

Chapter 4

The Impact of Gender and Race in the Courtroom and in the Legal Community

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I. Summary

The 1989 Gender and Justice in the Courts Study (1989 Study) found that gender affects both process and outcomes. It found that women face credibility issues in the courtroom and that women, as litigants, lawyers, and judges, were not always treated with respect, though the impact was often subtle and individual. In 2021, evidence suggests that biases based on gender, race, ethnicity, and other demographics continue to impact and shape various dynamics in the courtroom between litigants, jurors, witnesses, attorneys, judges, and court personnel. Similar biases negatively impact the acceptance of women, people who identify as LGBTQ+, and Black, Indigenous, and people of color¹ within the legal community more broadly.

Sometimes such bias in the courtroom is explicit, taking the form of unfair treatment in court, harassment, and disrespect. Often it is implicit, tainting decisions made by lawyers, judges, and jurors and possibly impacting case outcomes. For example, female and transgender litigants and witnesses face bias in the courtroom, especially if they are perceived to be sex workers. See “Chapter 10: Commercial Sex and Exploitation.” Stereotypes about women’s gender roles and demeanor may affect the way female attorneys and their clients are perceived and, ultimately, judged. Female litigators, especially women of color, continue to face uneven treatment from judges and demeaning treatment from opposing counsel, and may fear that resisting this treatment will harm their clients. The systemic consequences of these biases are addressed in depth in other chapters throughout this report.

While the bench and the bar are much more diverse in 2021, women, particularly Black, Indigenous, and other women of color, face barriers within the legal profession including pay disparity, career complications, and workplace harassment. As of 2020, over 40% of Washington’s judiciary is female and the Washington Supreme Court is now the most diverse state supreme court in the history of the nation, with seven female justices (out of nine), two

¹ The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report (“2021 Gender Justice Study Terminology, Methods, and Limitations”) for a more detailed explanation of terminology used throughout the report.

justices who are members of the LGBTQ+ community, and four justices who are persons of color. This includes Chief Justice González, who is the first person of color and the first Jewish person to hold that position. However, both men and women of color continue to be significantly underrepresented in judicial and law firm leadership positions nationally and in Washington. As of 2019, most equity partners in U.S. law firms were white males, whereas male attorneys of color constituted 6% of equity partners and women of color constituted only 3% of overall equity partners. About 2% of equity partners identified as LGBTQ+ and less than 1% of equity partners had a disability. There is a national pay gap between male and female attorneys, and it worsened from 85.3% in 2019 to 71.6% in 2021, dropping almost to the 2002 level of disparate pay (69.4%). Family and care responsibilities disproportionately borne by many women, and the impact of the COVID-19 pandemic, play a key role in contributing to these disparities.

Despite existing laws, policies and rules of professional conduct, sexual and workplace harassment continue to pervade the legal community, both nationally and in Washington. A [pilot project](#) conducted as part of the 2021 Gender Justice Study shows this. Our workplace survey of employees in Washington courts, Superior Court Clerks' Offices, and judicial branch agencies found that 57% of respondents experienced at least one type of workplace harassment on at least one occasion in the past 18 months. Though harassment experiences were not limited to any one group, employees who identified as American Indian, Alaska Native, First Nations, or other Indigenous Group Member (86%), bisexual (84%), gay or lesbian (73%), and women (62%) reported the highest rates of harassment.

In 2018, the Board for Judicial Administration (BJA) charged the Gender and Justice Commission with developing a model anti-harassment policy for Washington Courts. This policy was adopted by the Board for Judicial Administration on March 20, 2020. We strongly encourage all courts in the State of Washington to adopt a written anti-harassment policy and to implement it in a meaningful way. Much more needs to be done. For example, the judicial branch should take explicit steps to promote equity, diversity, and inclusion and should foster a culture that values individual differences in age, sexual orientation, gender identity or expression, disability, race, and ethnicity. It should also monitor the effectiveness of these efforts.

II. The 1989 Gender and Justice in the Courts Study Found That Gender Affects Both Process and Outcomes, But Concluded that the Impact Was Often Subtle and Individual

The 1989 Washington State Task Force on Gender and Justice in the Courts was concerned with “the professional acceptance and credibility of women in the courts, the effect of gender biased treatment on case outcome, and gender bias in employment practices and procedures.”² It tasked the Committee on the Treatment of Lawyers, Litigants, Judges, and Court Personnel to explore issues of gender bias and harassment against female lawyers, litigants, judges, and court employees. The Committee studied the courtroom environment, focusing on the treatment of litigants and legal professionals in the court and the credibility of women in the courtroom. It also studied the acceptance of women more broadly in the legal and judicial communities, and court personnel practices and procedures. The report found that “women faced continuing problems of credibility in the courtroom and women, as litigants, lawyers, and judges, were not always treated with respect.”³

The Committee reported information from five sources: (1) reports from other state gender bias task forces and the American Bar Association’s (ABA) Commission on Women in the Profession; (2) public hearings; (3) a survey of 1,509 responding lawyers; (4) a survey of 222 responding judicial officers (185 men and 33 women); and (5) personnel policies from the various Washington State courts. The two surveys were “the main source of data for this report,” but the Committee quoted extensively from the hearings as well. The Committee found that “some aspects of gender bias, as a result of cultural and societal influences, exist in the Washington State Court system,” but that “the bias tends to be more subtle than overt and is more a problem of individuals than the system as whole.”⁴ The Committee gave numerous examples of this bias derived from the surveys and hearings, including: use of first name rather than surname for female (but not male) judges, attorneys, litigants, and witnesses; use of diminutive terms like

² WASH. STATE TASK FORCE ON GENDER & JUST. IN THE COURTS, GENDER & JUSTICE IN THE COURTS 23 (1989), <https://www.courts.wa.gov/committee/pdf/Gender%20and%20Justice%20in%20the%20Courts--Final%20Report,%201989.pdf> (hereinafter “1989 Study”).

³ *Id.* at 4.

⁴ *Id.* at 135.

“young lady” or “dear” for female attorneys, litigants, and witnesses both in and out of open court; comments on personal appearance; the question “Are you a lawyer?” in court and in front of clients; sexist remarks and jokes; and how female litigants were regarded as less credible because of their gender by male judges of the and lawyers.⁵

The Committee specifically asked attorneys and judges “whether they thought that conduct such as use of first names and familiar terms, sexual or demeaning remarks and jokes, or biases as to credibility had an effect on case outcome.” About 50% of female lawyers and judges reported that it occasionally happens. By contrast, 80% of male lawyers, and nearly 100% of male judges reported that it never does.⁶

There has not been a subsequent survey in Washington that addresses the impact of explicit and implicit gender bias in the Washington State courts and legal community, although it was tangentially addressed in a 2012 survey of the Washington State Bar Association, which is discussed later. Several additional issues addressed by the Committee in 1989 have been evaluated by the judicial branch, legal scholars, and social scientists since then, including gender-based pay inequity, sexual harassment within the profession, and the effects of gender bias in the courtroom.

III. In 2021 Women Still Face Disrespect and Problems of Credibility Inside the Courtroom Because of Gender and Race

Biases based on gender, race, and other demographics continue to impact and shape various dynamics in the courtroom between litigants, jurors, witnesses, attorneys, judges, and court personnel. Sometimes such bias is explicit, taking the form of unfair treatment in court, harassment, and disrespect. More often it is implicit, tainting some of the day-to-day decisions made by lawyers, judges, and jurors and possibly impacting case outcomes. The systemic consequences of these biases are addressed in depth in the chapters throughout this report. Below we briefly highlight two illustrative issues: 1) Bias towards female and transgender litigants

⁵ 1989 Study, *supra* note 2

⁶ *Id.*

and witnesses, especially if they are perceived to be sex workers, and 2) Bias in the courtroom towards female litigators, especially Black, Indigenous, and women of color.

A. Gender still affects process and outcomes for women litigants and witnesses

Part of the problem is Washington judges' assumptions about how women should behave – and judges' expression of those assumptions in their rulings certainly supports the perception that the justice system is not fair to women. For example, in *State v. McKee*,⁷ the sentencing judge in a rape case reduced the defendant's sentence because the victim was exchanging sex for money. Specifically, the trial court imposed an exceptional sentence below the standard range because the victims "were initiators and/or willing participants in the illicit circumstances, or precursor offenses, leading to their rapes."⁸ The Court of Appeals reversed and ruled that such reasoning constituted "a reflection of the trial court's personal opinion and subjective belief that raping a prostitute is not as brutal as raping a woman who 'did not willingly start off ready to perform a sex act.'"⁹

Women in the sex industry often face explicit and implicit bias in the courtroom in both criminal settings, such as when testifying as victims of gender-based violence or against their exploiters, and in civil settings, such as in family law and domestic violence cases. We heard from some women and advocates that the women's credibility was questioned by judges, jurors, and opposing counsel because they were engaged in prostitution. A trafficking survivor who testified in favor of Senate Bill 5180 (2021-2022) (allowing the vacating of prostitution sentences committed as a result of being a victim of trafficking) described her experience having to go, as part of the vacatur process, "back to the court where a judge years earlier had called me a "hooker." She added: "I remember looking back at the audience in the court room and feeling like they thought I was garbage. I felt so low, and like I was a bad person."¹⁰

⁷ 141 Wn. App. 22, 167 P.3d 575 (2007).

⁸ *Id.* at 34.

⁹ *Id.*

¹⁰ Recorded testimony to the Washington State Legislature's House Public Safety Committee. TVW. Available at <https://www.tvw.org/watch/?eventID=2021031184> at the 23 minute mark.

The data shows that court personnel have sometimes shown similar disrespect towards members of the LGBTQ+ community. One example of such bias is the explicit misgendering of transgender litigants and witnesses. The 2015 U.S. Transgender Survey found that while 75% of individuals seeking a name change felt that they were treated respectfully by judges and court staff, 23% felt that they were only sometimes treated respectfully and two percent felt that they were never treated respectfully.¹¹ The Survey explains:

Reports of only sometimes or never being treated with respect were higher for certain groups of people, including people who were currently working in the underground economy, such as sex work, drug sales, or other work that is currently criminalized (41%), and people who had not had any hormonal or surgical treatment (35%). Respondents who interacted with judges or court staff who thought or knew they were transgender were asked about specific experiences during their interactions. Twenty-three percent (23%) were referred to by the wrong gender pronouns (such as he, she, or they) or title (such as Mr. or Ms.) during their interactions. Almost one in five (19%) people who interacted with judges or court staff were asked questions about their gender transition, such as whether they take hormones or have had any surgery. Nearly one in ten (9%) reported that they received unequal treatment or service, and 3% were verbally harassed. Overall, more than one-third (36%) of those who interacted with judges or court staff during the name change process reported having at least one of these experiences.¹²

The survey also found that 13% of respondents who used court services reported being denied equal treatment or service, were verbally harassed, or were physically attacked because of being transgender.¹³

¹¹ SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 83–84 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹² *Id.* at 84.

¹³ *Id.* at 219.

Though gender bias against litigants in certain types of cases has decreased, assumptions about how women should behave, and about whether women and others who fail to behave in the manner expected of their gender can really be considered victimized, credible, or even worthy of respect, remain. Similarly, some literature since 1989 suggests that gender and racial bias, especially implicit bias against attorneys, witnesses, and clients may affect the outcomes of cases.¹⁴ The chapters of this report that deal with access to process – for example, access to jury service, ability to pay court fees, feasibility of filing protection orders or even coming to the courthouse, participation by speakers with limited English proficiency, etc. – show that perceptions from 1989 about biased process are, unfortunately, a reality today. Likewise, the chapters of this report that address substantive areas of law – for example, juvenile justice proceedings, criminal charging, bargaining and sentencing, employment discrimination, family law – show that those perceptions from 1989 are also a reality today.

B. Bias in the courtroom against female litigators, especially Black, Indigenous, and women of color

Female litigators, especially Black, Indigenous, and women of color, continue to struggle against implicit and explicit gender and race bias in trial from judges, juries, opposing counsel, and even clients. They face uneven treatment from judges and demeaning treatment from opposing counsel, and they fear that resisting this treatment will harm their clients.

In a 2014 survey, 70.4% of women attorneys surveyed indicate that they experienced gender bias in the courtroom.¹⁵ Women attorneys continue to report experiencing gender bias from judges, jurors, and opposing counsel, including: being mistaken for a secretary or paralegal; being called a term of endearment (honey, sweetheart); being critiqued for their voice sounding shrill or too high (this perception was echoed by judges who have commented that a woman raising her voice in court was a problem because she sounds shrill, whereas a man sounds aggressive); being treated differently (ignored, bullied, treated in a condescending manner); and having clients

¹⁴ See, e.g., Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857 (2019); Michele N. Struffolino, *The Devil You Don't Know: Implicit Bias Keeps Women in Their Place*, 38 PACE L. REV. 260 (2018).

¹⁵ TAMMY J. MAYER & GARY L. MILLER, AGEISM AND SEXISM IN COURT 3 (2017), https://www.iadclaw.org/assets/1/7/16.1-_Meyer-_Ageism_and_Sexism_in_Court.pdf.

express a preference for male lead trial counsel (although judges reported that they often found women litigators better prepared and more likely to follow courtroom rules).¹⁶

Hostility against female trial lawyers can force a “double-blind dilemma” during trial, meaning the “attorney is conflicted between the need to confront the situation and nullify its demeaning effect, and a fear that any response will hurt her client’s case.”¹⁷

Implicit bias against female attorneys appears to extend all the way to the United State Supreme Court.¹⁸ Researchers analyzed the 601 briefs submitted between the 2010 and 2013 terms using quantitative textual analysis, searching for emotional content, and then comparing the gender of the authors of the briefs with the gender of the author of the opinion. They determined:

Our findings suggest that male justices reward attorneys, both male and female, for conforming to traditional gender norms in briefs. In other words, male attorneys are rewarded for utilizing more masculine language in their briefs, whereas female attorneys are rewarded for employing more feminine language. However, we find no effect on female justices’ evaluations of legal arguments for either male or female attorneys.¹⁹

They suggest that female justices are more cognizant of the tension faced by female attorneys when struggling against gender bias and are “perhaps less likely to sanction female counsel for violating gender norms.”²⁰ They conclude that, “this has important consequences for calls for diversity on the bench as well as normative concerns over the blindness of the justice system.”²¹

¹⁶ Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 *CARDOZO J.L. & GENDER* 229, 234 (2016).

¹⁷ *Id.* at 242. See also Sky Mihaylo & Joan C. Williams, *Interrupting Bias: Inside and Outside the Courtroom*, 32 *J. AM. ACAD. MATRIMONIAL L.* 365, 370 (2020) (calling this issue “tightrope bias”).

¹⁸ Shane A. Gleason, Jennifer J. Jones & Jessica Rae McBean, *The Role of Gender Norms in Judicial Decision-Making at the U.S. Supreme Court: The Case of Male and Female Justices*, 47 *AM. POL. RSCH.* 494 (2018). See also Shane A. Gleason, *Beyond Mere Presence: Gender Norms in Oral Arguments at the U.S. Supreme Court*, 73 *POL. RSCH. Q.* 596 (2020) (finding that attorneys are more successful in oral argument when their style is consistent with gender norms, raising normative concerns about implicit bias from the Court).

¹⁹ *Id.* at 496.

²⁰ *Id.*

²¹ *Id.*

Forensic psychologist and jury consultant Alexis Robinson observes that juror bias against female attorneys, especially Black, Indigenous, and women of color, may work to the detriment of their clients, who “may be at a distinct disadvantage with white and/or male jurors before any evidence is actually presented.”²² She explains:

Stereotypes about women’s gender roles and demeanor can affect the way that jurors perceive, and ultimately, judge female attorneys and their clients. Mock jurors indicated their disdain for the aggressive female attorneys by convicting their client more frequently than the assertive or passive female attorneys. Additionally, jurors were more receptive to the aggressive behavior when the attorney was male than when the attorney was female. Researchers believe that jurors’ punishment of women attorneys and their clients is the result of the jurors’ belief that aggressive behavior is counterstereotypical for women. It is also possible that jurors believe that females (regardless of presentation style) do not represent the juror’s prototype of an attorney.²³

Research suggests that “female attorneys of color are at a distinct disadvantage inside and outside the courtroom” because of biased judicial conduct.²⁴ Robinson contends that the “same biases that disadvantage women and Blacks, may have a unique effect on women of color” because Black women experience discrimination that corresponds to both their race and their gender.²⁵ Dr. Ann T. Greeley, another psychologist and trial consultant, echoed these concerns at the 2012 ABA Section of Litigation Annual Conference, noting that gender and racial implicit bias “exhibited in its many forms within the courtroom, affect decision-making and could ultimately compromise the integrity of the court system.”²⁶

²² Alexis A. Robinson, *The Effects of Race and Gender of Attorney on Trial Outcomes*, 23 THE JURY EXPERT 1, 2 (2011).

²³ *Id.* at 4.

²⁴ Connie Lee, *Gender Bias in the Courtroom: Combatting Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J.L. & GENDER 229, 243 (2016).

²⁵ *Id.* at 3. See also Carla D. Pratt, *Sisters in Law: Black Women Lawyers’ Struggle for Advancement*, 2012 MICH. ST. L. REV. 1777, 1779 (2012) (“For women of color, race is not merely an added layer that makes them subject to additional challenges, but rather a component of their identity that intersects with gender to expose them to unique challenges.”).

²⁶ Ann T. Greeley, *Gender and Racial Bias in the Courtroom*, AM. BAR ASS’N SECTION OF LITIG. 2012, SECTION ANN. CONF.: TRIAL TACTICS IN A DIVERSE WORLD (Apr. 18-20, 2012), at 34.

Evidence suggests that similar biases based on gender, race, and other demographics negatively impact the acceptance of women, people who identify as LGBTQ+, and Black, Indigenous and people of color within the legal community more broadly. Explicit and implicit biases underlie disparities in representation, inequities in pay and professional opportunities, and experiences with sexual and workplace harassment. Here too, Black, Indigenous, and other women of color bear the brunt disproportionately.

IV. Gender and Race Disparities in the Legal Community

A. The legal profession in Washington has become more diverse, but gender and race disparities remain a challenge

The number of women lawyers in the United States has been slowly increasing for decades. It constituted 29.3% in 2001 and increased to 37% by 2020.²⁷ In 2016, women comprised the majority (50.3%) of JD candidates for the first time. As older attorneys, who are predominately white males, retire, the composition of the bar will continue the move towards gender parity.²⁸ In March 2020, there were 40,620 lawyers (active and inactive), judges, limited practice officers, and limited license legal technicians in the Washington State Bar Association. Of this total, 29,236 indicate their gender, with 12,366 (30.44%) identifying as female and 55 (0.14%) identifying as non-binary, not-listed, multi-gender, transgender, or two spirit. This leaves 16,815 (41.4%) identifying as male and another 11,384 (28%) for whom gender identity is not provided. Given that over a quarter of the membership do not indicate their gender, it is difficult to ascertain the precise gender makeup of the Washington bar.

The percentage of women among Washington State judges has also increased since the 1989 Study. As of January 28, 2019, 42% of the judiciary was female, including six of the nine Supreme Court justices (67%) and 11 of the 27 Court of Appeals judges (41%). As of 2020, seven of the nine

²⁷ AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2020 32 (2020),

<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

²⁸ AM. BAR ASS'N, 2016-2017 ANNUAL REPORT OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR OF THE ABA 17 (2017),

https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/16_17_legal_ed_annual_report_final.pdf.

Supreme Court justices are now female, and two are members of the LGBTQ+ community.²⁹ Chief Justice González is the first person of color, and the first Jewish person, to hold that position. Gender diversity, along with the four justices who are persons of color, makes the Washington Supreme Court the most diverse state supreme court in the history of the nation.³⁰

Clearly, we have made progress towards diversity. In 1988, women made up only 11.02% of the Washington judiciary, with only one female member each on the Supreme Court and Court of Appeals. By 2013, the judiciary was 36.03% female, with five female justices, including a female Chief Justice, Barbara Madsen, who followed a female Chief and was then followed by two additional female Chief Justices, and ten female appellate judges. Based on a review of the list kept by the Administrative Office of the Courts, the overall percentage of women in the judiciary has been increasing about one percent each year since 2013.³¹ Nonetheless, the American Constitution Society for Law and Policy's report "The Gavel Gap: Who Sits in Judgment on State Courts?" found that while at the end of 2014, women of color in Washington comprised 15% of the general population, they comprised only four percent of state court judges. Similarly, men of color constituted 16% of the general population, but comprised only six percent of state court judges.³²

Similar trends exist within the Bar. In 2015, the Washington State Bar Association (WSBA) reported that in 2013, "racial diversity within the WSBA closely mirrors national trends" with 89%

²⁹ A 2012 survey of the Washington bar found that nine percent of attorneys identified as LGBTQ+. TRUE BERRING, LLC, WASHINGTON STATE BAR ASSOCIATION MEMBERSHIP STUDY 41 (2012), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-membership-study-report-2012.pdf?sfvrsn=f15638f1_0.

³⁰ Mark Joseph Stern, *Washington State Now Has the Most Diverse Supreme Court in History*, SLATE (Apr. 17, 2020), <https://slate.com/news-and-politics/2020/04/grace-helen-whitener-washington-supreme-court.html> ("Washington and California's Supreme Courts are, unfortunately, outliers on this front. A 2019 Brennan Center for Justice study found that most states' high courts are "overwhelmingly white and male." It noted that 24 states have all-white Supreme Courts, while just 15% of state Supreme Courts seats nationwide are held by people of color—even though nearly 40% of the country is non-white. Eighteen states never seated a Black Supreme Court justice and 13 "never seated a person of color as a justice." Women held just 36% of state Supreme Court seats.").

³¹ Gender diversity, or the lack of it, on appellate courts impacts decisions. See Mary Pat Gunderson, *Gender and the Language of Judicial Opinion Writing*, 21 GEO. J. GENDER & L. 1 (2019) (examining an all-male state Supreme Court's use of language to downplay domestic violence and predatory sexual behavior by lawyers).

³² WASH. STATE MINORITY & JUSTICE COMM'N, WORKFORCE DIVERSITY COMM., BRIDGING THE GAVEL GAP: A DIRECTORY OF JUDGES AND COMMISSIONERS OF COLOR IN THE STATE OF WASHINGTON 2017 3 (2017), <https://www.courts.wa.gov/committee/pdf/JudgesAndCommissionersOfColorDirectory.pdf> (citing TRACEY E. GEORGE AND ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (2018), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf>).

of the membership white compared to 72% of Washington’s population and 26% female compared to 51% of the population.³³ This report also notes the social barriers experienced in the profession by LGBTQ+ people (36% reported experiencing barriers), people with disabilities (34% reported experiencing barriers), Black, Indigenous, and people of color (32% reported experiencing barriers), and women (29% reported experiencing barriers).³⁴

B. Inequity in pay and career opportunities in the legal profession

1. Women, particularly Black, Indigenous, and women of color, face pay disparity and career complications

Pay disparity amplifies the barriers described in the prior section. In the largest 200 American law firms in 2019, women earned 85% to 93% of what men in the same position earned, with more equitable pay levels for associates than for equity partners.³⁵ Despite the growth in the percentage of female attorneys in the profession, federal statistics from 2002 show that female attorneys were paid on average only 69.4% of what their male counterparts were paid: \$1,073 for women, compared to \$1,547 for men.³⁶ By 2019, the federal statistics show that the pay disparity had improved to 85.3% with female attorneys making \$1,878 a week compared to men making \$2,202,³⁷ but by January 2021, likely due to the disparate impact of the COVID-19 pandemic on women, the pay disparity had widened dramatically to 71.6% with the income of female attorneys dropping to \$1,665 a week compared to men, whose income had increased to \$2,324.³⁸ The rate of recovery for salaries for female lawyers post-pandemic remains to be seen. It is important to note that Black, Indigenous, and women of color often face even more drastic

³³ LUMA CONSULTING, WASHINGTON STATE BAR ASSOCIATION DIVERSITY RESEARCH PROJECT LITERATURE OVERVIEW 2 (2015), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-diversity-research-project-2015.pdf?sfvrsn=525738f1_0.

³⁴ *Id.* at 3.

³⁵ DESTINY PEERY, NAT’L ASS’N WOMEN LAW, 2019 SURVEY REPORT ON THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS 20–21 (2020), <https://www.nawl.org/d/do/969>.

³⁶ AM. BAR ASS’N, COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (2006).

³⁷ U.S. BUREAU OF LAB. STAT., CHART 39: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2019), <https://www.bls.gov/cps/aa2019/cpsaat39.pdf> (labor force statistics from the current population survey).

³⁸ U.S. BUREAU OF LAB. STAT., CHART 39: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2021), <https://www.bls.gov/cps/cpsaat39.htm> (labor force statistics from the current population survey).

pay inequities than white women. See “Chapter 1: Gender and Financial Barriers to Accessing the Courts” for more data on how race and gender intersect to impact pay and income inequities.

A 2012 survey of the Washington State Bar Association found that nine percent of the bar identified as LGBTQ, non-binary, or two-spirit.³⁹ The survey also found that “their income lags notably behind the median and is the lowest of all diversity groups.”⁴⁰ Women also ranked “high among diversity groups in terms of the frequency of barriers reported as well as the intensity of those barriers.”⁴¹

Black, Indigenous, and women of color face significant intersectional disparity and barriers within the legal profession. The 2020 National Association of Women Lawyers Survey “Report on the Promotion and Retention of Women in Law Firms” reporting survey data from 2019 prior to the pandemic, found that white women constituted 18% of overall equity partners but women of color constituted only three percent of overall equity partners.⁴² Male attorneys of color constituted another six percent of equity partners.⁴³ The remaining 73% of equity partners were white males. About two percent of equity partners identified as LGBTQ+ and less than one percent of equity partners had a disability.⁴⁴ The report note that the numerical results from 2020 are “a near exact replication of those from 2017 to 2019” and that “the progress made by women in law firms over the last decade has been slow and incremental at best, and law firms continue to face challenges with respect to supporting and promoting women.”⁴⁵ In comparison to equity partners, the survey found that women of color make up about 22% of all law firm associates.⁴⁶ LGBTQ+ individuals of all genders comprise about four percent of associates, but persons with disabilities still comprise less than one percent of all associates.⁴⁷

Disparity in pay and opportunity is amplified by the fact that women continue to contribute disproportionately to domestic activities in most households. There is a significant body of

³⁹ TRUE BERRING, LLC, *supra* note 29, at 120.

⁴⁰ *Id.*

⁴¹ *Id.* at 121.

⁴² Peery, *supra* note 35, at 8–10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 3.

national literature finding that women spend significantly more time than men on child care and elder care duties, “invisible” household labor (e.g., scheduling doctor’s appointments, meal planning, organizing family events, etc.), and other unpaid domestic tasks.⁴⁸ The 2019 American Time Use Survey found that more women reported doing household activities every day, and they spent more time doing them; and men spent more time in leisure activities than women. This trend is true across all races and ethnicities captured in the survey, with Asian, Black, Hispanic, and white women all reporting spending more time on household activities and caring for household members than men in every race or ethnicity category. Hispanic/Latinx women reported spending the greatest number of hours per day on household activities. In families with children under age six, women spend nearly twice as much time as men providing childcare and women also spent more time doing other unpaid domestic tasks.⁴⁹ The trend of women shouldering more childcare exists even among dual-income couples.⁵⁰

This unbalanced division of work is associated with “psychological distress, depression, role overload, and even poor cardiovascular health” for women.⁵¹ This unequal division of domestic labor also amplifies challenges for women who absorb this extra workload, and then are often

⁴⁸ Lucia Ciciolla & Suniya S. Luthar, *Invisible Household Labor and Ramifications for Adjustment: Mothers as Captains of Households*, 81 *SEX ROLES* 467 (2019); *American Time Use Survey—2019 Results at Table 1- Time Spent in Detailed Primary Activities and Percent of the Civilian Population Engaging in Each Activity, Averages Per Day by Sex, 2019 Annual Averages*, U.S. BUREAU OF LAB. STAT. (2019), <https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today>; *Progress of the World’s Women 2019-2020: Families in a Changing World*, UN WOMEN (2019), <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women>; Marianne Bertrand, Jessica Pan & Emir Kamenica, *Gender Identity and Relative Income with Households* (Nat’l Bureau of Econ. Rsch., Working Paper No. 19023, 2013), <https://www.nber.org/papers/w19023>; Jill E. Yavorsky, Claire M. Kamp Dush & Sarah J. Schoppe-Sullivan, *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 *J. MARRIAGE & FAMILY* 662 (2015).

⁴⁹ *American Time Use Survey—2019 results at Table 1, Table 3, and Table 8A*, U.S. BUREAU OF LAB. STAT. (2019) <https://www.bls.gov/news.release/pdf/atus.pdf#:~:text=AMERICAN%20TIME%20USE%20SURVEY%20%E2%80%94%202019%20RESULTS%20In,the%20U.S.%20Bureau%20of%20Labor%20Statistics%20reported%20today>. Analysis of 2003-2011 American Time Use Survey data among married individuals with at least one working partner found that wives spent an average of 33.52 hours per week on “non market work” (childcare plus chores) compared to husbands who spent an average of 20.74 hours per week. On childcare alone, mothers spent an average of 9.41 hours per week compared to 5.07 hour per week per men. Bertrand, Pan & Kamenica, *supra* note 48.

⁵⁰ Yavorsky, Dush & Schoppe-Sullivan, *supra* note 48, review the literature on this topic and find that while some surveys have found a more equal division of domestic labor between men and women, research indicates that time use surveys are less accurate than the more robust research which uses time journaling and that men tend to over-estimate their contributions in time-use surveys more than women.

⁵¹ Ciciolla & Luthar, *supra* note 48, at 467.

also penalized during hiring, allocation of work assignments, promotion and other career advances due to assumptions and biases that they will miss more work to attend to childcare, elder care, and other domestic duties. Researchers have found evidence of a “motherhood penalty” during hiring and in wages. This penalty is unique to women and contrasts sharply with the “fatherhood bonus” which gives male parents an advantage in hiring and in wages.⁵² See “Chapter 5: Gender and Employment Discrimination and Harassment” for more information on hiring discrimination faced by women who are married, pregnant, or parenting and how this discrimination may be amplified for Black, Indigenous, and women of color. As noted in that chapter, there is a gap in the state and national literature related to workplace treatment of LGBTQ+ workers who are pregnant or parenting.

While most of this literature is general to all professionals, there are some studies specific to the legal profession. A study of the motherhood wage penalty found that the wage gap for mothers could be narrowed by delaying the birth of one’s first child—but only for some occupations. Legal professionals were among those who experienced the largest wage gains by delaying starting a family, and wage penalties for early childbearing were the “most pronounced among education administrators, financial managers, and lawyers.”⁵³ A separate study of the motherhood penalty found that while the sample of mothers across occupations experience a 2.8% wage penalty for every child, lawyers who were mothers experienced a penalty over 4% per child.⁵⁴ These stereotypes and motherhood penalties persist despite evidence (both from inside and outside of

⁵² Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020); Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC’Y 616 (2010); Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCH. 474 (2012); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIO. 1297 (2007); Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers*, WORKLIFE LAW (2011), https://worklifelaw.org/publications/IssueBrief_PoorPregnantAndFired.pdf; Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 DEMOGRAPHY 1663 (2018).

⁵³ Liana Christin Landivar, *First-Birth Timing and the Motherhood Wage Gap in 140 Occupations*, 6 SOCIUS : SOCIO. RSCH. FOR A DYNAMIC WORLD 1 (2020).

⁵⁴ Wei-hsin Yu & Janet Chen-Lan Kuo, *The Motherhood Wage Penalty by Work Conditions: How Do Occupational Characteristics Hinder or Empower Mothers?*, 82 AM. SOCIO. REV. 744, 760-761 (2017).

the legal profession) that the pro-work behaviors of mothers are comparable to (and sometimes exceed) the pro-work behaviors of fathers and non-parents.⁵⁵

2. The COVID-19 pandemic exacerbated these disparities

The COVID-19 pandemic has exacerbated this issue with women absorbing the bulk of childcare duties, including remote learning, and other unpaid domestic labor needed as a result of the pandemic.⁵⁶ This may be partially responsible for the dramatic increase in the pay gap between male and female attorneys discussed above. Analysis of Understanding America Study data from March through July of 2020 for respondents who reported being married or living with their partner found working mothers were 27% more likely than working fathers to be the only providers of care for their children. The authors conclude that:

Women have carried a heavier load than men in the provision of childcare during the COVID-19 crisis, even while still working. Mothers' current working situations appear to have a limited influence on their provision of childcare. This division of childcare is, however, associated with a reduction in working hours and an increased probability of transitioning out of employment for working mothers.⁵⁷

Some researchers have suggested that the increase in time spent on domestic work among both men and women will lead to a more equal division of household labor,⁵⁸ while other researchers indicate that the pandemic has exacerbated gender inequity in this area, contributed to increased psychological distress among working mothers, and harmed women's work prospects.⁵⁹

⁵⁵ Julie A. Kmec, *Are Motherhood Penalties and Fatherhood Bonuses Warranted? Comparing Pro-Work Behaviors and Conditions of Mothers, Fathers, and Non-Parents*, 40 Soc. Sci. Rsch. 444, 447 (2011) (citing research from 2000 from Alberta, Canada which found that "practicing lawyer mothers were more committed to their law careers than fathers despite the fact that mothers reported having less work control, spouses with longer work hours, and less workplace support than fathers").

⁵⁶ Dalvin Brown, *Women Take on a Greater Share of Parenting Responsibilities Under Stay-at-Home Orders*, USA TODAY (May 8, 2020), <https://www.usatoday.com/story/money/2020/05/08/women-take-on-more-their-kids-remote-learning-responsibilities/5178659002>; Daniel Carlson, Richard Petts & Joanna Pepin, *Changes in Parents' Domestic Labor During the COVID-19 Pandemic*, SOCARXIV (May 6, 2020), <https://doi.org/10.31235/osf.io/jy8fn>; Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 COVID ECON. 62 (2020).

⁵⁷ Gema Zamorro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work, and Mental Health During COVID-19* 1 (Univ. of S. Cal. CESR-Schaeffer Working Paper Series, Paper No. 2020-003, 2020), https://cesr.usc.edu/documents/WP_2020_003.pdf.

⁵⁸ Carlson, Petts & Pepin, *supra* note 56.

⁵⁹ Zamorro & Prados, *supra* note 57, at 1.

There has been a mass exodus of women from the workforce nationally as a result of COVID-19. Between February 2020 and February 2021 over 2.5 million women left the workforce nationwide, compared with about 1.8 million men.⁶⁰ This trend was apparent starting early in the pandemic. Between February and April of 2020 women went from having slightly lower unemployment rates than men (3.4% and 3.6% respectively) to having a rate almost three percentage points higher (16.3% and 13.5% respectively). Hispanic women saw an increase in unemployment rates of more than 200% in that timeframe, leading to a 20.2% unemployment rate in that population (compared to a 12.4% rate among white men). Single mothers have also been hugely impacted, with the unemployment rate in this population tripling in this timeframe (from 4.1% to 15.9%). Of note, over half of Black families with children and over 36% of Native American families with children nationally are headed by a single mother.⁶¹ Job losses have also been worse among women without a college degree than among those with a college degree.⁶² In addition, the Understanding America Study data cited above found that 42% of working mothers and 30% of working fathers had reduced their working hours at some point between March and July 2020. Working mothers were about 17% more likely than working women without children and working fathers to have reduced their working hours during the pandemic.⁶³

While research on the unequal division of unpaid domestic work is not specific to women in legal professions or to Washington State, it is likely that these findings are generalizable to both populations. The National Association of Women Lawyers explains the risk:

Now, the representation of women and diverse attorneys in law firms and the legal profession are newly threatened by a global pandemic that has put financial pressures on law firms – the type of financial stress that has resulted in cuts to diversity efforts and diverse representation in the past. Further, the shift to

⁶⁰ *Labor Force Statistics from the Current Population Survey, Household Data Seasonally Adjusted: A-3. Employment Status of the Civilian Noninstitutional Population by Sex and Age, Seasonally Adjusted*, U.S. BUREAU OF LAB. STAT. (July 2, 2021), <https://www.bls.gov/web/empsit/cpseea03.htm>.

⁶¹ *Quick Figures: Dramatic Decline in Employment Hits Women Even More Severely Than Men*, INST. FOR WOMEN'S POL'Y RSCH. (2020), <https://iwpr.org/wp-content/uploads/2020/05/QF-Breadwinner-Mothers-by-Race-FINAL.pdf>.

⁶² Zamarro & Prados, *supra* note 57, at 1.

⁶³ *Id.*

remote work and increased demands to support children and families no longer able to utilize schools and other services that have typically allowed women and attorneys of color to manage the demands of the legal profession alongside the demands at home has created additional challenges, if not threats, to the success and persistence of women and attorneys of color in law firms and the legal profession at large. ⁶⁴

Also, it is important to note that these are population level trends, which do not suggest that they are generalizable to every woman in every household. In fact, assumptions that they are can result in hiring and other workplace decisions that perpetuate gender inequities and continue to normalize an unequal division of unpaid domestic work.

IV. Sexual and Workplace Harassment Within the Legal Community

As explored in depth in “Chapter 5: Gender and Employment Discrimination and Harassment,” biased treatment of women, people who identify as LGBTQ+, and Black, Indigenous, and people of color in the workplace can be explicit and predatory, taking the form of harassment, and even sexual assault. The legal profession is no exception. After first reviewing previous data on sexual and workplace harassment within the legal profession, nationally and in Washington’s legal community, this chapter highlights key findings from a [pilot project](#) commissioned as part of the 2021 Gender Justice Study to identify whether employees of Washington’s judicial branch (all court employees, employees of judicial branch agencies and organizations, and administrators and clerks who work closely with judicial branch employees) suffered from harassment and discrimination of any kind in their workplace.

A. Previous data on sexual and workplace harassment within the legal community

In 1989, the Committee on the Treatment of Lawyers, Litigants, Judges, and Court Personnel briefly touched on the question of sexual harassment, termed “sexual advances (verbal or

⁶⁴ Peery, *supra* note 35, at 10.

physical),” in their surveys. The Committee noted that 16% of lawyers and four percent of judges reported verbal advances by male attorneys to female attorneys. In addition, five percent of lawyers and two percent of judges noted physical advances. Fewer than five percent noted any advances committed by judges or court personnel. Fewer than five percent noted advances by male attorneys to female litigants. This level of verbal harassment and physical assault, likely underreported, existed within the bench and bar despite the developing case law establishing civil liability for such actions.

In 1989, there were certainly laws on the books that barred sexual harassment and workplace discrimination in employment, including judicial recognition of hostile work environment. Today, there are even more federal and state laws on the books, and they bar even more forms of discrimination in employment – for example, federal law now explicitly bars discrimination on the basis of sexual orientation in employment (See “Chapter 5: Gender and Employment Discrimination and Harassment” and “Chapter 7: Gender Impact in Family Law Proceedings” for details).

Since the 1989 Study and the judicial recognition of hostile work environments, sexual harassment in the workplace, including in courts and law firms, has become much more widely acknowledged. In fact, as of 2014, “50 to 66 percent of female lawyers and 25 to 50 percent of female court personnel have experienced or observed sexual harassment. Almost 75 percent of female lawyers believe that harassment is a problem in their workplaces.”⁶⁵ The ABA reported similar national numbers in 2016.⁶⁶

⁶⁵ Bobbi Liebenberg, *Sexual Harassment – A Serious Problem Persists*, 22 ABA PERSPECTIVES 2 (2014), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2014/spring/sexual_harassment_a_serious_problem_persists.

⁶⁶ Cynthia L. Cooper, *Lawyers on Notice: Harassment and Discrimination Can Endanger Your License*, 25 ABA PERSPECTIVES 1 (2017), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2017/winter/lawyers_notice_harassment_and_discrimination_can_endanger_your_license. The survey of 2,827 lawyers by the ABA’s Commission on Women in the Profession found: “In reply to a question about whether people at their workplaces made sexist comments or told sexual stories or jokes, 82 percent of women and 74 percent of men replied in the affirmative. In addition, 27 percent of women and 8 percent of men said that they were subjected to ‘unwanted romantic or sexual attention’ or ‘unwanted attempts to touch,’ and 13 percent of women and 4 percent of men believed that they had lost career opportunities because they rebuffed sexual advances. Nonwhite and white respondents had similar response.” *Id.*

And an international survey reported similar results in a survey of nearly 7,000 lawyers in 135 countries, which found that 35% of female lawyers and seven percent of male lawyers reported having been sexually harassed at work.⁶⁷ Of those who had been harassed, 77% of the female lawyers and 88% of the male lawyers never reported the incident due to “the status of the perpetrator, fear of repercussions, and the incident being endemic to the workplace.”⁶⁸ The survey also found that 51% of female lawyers and 29% of male lawyers reported having been bullied at work.⁶⁹ The 359 U.S. survey respondents reported “higher rates of both bullying and sexual harassment than the global average: 63% of female respondents and 38% of male respondents reported that they had been bullied” with women 16% more likely to have been bullied within the past year, and “54% of female respondents and 11% of male respondents had been sexually harassed (above global averages).”⁷⁰

This problem is also endemic in the NLJ 500 law firms in the United States, as shown by a survey of 1,262 female and male partners with at least 15 years of practice experience: 50% of women versus six percent of men had received unwanted sexual conduct at work with 16% of women versus one percent of men having lost work opportunities as a result of rebuffing sexual advances and 28% of women avoiding reporting sexual harassment due to fear of retaliation.⁷¹ It is telling that these findings are part of a larger survey trying to ascertain why mid-career partners who are women leave the practice of law at much higher rates than their male colleagues.

The 2012 Washington State Bar Association Membership Study further illuminates the on-going need for anti-harassment training, policies, and enforcement within Washington’s legal profession. The study notes that participants “indicated that they had experienced discrimination or sexual harassment because of their gender” including “inappropriate behavior by supervisors, clients who preferred to work with male attorneys, and insinuations of weakness or

⁶⁷ KIERAN PENDER, INT’L BAR ASS’N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION (2019) https://www.unodc.org/res/ji/resdb/data/2019/us_too_bullying_and_sexual_harassment_in_the_legal_profession_html/iba_us_too.pdf.

⁶⁸ *Id.* at 8.

⁶⁹ *Id.*

⁷⁰ *Id.* at 98.

⁷¹ ROBERTA D. LIEBENBERG & STEPHANIE A. SCHRAF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE (2019).

incompetence.”⁷² These challenges are significant enough that “nearly 7% of female attorneys have considered taking legal action against their employer because of discrimination.”⁷³ The study was partially focused on the reasons attorneys left the profession and it is telling that harassment was “particularly evident in experiences of younger female attorneys.”⁷⁴ One attorney responded:

At a ... firm outside the Seattle metro area, I felt dissuaded from taking any action about the anti-gay remarks and jokes I consistently heard at the office, because my direct supervisors were pretty flippant about the whole concept of diversity and harassment training. They'd actually boast about ridiculing diversity and harassment trainers and about laughing their way through the firm-imposed training seminars. I think they equated diversity and anti-harassment with "political correctness" and they saw it as attempts to modify normal behavior, and in their view, normal behavior includes treating being gay as a joke or as something to avoid, and making comments to women that I think cross the line into harassment, but they think is just part of normal interaction. E.g., asking women employees who they're dating, or why they don't have children, or even making direct comments about female staffers' body parts and overall attractiveness.⁷⁵

⁷² TRUE BERRING, LLC, THE WASHINGTON STATE BAR ASSOCIATION: MEMBERSHIP STUDY 2012 93 (2012), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-membership-study-report-2012be2465f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=b0fd00f1_0. See also WOMEN LAWYERS ON GUARD, STILL BROKEN: SEXUAL HARASSMENT AND MISCONDUCT IN THE LEGAL PROFESSION, A NATIONAL STUDY (2020), <https://womenlawyersonguard.org/wp-content/uploads/2020/03/Still-Broken-Full-Report-FINAL-3-14-2020.pdf>.

⁷³ LUMA CONSULTING, WASHINGTON STATE BAR ASSOCIATION DIVERSITY RESEARCH PROJECT LITERATURE OVERVIEW 4 (2015), https://www.wsba.org/docs/default-source/about-wsba/diversity/wsba-diversity-research-project-2015.pdf?sfvrsn=525738f1_0.

⁷⁴ *Id.*

⁷⁵ True Berring, LLC, *supra* note 72, at 91. See also David N. Laband & Bernard F. Lentz, *Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover among Female Lawyers*, 51 INDUS. & LAB. REL. REV. 594 (1998) (nearly two-thirds of female lawyers in private practice and nearly half of those in corporate or public agency settings reported either experiencing or observing sexual harassment by male superiors, colleagues, or clients during the two years prior to the survey. Women who had experienced or observed sexual harassment by male superiors or colleagues reported lower overall job satisfaction than did those who had not, as well as a greater intention to quit).

The data is clear: sexual harassment is pervasive in the legal community, both nationally and in Washington. What this data doesn't tell us is: What other forms of workplace harassment exist in Washington's legal community? Who else in the legal community besides women are most impacted due to gender, race, and other demographics? Are Black, Indigenous, and other women of color disproportionately harmed? And what measures, if any, are in place to address these issues?

To start answering some of these questions and to establish a current baseline of workplace harassment within the judicial branch in Washington, the 2021 Gender Justice Study commissioned a state-wide survey of workplace harassment in the courts.

B. The 2021 Washington Courts Workplace Harassment Survey

The survey report (for the full survey report see Appendix C) includes findings from the state-wide Washington Courts Workplace Harassment Survey, as well as recommendations for action, based on key survey findings.

The study population included all court employees, employees of non-court judicial agencies (Administrative Office of the Courts [AOC], Office of Civil Legal Aid, Office of Public Defense, and Commission on Judicial Conduct), as well as Superior Court Clerk's Office employees. The inclusive nature of the survey made it possible to estimate the extent and types of workplace harassment experienced by employees as a whole, as well as by identifiable demographic subgroups who might be expected to experience higher exposure to harassment based on their status or identity. The purpose of the survey was to establish a current baseline of workplace harassment—the most pervasive, people-driven risk in the workplace⁷⁶—within the judicial branch, from which to evaluate progress on this issue via future survey administrations.⁷⁷

⁷⁶ STÅLE VALVATNE EINARSEN, HELGE HOEL, DIETER ZAPF & CARY L. COOPER, *The Concept of Bullying and Harassment at Work*, in BULLYING AND HARASSMENT IN THE WORKPLACE 51 (3d ed. 2020).

⁷⁷ ARINA GERTSEVA. WORKPLACE HARASSMENT SURVEY: WASHINGTON STATE COURTS, SUPERIOR COURT CLERKS' OFFICES, AND JUDICIAL BRANCH AGENCIES - SUMMARY FINDINGS REPORT 1. WASHINGTON STATE CENTER FOR COURT RESEARCH (2021).

Key findings include (quoting directly from the harassment survey report⁷⁸):

- The study found that 57% of respondents who participated in the survey experienced at least one type of workplace harassment on at least one occasion in the past 18 months; yet many employees did not recognize certain behaviors as “harassment,” even if they viewed them as problematic or offensive. Although some of these experiences do not correspond strictly to the legal definition of harassment, they are serious enough to create a work environment that a reasonable person would consider unwelcome, offensive or disrespectful.
- To give a sense of magnitude of these findings, assuming a court workforce of approximately 4,500 individuals, these figures translate into 2,565 court employees who experienced some type of workplace harassment at least once in the past 18 months.
- Overall, respondents who experienced harassment in the preceding 18 months reported an aggregate total of 6,086 separate harassment problems. That is, on average, 3.66 problems per person. The majority of these experiences (77%) included some form of non-sexual work-related harassment. Some examples of these behaviors include giving unreasonable deadlines or unmanageable workloads, excessive monitoring of work, assigning meaningless task, or being blocked from promotion or training opportunities.
- Sixteen percent (16%) of respondents reported experiencing harassment based on their sexual orientation, 8% experienced gender-based harassment, 6% experienced race-based harassment, and 4% experienced unwanted sexual attention. Although less than 1% of survey respondents (n = 41) experienced sexual coercion, the severity of those incidents suggests a need for prevention efforts and specific consideration.
- Approximately 44% of employees who experienced harassment in the past 18 months did not seek help. Of those who tried to get help, 65% were able to obtain some resolution of their problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not searching help were fear of repercussions (60%),

⁷⁸ *Id.* at 1-3.

the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%).

- The study found that harassment experiences are not limited to any one group. However, certain populations are more likely to experience workplace harassment than others.
- The highest rates of any workplace harassment were reported by Indigenous employees⁷⁹, (82%), bisexual (84%), gay or lesbian (73%), multiracial employees (66%), court clerks⁸⁰ (65%), and women (62%), relative to all respondents (57%).
- Indigenous employees, as a group, experienced the highest average number of harassment problems (7.29 per person) compared with any other racial or ethnic group. This estimate (7.29 problems per person) does not indicate how often (or how systematically) they have been exposed to these behaviors; it only represents an estimated number of different kinds of harassment behaviors they have been exposed to.
- Sexual minorities⁸¹, as a group, were significantly more likely than their heterosexual peers to experience at least one type of workplace harassment on at least one occasion in the past 18 months (76% for sexual minority group vs. 57% for heterosexual respondents). The between-group differences in prevalence were the most dramatic for the harassment based on sexual orientation (39% for non-heterosexual and 14% for heterosexual respondents), gender-based harassment (20% vs. 7%), and unwanted sexual attention (10% vs. 3%).
- Women (including transgender women) were significantly more likely than men (including transgender men) to experience incidents of gender-based harassment (9% vs. 4%) and

⁷⁹ This report uses “Indigenous” throughout to represent respondents who selected “American Indian, Alaska Native, First Nations, or other Indigenous Group Member” response option alone or in combination with any other race or ethnicity.

⁸⁰ “Court clerks” refers to employees who self-identified their role as “court clerks.” This include court clerks who have administrative responsibilities, at all levels of courts: some work for elected Superior Court Clerks; some work for appointed Superior Court Clerks; some work in the Municipal or District courts, the Court of Appeals, and the Supreme Court. The report distinguishes between court clerks and Superior Court Clerks due to their different rates of experienced harassment.

⁸¹ “Sexual minorities” or “non-heterosexual respondents” includes respondents who responded to the question on sexual orientation by marking “gay or lesbian,” “bisexual,” “asexual,” “pansexual,” or “questioning.”

work-related harassment (59% vs. 44%). When looking more closely at work-related harassment, results revealed significant gender differences for nine out of 14 behavioral situations described in the survey. Women were significantly more likely to report having their opinions ignored (37% vs. 25%), being exposed to an unmanageable workload (28% vs. 16%), having someone withholding information that affects their performance (27% vs. 15%), being shouted at or being the target of spontaneous anger (23% vs. 13%) being ignored or excluded (23% vs. 12%), being subjected to excessive monitoring (23% vs. 16%), receiving repeated reminders of errors (22% vs. 13%), and having someone spreading rumors about their competence (19% vs. 13%).

- Intersectionality analysis revealed that the issues most frequently identified by Black, Indigenous and women of color and sexual-minority women are simultaneously similar yet different from the experiences of single-race white women and heterosexual women:
 - Black or African-American and white women employees did not differ significantly in the prevalence of any type of harassment, except for race-based harassment (21% vs. 5%)
 - Hispanic/Latinx and white women experienced the same levels of overall workplace harassment (61%), but their experiences were significantly different in the prevalence of workplace maltreatment based on sexual orientation (26% for Hispanic/Latinx women vs. 16% for white women) and race (11% vs. 3%).
 - Indigenous women experienced the highest prevalence of overall workplace harassment (85%) compared with their single-race white peers (61%) or any other racial and ethnic group (based on the percentage point differences).
 - Sexual minority women were significantly more likely than heterosexual women to experience sexual-orientation based harassment (41% vs. 15%), gender-based harassment (22% vs. 8%) and work-related harassment (79% vs. 58%).
 - Non-white sexual minority women (n=15) were significantly more likely than non-white heterosexual women (n=201) to experience harassment based on sexual orientation (40% vs. 18%).

- We found a significant association between an employee’s position and workplace harassment. Court clerks, as a group, experienced workplace harassment at a higher rate (65%) than respondents with any other appointment type. Judicial assistants experienced the second highest rate of harassment (61%). Among all survey respondents, Superior Court Clerks (49%) and Judges or Commissioners (51%) experienced the lowest rates of harassment. These numbers, however, are still alarming. They mean that one out of every two Judges or Commissioners and one out of every two Superior Court Clerks experienced some type of workplace harassment at least once during the preceding 18 months.
- When asked about the perpetrator of the “worst” harassment incident, 19% of respondents indicated that the perpetrator was their supervisor or manager, 15% indicated that it was someone more senior (other than manager or supervisor), and 9% indicated that the perpetrator was the Judge or Commissioner. For 9% of employees, the perpetrator was someone of equal seniority and for 5% the perpetrator was someone junior to them.
- A sizable share of respondents experiencing workplace harassment in the past 18 months reported having a major problem with work withdrawal (20%); and 22% with searching for a new job. Seeking fresh employment as a result of the harassment was particularly problematic for Black or African American employees (44%) and employees with non-binary gender identity (43%).
- Respondents who experienced workplace harassment in the past 18 months and those who did not differed strongly in their awareness of their workplace policy and procedures, their views of the organization’s stance on diversity and commitment to take steps to protect the safety of employees. The biggest difference between these two groups were found in their level of confidence that their organization would deal with concerns or complaints in a thorough, confidential and impartial manner (87% vs. 60%).
- When analyzing the association between organizational factors and harassment, we found that awareness of policy (i.e., employees’ awareness and understanding of anti-harassment policy and procedures) and expectation of response (i.e., employees’

confidence that the organization would respond to harassment), all other conditions being equal, significantly decreased employees' likelihood of harassment.

Recommendations for action, based on key survey findings, are included in Part V. below.

V. Responding to Gender- and Race-Based Harassment and Bias

A. Addressing bias in Professional Conduct Rules

In the past, courts have generally addressed harassment and discrimination with rules, policies, or for physically assaultive conduct, through the criminal justice system. For example, in 1993, the Washington Supreme Court adopted RPC 8.4(g)⁸² which states that it is professional misconduct for a lawyer to “commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. ...” And in 2011, the Court revised the Code of Judicial Conduct to bar bias and prejudice, and to require lawyers to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others ...”

The American Bar Association has adopted similar rules, some would say with stronger anti-discrimination and anti-harassment provisions; the ABA's Rule 8.4(g)⁸³ now makes the ethical rules governing lawyers more like Rule 2.3 that governs judges. Several states have also adopted the new version of Rule 8.4, while six have declined to do so due to concerns about free speech.⁸⁴

In 2020, in response to sexual harassment and assault claims within the judicial branch, the Washington State Supreme Court Gender and Justice Commission approved and distributed a

⁸² RPC 8.4, http://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_08_04_00.pdf.

⁸³ AM. BAR ASS'N, H.D. PROPOSED RESOLUTION 109 & REPORT 16 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf.

⁸⁴ Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA UNDER CONSTRUCTION (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4.

Model Anti-Harassment Policy⁸⁵ for use in Washington courts. This policy was adopted by the Board for Judicial Administration on March 20, 2020.⁸⁶ The Commission strongly encouraged all courts to “adopt a written anti-harassment policy that informs all of its employees, including Judicial Officers, that harassment will not be tolerated.” The policy explains that it “seeks to eliminate all harassment because any act of harassment undermines the integrity and quality of the workplace and is unfair to any employee or volunteer who experiences it.” These policies should define and provide examples of harassment and other prohibited conduct and outline a procedure that “encourages all employees, not just targets of harassment, to report misconduct.” Importantly, the Commission also asked courts to “assure that complaints will be handled as confidentially as possible” and to “guarantee that employees who report harassment will not suffer adverse job consequences as a result.”⁸⁷

The harassment policy is broader than just gender-based harassment. It also bars “unwelcome language or conduct” targeting a person or group because of their age (40 or older, matching the Washington Law Against Discrimination and federal law), sex (including pregnancy), marital status, sexual orientation, gender identity, gender expression, race, creed, color, national origin, veteran status, or disability.⁸⁸ The policy explains that harassment becomes “unlawful when the unwelcome language or conduct becomes a condition of continued employment or is severe or pervasive enough that a reasonable person would consider intimidating, hostile, or abusive.”⁸⁹

Perhaps most helpfully, the policy includes examples of harassment:

Offensive jokes, comments about a person’s body, degrading language, or slurs;
Demearing or sexually suggestive photos or videos shared through social media,
email, or text message; Unwanted touching, offensive gestures, or blocking a
person’s movement. Sexual harassment is a form of harassment that is sexual in
nature. Sexual harassment includes, but is not limited to: Unwelcome comments,

⁸⁵ WASH. STATE SUP. CT. GENDER & JUST. COMM’N, RE: MODEL ANTI-HARASSMENT POLICY (2020), <http://www.courts.wa.gov/subsite/gjc/documents/Model%20Anti-Harassment%20Policy%20and%20FAQs.pdf>.

⁸⁶ WASH. BD. FOR JUD. ADMIN., MINUTES: MARCH 20, 2020 (2020), https://www.courts.wa.gov/content/publicUpload/bja_meetings/BJA%202020%2003%2020%20MTG%20MIN.pdf.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

jokes, suggestions, or derogatory remarks of a sexual nature; Inappropriate or unwelcome physical contact such as pats, squeezes, deliberately brushing against someone's body, or impeding or blocking a person's normal movement; Posting sexually suggestive or derogatory pictures, cartoons, or drawings at one's workstation or in common areas, or sending them through email or text messages; Unwelcome sexual advances or pressure for sexual favors; Basing employment decisions (such as promotions, evaluations, or assignments) or access to court services on a person's acquiescence in the sexually harassing conduct.⁹⁰

We have found no evidence that such policies, or their wording, affects judges' or lawyers' actions. We support the adoption of such policies; but we make no claim that they can really address the roots of the problem.

VI. Recommendations

- To develop a more inclusive and respectful work environment, the judicial branch and its leaders should take explicit steps to promote equity, diversity, and inclusion, and to foster a culture that values individual differences in age, gender, sexual orientation, gender identity or expression, disability, race, and ethnicity.
- The judicial branch should deliver regular workplace harassment prevention trainings that drive real changes.
- The judicial branch and its leaders should follow best practices to design and deliver prevention trainings for all types of workplace harassment, including harassment based on gender, race, ethnicity, or LGBTQ+ status.
- These trainings should focus on changing behavior, not on changing beliefs. Anti-harassment programs should encourage the support of certain populations that are more likely to experience workplace harassment than others (including, but not limited to sexual and gender minorities; women; Black, Indigenous, and employees of color). These training

⁹⁰ *Id.*

programs should be evaluated to determine whether they are effective and what aspects of the training(s) are most important to changing culture.

- To improve transparency and accountability, the judicial branch and its leaders should be as transparent as possible (while respecting the rights of the accused person) about how they are handling reports of workplace harassment. Decisions regarding disciplinary actions, if required, should be made in a fair and timely way. This accountability can ensure that the court workforce feels supported by their organizations, because perceived organizational support is significantly associated with lower rates of workplace harassment.
- To measure progress, the judicial branch and its leaders should work with researchers to evaluate their efforts to create a more diverse, inclusive, and respectful environment. Conducting regular surveys will help to track whether planned processes have been implemented and whether an anti-harassment policy is producing the desired effects. The survey methodology, when fully implemented, will enable the judicial leadership to monitor the sustainability and effectiveness of the anti-harassment efforts. The methodology should allow the branch to disaggregate the data by race, ethnicity, sexual orientation, and gender identity or expression to reveal different experiences across populations. The results of surveys should be shared publicly to demonstrate that the branch takes the issue seriously.
- The Gender and Justice Commission should continue to develop programs to increase the number of women, including women and other persons of color, in both the bench and bar.
- The Gender and Justice Commission should partner with the associations representing Washington courts and clerks' offices to educate and advocate for the adoption of the Model Anti-Harassment Policy by courts across Washington. AOC should track the progress on adopting the policy and should develop a method for evaluating outcomes of the policy.
- Every Washington court should publicize its procedure for filing complaints of sexual and other types of discrimination and harassment, and include this procedure on its website.
- By not later than 2022, the Court Education Committee of the Board for Judicial Administration should partner with the Gender and Justice Commission to develop a training for judges on how to model and, if necessary, control their courtrooms in

ways that immediately address inappropriate gender-biased conduct on the part of attorneys and court personnel.

- The Washington State Bar Association should identify (or convene stakeholders to identify) ways to minimize barriers within the profession related to: pay disparity, promotion opportunities, career complications, and workplace environment. The group should focus on barriers related to age, gender, sexual orientation, gender identity or expression, disability, race, ethnicity, family and care responsibilities, and the impact of the COVID-19 pandemic.