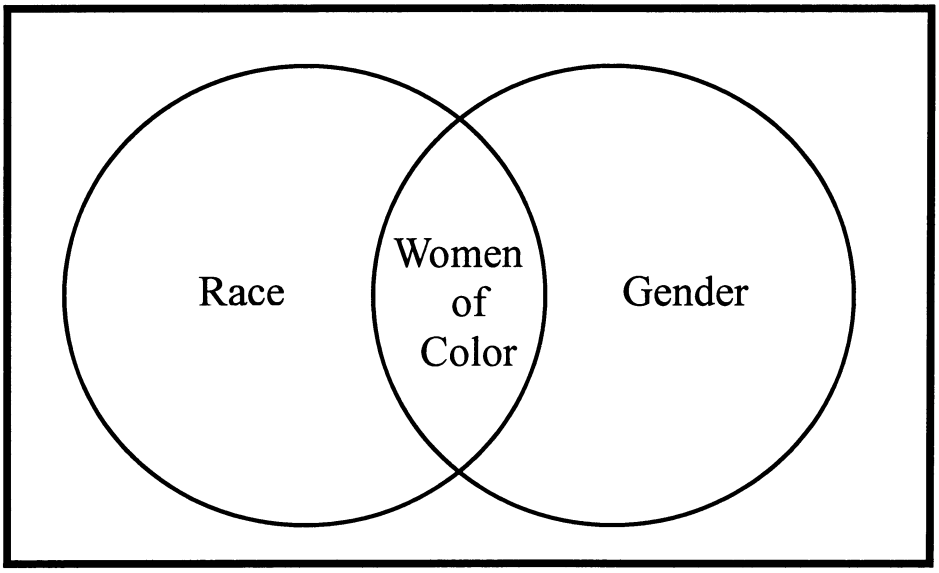
When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts

A Pre-Program Introduction



Celebration 2000
Plenary Session

8:15 – 11:30 a.m.
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Ballroom
DoubleTree Hotel, Spokane Center

When Bias Compounds:
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One of the most important issues affecting the quality of justice in the courts is how women, people of color and other historically disadvantaged groups are perceived and treated by jurors, court personnel, lawyers and judges.

Women of color often experience a type of bias that is more than race or sex bias alone, and more than race plus sex together.

This program examines the impact of such bias – how it occurs often through unconscious stereotyping, its effects on women who experience this compound bias, and its impact on the justice system.

The program also suggests tools and techniques for overcoming the negative effects of such bias, so as to insure equal justice in the courts for women of color.

To enable participants in the *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts* seminar to use effectively the limited time, we have prepared this short pre-program introduction.

We urge you to read this material before attending the program.

This material was adapted by Professors Marilyn J. Berger and Margaret Chon of Seattle University School of Law, from *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts—A Model Judicial Education Curriculum* (1998) developed by the National Judicial Education Program to Promote Equality for Women and Men in the Courts, Lynn Hecht Schafran, Esq., Director in cooperation with the National Association of Women Judges. The National Judicial Education Program is a project of the NOW Legal Defense and Education Fund. This curriculum was made possible by a grant from the State Justice Institute. For further information about this program, contact (360) 705-5290 or gender.justice@courts.wa.gov.

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TABLE OF CONTENTS

I. WHAT IS THE ISSUE?

One of the most important issues affecting the quality of justice in the courts is how women, people of color and other historically disadvantaged groups are perceived and treated by jurors, court personnel, lawyers and judges. Women of color are impacted in their roles as judges, attorneys, witnesses, parties, defendants and victims. This occurs both nationally and in even forward-looking states such as Washington State.

On a national level, research studies have documented how different parts of the justice system, such as jurors, other attorneys including prosecutors, and even media coverage, are biased against women of color. These studies include the following example:

> *A study of sentencing in Dallas, which employs jury sentencing in non-capital crimes, found that while the median sentence for a Black man that raped a White woman was 19 years, the median sentence for a White man who raped a Black woman was 10 years. The median sentence for White/White rape was 5 years; for Latino/Latina rape, 2 1/2 years; and for Black/Black rape, 1 year.*[1]

Locally, a number of women of color who work in the Washington State court system have shared some of their experiences:

> *A female Asian American attorney appeared in a rural Washington court ready for a civil trial. After waiting for over thirty minutes for the plaintiff's attorney to show up, he appeared and told her that he and her co-defendant attorney had already agreed to a continuance. No one had called her. Plaintiff's attorney had allowed his client to leave for vacation to Reno so the plaintiff was not even in the state on the scheduled trial date.*

This female Asian attorney reported that even when she objected, her argument was discounted, despite having a jury specially summoned into court for the trial. The additional cost to her clients and the system was disregarded and there was no value placed on her time.

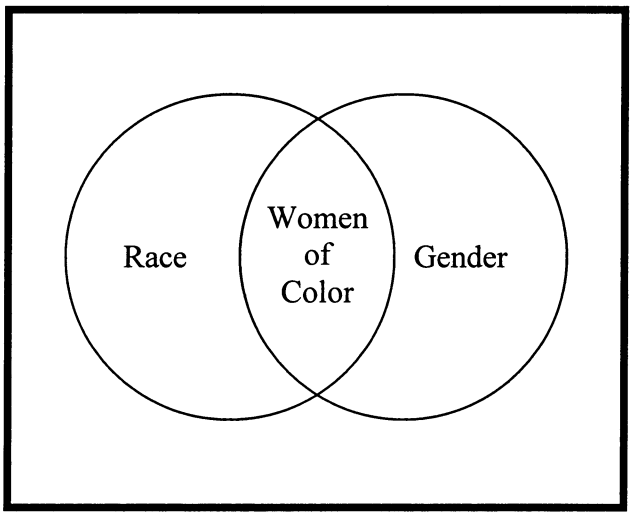
The following incident, again from Washington State, was reported by a judge in a domestic violence case:

> *An African American woman testified as the victim in a domestic violence trial in a strong, composed, and articulate manner. She was not crying, upset or hysterical. Her testimony was discounted by the jury.*

What do these stories reveal? One interpretation is that "these things happen," regardless of race or gender. Men or women of any color may experience being disbelieved as a witness, or being on the wrong side of the hometown lawyer advantage. Of course, race or gender are never the only explanation for courtroom dynamics. But it is important to be equally if not more skeptical of the claim that race and gender are irrelevant or unimportant, or that these are isolated incidents.

While the Asian American female attorney might have been a target of "hometowning," she might also be a target of different treatment than would be accorded a White male out-of-town lawyer. Women of color report a pattern of differential treatment.

As these examples show, women of color can have experiences that are both similar to and different from those of White women, or from men of color.[2] Women of color often experience multiple discrimination --- "a type of bias that is more than race or sex bias alone, and more than race plus sex. It can be a compound bias with geometrically damaging results."[3]



"Intersectionality" is a term coined by law professor Kimberle Crenshaw to describe the combined effects of discrimination on Black women.[4] The concept of intersectionality includes other women of color, such as Native American females. It can be extended to other intersecting identities such as disability and gender, race and sexual orientation, and so on. Age, social class, indigenous background, national origin, and many other categories are also socially significant.[5] While bias based on any of these categories is a problem, we focus here on the experiences of women of color as one example of a larger challenge to equal justice in the courts.

The Washington State examples demonstrate how intersectionality affects the quality of justice for everyone in the courts, and specifically for women of color. In the case of the African American witness, how might the jury's reaction be interpreted? The jury may not have seen her as the classic "victim" and apparently believed that she had a confrontational attitude. Its perception of her may have impacted its consideration of whether the defendant had actually committed the alleged offense. Yet, many women of color have a lot of pride and may not break down on the stand. Because of this, the African American female witness was affected differently and perhaps more severely than a White witness may have been, although both may have difficulty in establishing their credibility as domestic violence victims.

II. WHY IS THIS IMPORTANT?

Understanding intersectionality and how it operates is crucial to eliminating bias within the justice system. There are many reasons for this concern:

Fairness:

People with diverse and multiple identities, such as women of color, not only perceive bias. They are also often actually disadvantaged because of discriminatory behavior.

Public confidence:

Public perceptions of the courts are affected by disparate treatment of its citizens. Bias operates to impugn the integrity of the whole system.

Access to justice:

Women of color comprise a small but significant and growing minority. In Washington State, statistics indicate that women of color constituted 7.4% of the total population in 1995. By 2025, this percentage is projected to be 11.5%.[6] Such a significant portion of our state population should be guaranteed equal justice in the court system. Moreover, the number of women of color attorneys nationally has increased significantly, from 7,300 in 1980 to 22,000 in 1990.[7] For each of the last three years, the three law schools in Washington State combined have enrolled over 200 minority women law students.[8]

Professional responsibility:

Ethical obligations mandate non-discriminatory behavior. Judicial officers, including judges, their staff and court officials, are bound to perform their duties without bias or prejudice.[9] And attorneys have an ethical obligation not to commit a discriminatory act on the basis of sex, race, and other protected categories.[10]

For all these reasons, judges can and should take an essential role in the process of eliminating bias against women of color within the justice system.

III. HOW DOES THIS HAPPEN TO WELL-MEANING PEOPLE? FROM CATEGORIZATION TO STEREOTYPING TO DISCRIMINATION

One of the most important things to understand is how this bias occurs to well-meaning, fair-minded people. Human beings have many ways of noticing, thinking about, and interpreting information to understand the social world in which we live.[11]

Categorization: One of the main strategies we use to interpret and understand the world around us is to create categories. Our brains are hard-wired to do this. We could not function in the world if we had to start from scratch every time we came upon a new or unfamiliar object, person, or event. Categorizing things simplifies our lives.

> Categorization: The process by which we classify items, objects, or concepts, placing them together in groupings on the basis of their similarities with each other.

Lawyers are trained to put information into legal categories. Just as a solid thing with four legs and a flat surface belongs in the "table" category, an automobile accident caused by the speeding of one driver belongs in the "negligence" category. After the first year of law school, lawyers do not have to learn a new response to each item or object in a legal category; instead, they automatically place concepts in the relevant category.[12]

Categorization can lead to oversimplification and distortion, maximizing perceived differences between groups and minimizing differences within them. Once an individual is classified as a member of a social group, perceptions of that group's average or reputed characteristics, and perceptions of behavior based on those characteristics, are often extended to the individual.

> *In Washington State in May 1999, a Latina attorney was getting her papers ready to argue a motion in a superior court. Opposing counsel was a White male. The judge came out on the bench and saw the female attorney at counsel table. The judge said to her, "Are you going to be arguing this motion pro se?"*

In this example, the Latina might have been perceived as a *pro se* litigant because there are so few Latina attorneys. Or the judge may have assumed that she was uneducated or non-professional. This was not necessarily a conscious decision by the judge to characterize her or to hurt her feelings. People tend to perceive members of groups other than their own as being all alike, or to expect them to be all alike, which they never are.[13]

Stereotyping: The leap from categorization to stereotyping is a small one. Stereotypes, both benign and pernicious, evolve to describe categories of people.

> Stereotypes are a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group.

Stereotypes can affect the behavior of even well-meaning, fair-minded people. As argued by the American Psychological Association in its *amicus* brief to the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): "[S]tereotyping is part of the normal psychological process of categorization that under pertinent conditions, can lead to inaccurate generalizations about individuals, often transformed into discriminatory behavior."[14] Stereotypes are limiting and constitute a form of social control.[15]

In the above example involving the Latina lawyer, the stereotype controlled the judge's actions simply because it existed as an anchor or starting point in the judge's mind. The penalties can be swift and severe if one disappoints another's stereotype.[16] In the *Price Waterhouse v. Hopkins* case, Anne Hopkins, a White woman, was denied partnership in a major accounting firm because, although she brought in more than $40 million of business, the men who evaluated her thought that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[17] The legal profession is not exempt from similar negative effects of categorization.

> As reported by a recent ABA-commissioned survey, 65 percent of Black lawyers feel that minority women lawyers are treated less fairly than White women lawyers in law firms' promotion and hiring.[18]

Discrimination: Bias results not just from conscious, intentional prejudice, but also from unconscious, unintentional stereotyping by decent people who are not hostile bigots. Categorizing someone as coming from a different gender, race, or broad age group than oneself can result in an automatic bias, which says: "we" are automatically good, and "they" are not so good. This means that people automatically judge their own group as "better."[19]

Information that fits one's stereotypes is easy to take in, making stereotypes seem to fit automatically.[20] When information is ambiguous (and much of behavior is ambiguous), people interpret information so as to support their stereotypes, especially when they are making judgments under time pressure or conditions of information overload.[21] And given discretion in questions to ask, people prefer to elicit information that confirms their expectations.[22]

Discrimination occurs when stereotypes become the basis for faulty reasoning, leading to biased feelings and actions. This may disadvantage some (or advantage others) not because of who they are or what they have done, but because of the group to which they belong. People may treat members of an in-group preferentially, whether in assigning positive traits or in allocating rewards.[23]

IV. WHAT CAN WELL-MEANING PEOPLE DO? TOOLS AND TECHNIQUES

Stereotypes are not necessarily any more or less inaccurate, biased, or logically faulty than are any other kinds of generalizations. But they can and often do lead to discriminatory conduct.[24] After all, there is no guarantee that a person identified with a category will fit with our expectations for that category. Our stereotypes may not only be incorrect; they may blind us to a person's real nature. We can be resistant, however, to changing our stereotypes about people, even when we are faced with concrete evidence that they are wrong.

In the first example from Washington State, a female Asian American attorney had appeared in the courtroom ready for a civil trial and was told by plaintiff's counsel that he and her co-defendant attorney had already agreed to a continuance. No one had called her.

The judge chuckled and found the plaintiff had used "due diligence" although the plaintiff's attorney "probably" should have notified her before allowing his client to leave. The judge then granted the continuance motion and stated, "these things happen."

How might the opposing counsel's behavior and the judge's reaction to it be interpreted by the female Asian American attorney? She believed that they (in this case, middle aged White males) thought she would remain quiet, not put up a fuss, and go along with this decision. In her view, their stereotypes about Asian American women – that they are docile and unimportant – resulted in discriminatory treatment.

The easiest course for a person being stereotyped is to stay within the bounds of the expectations of others. But the person who is stereotyped may try to contradict the expectations. Either way, the stereotype must be addressed.[25] Intersectionality -- the multiple discrimination faced by women of color -- means that this Asian American female attorney participated in the justice system with a strong sense of unfairness. She was being treated differently because she was a woman or a minority or both. Her time and that of her client was not valued. Yet, without the support of the judge, it would be difficult if not impossible for her to raise this issue.

How might the judge have perceived the situation differently? Psychologists believe that there is a significant difference between unconscious and conscious information processing.[26] Stereotyping occurs without much thought or attention, primarily outside consciousness.[27] An important first step is to be aware of the stereotyping process and of what choices we are making.[28] People can be taught to recognize categorization, and to resist evaluating individuals in categorical terms. This breaks the link between categorization processes and discriminatory consequences.

In the previous example involving the Asian American female attorney, how could the judge have reacted differently? The key is to gather accurate additional information,[29] while not attempting to forget the person's social categories, which are still relevant and important. **Accurate information reliably decreases stereotypic thinking.**[30]

The judge could have stopped and asked himself the following questions:

- ❑ **What categories am I placing this person in?**
- ❑ **What stereotypes am I associating with these categories?**
- ❑ **Do the stereotypes result in automatic judgments about this individual?**
- ❑ **Is there an intersectionality issue here? If so, how do the different stereotypes interact?**
- ❑ **What further information do I need to make sure that I don't unconsciously act upon the stereotypes?**
- ❑ **What is my conscious reaction to this situation, based on a fuller set of information?**

When accuracy is the goal, individuals tend to pay closer attention, and can set aside their preconceptions.[31]

The judge looked at the attorneys before (him/her) . . . and . . .

What would you do?

V. CONCLUSION

Each of these examples points to the judge's responsibility to encourage lawyers, court personnel, juries and themselves to decrease their stereotypic thinking. A passive or no response by the justice system to negative stereotyping is equivalent to active discrimination.

Clarence Darrow once exhorted an all-white jury to overcome their automatic, stereotyped thinking in order to provide a truly fair trial to a group of African American men charged with murdering a White man:

> The case involved a Black family who moved into a middle-class White neighborhood in Detroit in 1925. When Dr. Ossian H. Sweet and his wife moved into the neighborhood with their baby daughter, they knew that other Blacks who had bought homes in White neighborhoods had been forced to move by "Improvement Associations." Accordingly, Dr. Sweet brought along his brothers, several friends, and an ample supply of guns and ammunition.
>
> Two nights after his arrival, a large White crowd, estimated at several hundred, gathered around the house and began throwing stones at the house amid cries of "N--------." Although police officers were present to maintain order, they stood idly by as the barrage of rocks increased. Seeing a big stone crash through an upstairs window and watching the crowd make a sudden movement, both Sweet and his younger brother, Henry, fired a warning shot over the heads of the boisterous mob. One of the mob's members was killed.
>
> Everyone in the house—eleven Black people—was arrested and charged with first-degree murder. The NAACP asked Darrow to come out of retirement to defend the Sweets. Darrow agreed. In his summation to the jury, Darrow challenged them to confront their own racial biases directly:
>
> > *The prosecutor says that this isn't a race question; it is a murder case. He says, "We don't want any prejudice; we don't want the other side to have any. Race and color have nothing to do with the case. This is a case of murder."*
> >
> > . . . . .
> >
> > *I insist that there is nothing but prejudice in this case; that if it was reversed and 11 Whites had shot and killed a Black while protecting their home and lives against a mob of Blacks, nobody would have dreamed of having them indicted. They would have been given medals instead.*

. . . . .

I haven't any doubt but that every one of you is prejudiced against colored people. I want you to guard against it. I want you to do all you can to be fair in this case, and I believe you will.

. . . . . .

You need not tell me you are not prejudiced. I know better. We are not very much but a bundle of prejudices anyhow. We are prejudiced against other people's color. Prejudiced against other men's religions; prejudiced against other people's politics. Prejudiced against people's looks. Prejudiced about the way they dress. We are full of prejudices.

. . . . . .

Suppose you were Black. Do you think you would forget it even in your dreams? Or would you have Black dreams? Suppose you had to watch every point of contact with your neighbor and remember your color, and you knew your children were growing up under this handicap. Do you suppose you would think of anything else?

. . . . .

Supposing you had your choice, right here this minute, would you rather lose your eyesight or become colored? Would you rather lose your hearing or be a Negro? Would you rather go out there on the street and have your leg cut off by a streetcar, or have Black skin?

. . . . . .

All I hope for, gentlemen of the jury, is that you are strong enough, and honest enough, and decent enough to lay your prejudice aside in this case and decide it as you ought to.

The jury returned a not guilty verdict for Henry Sweet and the prosecution decided not to proceed further against any of the remaining defendants.[32]

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[1] Lynn Hecht Schafran, *Women of Color in the Courts*, TRIAL 21, 22 (August 1999) (citing Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990 at A1); *see also* THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER: A REPORT OF THE MULTICULTURAL WOMEN ATTORNEYS NETWORK AMERICAN BAR ASSOCIATION (1994).

[2] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* UNIV. CHICAGO LEGAL FORUM 139 (1989); see also *Lam v. University of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994) ("where two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences . . . Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women.").

[3] Schafran, *supra* note 1, at 22.

[4] Crenshaw, *supra* note 2, at 140.

[5] OREGON SUPREME COURT/OREGON STATE BAR TASK FORCE REPORT ON GENDER FAIRNESS, Intersectionality 19 (May 1998).

[6] *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts*, Seattle pilot program, February 2000, *Racial and Ethnic Composition of Washington State – Women.* Source: http://www.census.gov/population/projections/state/stpjrace.txt.

[7] *Facts About Women of Color, Handout – Unit I*, WHEN BIAS COMPOUNDS: INSURING EQUAL JUSTICE FOR WOMEN OF COLOR IN THE COURTS—A MODEL JUDICIAL EDUCATION CURRICULUM (1998), National Judicial Education Program to Promote Equality for Men and Women in the Courts, Lynn Hecht Schafran, Esq., Director.

[8] Rick L. Moran and Kurt Snyder, Esq., Editors, OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS (1999-2001 eds.).

[9] Canon 3(A)(5) and 3(B)(2) of the Judicial Code.

[10] Rule 8.4 of the Rules of Professional Conduct.

[11] Irwin A. Horowitz & Kenneth S. Bordens, *Social Perception: The Construction of Social Reality,* in SOCIAL PSYCHOLOGY 87, 91(1994).

[12] *Id.* at 91-92.

[13] Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 5, 11 (1989).

[14] Brief of the American Psychological Association in *Price Waterhouse v. Hopkins*, on writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, June 18, 1988 at 4.

[15] Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, AMERICAN PSYCHOLOGIST 621, 623 (June 1993).

[16] *Id.*

[17] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

[18] Arthur S. Hayes, *Color-Coded Hurdle*, ABA JOURNAL (February 1999).

[19] Devine, *supra* note 13, at 9.

[20] *Id.* at 11-12.

[21] Fiske, *supra* note 15, at 623.

[22] Devine, *supra* note 13, at 11-12.

[23] Horowitz & Bordens, *supra* note 11, at 105.

[24] Devine, *supra* note 13, at 10.

[25] Fiske, *supra* note 15, at 623.

[26] Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 754-56 (1995).

[27] Horowitz & Bordens, *supra* note 11, at 106-107.

[28] Devine, *supra* note 13, at 11-12.

[29] Horowitz & Bordens, *supra* note 11, at 108.

[30] Devine, *supra* note 13, at 12.

[31] Armour, *supra* note 26, at 762-763.

[32] *Id.* at 762-63.

The Gender and Justice Commission and Minority and Justice Commission When Bias Compounds Planning Committee thank Professors Marilyn Berger and Margaret Chon for revising the pilot program primer and preparing this Pre-Program Introduction.

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She co-directed the innovative project, *Lessons From Woburn* with the Berkman Society for Internet and Society at Harvard Law School. She co-produced, wrote and directed the documentary, *Lessons From Woburn: Untold Stories* (1999). She also founded the *Films for Justice Institute* at Seattle University School of Law. She was selected as a Scholar in the Washington Commission for Humanities Inquiring Mind Program (1995-96). Her lectures from the Inquiring Mind Program are rebroadcast on Seattle cable TV. The Lessons From Woburn course and documentary were featured in the New York Times and in a documentary on COURT-TV publicizing the movie, *A Civil Action.*

She is the primary author of two law textbooks published by Aspen Press, previously Little, Brown & Company: Berger, Mitchell & Clark, Pretrial Advocacy: Planning, Analysis and Strategy [1988]; Berger, Mitchell & Clark, Trial Advocacy: Planning, Analysis and Strategy [1989]. She has published numerous articles appearing in professional journals, many deal with issues of gender and the profession, recently see, Berger & Robinson, "Gender Bias in the American Bar Association Journal: Impact on the Legal Profession," 13 Wisconsin Women's L. Journal, May, 1998.

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