WOMEN AS LITIGATORS

Abilities vs. Assumptions

Like their male counterparts, women litigators run the gamut from inspired to inept, with styles ranging from understated to flamboyant, from ingratiating to brusque. Society, however, is still so steeped in gender-based stereotypes about the "true nature" and "proper roles" of women[1] that it often is difficult for those with whom women litigators come into professional contact to deal with them as individuals, on the basis of ability, rather than on the basis of assumptions. These assumptions are false, lead to insulting behavior, and directly undermine women litigators' credibility, professionalism, and ability to represent their clients.

"Status-set" is sociology's term for the situation that prevails when a class of people sharing one key status, e.g., lawyer, share one or more other matching statuses, e.g., male, and society endorses this as the appropriate match. In our society, "lawyer-male" is a deeply entrenched status-set.

"Double-bind," another sociological term, describes the dilemma the professional woman faces in establishing her personal style. She is castigated as too weak to be effective if she displays "feminine" traits such as compassion and soft-spokenness; too pushy and abrasive if she asserts herself forcefully, although the same style would be deemed admirable in a man.

The fact that discrimination against women is the last publicly acceptable form of discrimination in our country exacerbates the impact of the assumptions generated by the "lawyer-male" status-set and the double-bind. Whatever judges' and lawyers' private prejudices may be, one does not hear in open court, "What can you expect from a Jewish lawyer?" or see a white male attorney drape his arm patronizingly around a black adversary and say in a tone guaranteed to shake the confidence of the latter's client, "Now, don't worry about this trial, young man. I'm sure you'll do just fine." However, substitute "woman" for "Jewish" or "black," and "young lady" for "young man," and these are typical incidents encountered by female litigators.

Despite the accelerating influx of women into law schools and the legal profession during the last decade, the 1980 census reveals that women are still less than 14 percent of the country's one-half million lawyers.[2] Additionally, most female practicing attorneys are relatively young. Thus, although the profile of the profession is changing, the status-set "lawyer-male" continues to dominate. This is particularly true with respect to litigation, for it is to this branch of lawyering that archetypically "masculine" adjectives such as "aggressive," "fist-pounding," and "hard-nosed" traditionally are assigned, and it is from this branch of lawyering that women were excluded longest.[3] When a lawyer or judge for whom "litigator-male" is a deeply rooted norm encounters a "litigator-female," his status-set expectations are violated and he focuses on the litigator's femaleness rather than on her professional competence.

The man's discomfiture may express itself in a wide range of responses, from calling the woman "young lady," "sweetheart," or some other inappropriate term, to the extreme reaction of a Texas judge who recently asked 5'2" Dallas lawyer Mannette Dodge to turn around and face the courtroom and then said, "Ladies and gentlemen, can you believe that this pretty little thing is an assistant attorney general?"

Although the number of women litigators is increasing rapidly and their success at every kind of litigation—civil and

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criminal, commercial and civil rights—is incontrovertible, the unfortunate reality is that incidents like these are happening every day to women litigators across the country. What must be understood about these incidents is that they result in more than personal embarrassment, humiliation, and anger for the women involved, and that whether the offending remarks are unintentionally sexist or deliberately made, their consequences are the same. In the courtroom, in chambers, and in other professional settings, terms of endearment, comments on looks and clothing, and remarks that otherwise call attention to the individual as a woman rather than as a lawyer undercut her credibility and her professionalism. How does an attorney establish her authority when the judge has just described her to the entire courtroom as "a pretty little thing"? Often these incidents affect not only how others perceive the lawyer involved, but also how she perceives herself. Cynthia Epstein's major study, *Women in Law,* quotes one woman's comment on how this kind of behavior affected her self-image.

"Some judges call you 'young ladies' and do not take you as seriously as they take male lawyers. There's nothing you can put your finger on and it's nothing where I can say I'm being mistreated, but the case may be coming out the wrong way because of it. It is a very unpleasant situation. What I've always found is that when other people are not taking me seriously, it makes it that much harder for me to take myself seriously."[4]

Moreover, the message that a judge does not take women litigators seriously can be conveyed in many ways other than a direct verbal put-down. Talking only to the male attorneys at conferences at the bench and in chambers, listening attentively to male attorneys but looking at the clock when female counsel speak, repeatedly addressing female and male counsel together as "gentlemen," and using sexist humor or disparaging remarks about women as a group all create a distinctly cold climate for women litigators.[5]

Many women report that even when they are not the butt of overtly offensive comments or jokes, they must prove themselves each time out of the starting gate unless they are well known to the judge and opposing counsel. Because the status-set "litigator-male" still is operative, it is assumed that every male attorney will be able to do his job. The surprise comes when he proves ineffective. With a female litigator, the assumptions are reversed. The surprise comes when it is realized how competent she is.

Houston federal district court judge Gabrielle McDonald sees a positive aspect in this mind set. When she was in practice, lawyers who had never opposed her and did not know her reputation were so certain she would be a pushover that her skill and consummate trial preparation came as a shock, giving her a terrific advantage.[6] Nonetheless, this advantage is not worth the cost. A trial is demanding enough without having to jump over the additional hurdles of sexism on the part of judge, jury, or adversary. Shifting attention from one's case to evaluating whether and how to respond to a male adversary's calling a female attorney or client by a first name when everyone else in the courtroom is being addressed formally is a distraction and places the woman lawyer in a typical double-bind situation. If she objects, she risks alienating the judge or jury as a "women's libber" or someone who makes a mountain out of a molehill. If she lets it go, she risks being perceived as weak and incapable of challenging an obvious effort to undermine her or her client's credibility. If she makes the wrong choice, she tarnishes her own image and disserves her client.

Sexual Trial Tactics

Jill Wine-Banks of the Chicago firm of Jenner & Block labels as "sexual trial tactics" such deliberate efforts to undermine women litigators on the basis that they are women. In 1974, when women were only 7 percent of all lawyers and a woman litigator a distinct *rara avis,* Wine-Banks (then Wine-Volner) was a member of the Watergate prosecution team. In 1976 she wrote an article describing the sexual trial tactics used against her during the Watergate and previous trials, and how she decided whether it was to her advantage to object, retaliate, or keep silent.[7] Wine-Banks' 1983 assessment is that sexual trial tactics still are flourishing and that judges and juries continue to see women litigators as women first and litigators only after they have proved themselves.[8]

At Wine-Banks' first trial, the defense attorney tried to undermine the jury's confidence in her by constantly referring to her as "the young lady." Not knowing how to respond, she ignored it, and soon realized she had chosen well. Her adversary's condescension toward her was antagonizing the jury toward him and generating sympathy for her. However, when the identical tactic was used against her during the Watergate trials, Wine-Banks quickly saw that this time the effort to demean her before the jury was having its desired effect; she determined to stop it. When it was her turn to question the offending lawyer's witness, she called her adversary by his first name, an equally demeaning tactic, and had to do it only once to make her point.

Wine-Banks cites as her worst experience with sexual trial tactics a trial in which the defense attorney opposing her continually sniffed the air over her shoulder while saying just loudly enough for the jury to hear, "Nice perfume," and pulled out her chair and took her elbow to assist her the few steps to the bench each time there was a side bar. Says Wine-Banks, "I could not quite figure out the jury's reaction to these tactical demonstrations of chivalry, so I decided to put an end to them. Besides, they were very offensive to me. At the next bench conference, when my opponent put his hand on my elbow, I turned to him and said loudly enough for the

judge to hear, 'Get your hands off me and don't ever touch me again.' The judge almost fell off his chair but the lawyer never touched me again. And I won the case."[9]

The Judge's Role

In each of these incidents, the burden was on Wine-Banks to decide whether she would be helped or hurt by a forceful response, and obviously she has superb instincts. However, a judge sensitive to the negative impact of such sexual trial tactics on a woman litigator's credibility and authority, and the double-bind implications for her of whatever action she might take, would have stopped the "the young lady" tactic with a comment like, "Counselor, if by 'the young lady' you are referring to your opponent, please note that in my courtroom lawyers are called counselor or by their names."

This scenario is not so unlikely as one might surmise. The National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) presented its pilot course, "Judicial Discretion: Does Sex Make a Difference?" at the California Institute for Judicial Education and Research in January 1981. The course, taught by female and male local judges and NJEP staff, dealt in part with courtroom interaction and how the sex-stereotyped treatment of women lawyers, litigants, defendants, and witnesses, whether deliberate or unintentional, undermines their credibility.

Alameda County (California) Superior Court Judge Michael E. Ballachey, one of the course teachers, told the following story about himself: "I had [a lawyer] the other day who was addressing a woman from the Legal Aid Society in a custody case, and he kept calling her Adele. So, eventually, I leaned over the bench and I said, 'Do you mean Mrs. Hendrickson, Paul?' The courtroom exploded, and he got the point. I don't think he'll do that right away."[10]

Several judges who attended the course agreed to be interviewed six weeks later about its impact on their courtroom perceptions. One male judge reported: "Now I'm much more prone to examine [courtroom interaction] from the female participant's point of view and how she must feel. Now I'm likely to say something to lawyers when I notice a problem. For example, on one or two occasions I've said things like: 'Counsel, I detect by the tone of your voice or your conduct in the courtroom that you have some propensity to suggest to this court that you don't feel women ought to be lawyers.'"[11]

Happily, through the efforts of individual women litigators, women's bar groups, and courses at judicial colleges, judges are beginning to learn the importance of examining their own courtroom behavior toward women and of playing an affirmative role in cutting off sexual trial tactics.

Nancy Stearns and Mary Lyndon are seasoned assistant attorneys general in the New York Environmental Protection Bureau. At a motion hearing before the New York Supreme Court (in New York, this is the trial court of general jurisdiction) in which counsel for both sides were women, the judge continually referred to counsel as "girls." Stearns and Lyndon were profoundly disturbed by this incident and, after much reflection and consultation with colleagues, determined to write the judge a letter. Its language is an excellent example of how, without rancor, a judge can be helped to understand the deeper implications of what to many seems a harmless turn of phrase:

"Although I am confident you did not mean to offend me or the other two attorneys, I found it extremely demeaning to be called a girl and presumably considered a youngster. Use of the term 'girl' implies that we are not serious attorneys and not equals of the male attorneys appearing before you.

"What is more, there cannot help but be an impact on the client when a woman attorney is perceived to be less serious or treated with less dignity than a male attorney....

"I can assure you that many women lawyers are offended when addressed in this way. Most, however, are not willing to raise the matter directly for fear of alienating a judge before whom they might appear again.

"Because I could see from appearing before you that you wish to treat all parties and their attorneys with fairness and justice, I am sure that you will not be offended by this letter and will accept the remarks I have made...in the constructive spirit in which they are intended."[12]

In several instances, women's bar associations have sought ways to make the judges in their own communities aware of similar problems. In 1980 the Alameda County Women Lawyers invited Judge Ballachey to be on a panel with two women attorneys for a discussion focusing on women lawyers' experiences in court and how they felt they were being treated and perceived. Through Judge Ballachey, word went back to another county judge that women lawyers often felt excluded in his presence because of his constant discussion of football games and his locker room humor. Moreover, Judge Ballachey's participation in this panel led to his subsequent participation as a teacher in the NJEP's pilot course, where he said of his experience with Alameda County Women Lawyers, "What struck me most forcefully throughout this meeting was the *intensity* of the attorneys' feelings about the way they were treated as professionals and how they felt unfairly excluded from the formal and informal networks which operate in the legal and judicial systems."[13]

In another variant on this theme, women lawyers in Vermont last year organized a panel discussion called "Women as Trial Attorneys: The Judicial Viewpoint," at which, in the words of one of the organizers, "Three male judges [there are no women judges in Vermont] told us what they thought was happening in the courts, and we told them what was really happening in the courts."[14] The Status of Women Committee of the Connecticut Bar Association has arranged with Connecticut's judicial education division that a course adapted from NJEP's courses be presented at the 1984 Connecticut Judicial College.

One of the judges on the Vermont panel admitted that "there is one notoriously sexist judge, who I won't identify, who does not like women lawyers." Everyone knew to whom he referred, and a woman asked the speaker what action she should take against this judge who had "reduced her to tears at home" after a court case. "I would make a complaint to the judicial conduct board," was the response.[15] One such complaint to a judicial conduct board, the first of its kind, was recently decided in New York.

On December 7, 1981, in the course of oral argument over the adjournment of a welfare case, New York State Supreme Court Justice Anthony T. Jordan, Jr. asked East Brooklyn Legal Services lawyer Martha Copleman several questions including the length of time she had been practicing, called her "little girl," and apologized when she objected and asked to be addressed as "counselor." Then, to quote the deci-

sion: "As the argument on the requested adjournment was concluded respondent told Ms. Copleman: 'I will tell you what, little girl, you lose.' Respondent's voice was raised and he conveyed the impression of insulting and demeaning Ms. Copleman. Ms. Copleman was upset by the incident, felt humiliated and was close to tears as she left the courtroom. Respondent did not apologize because he did not believe he had said anything wrong."[16]

Copleman instituted a formal complaint with the New York State Commission on Judicial Conduct, a nine-member panel of judges, attorneys, and lay persons, which issued its determination on February 28, 1983. A six-person majority held that the judge should be publicly admonished, a very strong sanction. Two panel members voted to admonish the judge privately. The one dissenter, a prominent male litigator, described the matter as "trivial" and the lawyer as "oversensitive." The majority wrote:

"A judge is obliged to treat those who appear in his or her court with courtesy and respect, and to maintain the decorum and dignity of the court.

"[W]hen respondent first addressed a lawyer in his court as 'little girl,' it may well have been an inadvertent expression of unconscious prejudice or the result of an ingrained pattern of speech. That phrase is objectionable no matter what its origin. We note here that we do not share the dissenter's view that the term 'little girl' is comparable to 'young lady.' Notwithstanding our respect for the dissenter's extensive experience in court, the former term was never an accepted or acceptable manner of addressing an attorney, even in the 'bruising give-and-take' of the courtroom.

"When respondent, with his voice raised, repeated the phrase 'little girl' after the attorney had objected, it was clearly an epithet calculated to demean the lawyer. It was intentional and not, as the dissent suggests, inadvertent. As such it constituted misconduct. Yet even if respondent's second use of the phrase was unintentional, his contention that 'little girl' is analogous to 'sweetheart' or 'darling,' and his suggestion that these are terms of endearment, are neither persuasive nor mitigating. Expressions such as these are insulting, belittling and inappropriate in an exchange between judge and lawyer. They diminish the dignity of the court."[17]

This determination is noteworthy for two reasons. Primary, of course, is the fact that the commission understood the gravity of the complaint and responded appropriately. Attorneys and judges from all parts of the country have expressed their profound hope that this determination will help other judges to become more aware of their own behavior. The defense put forward by the judge (whose counsel was a former judge), that "little girl" was inoffensive because it was analogous to calling the lawyer "sweetheart" or "darling" is painfully illustrative of how little understood is the impact of such belittling and inappropriate forms of address.

A second important point is the commission's recognition that even if the judge's first use of "little girl" was inadvertent "[t]hat phrase is objectionable no matter what its origin." Whether a judge employs these inappropriate terms because he is disconcerted when his "litigator-male" status-set expectations are violated, or as a deliberate sexual putdown, their effect is the same: The female lawyer is humiliated, demeaned, and loses authority with her client and the jury.

Openness to Change

Women litigators concerned about sexually discriminatory treatment from professional colleagues often are advised to let time, retirement, and death take care of the problem. Older practitioners and judges, it is said, cannot be expected to change their long-held assumptions. That these men cannot alter the way they treat women in the courtroom and other professional settings is simply untrue. Given the fluid nature of the law, a considerable degree of openness to change is essential for anyone in the legal profession. For example, when the revised bankruptcy code took effect, no one suggested that those who had practiced under the old code for at least 10 years be excused from learning the new one.

Certainly the experience of blacks with the judicial system demonstrates that judges and lawyers can change their professional demeanor. Judges and practitioners schooled in a long tradition of disrespect for the black community have learned that it is no longer acceptable to call a black lawyer "boy" or to address a black witness by his or her first name. Blacks have insisted on this respect, risking contempt citations and litigating all the way to the Supreme Court when necessary.[18] Judges and lawyers, whatever their age or status-set expectations, similarly should be required to examine their stereotyped assumptions about women litigators and accord these lawyers the same respect given their male colleagues. T

(see References, p. 100)

REFERENCES

Schafran, p. 36

[1] Justice Bradley, in his notorious and often-quoted concurring opinion in *Bradwell v. Illinois,* 83 U.S. (16 Wall. 130) 442 (1873), denying a woman a license to practice law, defined a woman's nature and role as follows: "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is found in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of women." 83 U.S. 442, at 446.

[2] *Women and Blacks Gained in Job Market in the 1970's,* THE NEW YORK TIMES (April 24, 1983), at 1.

[3] Until the 1970s, large firms simply did not permit women to go into court. There are some who believe that, even today, women litigators at these firms are largely limited to brief writing. In 1981 one-third (83) of the assistant district attorneys in New York District Attorney Robert Morgenthau's office were women. However, when Morgenthau was United States Attorney for the Southern District of New York in the mid-1960s, he refused to hire women for the criminal division. *See* Cynthia Epstein. WOMEN IN LAW. New York: Basic Books, Inc. (1981), Ch. 6, "Patterns of Practice," at p. 96.

[4] *Id.,* at p. 277.

[5] *See* Hall, Roberta M., and Bernice R. Sandler, *The Classroom Climate: A Chilly One for Women?* Project on the Status and Education of Women, Association of American Colleges, Washington, D.C., 1982, summarized by Peggy J. Schmidt in *Sexist Schooling,* WORKING WOMEN (October 1982), at p. 101.

[6] Speech by Hon. Gabrielle McDonald to the Travis County Women Lawyers' Association, Austin, Texas (March 4, 1983).

[7] Wine-Volner, Jill, *How One Woman Tamed the Watergate Tigers,* REDBOOK (April 1976), at p. 86.

[8] Jill Wine-Banks in conversation with author, February 23, 1983.

[9] Wine-Volner, *supra* note 7, at p. 88.

[10] National Judicial Education Program, JUDICIAL DISCRETION: DOES SEX MAKE A DIFFERENCE? INSTRUCTOR'S MANUAL. New York: NOW Legal Defense and Education Fund (1981), at p. 39.

[11] Norma J. Wikler, NATIONAL JUDICIAL EDUCATION PROGRAM. REPORT ON THE FIRST FIFTEEN MONTHS. New York: NOW Legal Defense and Education Fund (1981), at 287.

[12] Letter dated June 1, 1982 provided to the author by Nancy Stearns, Esq.

[13] National Judicial Education Program, *supra* note 10, at p. 9. One way women are excluded from the legal profession's networks is through their exclusion from "private" clubs that are in fact centers of formal and informal business activity. Women litigators are often faulted by their male adversaries for not participating in the easy camaraderie of peers when out of court, but camaraderie is not so easy when the club to which your adversary repairs for lunch or a post-hearing drink bars women members. A woman cannot go there alone or with female colleagues to mingle with other attorneys, which is how many men nurture their interfirm relationships. If invited as a guest, she must decide whether the professional benefit outweighs her distaste for being in a club where she is a second-class citizen. If she goes to the club, she is there as an outsider (a status that will be underscored if her host cannot take her into the bar or the main dining room), hardly the best posture from which to establish a peer-level relationship with the male attorney who is the insider. A useful approach to effecting change in exclusionary membership policies is to deny discriminatory clubs the legal community's financial support. The American Bar Association, the New York State Bar Association, the Los Angeles Bar Association, and the Association of the Bar of the City of New York prohibit their sections, committees, and staffs from holding professional, business, or social functions at clubs that exclude women and minorities from membership. Several New York City law firms have adopted similar policies, and broadened them to include not paying partners' membership dues and fees or reimbursing attorneys for business expenses incurred at these clubs. The New York Court of Appeals bars judges and other employees of the unified court system from conducting official business at discriminatory clubs. Lynn Hecht Schafran. WELCOME TO THE CLUB! (NO WOMEN NEED APPLY). New York: Women and Foundations/Corporate Philanthropy (1981), at pp. 13, 15–16. Other bar associations, law firms, and judicial administrators can adopt all of these strategies.

[14] *Attorneys Charge Sexism,* RUTLAND (VERMONT) HERALD (April 4, 1982), at pp. 1, 8.

[15] Another attorney present suggested that discontented lawyers request to speak at the judge's retention hearing. *Id.,* at p. 8.

[16] *Matter of Jordan,* NEW YORK LAW JOURNAL (March 2, 1983), at p. 12 (Commission on Judicial Conduct).

[17] *Id.*

[18] A Georgia prosecutor was addressing all white witnesses as "Mister," but consistently called the black defendant "George." The defendant's attorney objected, asking that his client also be addressed as Mister, and was held in contempt when he persisted in objecting to what he called a "racial slur." The prosecutor subsequently entered into a consent decree in a separate suit filed in federal court, in which he agreed to address everyone formally. The defense attorney, Millard C. Farmer, Jr., told the *New York Times,* "That case has probably had more effect on the way prosecutors and judges look at black people than any case that I know of.... Many other lawyers have told me it's really changed the whole thing in the state." *Courtesy in Court,* THE NEW YORK TIMES (February 22, 1981). During a 1963 Alabama civil rights trial the state prosecutor persisted in calling witness Mary Hamilton "Mary." She refused to answer until addressed as "Miss Hamilton." The trial judge held her in contempt, the Alabama Supreme Court affirmed, the United States Supreme Court reversed. *Ex parte Mary Hamilton,* 156 So.2d 926 (1963), *rev'd sub nom. Hamilton v. Alabama,* 376 U.S. 650 (1964).