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PARTY OUTFITS AND PANTYHOSE¹: GENDER BIAS IN THE COURTROOM

By Geri E. Satin, Esq., M.S.,² Margaret E. Wood, Esq.,³ and Donna M. Krusbe, Esq.⁴

IT HAS BEEN TWENTY-ONE YEARS since the nation was riveted by the trial of O.J. Simpson for the murder of his wife, Nicole Brown Simpson, and Ronald Goldman. Arguably, the Simpson trial was the nation's first introduction to reality TV, attracting more than 95 million viewers for the announcement of the jury verdict.⁵ The case was notable in many respects, not least of which was the intense scrutiny of the female prosecutor, Marcia Clark. Clark was criticized for her appearance, mannerisms, and even her child-rearing abilities.⁶ More than two decades later, the trial has re-entered the public discourse due to the release of the critically acclaimed mini-series *American Crime Story: The People v. O.J. Simpson*.

This renewed interest in the O.J. Simpson trial begs the question: Does gender bias in the courtroom still exist? Are women in today's legal system judged based on the weight of their words rather than the height of their heels? This article reexamines precisely how far the legal profession has come – or not – in the last twenty years to achieve equal treatment for female attorneys, litigants, and expert witnesses throughout the litigation process and especially in the courtroom.

I. ANECDOTAL EVIDENCE OF GENDER BIAS IN THE COURTROOM

In the 19th century, the prevailing belief was that young women were so frail that if they studied for many hours, they risked damage to their reproductive systems or, worse, could actually go insane!⁷ Historically, this and other biases have contributed to denying women the ability to participate in the legal process in any meaningful way. Fortunately, it has now been established that the human race is not in danger of extinction because women dare to educate themselves. Unfortunately, biases still influence the extent to, and manner in, which women are allowed to participate in the legal process.

In 1990, the Florida Supreme Court Gender Bias Study Commission issued its first report.⁸ The express purpose of the Commission was “to determine in what

areas of our legal society bias based on gender exists, and recommend measures to correct, or at least minimize the effect of, any such bias.”⁹ The Commission found that “gender bias permeates Florida's legal system today. . . . [G]ender bias is practiced to a disturbing degree by members of this state's legal profession, often in forms that have become highly institutionalized.”¹⁰ Specifically with regard to women practicing law, the Commission found that they “still encounter both flagrant and veiled antagonism throughout the legal system. This antagonism can influence the outcome of cases and client relationships.”¹¹ As recently as 2008, the Florida Supreme Court's Standing Committee on Fairness and Diversity found that “gender inequality persists in Florida's court system despite the advances women have made in the legal profession and society as a whole.”¹²

In what ways does gender bias continue to manifest in legal practice and in the courtroom specifically? We surveyed women practicing law in Florida regarding their experiences and observations of gender bias in their legal practice and in litigation. Those who responded were both new and seasoned attorneys practicing throughout the state in a wide variety of areas of criminal and civil law in both the public and private sectors. In general, most respondents expressed that while incidents of gender bias have decreased, gender-based discrimination persists. Anecdotally, respondents reported that they are treated differently from their male counterparts by other attorneys, clients, and judges; their compensation is lower than similarly situated men; and, it is more difficult to advance their careers.

Respondents' reports of bias range from the mild to the more troubling. For example, female attorneys frequently reported receiving comments about their personality and appearance (often being referred to by opposing counsel, employers, and even judges as “cute,” “attractive,” “sweetheart,” and “little lady”). Several attorneys reported that their superiors emphasized that they were expected to dress and act in a certain manner when appearing in court.¹³ While



trying cases, respondents also reported being called “too tough,” “too aggressive,” or “too emotional,” even while observing similar (albeit, unchecked) behavior by their male counterparts. While such comments are belittling and demeaning, they are generally innocuous.

However, respondents also reported occasions of more egregious bias. An attorney practicing in the 19th Judicial Circuit reported that while taking a deposition, opposing counsel objected frequently and vigorously to her non-objectionable questions in an attempt to harass and intimidate her. Based on discussions with attorneys who observed this opposing counsel in other depositions, the respondent was certain his tactics were motivated by gender bias. Another attorney reported that when trying a case in front of a male judge, the judge threatened to hold her in contempt of court for objecting too frequently.

Many respondents commented that they have had more difficulty advancing their careers than their male counterparts. A partner in a mid-size insurance defense firm noted that “[women] have more difficulty being promoted to managing partner status. From what I can see, women seem to need to work harder [than men] in order to obtain the same compensation/status as men.” Even after becoming a shareholder, one attorney observed, “I had to continue to prove my worth, which others did not.” With regard to pay inequality, a respondent remarked: “I think there is an inherent bias that men are more capable and more autonomous, so they are given raises, promotions and bonuses.” Moreover, once female attorneys have families, they appear to have a particularly difficult time overcoming the perceptual bias that they cannot both effectively lawyer and handle outside commitments. “Once I had kids,” commented one litigator, “the partners for whom I worked (all men) assumed I didn't want to be involved in big cases, especially those involving travel, so my profile and my

hours suffered.” Similarly, a young attorney was told by the partners at her firm that she could not advance because she was on the “baby train.”

These anecdotal reports mirror those reported by the Florida Bar, Young Lawyers Division in its 2015 survey, “Women in the Legal Profession.” Survey results collected from more than 400 female attorneys in the state revealed persistent gender bias and harassment from opposing counsel, employers, and the judiciary; job resignations due to lack of advancement and/or employer insensitivity (reported by 25% of respondents); and, wage-gap issues (reported by 21% of respondents).¹⁴

II. EMPIRICAL SUPPORT FOR GENDER BIAS IN THE COURTROOM

Gender bias in the legal system and in the courtroom is not limited to anecdotal reports by female attorneys throughout Florida. The existence of gender bias is also supported by a wealth of empirical evidence. Research has consistently shown there to be significant and pervasive gender bias against (1) *female expert witnesses*, (2) *female attorneys*, and (3) *female litigants*.

A. Bias Against Female Experts

Although research shows that bias against female expert witnesses is very real, there remains wide disagreement between male and female attorneys on this issue. Studies conducted in the 1980s and 1990s on gender-based discrimination in the courts revealed that 55% of female attorneys believed judges assigned more credibility to male expert witnesses, while only 13% of male attorneys held that belief.¹⁵ Almost ten years later, studies found that male attorneys and judges believed that gender bias had disappeared, while, according to female attorneys, not much had changed.¹⁶

Female expert witnesses have reported being addressed in a patronizing way, being addressed by an incorrect title (such as “Ms.” when “Dr.” was the appropriate title), and being required to produce greater credentials to be qualified as an expert than their male counterparts.¹⁷ Female experts report being asked more personal, intrusive, and gender-based questions, such as “Have you ever miscarried,” “Do you have children,” “Are you personally familiar with symptoms of PMS,” or “Have you personally ever been a victim of domestic or sexual abuse.”¹⁸

What underlies this tendency to discredit female experts so that they must work harder to be taken seriously? Those who study the issue hypothesize that the perception of female expert witnesses is rooted in traditional notions of gender roles in society. Traditionally, men have been considered to be competent, assertive, logical, and rational, while women have been typecast as warm, expressive, illogical, indecisive, and incapable of leading.¹⁹ Men and women are expected to behave according to these gender role stereotypes and, when they do not, prejudice results.²⁰

Thus, in the courtroom, the credibility of a female expert witness seems to depend on how closely she comports with her stereotypic gender role. For example, some studies have shown that being likeable (i.e., warm, caring, and non-assertive), as well as being competent and knowledgeable, is important to the credibility of a female expert, but relatively unimportant in assessing the credibility of a male expert.²¹ Women tend to smile more often than men. This contributes to their likeability and credibility, whereas, men may actually lose credibility by smiling and stepping outside of their gender role.²³

In addition, some psychologists theorize that the type and complexity of the case may affect the way jurors perceive female experts; however, there is no definitive answer to this supposition.²⁴ For example, some studies have indicated that female experts are not perceived as credible when testifying about complex subjects or in fields that are typically considered to be “male-dominated,” such as construction, antitrust, or engineering.²⁵ Female experts tended to garner more credibility when testifying about areas such as domestic abuse, child support, or women’s clothing. That said, however, a handful of studies have also shown that gender may not significantly affect juror decision making.²⁶

The one consistent empirical finding is that a woman is perceived as more persuasive and credible when she is behaving according to her gender role and that she is “more likely to face prejudice when she is playing a more masculine occupational role.”²⁷ Given the foregoing, the undeniable reality is that gender role stereotypes are applied to expert witnesses.

B. Bias Against Female Attorneys and Litigants

Gender bias has also been empirically shown to persist against female attorneys as well as against female litigants. Researchers have found that “aggressive” female lawyers are viewed by jurors less favorably than “aggressive” male attorneys.²⁸ Likewise, studies have shown that jurors rate competent and successful women in traditionally male positions as “selfish, insensitive, cold, and manipulative.”²⁹ A female attorney’s voice can even be a detriment to her and her client. Higher pitched voices are associated with lower “competence,” “decreased conscientiousness and lower emotional stability.”³⁰ The report of the Florida Supreme Court Gender Bias Study Commission noted that unfair treatment is not limited to female attorneys. The 1990 Report found that “[w]omen litigants tend to have their memory and credibility questioned more often than similarly situated men.”³¹

It is undoubtedly concerning that jurors make biased credibility assessments of female attorneys and litigants. However, these empirical findings beg the more practical question of whether this actually matters. Jurors may indeed find aggressive female attorneys less likeable than similarly aggressive male attorneys, and they may prefer the lower tone of a male attorney’s voice over a female attorney’s voice. But, does such gender bias significantly affect juror decision making and verdicts? Does gender bias in the courtroom have a real impact on the efficacy and reliability of a trial by jury? The short answer is, at least to some degree, yes.

A jury verdict is the product of a highly complex and interrelated set of variables, including, but not limited to, the attorney’s characteristics (e.g., gender, race, presentation style, competence, knowledgeability, attractiveness, etc.); the nature of the criminal or civil event and corresponding claims; the documentary and testimonial evidence; demonstrative aids; the opposing attorneys’ characteristics; juror characteristics (including demographics as well as life experiences, biases, attitudes, and beliefs); expert and lay witnesses’ characteristics; and, the judge’s characteristics. Needless to say, this web of case complexities makes it exceedingly difficult to pinpoint exactly which variable(s) is/are driving juror judgments.

Research analyzing the impact of

attorney gender on juror decision making has produced inconclusive results. It is undisputed that “extralegal” factors, such as gender, are not chief determinants of jury verdicts. Studies consistently show that the party presenting the strongest evidentiary case generally prevails at trial.³² For example, Diamond and colleagues (1996) studied the reactions of 60 jurors to attorneys in a simulated antitrust price-fixing case.³³ In deliberations, jurors made relatively few comments about the attorneys and, instead, focused primarily on the evidence.³⁴ Data from actual trials similarly demonstrates that jurors are considerably less focused on “extralegal” factors relative to the actual evidence.³⁵

That is not to say, however, that attorney gender does not have any impact on juror decision making. To the contrary, mock juror research has found that defendants represented by male attorneys obtain more positive trial verdicts than defendants represented by female attorneys, particularly when the female attorney exhibits an “aggressive” presentation style and demeanor in the courtroom.³⁶ Specifically, defendants with aggressive female attorneys were more likely to be convicted than defendants with passive female attorneys.³⁷ By contrast, defendants with aggressive male attorneys were less likely to be found guilty than both male and female attorneys with passive speech styles.³⁸ In another study, in which researchers withheld information about the attorney’s gender, mock jurors were more likely to assume that the attorney was male than female.³⁹ These studies, taken together, suggest that jurors may not consider women as an adequate substitute for the “prototypical male attorney,” and therefore jurors may process case-determinative information delivered by female attorneys in a negative manner resulting in poor outcomes for female attorneys’ clients.

Litigant gender has also been empirically shown to impact juror decision making. For example, one study demonstrated that male jurors found overweight female defendants significantly guiltier than thin female defendants; whereas, for all jurors, a male defendant’s weight had no effect on how his guilt was perceived and judged.⁴⁰ Perceived male/female stereotypes and resulting biases also extend to civil cases. Researchers have found that, in wrongful

death cases, the estates of male decedents are awarded substantially higher monetary damages than the estates of similarly situated female decedents.⁴¹ This finding has been theorized to be “traced most directly to stereotypes about employment remuneration based on longstanding discrimination against women in the workplace.”⁴²

III. RECOMMENDATIONS TO COMBAT GENDER BIAS MOVING FORWARD

Given that gender bias persists in the courtroom, how do we mitigate against it? It has been eight years since the Florida Supreme Court’s Standing Committee on Fairness and Diversity reexamined gender bias. What recommendations from the 2008 report have been applied? Have they been effective? What additional steps should be taken?

For one, the legal community should continue to implement measures to bring more female attorneys, experts, and judges into the courtroom. The American Constitution Society issued the Gavel Gap report this year in which it found that while women comprise 51% of the population of the State of Florida, only 31% of all state court judges are women.⁴³ Similarly, the American Bar Association reports that, as of April 2013, women comprise only 34% of all U.S. attorneys.⁴⁴ It is our hope that increasing female presence in the courtroom will result in jurors’ eventual abandonment of outdated stereotypes concerning what constitutes the “archetypal lawyer.”

In addition, there are a number of tools that the legal community can employ to combat gender bias in the courtroom. These include, but are not limited to: (1) engaging in civility and professionalism throughout the course of litigation, and exercising a no-tolerance policy for gender stereotyping by lawyers, judges, or anyone else in the courtroom; (2) allowing for, and engaging in, voir dire designed to unearth any juror biases to female attorneys, litigants, and/or experts; and, (3) conducting CLEs designed to educate attorneys and judges on the real dangers of gender bias over the course of litigation and, particularly, in the courtroom.

Additionally, the legal community recently began promoting the benefits of mindfulness in the practice of law. Each member of the legal community would be well served to

engage in mindfulness by self-reflecting on our own biases. In her report, “Gender and Racial Bias in the Courtroom” for the ABA Section of Litigation 2012 Section Annual Conference, Ann T. Greeley, Ph.D., encourages attorneys to try to uncover their own biases.⁴⁵ The author notes that bias is “pervasive” but with motivation, monitoring, and accountability, all individuals involved in the legal system can limit the influence such bias has on their decision making.⁴⁶

Women in the legal profession continue to shatter traditional gender stereotypes, defining themselves not based on gender, but rather on professional aptitude, competence, skill, and results. But, truth is in the eye of the beholder – in the legal system, this truth continues to be colored by antiquated stereotypes and gender-based discrimination. Over two decades after the O.J. Simpson verdict, women in the courtroom are still subject to persistent gender bias. We hope that, twenty years from now, we will have much different news to report.

¹The title of this piece is taken from a memorandum purportedly circulated by the global law firm Clifford Chance, in which female attorneys were instructed on “What Not to Wear,” including the helpful tip: “Wear a suit, not your party outfit.” Slaci Zaretsky, *Biglaw Memo From Top Firm Advises That Women ‘Don’t Giggle, Don’t Show Cleavage,’ ‘Above the Law,’* Oct. 24, 2013, available at <http://abovethelaw.com/2013/10/biglaw-memo-from-top-firm-advises-that-women-dont-giggle-dont-show-cleavage>. Furthermore, several of our survey respondents noted that they were frequently admonished to wear pantyhose and skirt suits when appearing in court.

²Geni Satin, Esq., M.S., is a senior jury and trial consultant at Focus Litigation Consulting, LLC, specializing in mock trials, focus groups, witness preparation, and jury selection in complex civil and criminal cases across the country. Satin is a member of the Miami-Dade chapter of FAWM. Satin can be reached at gsatin@focuslitigation.com, or (305) 377-0786.

³Margaret E. (Peggy) Wood practices Estate Planning, Probate and Trust Administration with McCarthy, Summers, Bobko, Wood, Norman, Bass & Melty, P.A. in Stuart, Florida. She is a past President and Vice President of Martin County FAWM and the current Secretary.

⁴Donna Krusbe is an attorney at Billing, Cochran, Lyles, Mauro & Ramsay, P.A. She focuses on civil appeals and litigation support. She is a former law clerk to the Honorable George A. Shahood, Fourth District Court of Appeal, and a past member of the Board of Directors of the Florida Bar Foundation.

⁵Engel, Pamela, *The World Stopped When the OJ Simpson Verdict Was Read*, *Business Insider*, Jun. 12, 2014, available at <http://www.businessinsider.com/the-world-stopped-when-the-oj-simpson-verdict-was-read-2014-6>.

⁶Traster, Rebecca, *Marcia Clark is Redeemed*, *N. Y. Magazine*, Feb. 17, 2016, available at <http://nymag.com/theout/2016/02/marcia-clark-redeemed-c-v-r.html>.

⁷Neal, T.M.S. (2014). *Women as expert witnesses: A review of the literature*, *Behavioral Sciences and the Law*, 32(2), 164–179. doi:10.1002/bsl.2113.

⁸Report of the Florida Supreme Court Gender Bias Study Commission (Mar. 1990), at http://www.flcourts.org/core/fileparse.php/243/urlt/gender_biassummary.pdf.

⁹Id. at 2.

¹⁰Id.

¹¹Id. at 31.

¹²Final Report: Perceptions of Fairness and Diversity in the Florida Courts, Florida Supreme Court Standing Committee on Fairness and Diversity, 48 (March 14, 2008), at <http://www.flcourts.org/core/fileparse.php/243/urlt/FairnessDiversityReport.pdf>.

¹³Zaretsky, supra note 1.

¹⁴Florida Bar, *Young Lawyers Division* (December, 2015). *2015 Young Lawyers Division Survey on Women in the Legal Profession*. Retrieved from <http://www.floridabar.org/TFB/TFBResources.nsf/>

¹⁵Neal, T.M.S. (2014). *Women as expert witnesses: A review of the literature*, *Behavioral Sciences and the Law*, 32(2), 164–179. doi:10.1002/bsl.2113

¹⁶Id.

¹⁷Id.; Larson, B. A. & Brodsky, S. L. (2014). *Assertive Women as Expert Witnesses: A Study of Assertive and Defensive Responses in Male and Female Experts*, *Behavioral Sciences and the Law*, 32(2), 149–163. doi:10.1002/bsl.2116.

¹⁸Assertive Women as Expert Witnesses: A Study of Assertive and Defensive Responses in Male and Female Experts, p. 150; Dafary-Kapour, T. O’Connor, M. & Mechanic, M. (2014). *Gender-Intrusive Questioning: A Study of Expert Witnesses*. *Behavioral Sciences and the Law*, 32, 180–194. doi:10.1002/bsl.2114

¹⁹Women as Expert Witnesses, p. 2; Neal, T.M.S., Guadagno, R.E., Eno, C.A., & Brodsky, S.L. (2012). *Warmth and Competence on the Witness Stand: Implications for Credibility of Male*

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Young women lawyers need mentors who can help them navigate those aspects of their legal career that are unique to women, in addition to enjoying the well-known benefits of mentoring, such as professional growth, career development, networking, and personal satisfaction for both mentor and mentee. FAWL and

many of its chapters have developed creative, effective ways to facilitate these relationships. The variety of approaches shows that there is no-one-size-fits-all approach to mentoring, but there is a common theme: creating a spirit of openness and willingness to help. As the HAWL chapter put it, mentoring programs

strive to “foster the highest ideals of the legal profession.”²

¹Counselor, *Who Is Counseling You?*, American Bar Association, February 27, 2012

²Hillsborough Association for Women Lawyers Mentoring Program, <http://www.hawl.org/get-involved/mentoring-program/>

FAWL'S MEMBER ADVANCEMENT AND PROMOTION COMMITTEE

WITH ITS GOAL TO PROMOTE WOMEN — on the bench, in Bar leadership, in law firms and in the community—the Member Advancement and Promotion (MAP) Committee is critical to achieving FAWL's mission to promote gender equality and leadership roles for its members. The Committee provides the President-Elect of the Florida Bar with recommendations of qualified FAWL members for standing committees, works with local chapters to vet qualified members for the bench, and writes letters on behalf of qualified members to the Judicial Nominating Commission (JNC) and for other leadership positions in the community as well.

Formed during Gigi Rollini's term as FAWL president in 2010–2011, as a result of prior FAWL president Tasha Dickinson's efforts to better promote FAWL's members to leadership roles, the MAP Committee has been essential in the years since in promoting women in Bar leadership. The MAP Committee has been key to forming a baseline to measure progress and ensure accountability in appointments to key Bar positions. The Florida Bar has touted the Committee as a model for other Florida voluntary bar organizations, and other states have approached the Committee to request assistance with similar efforts. This success has been due to the efforts of early MAP Committee members, FAWL Chapters and the Florida Bar leaders. As a result, the benefits of these efforts will be felt for years to come.

The Committee is also interested in offering possible educational opportunities, such as a seminar on the JNC & the Bench, and a seminar with a panel of local female partners to discuss advancing women in law firms. Committee Chair Robin Bresky feels honored and privileged to have the opportunity to continue what Gigi Rollini and Tasha Dickinson started and to contribute to this important part of FAWL's mission.

For more information, please contact Committee Chair, Robin Bresky, directly at the following: Email: rbresky@breskypappellate.com; Telephone: 561-994-6274.



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²² Nagle, J. E., Brodsky, S. L., and Weeter, K. (2014). Gender, smiling, and witness credibility in actual trials. *Behavioral Sciences and the Law*, 32, 195–206. doi:10.1002/bsl.2112

²³ *Id.*

²⁴ *Women as Expert Witnesses*, p. 3.

²⁵ *Women as Expert Witnesses*, p. 3; *Assertive Women as Expert Witnesses: A Study of Assertive and Defensive Responses in Male and Female Experts*.

²⁶ *Women as Expert Witnesses*, p. 3; *Assertive Women as Expert Witnesses: A Study of Assertive and Defensive Responses in Male and Female Experts*.

²⁷ *Women as Expert Witnesses*, p. 4.

²⁸ Hahn, P.W., & Clayton, S.D. (1996). The effects of attorney presentation style, attorney gender, and juror gender on juror decisions. *Law and Human Behavior*, 20, 533–554.

²⁹ Heilman, M.E., Block, C.J., & Martell, R.F. (1995). Sex stereotypes: Do they influence perceptions of managers? *Journal of Social Behavior and Personality*, 10, 237–252.

³⁰ Imhof, M. (2010). Listening to voices and judging people. *The International Journal of Listening*, 24, 19–33.

³¹ *Report of the Florida Supreme Court Gender Bias Study Commission*, supra note 3, at 31.

³² Visher, C. A. (1987). Juror decision-making: The importance of evidence. *Law and Human Behavior*, 11, 1–17. Overland, S. G. (2008). The juror factor: Race and gender in America's civil courts. El Paso, TX: LFB Scholarly Publishing. Feigenson, N. (2000). *Legal blame: How jurors think and talk about accidents*. Washington, D.C.: American Psychological Association.

³³ Diamond, S. S., Casper, J. D., Heiert, C. L., & Marshall, A. M. (1996). Juror reactions to attorneys at trial. *The Journal of Criminal Law and Criminology* (1973-), 87(1), 17–47.

³⁴ *Id.*

³⁵ See Visher, 1987.

³⁶ E.g., Hahn, P.W., & Clayton, S.D. (1996). The effects of attorney presentation style, attorney gender, and juror gender on juror decisions. *Law and Human Behavior*, 20, 533–554.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Diamond, S. S., Casper, J. D., Heiert, C. L., & Marshall, A. M. (1996). Juror reactions to attorneys at trial. *The Journal of Criminal Law and Criminology* (1973-), 87(1), 17–47.

⁴⁰ Schvey, N. A., Puhl, R. M., Levandoski, K. A., & Brownell, K. D. (2013). The influence of a defendant's body weight on perceptions of guilt. *International Journal of Obesity*, 37(9), 1275–1281.

⁴¹ Goodman, J., Loftus, E. F., Miller, M., & Greene, E. (1991). Money, sex, and death: Gender bias in wrongful death damage awards. *Law and Society Review*, 263–285.

⁴² *Id.* at 281–82.

⁴³ George, Tracey E. and Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?* (2016), at <http://gavelgap.org/pdf/gavel-gap-report.pdf>

⁴⁴ *American Bar Association, Commission on Women in the Profession*, (July, 2014). *A Current Glance at Women in the Law*. Retrieved from https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf

⁴⁵ Greeley, Ann T., *Gender and Racial Bias in the Courtroom*, p. 3 (2012), at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/37-1_gender_racial_bias_in_the_courtroom.authcheckdam.pdf

⁴⁶ *Id.* at 4.