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Marina Angel

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Sexual Harassment by Judges

MARINA ANGEL*

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I. INTRODUCTION

Judges have solicited sexual favors from criminal defendants, civil litigants, lawyers (including prosecutors, public defenders, and private counsel), law clerks, law students, court employees, job applicants, probation officers, juvenile court wards, and jurors.¹ Some have specifically demanded sex for favorable treatment and have retaliated when their demands were not met.² Despite the seriousness of this conduct, however, sanctions imposed against offending judges have been surprisingly light. In a typical case, a judge found to have engaged in sexually harassing conduct receives nothing more than a censure, reprimand, or admonishment. In some of the more blatant cases, judges are suspended or removed from office. A few judges have been suspended from the practice of law.³ Even fewer have been criminally prosecuted.⁴ In short, the legal response to sexual harassment by judges has been disproportionately low compared to the magnitude of the problem.

This Article explores several issues related to sexual harassment

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1. See *infra* Section III.

2. See *infra* text accompanying notes 65-80.

3. See *infra* text accompanying notes 52-53.

4. See *infra* text accompanying notes 31-33 & 50.

by judges. In an attempt to provide some insight into the magnitude of the problem, Section II of the Article examines the reports of various state task forces and committees on gender bias and sexual harassment in the courts. Section III recounts specific examples of sexual harassment by judges, and demonstrates how this conduct is met with woefully inadequate sanctions. Section IV suggests some of the possible reasons for the continuing tolerance of sexual harassment in the courts. Section V examines the Model Code of Judicial Conduct, recently adopted by the ABA, and compares the Code's provisions with the private sector approach to sexual harassment. Section VI concludes that rigorous enforcement of the Model Code is necessary to lessen and eliminate this behavior.

II. THE PROBLEM OF SEXUAL HARASSMENT: ITS NATURE AND SCOPE

While reported cases give some sense of the problem, they do not reflect its magnitude. Very few victims of sexual harassment file formal charges, and complaints in disciplinary cases against judges are usually confidential.⁵ The extent of the problem can best be understood by reviewing the reports of the various state supreme court task forces on gender bias in the courts.⁶

For instance, the New Jersey Supreme Court Task Force on Women in the Courts conducted a survey of the New Jersey Bar in 1984, and reported that twenty-five percent of responding women

5. See *infra* text accompanying notes 26-30.

6. At their 1988 annual joint meeting, the Conference of Chief Justices and the Conference of State Court Administrators both adopted resolutions urging every chief justice to establish a task force on gender bias. L. SCHAFFRAN, PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO ISSUES AND RESOURCES 3-4 (1989). As of May 1, 1990, 13 state supreme court task forces had issued final reports. See, e.g., GENDER BIAS STUDY COMM'N, FLA. SUPREME COURT, REPORT (1990) [hereinafter FLORIDA TASK FORCE]; GENDER BIAS TASK FORCE, NEV. SUPREME COURT, JUSTICE FOR WOMEN (1988); MD. SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS (1989) [hereinafter MARYLAND TASK FORCE]; N.Y. TASK FORCE ON WOMEN IN THE COURTS, REPORT (1986), reprinted in 15 FORDHAM URB. L.J. 11 (1986-1987) [hereinafter NEW YORK TASK FORCE]; R.I. COMMITTEE ON WOMEN IN THE COURTS, FINAL REPORT (1987); TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, MINN. SUPREME COURT, FINAL REPORT (1989), reprinted in 15 WM. MITCHELL L. REV. 827 (1989) [hereinafter MINNESOTA TASK FORCE]; TASK FORCE ON GENDER ISSUES IN THE COURTS, MICH. SUPREME COURT, FINAL REPORT (1989) [hereinafter MICHIGAN TASK FORCE]; TASK FORCE ON WOMEN IN THE COURTS, N.J. SUPREME COURT, THE FIRST YEAR REPORT (1984), reprinted in 9 WOMEN'S RTS. L. REP. 129 (1986) [hereinafter NEW JERSEY TASK FORCE]; WASH. STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, FINAL REPORT (1989) [hereinafter WASHINGTON STATE TASK FORCE]; see also GENDER BIAS STUDY COMM'N, SUPREME COURT OF MASS., REPORT (1989), reprinted in part in 74 MASS. L. REV. 50 (1989) [hereinafter MASSACHUSETTS TASK FORCE].

attorneys had experienced unwelcome sexual advances from judges.⁷ In 1986, the New York Task Force on Women in the Courts reported on its survey of attorneys throughout the state which asked whether judges subjected women attorneys to verbal or physical sexual advances.⁸ Sixteen percent of the women questioned but only three percent of the men believed this happened sometimes or often; thirty one percent of the women and ten percent of the men believed it rarely happened; and eighty-two percent of the men believed it never happened.⁹ Nineteen percent of the female attorneys surveyed by the Maryland Special Joint Committee on Gender Bias in the Courts stated that judges subjected women attorneys to verbal and physical sexual advances.¹⁰ The Maryland Committee also surveyed court employees who spent more than half of their time in the courtroom. Twenty-two percent of the female employees and eight percent of the male employees said that judges subjected female employees to unwelcome verbal or physical sexual advances.¹¹ The 1989 Washington State Task Force on Gender and Justice in the Courts surveyed judges. When asked if male judges subjected female judges to verbal sexual advances, 13.3% of the women judges responded that they were, but 96.3% of the male judges responded that it never happened.¹²

The 1989 Massachusetts Gender Bias Study Commission reported that fifteen percent of all attorneys (thirty-one percent of the women and twelve percent of the men) had witnessed a judge sexually harass a female attorney by inappropriate sexual comments.¹³ Six percent of all attorneys (thirteen percent of the women and four percent of the men) had witnessed a judge touch a female attorney in an inappropriate manner.¹⁴ Eighteen percent of all attorneys (thirty-eight percent of the women and fourteen percent of the men) had observed female litigants, witnesses, and others subjected to inappropriate comments of a sexual or suggestive nature.¹⁵ Six percent of all attorneys (eleven percent of the women and five percent of the men) had observed judges touch female litigants, witnesses, and others in inappropriate ways.¹⁶

7. NEW JERSEY TASK FORCE, *supra* note 6, at 140.

8. NEW YORK TASK FORCE, *supra* note 6, at 134.

9. *Id.* at 134 n.392.

10. MARYLAND TASK FORCE, *supra* note 6, at 125.

11. *Id.* at 82.

12. WASHINGTON TASK FORCE, *supra* note 6, app. B, at 232.

13. MASSACHUSETTS TASK FORCE, *supra* note 6, at 59.

14. *Id.*

15. *Id.* at 65.

16. *Id.*

In Minnesota, fifteen percent of women attorneys reported that women litigants or witnesses received verbal sexual harassment from judges sometimes or often;¹⁷ twenty-six percent of women attorneys identified judges as a source of verbal sexual harassment of women attorneys sometimes or often;¹⁸ and twenty-five percent of women attorneys reported that judges subjected women attorneys to physical sexual harassment rarely or sometimes.¹⁹ Forty-seven percent of women attorneys, but only thirteen percent of men attorneys, said that in court or in chambers judges sometimes or often make remarks or jokes demeaning to women.²⁰

Judges have called women attorneys "honey," "dear," "sweetie," "pretty eyes," "baby doll," and "sweetheart."²¹ Task forces have noted the damaging effects of a judge's endearments. The New Jersey Task Force stated that "what might be considered no more than violations of etiquette in some social contexts has serious consequences in the courtroom, where such behavior damages the credibility of female attorneys, witnesses and litigants."²² The Massachusetts Task Force concluded that "[t]he overall effect of such behavior is to isolate female attorneys, cause them (and in some instances, their clients) to doubt their own abilities and effectiveness, and generally to make them feel unwelcome."²³ Worse, not all such unprofessional conduct

17. MINNESOTA TASK FORCE, *supra* note 6, at 926.

18. *Id.* at 941.

19. *Id.* at 941-42.

20. *Id.* at 930.

21. See, e.g., MARYLAND TASK FORCE, *supra* note 6, at 123; MASSACHUSETTS TASK FORCE, *supra* note 6, at 59; MINNESOTA TASK FORCE, *supra* note 6, at 927; NEW JERSEY TASK FORCE, *supra* note 6, at 139; WASHINGTON TASK FORCE, *supra* note 6, at 119-20. One particular judge, Los Angeles Municipal Court Judge David M. Kennick, addressed female attorneys, criminal defendants, a court clerk, and a police detective as "sweetheart," "honey," "dear," "sweetie," and "baby." Kennick v. Commission on Judicial Performance, 50 Cal. 3d 297, 324, 787 P.2d 591, 604, 267 Cal. Rptr. 293, 306 (1990). The Supreme Court of California found this conduct to be "unprofessional, demeaning and sexist." *Id.* 787 P.2d at 605, 267 Cal. Rptr. at 307. The court censured Kennick for his conduct but removed him from office "on the sole ground of persistent failure or inability to perform his judicial duties." *Id.* at 342-43, 787 P.2d at 617, 267 Cal. Rptr. at 319.

22. NEW JERSEY TASK FORCE, *supra* note 6, at 139.

23. MASSACHUSETTS TASK FORCE, *supra* note 6, at 59. Similarly, the Florida Gender Bias Study Commission stated:

There is no question: Judicial behavior of this type is inappropriate in any setting. But it is especially unethical and prejudicial when occurring in front of clients and juries. Both the impartiality of the judge and the jurors is subject to legitimate doubt in the face of such actions and statements. A fair trial in a truly adversarial setting may become impossible when one of the attorneys is reduced to a laughing stock by a judge. In this way, justice is defeated. Clients, confronted by such bias, are given a none too subtle message: Get a male lawyer or lose your case. This is gender bias of the worst order.

FLORIDA TASK FORCE, *supra* note 6, at 199.

can be considered inadvertent.²⁴

This behavior places women attorneys in an untenable position—they either endure such conduct from judges with its adverse effects on clients, witnesses, adversaries, and jurors, or object and face possible retaliation. The Maryland study quoted one respondent who “emphasized the no-win position of both the judicial system and the female attorney when a judge feels free to make sexual advances: ‘[The] biggest worry is that your client will be at a disadvantage if you don’t “flirt” back. . . .’ ”²⁵ In New York, women judges “emphasized the difficulty a female attorney faces when she must decide whether making an issue of such behavior on the part of a judge or adversary will prejudice her client’s case.”²⁶ Similarly, in New Jersey, “[f]emale attorneys are extremely loath to appear discourteous to a judge who thinks that he is complimenting them, especially if one feels that taking such a position will hurt a client or a case.”²⁷ The Florida Gender Bias Study Commission reported that nearly forty percent of the women attorneys responding to its survey wanted to file complaints about unprofessional judicial conduct.²⁸ All but one refused to do so for fear of ostracism, or in the belief that no action would be taken.²⁹ The woman who filed the complaint stated that it “was poorly handled and that she had suffered long-term repercussions.”³⁰

III. COMPOUNDING THE PROBLEM: INADEQUATE SANCTIONS

This Section will review instances of sexual harassment by judges that have been reported in caselaw. The studies on sexual harassment

24. A male attorney “on several occasions observed the use of a demeaning term of pseudo endearment to belittle and undermine the professionalism of a female attorney.” NEW JERSEY TASK FORCE, *supra* note 6, at 139. Other disturbing incidents and judicial attitudes were revealed to state task forces. The Minnesota Task Force received a report from a male attorney that “a judge told me in chambers it was hard to listen to female attorneys when ‘really all you can do is think of screwing them.’ ” MINNESOTA TASK FORCE, *supra* note 6, at 929. A female attorney “heard judges and lawyers agree in chambers that certain female attorneys ‘needed a good lay.’ ” *Id.* In Massachusetts, an attorney “overheard a comment by a judge to a courtroom clerk to the effect that he thinks ‘women should be kept pregnant and slapped around once in a while to let them know who’s boss.’ ” MASSACHUSETTS TASK FORCE, *supra* note 6, at 60.

25. MARYLAND TASK FORCE, *supra* note 6, at 125, *see infra* note 204 and accompanying text.

26. NEW YORK TASK FORCE, *supra* note 6, at 139.

27. NEW JERSEY TASK FORCE, *supra* note 6, at 139.

28. FLORIDA TASK FORCE, *supra* note 6, at 206.

29. *Id.*

30. *Id.* The Michigan Task Force “noted the concern of a significant number of women that testifying [before the Task Force] could place a female attorney at risk and that many women who might wish to speak to issues of discrimination would not come forward for fear of reprisal.” MICHIGAN TASK FORCE, *supra* note 6, at 85.

in the workplace and the findings of the state supreme court gender bias task forces show that such conduct is not unusual. However, only the most blatant cases—usually involving multiple victims and occurring over an extended period of time—have been found to violate the vague prohibitions of codes of judicial conduct.³¹ The penalties imposed are frequently inexplicable, considering the gravity of the conduct. Judges are often merely censured or suspended, instead of removed from office.³² Even if a judge is removed from office, there may be no discipline or only a short suspension for the judge as a lawyer.³³

A. *Quid Pro Quo Sexual Harassment*

The Code of Federal Regulations defines quid pro quo sexual harassment as the explicit or implicit solicitation of sexual favors for favorable treatment or other benefits.³⁴ Considering the relative position of judges vis-a-vis criminal defendants, wards of the court, court employees, and even relatives of litigants, this type of behavior is especially objectionable. Nevertheless, reported cases provided numerous instances of judges engaging in quid pro quo sexual harassment.

For instance, North Carolina Judge Bill J. Martin attempted to obtain sexual favors from two defendants.³⁵ One defendant was on her way home during a noon recess when she noticed the judge in a car behind her, tapping his horn and motioning her to pull over.³⁶ When she told Judge Martin she appreciated his willingness to help her, "he grinned and said 'Well, how much?'"³⁷ Martin told another defendant that he would favorably change her limited driving privileges and made sexual advances toward her.³⁸ In another incident, a

31. See, e.g., ABA MODEL CODE OF JUDICIAL CONDUCT (1972). This and other states codes provide little guidance on matters of sexual harassment. A judge must observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." *Id.* at Canon 1. A judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.* at Canon 2. Perhaps the most pertinent provision is Canon 3, which speaks to a judge's adjudicative responsibilities. *Id.* at Canon 3. This requires a judge to "maintain order and decorum in proceedings" and "be patient, dignified, and courteous." *Id.* None of these provisions suggests any real standard prohibiting sexual harassment in the courtroom. See *infra* Section V(B).

32. See, e.g., *infra* text accompanying notes 57, 79-80, 90, 111, 119, 128, 138 & 153.

33. See *infra* text accompanying notes 41, 64, 73, 102, 145 & 149.

34. 29 C.F.R. § 1604.11(a)(1) (1989).

35. *In re Martin*, 302 N.C. 299, 311, 275 S.E.2d 412, 418 (1981).

36. *Id.*

37. *Id.*

38. *Id.* at 304, 275 S.E.2d at 414.

woman asked why she had accepted a lunch invitation from Judge Martin responded:

"One, because he was such an important person . . . and I was just an individual, a common person . . . , I felt it was an honor, you know, him asking me to lunch; . . . second . . . , I am kind of scared of anybody that is in the law. It felt like if I said, no, maybe that I'd be crossing him in some way, and he'd be mad at me."³⁹

The Supreme Court of North Carolina noted that women defendants were "in particularly vulnerable and susceptible 'bargaining' positions."⁴⁰ Nevertheless, the court merely removed Judge Martin from office.⁴¹

The Kentucky Bar Association charged Judge Thomas F. Hardesty with making "untoward propositions to females who were before his court as criminal defendants."⁴² The Supreme Court of Kentucky found a "strong indication" that Judge Hardesty was offering the women leniency in exchange for sexual favors.⁴³ Judge Hardesty resigned before the Judicial Retirement and Removal Commission completed its investigation.⁴⁴ The commission nevertheless publicly censured him.⁴⁵ The Kentucky Bar Association began proceedings against him as an attorney.⁴⁶ Although the Kentucky Supreme Court stated that a one-year suspension from the practice of law would have been an appropriate penalty for such misconduct, it dismissed the proceedings on procedural grounds.⁴⁷

Judge Robert Dean Hawkins resigned after Kentucky's Judicial Retirement and Removal Commission found that he had engaged in sexual relations with two female juvenile wards under his jurisdiction.⁴⁸ The Commission believed public censure was the most severe sanction that it could impose since he had resigned.⁴⁹ In contrast, the New York Commission on Judicial Conduct found that Judge Thomas Mills' conduct warranted formal removal despite his resignation.⁵⁰ This town court justice engaged in a relationship with a seven-

39. *Id.* at 317, 275 S.E.2d at 422.

40. *Id.*

41. *Id.* at 320, 275 S.E.2d at 423-24.

42. *Kentucky Bar Ass'n v. Hardesty*, 775 S.W.2d 87, 87 (Ky. 1989).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 88.

48. AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND DISABILITY DIGEST KY4 (Jan. 1981-June 1986).

49. *Id.* A criminal court convicted Hawkins of tampering with a grand jury investigation of his conduct. *Id.* at 7.

50. *Id.* at NY61. This is one of the few cases where there was a criminal investigation. *Id.*

teen-year-old, knowing that she was scheduled to appear before him in court, failed to reveal his personal relationship, and offered to disqualify himself only after he learned of a criminal investigation concerning his conduct and after he had already arraigned and released the defendant without bail.⁵¹ In another New York case, the court found William M. Higgins, a family court judge, guilty of "soliciting and agreeing 'to accept sexual favors of' a female, in consideration for which [he] represented to her that the exercise of his duties as a Judge of the Family Court of Suffolk County would be influenced in her favor."⁵² Although Higgins resigned from the bench, the court suspended him from the practice of law for two years.⁵³

The Florida Bar accused Circuit Court Judge Alfonso C. Sepe of "soliciting sexual favors from the wife of a convict in exchange for a reduction in the sentence."⁵⁴ He denied the accusation, but conceded that "some of his statements and actions were misconstrued and thereby considered improper by the convict's wife."⁵⁵ The Florida Judicial Qualifications Commission investigated, but published no results because Judge Sepe resigned.⁵⁶ Judge Sepe submitted a conditional guilty plea to the Board of Governors of the Florida Bar in exchange for a public reprimand against him in his capacity as a lawyer.⁵⁷

The Supreme Court of North Carolina removed Judge Charles T. Kivett from office for wilful misconduct, including obstruction of justice.⁵⁸ Kivett granted lenient treatment on various traffic charges to the son of a woman with whom he had sexual relations.⁵⁹ Similarly, he requested that an assistant district attorney reduce a charge of driving under the influence and took a plea to this charge from another woman with whom he had been sexually involved.⁶⁰ Judge Kivett also touched a probation officer in a manner that she considered to be a sexual assault.⁶¹ Judge Kivett was unethically involved with a bail bondsman who "lined up" women for the judge to "take out."⁶² The bail bondsman testified that Johnson "had engaged in sex

51. *Id.*

52. *In re Higgins*, 79 A.D.2d 145, 145, 436 N.Y.S.2d 71, 71 (App. Div. 1981).

53. *Id.* at 146, 436 N.Y.S.2d at 72.

54. *Florida Bar v. Sepe*, 380 So. 2d 1040, 1040 (Fla. 1980).

55. *Id.*

56. *Id.*

57. *Id.* at 1041.

58. *In re Kivett*, 309 N.C. 635, 673, 309 S.E.2d 442, 464 (1983).

59. *Id.* at 648-49, 309 S.E.2d at 450.

60. *Id.* at 659-60, 309 S.E.2d at 456.

61. *Id.* at 661-62, 309 S.E.2d at 457-58.

62. *Id.* at 645, 309 S.E.2d at 453.

with a lady juror in Chambers [while] a chief deputy or deputy had guarded the door."⁶³ The Supreme Court of North Carolina removed Judge Kivett from office.⁶⁴

A particularly notorious case involved Bertram R. Gelfand, the Surrogate of Bronx County.⁶⁵ The New York Court of Appeals found that Judge Gelfand misused his office to "prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue their affair."⁶⁶ When the judge's law clerk refused to continue their affair, he fired her, emptied her office desk, and left the contents on the doorstep on her residence.⁶⁷ Gelfand left more than sixty annoying and obscene messages on her answering machine.⁶⁸ In a "desperate effort" to reach her, Gelfand falsely identified himself to a doorman as her attorney.⁶⁹ He confronted her boyfriend and threatened to speak to his employer, the Bronx County District Attorney, and have the boyfriend fired if he did not reveal her whereabouts.⁷⁰ Gelfand called the Deputy Chief Administrative Judge and asked him to view unfavorably any application that the law clerk might submit for a position in the court system.⁷¹ Gelfand even met with the law clerk's new employer and "remonstrated with [him] because he had hired the law assistant without first consulting him."⁷² The court removed Gelfand from office.⁷³

63. *Id.* at 647, 309 S.E.2d at 449.

64. *Id.* at 673, 309 S.E.2d at 464.

65. *In re Gelfand*, 70 N.Y.2d 211, 512 N.E.2d 533, 518 N.Y.S.2d 950, *cert. denied*, 484 U.S. 977 (1987).

66. *Id.* at 215, 512 N.E.2d at 535, 518 N.Y.S.2d at 952.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 217, 512 N.E.2d at 536, 518 N.Y.S.2d at 953. In a subsequent development, the *New York Times* reported that the New York State Commission on Judicial Conduct had cautioned Presiding Justice Francis T. Murphy, Jr., of the Appellate Division for the First Department, the appellate court for Manhattan and the Bronx, "against interfering—or even the appearance of interfering—with disciplinary proceedings against lawyers within his jurisdiction." *N.Y. Times*, July 6, 1990, at B1, col. 4. Justice Murphy was charged with using his influence to open an investigation against the same ex-law clerk of former Bronx Surrogate Gelfand. The article reported that Bronx Politicians regarded Judge Gelfand as a friend of Justice Murphy. *Id.* at B2, col. 3. A few days later, the *Times* reported that Justice Murphy had claimed that the State Commission on Judicial Conduct had cleared him of all charges, and Justice Murphy released a confidential letter from the Commission which said the Commission had "decided to conclude this matter with issuance of this letter of dismissal and caution." *N.Y. Times*, July 10, 1990, at B1, col. 3. The *Times* noted that "the Commission has the power to issue such a letter after finding that an allegation was not serious enough to warrant public discipline." *Id.*

The case against Judge Harold L. Hammond involved both quid pro quo sexual harassment and retaliation.⁷⁴ The Kansas Commission on Judicial Qualifications found that Judge Hammond required two employees to engage in sexual relations with him as a condition of employment.⁷⁵ Judge Hammond terminated one of the employees when the employee refused to continue their physical relationship; the other was terminated for refusing to have such a relationship.⁷⁶ Judge Hammond retired because of a physical disability⁷⁷ after the commission recommended censure and suspension without pay for six months.⁷⁸ The Supreme Court of Kansas published the censure and ordered costs. Although the court found "[t]he exacting or the demanding of sexual favors as a condition of employment . . . reprehensible,"⁷⁹ it concluded that "[s]uch conduct merits discipline no less substantial than that recommended by the Commission, and *perhaps removal from office*."⁸⁰

Judge Alberto O. Miera made unwelcome sexual advances to his male court reporter.⁸¹ At oral argument before the Minnesota Supreme Court, Miera contended, "[T]here's no harm in asking."⁸² The court, however, disagreed: "[H]e was a court reporter, a close personal assistant who serves at the judge's discretion. Both the judicial office and the unique relationship between judge and reporter make this employee particularly vulnerable to abuse of power. It is disingenuous to assert that Johnson could simply say 'no.'"⁸³

In two other incidents, Judge Miera engaged in conduct that could be considered "hostile environment sexual harassment," discusses in the next subsection. Miera once asked four female employees in the court clerk's office, "Do you people eat bananas for the vitamins or for the phallic symbol they represent?"⁸⁴ On another occasion, Judge Miera touched the shirt of a female court employee.⁸⁵ Instead of recognizing the two incidents as hostile environment sexual harassment, the Supreme Court of Minnesota concluded that the incidents were not "wilfully offensive" and did not "represent[] a sexual

74. *In re Hammond*, 224 Kan. 745, 585 P.2d 1066 (1978).

75. *Id.*

76. *Id.*

77. *Id.* at 746, 585 P.2d at 1067.

78. *Id.*

79. *Id.*

80. *Id.* (emphasis added).

81. *In re Miera*, 426 N.W.2d 850, 851 (Minn. 1988).

82. *Id.* at 855.

83. *Id.* at 855-56.

84. *Id.* at 856.

85. *Id.*

advance of some kind.”⁸⁶ The court characterized them as “*slightly risque humor*”⁸⁷ and concluded that “[b]y themselves, the incidents would not warrant discipline.”⁸⁸ The Board on Judicial Standards recommended Judge Miera’s removal,⁸⁹ but the supreme court ordered only public censure and a one-year suspension without pay and publicly reprimanded him in his capacity as a lawyer.⁹⁰

B. *Hostile Environment Sexual Harassment*

Conduct constitutes hostile environment sexual harassment if it unreasonably interferes with performance or creates an intimidating or offensive environment.⁹¹ The reported hostile environment cases often involve a large number of women who were the objects of the judges’ sexual harassment. Two of the most egregious examples of hostile environment sexual harassment involved judges in the State of Washington.

Judge Mark S. Deming⁹² harassed so many women that the Washington Supreme Court found it necessary to categorize the complainants as district court personnel, probation personnel, prosecuting attorney personnel, and assigned counsel personnel.⁹³ Moreover, the court gave only “illustrative excerpts” of the judge’s misconduct.⁹⁴ Judge Deming once asked a third-year law student in his chambers to “take [her] clothes off and bend over.”⁹⁵ He told a docket clerk to stand up and then hugged her and unlatched her bra strap: “He then said something to the effect of, ‘Gee, I haven’t lost my touch,’ and was kind of tickled with himself.”⁹⁶ On another occasion, Judge Deming told a deputy prosecuting attorney that he had reached “a heightened

86. *Id.*

87. *Id.* (emphasis added).

88. *Id.*

89. *Id.* at 858.

90. *Id.* at 859.

91. 29 C.F.R. § 1604.11(a)(3) (1989).

92. *In re Deming*, 108 Wash. 2d 82, 736 P.2d 639 (1987).

93. *Id.* at 111, 736 P. 2d at 654.

94. *Id.*

95. *Id.* The use of such terms toward women is not unusual. The Massachusetts Task Force reported that when an attorney “stated that she believed that her client ‘had bent enough’ in attempting to reach a compromise, the judge replied that from what he could see, her client [had] been bending for years.” This comment caused an uproar in the courtroom.” MASSACHUSETTS TASK FORCE, *supra* note 6, at 66. In New York, Brooklyn District Attorney Elizabeth Holtzman reported that on a hot summer day a male defense counsel was given permission to remove his jacket. The female assistant district attorney “asked the male judge in open court if she too could remove her jacket. The judge replied: ‘Don’t remove your jacket unless you intend to remove all of your clothes!’ ” NEW YORK TASK FORCE, *supra* note 6, at 132-33.

96. *Deming*, 108 Wash. 2d at 112, 736 P.2d at 655.

state of excitement" seeing her on the witness stand.⁹⁷ He told another deputy prosecuting attorney at the end of the docket, "I would really like to jump your bones."⁹⁸ He winked at an attorney from the Department of Assigned Counsel and then blew her a kiss in his courtroom. Her client asked "What's going on?" as observers in the gallery glared at the attorney and some even giggled.⁹⁹ In yet another incident, a law student intern appeared in his courtroom and asked a male prosecutor if she could interrupt. The prosecutor agreed and said to Judge Deming, "Well, Your Honor, Miss [Name] is here on a matter that will be very quick." The judge responded, "Oh, she's here for a quickie, uh."¹⁰⁰ Judge Deming liked touching a particular probation officer and, when she refused once, Deming "chased [her] around his clerk's desk. He ended up jumping over the top . . . to touch [her]."¹⁰¹ Deming was removed from office by the Supreme Court of Washington.¹⁰² In its opinion the supreme court noted:

The victims of Judge Deming's inappropriate actions were women who had to appear in his courtroom or who were under his supervision and control. His actions were unprofessional, demeaning and embarrassing to the involuntary participants, who suffered varying degrees of anger, anguish, intimidation and humiliation. Judge Deming's sexual harassment and intimidation of women subject to his authority is inexcusable, and violates the Code of Judicial Conduct.¹⁰³

However, the court inexplicably added that "we feel a sense of sadness and appreciate the tragic consequences of his lack of *social graces, restraint and decorum*."¹⁰⁴ Such characterizations minimize the severity of the hostile environment created for women attorneys, law students, and court and probation personnel.

The other Washington judge is Marvin C. Buchanan.¹⁰⁵ Judge Buchanan "freely commented about the size of one staff member's breasts and speculated about the type of lingerie the employees

97. *Id.*

98. *Id.* at 114-15, 736 P.2d at 656.

99. *Id.* at 115, 736 P.2d at 656. Similar conduct was found in Massachusetts, whose Task Force reported, "Other complaints were registered against a judge who, after considering an argument for a temporary restraining order, smiled at the female attorney, signed the order, [and] said, 'anything for you, honey,' and blew her a kiss." MASSACHUSETTS TASK FORCE, *supra* note 6, at 59.

100. *Deming*, 108 Wash. 2d at 116, 736 P.2d at 657.

101. *Id.* at 114, 736 P.2d at 656.

102. *Id.* at 121, 736 P.2d at 659.

103. *Id.* at 117, 736 P.2d at 657.

104. *Id.* (emphasis added).

105. *In re Buchanan*, 100 Wash. 2d 396, 669 P.2d 1248 (1983).

wore.”¹⁰⁶ He requested another employee to wear clothing “which, according to the judge, ‘looked sexy on her.’”¹⁰⁷ The judge asked women job applicants personal and immaterial questions about their spouses, and whether the applicants were willing to go on boating or flying trips with him.¹⁰⁸ Judge Buchanan’s employees tolerated his conduct for fear of reprisal.¹⁰⁹ Indeed, once the complaint was filed, the judge discharged two female staffers, although he had previously expressed satisfaction with their performance.¹¹⁰ Since Buchanan did not file for reelection and was no longer a judge, censure was the strongest sanction available to the Supreme Court of Washington.¹¹¹

Circuit Court Judge Christ Seraphim of Milwaukee County also engaged in hostile environment sexual harassment.¹¹² The objects of Judge Seraphim’s attention were an employee of the Wisconsin Correction Services, a journalism student who attended his court, a guest at a wedding he performed, and a legal secretary in the public defender’s office.¹¹³ When the wedding guest went to shake his hand, he grabbed her, “put his arm around her and, as his hand reached the side of her breast, he said, ‘Hey, baby, is all that you?’”¹¹⁴ He met the legal secretary on a bus and asked her to marry him.¹¹⁵ When they reached the Milwaukee Safety Building and entered an elevator, he “started kissing her on the face and nibbling on her ear. When she opened her mouth to protest, [Seraphim] put his tongue in her mouth.”¹¹⁶ The Judicial Commission recommended Seraphim’s removal or, in the alternative, suspension without pay for at least three years.¹¹⁷ The panel found the incidents involved “unprivileged and nonconsensual physical contacts with offensive sexual overtones.”¹¹⁸ In other words, they were tantamount to sexual assaults. However, the Supreme Court of Wisconsin opted for a lesser penalty of three years suspension, stating, “Standing alone any one of the vio-

106. *Id.* at 398, 669 P.2d at 1249.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 400-01, 669 P.2d at 1251.

112. *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485, *cert. denied*, 449 U.S. 994 (1980).

113. *Id.* at 501-03, 294 N.W.2d at 494-95.

114. *Id.* at 502, 294 N.W.2d at 495. The Minnesota Task Force reported an incident where “[a]t a bar dinner, a judge began stroking the arm of a woman attorney whom he had just been introduced to, then started pulling her toward him, with his arm around her shoulder.” MINNESOTA TASK FORCE, *supra* note 6, at 943.

115. *Seraphim*, 97 Wis. 2d at 503, 294 N.W.2d at 495.

116. *Id.*

117. *Id.* at 513, 294 N.W.2d at 500.

118. *Id.* at 503, 294 N.W.2d at 495.

lations, or even perhaps several, would not warrant suspension or removal. Censure or reprimand would be appropriate."¹¹⁹ Although in each instance Seraphim took advantage of his judicial position for sexual gratification, the court concluded that "[h]e was not charged with any serious violation of the criminal law nor any corrupt conduct in office."¹²⁰

Justice of the Peace Fred S. Ackel flirted with one litigant, stating that he was taught "how to put a rubber on."¹²¹ He later queried, "I'm oral. Are you?"¹²² He stared at her chest, hugged her, and called her "honey" and "cute."¹²³ He placed his arms on the shoulders of two female attorneys and called them "honey," "babe," "dear," and "sweetie."¹²⁴ He used similar terms of endearment on a deputy county attorney and his law clerks in his office.¹²⁵ He also hugged his clerks.¹²⁶ Although the Judicial Commission recommended removal,¹²⁷ the Supreme Court of Arizona reduced Ackel's punishment to censure because "the record [did] not indicate that Ackel ever conditioned his performance on the return of favors, sexual or otherwise."¹²⁸ Even if this were true, the court undercut the seriousness of hostile environment sexual harassment for women attorneys, clerks, and litigants. In dissent, Vice Chief Justice Feld-

119. *Id.* at 513, 294 N.W.2d at 500.

120. *Id.*

121. *In re Ackel*, 155 Ariz. 34, 36, 745 P.2d 92, 94 (1987).

122. *Id.* In Minnesota, "[a] judge told attorneys in chambers that while he was 'bald on top' he has 'plenty of thick pubic hair, ha ha ha.'" MINNESOTA TASK FORCE, *supra* note 6, at 942.

123. *Ackel*, 155 Ariz. at 36, 745 P.2d at 94.

124. *Id.* at 42, 745 P.2d at 100. The Minnesota Task Force reported a similar incident where the "[j]udge put his arm around [a] woman attorney, hugged her, [and] made flirtatious remarks when she requested information on how to proceed in completing forms for court." MINNESOTA TASK FORCE, *supra* note 6, at 943, *see supra* notes 21-24 and accompanying text.

125. *Ackel*, 155 Ariz. at 42, 745 P.2d at 100. The Minnesota Task Force included a section on abuse of law clerks: "Reports that women attorneys had experienced physical sexual harassment came . . . from women who had served as law clerks to judges. . . . Reports of physical harassment of women law clerks by judges came from at least four different judicial districts." MINNESOTA TASK FORCE, *supra* note 6, at 942. A female attorney reported to the task force that "a judge continually pawed, touched, and made inappropriate sexual comments to his female law clerk. . . . I observed these things and heard daily accounts." *Id.* Another said, "One judge unzipped his pants and adjusted his shirt in chambers repeatedly in front of his female clerk. She never felt safe enough to report it. She told me about it. . . . This had a lasting impact on her self-esteem." *Id.* Another reported, "I worked for a judge who kissed me on the mouth and patted my rear very suddenly one day. . . . I recently became aware of two secretaries who [sic] he has similarly harassed." *Id.*

126. *Ackel*, 155 Ariz. at 42, 745 P.2d at 100.

127. *Id.* at 43, 745 P.2d at 101.

128. *Id.*

man viewed the facts differently and would have removed Ackel from the bench:

The respondent obviously sought sexual favors from [the litigant] and made it quite clear that although nothing was demanded of her, compliance would bring judge and litigant to an even better working relationship. Together, the judge and [she] would work to "get the son of a bitch." The problem, of course, is that the "son of a bitch" in question was the other party to the litigation before the judge.¹²⁹

The dissenter found the conduct amounted to the solicitation of sexual favors for justice¹³⁰—the definition of quid pro quo sexual harassment.

Detroit Recorder's Court Judge James Del Rio also sexually harassed a series of women.¹³¹ In the middle of a hearing in open court, Judge Del Rio called a female criminal defense attorney for a bench conference and asked her for a date.¹³² She declined the offer and later, whenever she appeared before him, Judge Del Rio treated her with disdain.¹³³ Judge Del Rio asked a newspaper reporter who had refused a date with him whether she was a lesbian.¹³⁴ When the reporter later came into his court, he verbally embarrassed and abused her.¹³⁵ Judge Del Rio was once overheard speaking to a female juror assigned to a case in progress before him, asking whether it would be all right to call her when the case was over.¹³⁶ The Judicial Tenure Commission recommended Judge Del Rio's removal.¹³⁷ The Supreme Court of Michigan disregarded the recommendation and instead imposed a five-year suspension without pay.¹³⁸

Los Angeles Municipal Court Judge Leland W. Geiler harassed his law clerk, two female attorneys, and the calendar coordinator.¹³⁹ In one instance, he was in his chambers with five or six men when he called in his female law clerk. After she had left, the judge asked the

129. *Id.* (Feldman, J., dissenting).

130. *Id.*

131. *In re Del Rio*, 400 Mich. 665, 256 N.W.2d 727 (1977).

132. *Id.* at 720, 256 N.W.2d at 750. Similar conduct has been reported elsewhere. "A male judge interrupted a female prosecutor's opening statement and called her to the bench to tell her he liked the way she was wearing her hair that day." MINNESOTA TASK FORCE, *supra* note 6, at 928.

133. *Del Rio*, 400 Mich. at 720, 256 N.W.2d at 750.

134. *Id.* at 722 n.27, 256 N.W.2d at 751 n.27.

135. *Id.*

136. *Id.* at 720 n.25, 256 N.W.2d at 750 n.25.

137. *Id.* at 671-72, 256 N.W.2d at 728-29.

138. *Id.* at 726, 256 N.W.2d at 753.

139. *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 277, 515 P.2d 1, 5, 110 Cal. Rptr. 201, 205 (1973), *cert. denied*, 417 U.S. 932 (1974).

other men, "How would you like to eat that?"¹⁴⁰ He occasionally asked the clerk, "Did you get any last night?"¹⁴¹ and he often told the her she was "nothing but a fucking clerk."¹⁴² In addition to his harassment of women, Judge Geiler, in a public corridor of the Hall of Justice, grabbed a court commissioner's testicles from behind.¹⁴³ He prodded a male deputy public defender with a dildo during a conference in chambers and referred to the incident twice in open court in order to curtail the defender's cross-examination of two witnesses.¹⁴⁴ The California Supreme Court removed Geiler from office but allowed him to continue to practice law.¹⁴⁵

The California Supreme Court also found Municipal Court Judge Richard Ryan guilty of four acts of wilful misconduct and fourteen acts of prejudicial conduct.¹⁴⁶ Among other things, Judge Ryan liked to tell jokes.¹⁴⁷ At a preliminary hearing in his chambers, Judge Ryan asked the two female attorneys who were present if they knew the difference "between a Caesar salad and a blow job."¹⁴⁸ When the

140. *Id.* at 277 n.6, 515 P.2d at 5 n.6, 110 Cal. Rptr. at 205 n.6. Similar conduct was reported in Massachusetts:

An attractive female prosecutor was called away from her work in the law library by a court officer who told her that Judge X wanted to see her. When she arrived at the judge's chambers, where Judge X was conversing with a male attorney and a male court officer, the judge said to the others: "see what I mean guys—O.K. you can go now."

MASSACHUSETTS TASK FORCE, *supra* note 6, at 60.

141. *Geiler*, 10 Cal. 3d at 277 n.6, 515 P.2d at 5 n.6, 110 Cal. Rptr. at 205 n.6.

142. *Id.* The California Commission on Judicial Performance charged Municipal Court Judge Mario P. Gonzales with 21 instances of wilful misconduct and prejudicial conduct. *Gonzalez v. Commission on Judicial Performance*, 33 Cal. 3d 359, 364, 657 P.2d 372, 373, 188 Cal. Rptr. 880, 881 (1983). The Commission charged Gonzales with improperly engaging in personal verbal attacks and improper sexual and ethnic remarks both in open court and in private communications with persons associated with the court. *Id.* at 889-90, 657 P.2d at 381, 188 Cal. Rptr. at 376. However, the California Supreme Court was not persuaded that the charge of consistently making improper and unwarranted sexual advances towards a municipal court interpreter was supported by clear and convincing evidence. *Id.* at 377, 657 P.2d at 382, 188 Cal. Rptr. at 890. The court removed Judge Gonzales from office but allowed him to practice law on condition that he pass a professional responsibility examination. *Id.* at 378, 657 P.2d at 383, 188 Cal. Rptr. at 891.

143. *Geiler*, 10 Cal. 3d at 278, 515 P.2d at 5, 110 Cal. Rptr. at 205. Judge Geiler's grip caused the commissioner "so much pain that he almost passed out. Nevertheless, [the commissioner] considered the conduct to be friendly horseplay." *Id.* at 277 n.6, 515 P.2d at 5 n.6, 110 Cal. Rptr. at 205 n.6.

144. *Id.* at 277, 515 P.2d at 5, 110 Cal. Rptr. at 205. The Minnesota Task Force also noted the "frequent use of the term 'dildo' during settlement negotiations." MINNESOTA TASK FORCE, *supra* note 6, at 942.

145. *Geiler*, 10 Cal. 3d at 287, 515 P.2d at 12, 110 Cal. Rptr. at 212.

146. *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 546, 754 P.2d 724, 741, 247 Cal. Rptr. 378, 395 (1988).

147. *See supra* note 23 and accompanying text.

148. *Ryan*, 45 Cal. 3d at 544, 754 P.2d at 739, 247 Cal. Rptr. at 394.

female attorneys responded that they did not, the judge said, "Great, let's have lunch."¹⁴⁹ The Supreme Court of California removed Ryan from the bench, but allowed him to continue practicing law upon passage of a professional responsibility examination.¹⁵⁰

New York Judge John J. Fromer, publicly commenting to a newspaper reporter regarding a possible sentence reduction in a pending rape case, stated, "Maybe they ended up enjoying themselves."¹⁵¹ The New York Commission on Judicial Conduct noted that the statements were humiliating to the victim and could possibly discourage complainants from filing rape charges.¹⁵² Nevertheless, the Commission merely censured Judge Fromer.¹⁵³ Similarly, although Judge Warren M. Doolittle made numerous improper comments to female attorneys over a four-year period and suggested that they could get whatever they were asking of the court because of their physical appearance, the New York Commission on Judicial Conduct merely admonished him.¹⁵⁴

IV. EXPLAINING THE PROBLEM: THE DIFFERING PERCEPTIONS OF MEN AND WOMEN

Sexual harassment has traditionally been, and continues to be, primarily a women's problem. It involves abuse of power,¹⁵⁵ and because women have not historically held power positions, the perceptions of men and women regarding sexual harassment vary considerably.¹⁵⁶

For example, in a study by the New York Task Force on Women in the Courts,¹⁵⁷ sixteen percent of women but only three percent of men believed that judges subjected women attorneys to verbal or physical sexual advances sometimes or often.¹⁵⁸ Conversely, eighty-

149. *Id.*

150. *Id.* at 518, 547, 754 P.2d 724, 741, 247 Cal. Rptr. 378, 395 (1988).

151. AMERICAN JUDICATURE SOCIETY, *supra* note 48, at NY63. In Massachusetts, a prosecutor reported that at least four "superior court judges before whom she has appeared have made demeaning comments about rape victims." MASSACHUSETTS TASK FORCE, *supra* note 6, at 59.

152. AMERICAN JUDICATURE SOCIETY, *supra* note 48, at NY63.

153. *Id.* (The decision does not state whether Fromer received any punishment other than censure.).

154. *In re Doolittle* (N.Y. Comm'n on Judicial Conduct, June 13, 1985) (Westlaw, JDDD database).

155. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M.L. REV. 91, 98 (1987).

156. Collins & Blogett, *Sexual Harassment . . . Some See It . . . Some Won't*, 59 HARV. BUS. REV. 76, 78 (1981).

157. NEW YORK TASK FORCE, *supra* note 6.

158. *Id.* at 134 n.392.

two percent of the men, but only forty-seven percent of the women, believed it never happened.¹⁵⁹ When asked whether judges subjected women litigants or witnesses to verbal or physical sexual advances, nine percent of the women attorneys in the New York survey, but only two percent of the men, answered that it happened sometimes or often.¹⁶⁰ In contrast, eighty-three percent of the men, but only forty-nine percent of the women, reported that it never happened.¹⁶¹ Similarly, although the Maryland Special Joint Committee on Gender Bias in the Courts reported that nineteen percent of female attorneys stated that judges subjected women attorneys to verbal and physical sexual advances,¹⁶² judges and male attorneys surveyed generally believed that such conduct rarely or never occurred.¹⁶³

A comparable problem occurs with the characterization of sexual harassment. For example, courts often experience difficulty in distinguishing between quid pro quo and hostile environment sexual harassment. The difficulty may result from the different perception of the sexes: what women perceive as unwelcome sexual advances implicitly tied to benefits, courts and commissions composed largely of men may see as only hostile environment sexual harassment, or not as sexual harassment at all, but rather "bad manners."¹⁶⁴

The problem of differing perceptions is exacerbated by the fact that the law continues to be a male-dominated profession. Research confirms that the incidence of sexual harassment drops as the number of women in the work force increases.¹⁶⁵ In private industry, the formal complaint rates are highest in companies whose work forces are at least seventy-five percent male and lowest where work forces are at least seventy-five percent female.¹⁶⁶ These statistics are of particular relevance for lawyers, since women constitute only 7.4% of federal judges,¹⁶⁷ 7.2% of state judges,¹⁶⁸ and 20% of attorneys.¹⁶⁹

Further compounding the problem is that, until recently, codes of conduct governing judicial behavior have been vaguely worded and

159. *Id.*

160. *Id.* at 120 n.347.

161. *Id.*

162. MARYLAND TASK FORCE, *supra* note 6, at 125.

163. *Id.*

164. See NEW JERSEY TASK FORCE, *supra* note 6, at 139.

165. KLEIN ASSOCIATES, THE 1988 WORKING WOMAN SEXUAL HARASSMENT SURVEY 2 (1988). *Working Woman Magazine* commissioned the report and published the results. Sandroff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 69.

166. KLEIN ASSOCIATES, *supra* note 165, at 2.

167. ABA Comm. on Women in the Profession, Report to the House of Delegates 6 (1988).

168. *Id.*

169. *Id.* at 5.

arbitrarily applied—especially with regard to sexual harassment.¹⁷⁰ Where a particular provision is open to different interpretations, it is reasonable to assume that the particular interpretation chosen will reflect prevailing attitudes and perceptions. Thus, in a male dominated profession like the law, one would expect these standards of conduct to be interpreted from the male point of view. Law, therefore, is a profession where a great degree of sexual harassment can be expected.¹⁷¹

V. RESPONSES TO THE PROBLEM

A. *Sexual Harassment in the Workplace: Problems and Solutions*

Although this Article focuses specifically on sexual harassment in the judicial system, the problem itself pervades private industry as well. Unfortunately, it is difficult to discover the extent of the problem. Few employees file formal complaint, usually only one percent to five percent.¹⁷² The 1988 Working Woman Sexual Harassment Survey by Klein Associates (the "Klein Report"), a Massachusetts consulting firm, reported on Fortune 500 service and manufacturing companies.¹⁷³ Their results indicated that at least fifteen percent of female employees and five percent of male employees annually experienced some form of sexual harassment.¹⁷⁴ A recent federal government study revealed an even higher annual rate: twenty-one percent for women and seven percent for men.¹⁷⁵

The Klein Report found that "[s]exual harassment costs a typical Fortune 500 service or manufacturing company \$6.7 million per year—a cost of \$282.53 per employee."¹⁷⁶ These costs are comprised

170. See *supra* note 131.

171. Two male authors, both professors at New York University School of Law, stated in an early, major article on sex discrimination by judges:

Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues.

Johnston & Krapps, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971). Others have also written about the problems faced by women who must deal with judges. See Gilsinan, Obernayer & Gilsinan, *Women Attorneys and the Judiciary*, 52 DEN. L.J. 881 (1975); Comment, *Gender Bias in the Judicial System*, 61 S. CAL. L. REV. 2193 (1988).

172. KLEIN ASSOCIATES, *supra* note 165, at 26.

173. *Id.* at 3.

174. *Id.* at 10.

175. See *id.* at 10.

176. *Id.* at 2.

of "turnover, absenteeism, reduced productivity, and [the use of] internal complaint mechanisms."¹⁷⁷ Even this substantial figure may understate the full financial impact of sexual harassment in the workplace. For example, the Klein Report did not evaluate the expenses of "litigation, responding to charges filed with municipal/state/federal regulatory agencies, destructive behavior and sabotage."¹⁷⁸ Similarly, the emotional and psychological stress effects of sexual harassment, while not easily quantifiable, have also been recognized as substantial.¹⁷⁹

Although sexual harassment in employment has long been a problem for women, it was neither spoken of nor recognized as a legal wrong until recently. Title VII of the 1964 Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.¹⁸⁰ It was not until 1980, however, that the Equal Employment Opportunity Commission ("EEOC") issued regulations on sexual harassment, a subcategory of sex discrimination.¹⁸¹ The regulations prohibit both quid pro quo, or blackmail harassment, and hostile environment sexual harassment.¹⁸² The regulations require employers to specifically express strong disapproval of sexual harassment and develop procedures and sanctions to eliminate it from the workplace.¹⁸³

177. *Id.*

178. *Id.*

179. See Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling*, 52 AM. J. ORTHOPSYCHIATRY 539 (1982); Wells & Angel, *Sexual Harassment: A Psychiatric and Legal Analysis*, PSYCHIATRIC TIMES, Dec. 1990, at 49.

180. 42 U.S.C. § 2000e (1988).

181. 29 C.F.R. § 1604.11(a)-(e) (1980) (now codified at 29 C.F.R. § 1604.11(a)-(g) (1989)).

182. See *supra* Section III. Quid pro quo harassment is defined by in the Code of Federal Regulations as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . either explicitly or implicitly" linked to the grant of or denial of economic benefits. 29 C.F.R. § 1604.11(a)(1), (2) (1989). Hostile environment sexual harassment is recognized as an action which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* § 1604.11(a)(3).

183. 29 C.F.R. § 1604.11(f) (1989). Sexual harassment has been recognized as a serious problem in such diverse, non-employment settings as education, see, e.g., Biernat, *Subjective Criteria in Faculty Employment Decisions Under Title VII: A Camouflage for Discrimination and Sexual Harassment*, 20 U.C. DAVIS L. REV. 501 (1987); Crocker & Simon, *Sexual Harassment in Education*, 10 CAP. U.L. REV. 541 (1981); Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986); Inguilli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281 (1987); Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987); housing, see, e.g., Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061 (1987); Comment, *Sexual Harassment in Rental Housing*, U. ILL. L. REV. 175 (1989); and prisons, see, e.g., Comment, *Women Prisoners: Freedom from Sexual Harassment, A Constitutional Analysis*, 13 GOLDEN GATE U.L. REV. 667 (1983).

*Meritor Savings Bank FSB v. Vinson*¹⁸⁴ is the leading case on sexual harassment. Writing for the United States Supreme Court, Chief Justice Rehnquist stated that "[w]ithout question when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."¹⁸⁵ Under the EEOC regulations,¹⁸⁶ the proper inquiry is whether the sexual advances were unwelcome, not whether participation was voluntary.¹⁸⁷ The bank's "general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination."¹⁸⁸ In addition, the bank's policy requiring employees to address complaints to their immediate supervisors placed the employees in an untenable position; the harassed employee was forced to complain to the harasser.¹⁸⁹

As a result of *Meritor*, companies must now have a specific policy prohibiting sexual harassment, a policy which is adequately publicized to both rank-and-file and supervisory employees.¹⁹⁰ Further, there must be a reporting mechanism for speedy investigations and responses to claims of sexual harassment.¹⁹¹ Perhaps because the *Meritor* Court set out clear standards, perhaps because the financial costs of non-compliance are enormous, or perhaps because of a growing awareness in private industry of the scope of the problem, American industry has taken seriously the EEOC regulations and the Supreme Court's opinion in *Meritor*. According to the Klein Report, seventy-six percent of the responding companies had written policies specifically prohibiting sexual harassment.¹⁹² A legal system which mandates such policies for employers should require no less of itself.

B. *The ABA Solution: The Model Code of Judicial Conduct*

The cases do not involve just a few "nuts," but illustrate a serious problem of judicial misconduct which codes of judicial conduct, with their general prohibitive language, do not adequately address. In response to complaints about unduly vague standards of judicial conduct, the ABA House of Delegates passed a new Model Code of Judi-

184. 477 U.S. 57 (1986).

185. *Id.* at 64.

186. See *supra* note 180 and accompanying text.

187. *Meritor*, 477 U.S. at 68.

188. *Id.* at 72-73.

189. *Id.* at 73.

190. See U.S. MERIT PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 46-47 (1988).

191. See *id.* at 47-48.

192. KLIEN ASSOCIATES, *supra* note 165, at 8.

cial Conduct at its annual meeting in August 1990.¹⁹³ The commentary to Canon 3B(5) now specifically prohibits sexual harassment.¹⁹⁴ Now, under the Code, a judge "must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control."¹⁹⁵ Thus, judges are now subject to the same sort of regulations regarding sexual harassment as are private employers under Title VII of the Civil Rights Act.¹⁹⁶ Of particular importance to the new Model Code of Judicial Conduct's specific prohibition of sexual harassment is the *Meritor* Court's proclamation that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [a female employee's] failure to invoke that procedure" cannot insulate the employer from liability.¹⁹⁷

Specific condemnation and prohibition of unacceptable judicial behavior will work to lessen, if not eliminate, gender bias in the future.¹⁹⁸ It should be noted, however, that judges are not the only

193. ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY REPORT TO THE HOUSE OF DELEGATES 1 (1990) [hereinafter ABA COMMITTEE REPORT].

194. *Id.* app. B at 13. This commentary was added as a Committee Amendment to Canon 3B(4). *Id.* Canon 3B(4) requires that a "judge shall be patient, dignified and courteous to litigants, jurors, witness, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control." MODEL CODE OF JUDICIAL CONDUCT Canon 3B(4) (1990).

The prohibition against sexual harassment was initially proposed to the Committee after circulation of its Midyear 1990 Draft by Professor Vanessa Merton, Associate Dean for Clinical Education at the Pace University Law School. ABA COMMITTEE REPORT, *supra* note 193, app. D. at 9. It was originally proposed as an addition to Canon 3B(5) which provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

MODEL CODE OF JUDICIAL CONDUCT Cannon 3B(5).

Since Canon 3B(5) is the general anti-discrimination section, and since sexual harassment is a sub-category of sex discrimination, the prohibition properly belongs in Cannon 3B(5). It is not clear why the Committee downgraded it to commentary and moved it to Canon 3B(4).

On a motion from the floor of the ABA House of Delegates, the commentary was moved from Canon 3B(4) to Canon 3B(5). Telephone interview with William F. Womble, Chair, ABA Judicial Code Subcommittee, Standing Committee on Ethics and Professional Responsibility (August 9, 1990).

195. MODEL CODE OF JUDICIAL CONDUCT Cannon 3B(4).

196. Compare MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) with 29 C.F.R. § 1604.11(a) (1989) (both prohibiting conduct which could be perceived as sexual harassment).

197. *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 72 (1986).

198. N. WIKLER & L. SCHAFFRAN, LEARNING FROM THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS 24-29 (1989).

source of sexual harassment in the courtroom; lawyers are even worse.¹⁹⁹ The Model Code of Judicial Conduct addresses this problem to some extent by obligating judges to hold attorneys and subordinates to the same standard of conduct.²⁰⁰ If sexual harassment in the courts is to be completely eliminated, however, it is necessary to supplement the Code with an amendment to the ABA Model Rules of Professional Conduct for Lawyers specifically prohibiting sexual harassment by attorneys. Nevertheless, the standards set out in *Meritor*, coupled with the well developed body of law on sexual harassment under Title VII and the ABA's adoption of a specific prohibition against sexual harassment by judges, provide the foundation for analysis of future cases of judicial misconduct.²⁰¹

199. See, e.g., NEW JERSEY TASK FORCE, *supra* note 6, at 140 (55% of responding female attorneys had experienced unwelcome sexual advances from male attorneys, with 31% of female respondents and 16% of the male respondents reporting that they had observed sexual advances towards female witnesses and litigants by attorneys) (*compare with statistics for judges, supra* note 7 and accompanying text); NEW YORK TASK FORCE, *supra* note 6, at 134 (36% of the female attorneys and 7% of the male attorneys believed that attorneys often or sometimes subjected female attorneys to verbal or physical sexual advances, and 29% of the female attorneys and 72% of the male attorneys believed that it never happened) (*compare with statistics for judges, supra* note 9 and accompanying text); MARYLAND TASK FORCE, *supra* note 6, at 125 (when asked whether male attorneys subjected women attorneys to verbal or physical sexual advances 47% of the female attorneys answered affirmatively, as did 7% of judges, and 8% of male attorneys; 33% of female attorneys and 73% of male attorneys believed it never happened) (*compare with statistics for judges, supra* note 11 and accompanying text); MASSACHUSETTS TASK FORCE, *supra* note 6, at 54-55 (68% of women attorneys and 32% of male attorneys had observed counsel sexually harass a female attorney by making inappropriate sexual comments; 42% of female attorneys and 11% of male attorneys had witnessed counsel touch female attorneys in an inappropriate manner) (*compare with statistics for judges, supra* notes 14-16 and accompanying text); MINNESOTA TASK FORCE, *supra* note 6, at 926 (33% of female attorneys thought that female litigants or witnesses received verbal harassment sometimes or often) (*compare with statistics for judges, supra* note 17 and accompanying text); *id.* at 941 (45% of female attorneys reported that they are always, sometimes, or often subjected to or have observed verbal sexual harassment from other male attorneys) (*compare with statistics for judges, supra* note 18 and accompanying text); *id.* at 930 (63% of female attorneys and 19% of male attorneys reported comments, remarks, or jokes demeaning to women are made often or sometimes by attorneys) (*compare with statistics for judges, supra* note 20 and accompanying text).

200. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5).

201. See, e.g., Dworkin, Ginger & Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990); Holtzman & Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U.L.J. 239 (1987); Martucci & Terry, *Sexual Harassment in the Workplace: A Legal Overview*, LAB. LAW. 125 (1987); Oneglia & Cornelias, *Sexual Harassment in the Workplace: The Equal Employment Opportunity Commission's New Guidelines*, 26 ST. LOUIS U.L.J. 39 (1981); Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. CHI. L. REV. 328 (1988); Vinciguerra, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 YALE L.J. 1717 (1989); Note, *Employer Liability Under Title*

VI. CONCLUSION

Our judicial system is one American institution that *must* be free of sexual harassment.²⁰² State task force surveys have uncovered a small percentage of judges and lawyers who have forestalled or corrected discriminatory behavior *sua sponte*.²⁰³ Maryland courts, for example, require that recusal motions alleging judicial misconduct be heard by another judge.²⁰⁴ Until women make up a greater proportion of the legal profession, however, sexual harassment is likely to be a magignant problem. The new commentary to the Model Code of Judicial Conduct prohibiting sexual harassment has finally subjected

VII for Sexual Harassment After Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987).

202. Claims of sexual harassment are not limited to those against state trial court judges. A former secretary to United States District Judge Spencer Mortimer Williams filed suit against the judge individually and in his official capacity as a judge and as founder and past President of the Federal Judges Associations. *Garcia v. Williams*, 704 F. Supp. 984 (N.D. Cal. 1988). The district court did not reach the merits, finding almost all the claims based on sexual harassment to be time barred. *Id.* at 1000.

The Florida Task Force received testimony that, "During an oral argument at the Florida Supreme Court, a judge used a hypothetical about a pretty assistant attorney general wearing a red blouse' which was exactly what I was wearing." FLORIDA TASK FORCE, *supra* note 6, at 205.

Justice Richard Neely of the West Virginia Supreme Court voluntarily resigned his position as Chief Justice. *In re Neely*, 364 S.E.2d 250, 255 (W.Va. 1987). Although the allegations against Justice Neely did not involve sexual harassment, the judge's conduct was degrading to women. Justice Neely was admonished by the Supreme Court for requiring his secretary, as a condition of her employment, to babysit his son "on at least eleven occasions in a twenty-seven month period, *once for more than seven days*." *Id.* at 251 (emphasis added). The majority stated that his conduct did not "in some way evidence a bias against women." *Id.* at 254. Two judges would have publicly censured Justice Neely. The concurring and dissenting opinion found that "requiring personal services of his secretary in the form of babysitting . . . clearly violate[d]" the Judicial Code of Ethics. *Id.* at 257.

203. See, e.g., NEW JERSEY TASK FORCE, *supra* note 6, at 141; NEW YORK TASK FORCE, *supra* note 6, at 137.

204. *Surrat v. Prince George's County*, 320 Md. 439, 589 A.2d 745 (1990). In this groundbreaking decision, the Maryland Court of Appeals ordered that another judge decide the recusal motion of a judge charged with sexual harassment of the plaintiff's attorney. After the trial judge awarded over \$500,000 in an obstetrical malpractice action, the judge ordered a remittitur reducing the amount by half. *Id.* at 457, 589 A.2d at 754. Plaintiff's attorney charged the judge with sexually harassing conduct over a period of ten years. *Id.* at 462, 589 A.2d at 756. Six days before the trial at issue, during a settlement conference in chambers on another malpractice case, the attorney claimed the judge "asked whether she had a 'steady' yet. She asked if he had someone in mind. His response was 'Yes, me.' Her reply was 'Forget it.'" *Id.* at 462, 589 A.2d at 756. The attorney claimed that at the trial, the judge conveyed his lack of patience with her to the jury by his facial expressions and body language. *Id.* Finally, she claimed that after the plaintiffs had rested, the judge asked her at a chambers conference, "Do you want to give me your phone number now?" She answered 'Over my dead body.'" *Id.* at 463, 589 A.2d at 757. Counsel argued that the judge was "a piqued suitor" and, therefore, his impartiality could be questioned. *Id.* The court relied on the report of the MARYLAND TASK FORCE, *supra* note 6, and the Maryland Code of Judicial Conduct in reaching its result. *Id.* at 463-64, 589 A.2d at 757.

judges to the same rules imposed on employers under Title VII of the 1964 Civil Rights Act.²⁰⁵ Vigorous enforcement of the specific prohibition in the commentary to the new ABA Code of Judicial Conduct is essential if sexual harassment is to be eliminated from our legal system.

205. See *supra* notes 180-81 and accompanying text.