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*ELIMINATION OF GENDER BIAS AND SUBSTANCE
ABUSE IN THE LEGAL PROFESSION*

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MICHAEL LYNN GABRIEL

ATTORNEY AT LAW

B.S., J.D., M.S.M., DIP.(TAX), LL.M.(TAX)

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I. ELIMINATION OF GENDER BIAS IN THE LEGAL PROFESSION

PART ONE: GENDER BIAS IN A LAW OFFICE AGAINST

AN ASSOCIATE

INTRODUCTION

Gender bias as related to domestic relations, child custody, child support, criminal matters, sexual harassment and domestic violence actions are major concerns for all legal practitioners. Sensitivity on these issues has developed recently in large part in response to the O.J. Simpson murder trial of his former wife Nicole against whom he was once convicted of spousal battery. In response to the growing awareness of spousal abuse many state supreme courts have instituted committees and task forces to render recommendations as to how to remove gender bias from the courts. California's Judicial Council Advisory Committee on Gender Bias in the Courts issued a 1990 report ***"Achieving Equal Justice for Women in the Courts"***. The Colorado's Supreme Court Task Force issued a 1990 report ***"Gender & Justice in the Colorado Courts"***. Connecticut's Legal Services Unit dispenses the 1991 report "The Connecticut Task Force on Gender, Justice and the Courts." In Florida there is the 1990 ***"Report of the Florida Gender Bias Study Commission."*** In Georgia, there is the 1991 ***"Gender and Justice of the Courts."*** Massachusetts issued in 1989 ***"Gender Bias Study of the Court System in Massachusetts"*** published in New England Law Review

745 and 23 Suffolk Univ. Law Review 576. In Minnesota, there is the 1989 **"Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts"**, published in 15 William Mitchell Law review 829. The Nevada Supreme Court created a gender bias task force who wrote a report entitled **"Justice for Women."** In New Jersey, a task force appointed by its Supreme Court prepared a report entitled **"Women in the Law: Changing Roles, Changing Attitudes."** In New York, there is the 1987 **"Report of the New York Task Force on Women in the Courts."** In Utah, there is the 1990 **"Report of the Task Force on Gender and Justice."** In Washington, there is the 1989 **"Gender and Justice in the Courts"**. The United States Department of Justice issued a task force report on family violence called **"The U. S. Attorney General's Task Force on Family Violence: Final Report."** The National Center for State Courts wrote a report entitled **"The Impact of Domestic Relations Cases on the New Hampshire Superior Court: Analysis and Recommendations."** These are just a few of the judicial and governmental reports relating to the issue of gender bias. There have been many books and private studies and reports by law schools and citizens' review committees, all documenting some type of dramatic gender bias in the past. The purpose nowadays is to eliminate such gender bias so everyone faces a level playing field. Sometimes the gender bias works for the benefit of women, and at other times it works against them. Not all bias has been bad in itself. In fact, in the area of criminal

law, gender bias has worked for the benefit of the women criminal defendants in that studies show that they charge them less often or sentenced less harshly than their male counterparts.

A tricky analysis, for the purpose of determining the existence of gender based wage discrimination, is the fact it is commonly stated that women college graduates earn less than male high school graduates. As with most general statements, this may or may not be true in specific cases. A male high school graduate who goes into pro football will tend to earn more than most women college graduates and most male college graduates as well. Making this argument as support for the belief that women should be paid more is a mistake and hurts the issue of gender equality when you try to compare apples and oranges. The only true analysis is to compare the jobs and pay which women make to the exact same jobs which men engage in. The Equal Pay Act, which requires women be paid the same as men if they are doing the same job as men. The real difference in the pay discrepancy between a divorced husband and a divorced wife is the type of work they are engaged not the fact that they are being paid differently for the same work. The issue of comparable worth has been raised as a basis for paying women more in the general society despite the fact that they may not be doing the same identical work as men. Comparable worth is based upon a belief that when jobs require similar knowledge and competency to be performed then the persons doing them should be paid the same. Under this argument, a secretary with a high school

education should be paid the same as a truck driver with a high school education. Comparable worth, as a legitimate doctrine, was considered by the United Supreme Court in ***County of Washington vs. Gunther*** (1981) 452 U.S. 161, 101 S.Ct. 2242. The Court held in this case that wage discrimination claims are not limited by the Bennett Amendment to Title VII. The Bennett Amendment states; "It shall not be an unlawful employment practice under this subchapter (Title VII) for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees if such differentiation is authorized by the provisions of section 206(d) of Title 29 (The Equal Pay Act)." The ***Gunther*** decision incorporated the four affirmative defenses of the Equal Pay Act to Title VII wage discrimination claims but no longer operated to bar them altogether, such as in ***Lemon vs. City and County of Denver*** (1980) 620 F.2d. 228. The Supreme Court specifically limited the extent of its holding in ***Gunther***. It stated that it specifically did not "decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII." In fact, the Supreme was very clear in stating that its decision was not based on the "controversial concept of comparable worth" which was interpreted by the Court as seeking "increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." To date, comparable worth

is an interesting idea but no wide spread support exists for its implementation. Nonetheless, comparable worth studies have been useful in determining whether wage discrimination is being practiced. *American Nurses' Asso. vs. Illinois* (1986) 783 F.2d 716, *Power vs. Michigan* (1982) 539 F. Supp. 695. *Oaks vs. City of Fairhope* (1981) 515 F.Supp. 721, *AFSCME vs. County of Nassau* (1985) 609 F.Supp. 695, *AFSCME vs. Washington* (1985) 770 F.2d 1401, *IUE vs. Westinghouse* (1980) 631 F.2d 1094.

In an egalitarian society, a society based upon equal protection of the law, people should be treated equally. Judges have the discretion to sentence people differently based upon the facts of their particular case: the more willful the action, the harsher the punishment. The Nevada Supreme Court's Gender Bias Task Force in *Justice For Women*, stated:

"It is for these reasons that in legal disputes between men and women it is of utmost importance that each party understand as thoroughly as possible the position of the other party, The law should be made as clear as it possibly can be and special efforts should be made by all concerned that the parties understand what the law is and what reasonable expectations are for each party."

There should not be any preconceived notions by the court before sentencing or before the judge even sees or hears the facts of the case. Judicial favoritism based upon perceived ideas and beliefs are what courts and the legal professions are trying to abolish and to do away with, which is always good in the sense that when everyone is treated equally regardless of the results.

CHAPTER ONE

LAW FIRM GENDER BIAS IN THE EMPLOYMENT OF ASSOCIATES, ANALYSIS OF EZOLD AND OTHER RELEVANT CASE LAW.

INTRODUCTION

As a result of the Supreme Court's decision in *Hishon v. King & Spaulding* (1984) 467 US 69, law firms are now required to eliminate sex as a determining factor for partnership among its associates. Prior to *Hishon*, this was not an issue. Law firms, before *Hishon*, were not covered by Title VII of the Civil Rights Act of 1964 and thereby were free to deny partnership participation to associates because of sex or race. *Hishon* changed that and created an area of uncertainty among law firms. As a result of the *Hishon* decision, law firms knew that they could not discriminate because of sex in partnership offers but they were aware that any female associate denied partnership participation could claim prima facie sex discrimination simply because of the denial. Partnerships, in general and law firms, in particular, struggled for years with developing the type of evaluation process which would establish a sex blind evaluation process.

There are two cases of significant note to law firms in implementing a sex blind evaluation process for associates. The first case is *Ezold v. Wolf, Block, Schorr and Solis-Cohen* (983 F.2d 509 (1992)) and *Hopkins v. Price Waterhouse* 920 F.2d 967

(1990). Each of these cases is important for law firms because they both relate to the factors and considerations that a partnership can view in making an evaluation of an associate's partnership potential. In **Ezold**, the law firm's decision not to offer a woman associate a partnership was upheld. In contrast, in **Hopkins**, Price Waterhouse was found liable for illegal sex discrimination against its women associates in its partnership evaluation process. Because both of these cases involve partnerships and interpret **Hishon** they are representative of the degree of scrutiny and care which courts now give sex discrimination claims against partnerships. As such, they are the controlling case law for this developing area. **Hishon** merely stated the skeletal position that partnerships could not discriminate in making partnership offers. These subsequent cases add the flesh and bones to the **Hishon** decision and cover the practical points that a partnership cannot consider in making a partnership evaluation. This chapter will analyze both **Ezold** and **Hopkins** to present the points considered important by the courts for the proper evaluation of associates by a partnership in its considerations for making a partnership participation offer.

Just as it is important for a law firm to be sex blind in its partnership determinations for associates, it must also be sex blind in its day to day operations. It must be not forgotten, discounted or ill-considered that day to day operations of the law firm must also be sex blind. Also covered in this chapter is a

discussion of the major sex discrimination laws that are applicable to law firms. These laws, while general in scope, still apply to law firms and a violation of which exposes the law firm to damages under Title VII.

A. EZOLD

From its very beginning Ezold was recognized as having the potential of being a seminal case in the area of sex discrimination in employment. The Appellate Court recognized the important legal impacts deriving from this case and accordingly took great care in its deliberations. The court stated:

"This case raises important issues that cut across the spectrum of discrimination laws. It is also the first in which allegations of discrimination arising from a law firm partnership admission after trial. Accordingly, we have given it our closest attention and after an exhaustive analysis of the applicable law have concluded that the District Court made two related errors whose combined effects require us to reverse the judgment in favor of Ezold."

In a sex discrimination case brought under Title VII against a law firm, the plaintiff is required to first present by a preponderance of the evidence a prima facie case of discrimination by showing that the attorney was qualified for and rejected for the position, and that members of the other sex were treated more favorably. Once that is done, the burden then shifts to the law firm, defendant, to produce evidence of a legitimate, nondiscriminatory reason for the attorney's rejection. If the law

firm's evidence creates a genuine issue of material fact, then the presumption of discrimination drops from the case and then the plaintiff must then prove, by the preponderance of the evidence, that the defendant's proffered reasons were merely a pretext for discrimination.

In **Ezold**, the law firm had claimed that the plaintiff was denied partnership because she lacked the caliber of legal analyzing ability that the firm demands for its associates. The plaintiff therefore had the burden to prove that such a reason was pretextual to cover the law firm's sex discrimination.

The basic facts of **Ezold** were that the plaintiff was hired in 1983, prior to **Hishon**, and told at that time that:

"It would not be easy for her at Wolf because, 'she was a woman, had not attended an Ivy League school and had not been on law review."

At the time, the plaintiff was hired, sex discrimination in making a partnership offer was permitted. The law changed the following year. In any event, the plaintiff had been informed that it would be difficult to become a partner due to her school and lack of law review.

The law firm has a policy of evaluating senior associates within two years of partnership consideration each year and non-senior associates, semiannually. The law firm has its partners submit written evaluations on the associates. The law firm placed an extreme amount of importance on the legal analytic ability of

its partners. The court noted that:

"The record does not show that anyone was taken into the partnership without serious consideration of their strength in the category of legal analytic ability."

The plaintiff herself admitted at trial that because of the nature of the law firm's litigation practice, that the litigators devote much more time to legal analysis than to court work. One of the partners who supported to plaintiff for partnership testified that he recognized the shortcomings of the plaintiff's legal analytic ability but advocated a relaxation of the standard for her because he believed that her other abilities "outweighed whatever deficiencies she had in the legal analytic area."

The District Court did not limit its decision to a finding of whether the legal analytic ability of the plaintiff was the pretextual. Instead the District Court substituted itself for the defendant and made its own decision as to whether the plaintiff should be a partner. This was found to be improper by the Circuit.

"We have cautioned courts on several occasions to avoid unnecessary intrusion into subjective promotion decisions in the analogous context of academic tenure. While such decisions are not insulated from judicial review for unlawful discrimination,

'it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature

are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals.'

The Circuit court found that the District Court had gone beyond merely analyzing the law firm's criteria but actually created its own evaluation process. The Circuit Court found that the District Court had

"disagreed not only with Wolf's standards, but also with Wolf's partnership standards themselves. For example, it found

'In the magnitude of its complexity, a case may have a senior partner, a younger partner, and an associate(s) assigned to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.'

The District Court disagreed with Wolf's decision not to overlook Ezold's deficiency in legal analysis because of her other skills and attributes but the court is not a member of Wolf's Associates Committee or Executive Committee. Its belief that Wolf's high standard of analytical ability was unwise in light of the staffing of senior partners on complex cases does not make Wolf's standard a pretext of discrimination."

Rather than focus of the qualifications which the law firm claimed the plaintiff did not adequately possess, the District Court concentrated on skills and attributes other than legal analysis ability, which the law firm never denied that the plaintiff adequately possessed. The Circuit Court found that this was also an error by the District Court,

"Where an employer produces evidence that the plaintiff was

not promoted because of a view that the plaintiff lacked a particular qualification the employer deemed essential to the position sought, a district court should focus on the qualification the employer found lacking in determining whether nonmembers of the protected class were treated more favorably. Without such a limitation, district courts would be routinely called upon to act as members of an employer's promotion board or committee. It would subjectively consider and weigh all the factors the employer uses in reaching a decision on promotion and then make its own decision without the intimate knowledge of the history of the employer and its standards that the firm's decision makers use in judging the degree to which a candidate exhibits a particular qualification that the employer has decided is of significance or primary importance in its promotion process.

The Circuit made clear that it is not the function of the District Court to rule on whether the employer made the correct decision in not offering a promotion but only whether there had been any illegal discrimination practiced in arriving at that decision. The Court stated:

"The firm may have been wrong in its perception of Ezold's legal analytic ability and, if so, its decision to pass over Ezold would be unfair, but that is not for us to judge. Absent a showing that Wolf's articulated reason of lack of ability in legal analysis was used as a tool to discriminate on the basis of sex, Ezold cannot prevail.

The Appellate Court always bore in mind that the issue before it was whether Ezold was denied a promotion because she was a woman. That was the ultimate issue to be decided by the court. All of the evidence produced before the Court was intended to either prove or

disprove whether Ezold's promotion was denied because she was a woman. The Court concluded its opinion by finding that there was no discrimination by the law firm.

"We have reviewed the evidence carefully and hold that it is insufficient to show pretext. Despite Ezold's disagreement with the firm's evaluations of her abilities, and her perception that she was treated unfairly, there is no evidence of sex discrimination here. The district court's finding that Wolf's legitimate no discriminatory reason was incredible because Ezold was evaluated more severely than male associates because of her gender, as well as its finding that Wolf's requirement that she possess analytical skills sufficient to handle complex litigation was a pretext for discriminations are clearly erroneous and find no support in the evidence."

B. HOPKINS

In addition to the ***Ezold*** decision, no discussion regarding sex discrimination in a partnership evaluation will be complete without an analysis of the ***Hopkins*** decision. Together, the two cases form the basis for determining whether sex discrimination occurred in the evaluation process of associates of a partnership.

Hopkins addressed the issue of whether a qualified female accountant who was qualified for promotion because of her work could be denied partnership because of her interpersonal skills. Price Waterhouse categorized the plaintiff as having deficiencies in dealing with staff members, being overly aggressive, unduly harsh, difficult to work with and impatient with staff along with being insensitive with others.

The plaintiff claimed that a double standard was being applied to her. The Plaintiff claimed that she was not being evaluated as a manager, "but a woman manager, based on a sexual stereotype that prompts males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate 'feminine' behavior.

The court considered the plaintiff's arguments and found them valid. The court stated:

"Comments influenced by sex stereotypes made by partners, the firm's evaluation process gave substantial weight to these comments; and the partnership failed to address the conspicuous problem of stereotyping in partnership evaluation."

The Court, in essence, found the comments sufficient for the plaintiff to win. Once the Court was convinced that comments played a part in the decision process, the Court found for the plaintiff. The court found that the comments so tainted the selection process that there was no other result than to rule for the plaintiff. There was opportunity for a new reevaluation to determine if in the sex blind reconsideration the result would be the same. The court found:

"That the [partnership's] Policy Board decision not to admit the plaintiff to partnership was tainted by discriminatory evaluations that were the direct result of its failure to address the evident problem of sexual stereotyping in particular evaluations."

The history of the case is interesting in that it established

the law as to the remedy which could be fashioned for sex discrimination. Initially, the Plaintiff's remedy was limited because she voluntarily left the firm after being denied partnership participation. As such, the District Court found that she had not been constructively discharged. This finding was confirmed by the Circuit Court of the District of Columbia but reversed by the United States Supreme Court. The Supreme Court held that even if a Title VII violation is proven based upon sex, the employer may still not be liable if the same decision would have been made without the sexual influence. This is what is known as a mixed motive case, a decision that has both legal and illegal support for it. The Supreme Court's holding was subsequently nullified by the Civil Rights Act of 1991 which provides that in a mixed motive case, even if the other factors would have justified the employer's decision, the employer is still liable.

As a result of the Civil Rights Act of 1991, the decision of the District Court is now the law of the land rather than the Supreme Court's reversal. Therefore, it is the opinion of the District which should be analyzed for the issues for which the case address.

The major question raised by in **Hopkins** is the scope of the remedy that the court can fashion once a Title VII violation is found. The Plaintiff wanted to be made partner and the Price Waterhouse wanted only to pay damages. The issue of whether the Court could order reinstatement was of a prime concern to the

parties and the status of the law in general. The Court ruled:

"In light of the [Supreme] Court's holding in **Hishon**, the answer to the question whether Title VII will afford a complete remedy once it is found that admission to partnership has been denied due to prohibited discrimination seems self-evident. In fact, it would be impossible to reconcile a denial of this remedial authority with the Court's resounding affirmation in **Hishon** that Title VII promises employees nondiscriminatory consideration for partnership where consideration is held out as a privilege of employment. The mere fact that elevation to partnership may place the beneficiary beyond Title VII's protective reach in no way proves that Title VII is powerless to elevate a victim of discrimination to that position in the first place."

In making its determination regarding the scope of the remedy that can be fashioned, the Court considered the opinion taken by the EEOC and adopted it as their own. The court stated:

"It is also noteworthy that the EEOC, the agency to which we owe deference in construing Title VII, see **EEOC v Commercial Office Pools** 486 U.S. 107, 115 (1988) agrees with our construction of the remedial reach of Title VII.... The EEOC has applied its expertise to the question before us and has concluded that Title VII authorizes court-ordered elevation to partnership as a remedy for the discriminatory denial of partnership.

After making its determining that the Court had the power to order Price-Waterhouse to elevate the plaintiff to partner as a remedy for a Title VII violation, the court then went on to swiftly discount Price-Waterhouse's defense of freedom of association.

The significance of **Hopkins** lay in large part in the fact that

even if there is a legitimate reason not to promote a person to partner, if in the considerations, illegal sex discrimination is also present, then the whole process may be so tainted that the person will be elevated irrespective of the legitimate reason not to elevate. For this reason, the evaluation process must be sex blind or else the partnership is giving to the associate grounds for obtaining an automatic elevation.

C. OPERATING A LAW PRACTICE FREE OF GENDER BIAS

INTRODUCTION

From the moment, attorneys get together to form a law firm, their lives will never be the same. The social engineers have succeeded in passing employment laws that impose onerous and often ridiculous hiring restrictions. The result is that today, law firms can find themselves totally at the mercy of unscrupulous employees or prospective job applicants who file frivolous employment complaints. In addition, the regulatory agencies often side with the employees or prospective employees regarding such complaints. Unwarranted complaints against law firms harms the other employees often as much as it does the owners. Money spent in fighting a frivolous or manufacture complaint along with the loss of business caused through the bad publicity of time taken away from the law firm's work, reduces its profitability. This means that there is less money available for raises and benefits to reward the work of the good employees.

The media accurately reflects the degree in which employment law has shifted in recent years. For example, a national television news show devoted an entire program to an example of this plight during the 1992 Presidential campaign. A small employer in Illinois with about 50 employees was charged by the federal Equal Employment Opportunity Commission with discrimination against a black woman because she had not been hired. The employer's business was located in a primarily Hispanic part of town. All of the employees were minorities. The only Caucasian was the boss. The number of employees had varied in the past. Many employees would come and go. The employer had other black employees. The Equal Employment Opportunity Commission concluded that, given the demographics of the area, the employer should have had more black employees and ordered him to pay a fine of nearly \$100,000. There was no proof of discrimination: only the imposition of the demographic study which the agency adamantly claimed was not a quota requirement. The show interviewed former black employees who all stated that they had never in any way felt discriminated against or felt that they had been treated unfairly. The employer offered the woman a job, but she refused, choosing instead to receive the agency's award of lost pay for not being hired. This highlights the concern that an employer should have when hiring employees, that is the possibility of being charged with racial or sexual basis simply because of the makeup of the office.

In our society, a terminated employee or an unsuccessful job

applicant often has nothing to lose by filing a false complaint alleging discrimination. Most complaints are not required to be verified. Outlandish claims can be made. In fact, there are some people who deliberately apply for a job with the hope of being rejected so they can file a discrimination suit. After the suit is filed, the person offers to settle for an amount considerably less than the employer would have to spend defending himself against the worthless complaint.

Employment law is not and has never been settled. Each state and the federal government has its own laws regulating employment relations. A corporation operating plants in several states will have unique problems. Such corporations must be careful to obey all state laws. They must be careful not to give unequal treatment to their employees in the different states because of differing state laws. An example of this is that in 1997, American Airlines challenged in Federal Court a City of San Francisco law that required employers doing business with the City give all the rights to the partners of gay employees that it gives to spouses of married employees. American Airlines objected because it would have to give those rights to gay partners outside of San Francisco as well or be in violation of the Federal law of equal pay for equal work.

The penalties for violating labor laws can be astounding. In a case involving sex discrimination, an insurance carrier recently paid more than \$250,000,000 in settlements. Given the fact that

courts can go back years and make awards for hundreds of people regarding past conduct, it becomes absolutely imperative that an employer know, understand and follow the law. Ignorance and good faith mistakes are just not sufficient defenses to violations of employment laws.

This chapter is designed to help instruct a law firm in how best to hire competent, professional and decent associates without violating state or federal law. It is also designed to inform attorney applicants of their rights under the law so that they can protect themselves from gender based discrimination. It also points out to associates their rights under the law so that they are able to protect their interest in the event of illegal sex discrimination in employment. This chapter touches upon the major considerations of employment law as relating to gender bias. Every attorney and law firm should have a working knowledge of them.

I. NON-BASED QUESTIONS QUESTIONS THAT A LAW FIRM MAY ASK AN ASSOCIATE

A law office has the right to establish job-related requirements and to seek the most qualified person for a job. The employer is permitted to ask questions and obtain certain personal information to be used in making the employment selection and the job assignment decisions. The tests for the appropriateness of a certain question are whether they will result in the disproportionate elimination of members of a protected group, or are they a valid predictor of successful job performance and are

not gender based.

Despite the above, a law firm is prohibited from making any non-job related inquiry which may directly or indirectly limit a person's employment opportunities because of race, color, religion, national ancestry, physical handicap, marital status, sex or (for adults) age.

A law firm is not permitted to ask a female attorney applying for an associate position, her maiden name. Such information is considered irrelevant to job performance and an unnecessary intrusion into her privacy. Asking such questions may tend to stigmatize an unmarried woman or perpetuate stereotypes that a single woman may get married and quit while a married woman is a more stable employee. Appropriate questions that can be asked instead are, "Have you ever used another name?" or "Is any additional information relative to a change of name, use of an assumed name, or nickname necessary to enable a check on your work or educational record? If so, please explain."

A law firm is permitted to ask a female attorney applicant for her place of residence. Such information is necessary for the ordinary operation of the business. The law office has a legitimate reason for wanting that information so he can contact the individual when necessary. The law firm also needs this information to maintain required tax and governmental records.

The law office has no valid business reason for asking whether an attorney applicant owns or rents a home. Such a question may

have the effect of discriminating against a job applicant who is a renter because the law office may feel that a person owning a home would be stable. It may also lead to impermissible questions regarding the marital status of the applicant which is not job-related and therefore may be the basis of a gender bias complaint.

It is illegal in California for a law firm to ask an attorney applicant to list all organizations, clubs, societies and lodges to which he belongs. The reason for this is that the questions are so general as to elicit and obtain irrelevant information. Moreover, the answers could disclose information that might cause discrimination based on age, religion, sexual or national origins. The theory is that if the law office does not know of the information, the law office cannot use it to discriminate. An law office may ask an attorney applicant the following question, "Please list job-related organizations, clubs, professional societies, or other associations to which you belong. You may omit those that indicate your race, religious creed, color, national origin, ancestry, sex, or age."

An law office must be careful when speaking with a person offered as a reference by an applicant. In questioning the reference, the law office may ask only those questions that could be asked of the applicant. The law office may not ask an applicant's references questions whose answers would elicit prohibited information regarding the applicant's race, color, national origin, ancestry, physical handicap, medical condition,

marital condition, age or sex. An employment discrimination complaint can be filed by a job applicant against any law office who asks such improper questions.

The law office is permitted to ask an applicant the name of the person who referred the applicant for the position. The law office may also request the names of persons willing to provide professional or character references on the applicant. An law office may ask an applicant to furnish the name and address of a person to be notified in the case of an accident or emergency. Such information serves a legitimate business purpose. The law office is not permitted in California to ask the name, address and relationship of a relative to be notified in case of an accident or emergency. From this information may be inferred other information of marital status or national origin that is otherwise improper and irrelevant for job performance. For example, if a parent is listed as the relative to be contacted, the applicant's ethnic background might be determined from that parent's name.

II. AGE DISCRIMINATION IN A LAW OFFICE

Age discrimination and gender bias often arise in the same fact pattern. Many gender bias complaints also have an age discrimination component as well. As such, law firms should be aware of potential claims of age discrimination as well as gender bias in making their employment decisions.

Age discrimination is the firing or hiring of employees based

solely upon age. In 1967 Congress passed the **American Discrimination in Employment Act** (ADEA) to fight age discrimination. Under this Act an law office cannot discriminate in the hiring, firing or promotion of employees between 40 and 65 years of age. In 1978 ADEA was extended to most employees up to 70 years of age with the following exceptions:

1. Executive or high-policy making employees.
2. College or university employees.
3. Bona fide occupational qualifications, such as airline pilots retiring at 60 years of age.

There have been significant and well publicized cases in the last few years whereby employees who were discharged because of their age have recovered huge awards in court.

Age discrimination is against both state and federal law. Yet some jobs may legally have age limitations. Examples: Airline pilots who must retire at age 60 or a bartender in a state where the legal age to drink is 21. Age questions that are illegal or dubious and should be avoided are as follows:

1. What is your age?
2. What is your birthdate?
3. What are the dates of attendance or completion of elementary or high school?
4. General questions that are designed or tend to identify applicants as being over 40 years of age.

Questions that have been held not to promote age discrimination by an employer are:

1. If hired can you show proof of age?

2. Are you over eighteen years of age?
3. If under eighteen, can you, after employment, submit a work permit?

A law office may make a statement that employment is subject to verification that applicant meets legal age requirement. Age discrimination for a job is permitted when the type of job requires exceptionally good health. Where the risk to the public increases as the employee ages, the validity for an age limit for employment or for mandatory retirement also increases. Federal courts have upheld the mandatory retirement of airline pilots at 60 years of age by recognizing that pilots of that age have more strokes and heart attacks than younger pilots. A pilot having a heart attack may result in a plane crash. Such a job related standard for attorneys, however, can not be justified in the legal profession and therefore could not be the legitimate basis for discrimination.

III. EQUAL PAY FOR EQUAL WORK

The Federal Equal Pay Act (FEPA) applies to nearly all employers in the United States (Congress exempted itself). Under this act, law offices must pay the same amount to men and women working under similar conditions doing jobs that require similar skill, effort and responsibility. Under FEPA salary differentials based upon non-sex reasons such as seniority or work performance are still permissible. Job titles are not dispositive in determining if the work done by men and women are similar. The actual duties need not be identical but they must be substantially equal in order for FEPA to apply.

FEPA is administered by the Equal Employment Opportunity Commission (EEOC) at 2401 E. Street, N.W., Washington, D.C. 20506. If the EEOC decides not to act upon a complaint filed against an law office, the employee will have two years to file a lawsuit for the equal-pay violation. He has three years to file for intentional discrimination. The court can award back pay, court costs and attorney fees.

IV. AT-WILL EMPLOYMENT

Most employment in the United States is done without executing a written contract. Termination of such employment is therefore "at the will" of the law office. Unless state law requires grounds for discharge of an employee, an law office may fire an employee who does not have an employment contract. The law office may fire him at any time and without reason. Exception: illegal discrimination, such as through gender bias.

The only limitation on an at-will law office is that the law office may not fire an "at will" employee for an illegal discriminatory reason such as age, sex, religion or natural origin.

California is one of a minority of states that will find an implied contract that prohibits firing an employee without just cause. The implied contract theory used in California is not followed in most states. The implied contract is found to exist if the company acts in such a way as to create the belief among employees that they will only be fired for good cause.

CHAPTER TWO

GENDER BIAS AND DISCRIMINATION IN PARTNERSHIP PARTICIPATION OFFERS TO ASSOCIATES BY LAW FIRMS. ANALYSIS OF THE SUPREME COURT'S HISHON DECISION AND OTHER CONTROLLING CASE LAW.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits any discrimination in employment which is based upon race, color, natural origin, sex or religion. This course deals only with Title VII's application to sexual discrimination against attorneys employed by law firms. This chapter is intended to educate both law firms and attorneys as to the applicability of Title VII to the partnership making decision process.

By their very nature, partnerships are usually considered exempt from Title VII's regulation because the partners are, in essence, co-owners of the partnership and therefore are not, by definition, its employees. By its most common definition, a partnership is two or more individuals joining together to conduct a business. The partners are the owners of the partnership and are personally responsible for the debts and obligations of the partnership. As such, it was a long held belief that partners should have sole and absolute discretion to decide among themselves with whom they wished to go into business especially since they

would be personally liable for the conduct and errors that the other partners made. For this reason, even though Title VII was enacted in 1964, it had never applied to a law firm partnership decision making process prior to 1984 when the United States Supreme Court issued its decision in *Hishon vs. King & Spaulding*, 467 US 69. Prior to this case, the determination of whether a law firm could or would make a partnership offer to an associate was totally within the law firm's purview and was not susceptible to a claim of gender bias. *Hishon* changed that belief but it was because that belief was so deeply ingrained that it took nearly twenty years for the Supreme Court to do so.

The main question that was placed before the Supreme Court was whether a law firm, which was a partnership of attorneys, could legally decide not to offer a woman associate partnership participation simply because she was a woman. The decision to challenge the law firm's refusal to offer a partnership to the woman attorney was based upon the applicability of Title VII, an issue of first impression to the Court.

When an employer-employee relationship exists, under Title VII, 42 U.S.C. sec. 2000e-2(a)(1) an employer is liable any acts of sexual discrimination that relate to the employee's "compensation, terms, conditions or privileges of employment." It was this language which had long been confusing to the courts when applied to a partnership setting. The argument had been successfully

advanced that the decision to make a partnership offer or not had no relation to an associate's employment. If the offer was not made, the associate remained in the same position. Conversely, if the offer was made and accepted, the associate no longer was an employee but became a partner, which is analogous in Title VII to the employer. In short, partnerships argued that a partnership offer was, in reality, an offer to change the employee's status into a status unregulated by Title VII. As such, it was argued, the offer should be as unregulated as the partner status in which the employee would be changed.

In *Hishon*, a female associate was denied partnership after working for the firm for six years. Upon denying the associate an offer of partnership, it was expected that she would leave the firm. Instead, the associate filed a suit claiming Title VII sex discrimination in refusing to make the partnership offer. The law firm made a motion to dismiss claiming that Title VII did not apply to law firms as it would be infringing on the individual partners' right of association. Both the District Court and the Eleventh Circuit agreed with the law firm and an appeal was made to the Supreme Court.

THE SUPREME COURT'S HISHON DECISION

In undertaking its analysis, the Supreme Court first made note of the basic facts. The Plaintiff was hired by the defendant law firm in 1972. In 1980, when the suit was filed, the defendant,

which was a general partnership, had 50 partners and 50 associates. None of the partners were women. The Plaintiff claimed that the possibility of her being made a partner had been held out to her as an inducement to join the defendant. The plaintiff alleged that she had been assured that it was the policy of the defendant to keep associates on for five to six years and if they received satisfactory evaluations they were to be promoted "on a fair and equal basis". The plaintiff has been passed over for partnership twice and then notified that her employment was to be terminated.

Following her termination by the defendant, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission claiming that her employment rights had been violated under Title VII of the Civil Rights Act of 1964, 78 Stat.241, 42 U.S.C. Sec 2000e et seq. Ten days later the EEOC issued a notice of right to sue and the Plaintiff her action in District Court. The plaintiff sought compensatory damages in lieu of being made a partner rather than reinstatement which was a waiver of any claim for specific performance on the claim of entitlement for partnership.

The first decision that the Supreme Court had to make in deciding the case was the standard of review to be used. This was a procedural step but it had an important impact on the outcome of the case. The Plaintiff's case had been dismissed because of a finding by both the District Court and Eleventh Circuit that Title VII was inapplicable to the selection of partners by a partnership.

The Supreme Court viewed the dismissal as being on the ground that the complaint failed to state a claim for which relief could be granted under Title VII. As such, the standard of review when a case is dismissed is that the facts must be viewed as consistently as possible with the allegations contained in the complaint, **Conley vs. Gibson**, 355 US 41 (1957). The issue then became before the court was whether the complaint stated a cause of action under Title VII, particularly the portion that read:

(A) **IT SHALL BE AN UNLAWFUL EMPLOYMENT PRACTICE FOR AN EMPLOYER:**

(1) to fail or refuse to hire or to discharge any individual, or otherwise **to discriminate against any individual with respect to his** compensation, **terms, conditions, or privileges of employment, because of such individual's** race, color, religion, **sex**, or national origin."

The Supreme Court considered the plaintiff's claim that the promise to consider her was a "term and condition or privilege of employment" which brought the complaint under Title VII. The Supreme agreed with the Plaintiff stating:

"Because the underlying employment relationship is contractual, it follows that the "terms, conditions or privileges of employment" clearly include benefits that are part of an employment contract." Here petitioner in essence alleges that respondent made a contract to consider her for partnership. Indeed, this promise was allegedly a key contractual provision which induced her to accept employment. If the evidence at trial established that the parties contracted to have petitioner considered for partnership, that

promise was clearly a term, condition or privilege of her employment. Title VII would then bind respondent to consider petitioner for partnership as the statutes provides, i.e. without regard to petitioner's sex."

The Supreme Court found that Title VII would apply in a partnership setting to assure a fair and sex blind determination when the contract expressly called for a partnership evaluation.

Probably the most interesting aspect of the Supreme Court's decision in **Hishon** is its scope. The Court could have held that the Petitioner had an express right under her contract to be evaluated for a partnership and therefore under Title VII that evaluation should have been made without regard to her sex. Without going any further, the petitioner would have won. Instead of stopping with a finding that Title VII applies to partnerships where promises of partnership evaluations were expressly made, the Supreme Court went further to extend Title VII coverage to instances where no express promises were made when necessary to assure equal treatment. The Court held:

"Petitioner's claim that a contract was made, however, is not the only allegation that would qualify respondent's consideration of petitioner for partnership as a term condition, or privilege of employment. An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual **right** of employment, may qualify as a "privilege" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the

employer would be free under the employment contract simply not to provide the benefit at all. These benefits that comprise "the incident of employment" or that form "an aspect of the relationship between the employer and employees" ***Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*** 404 U.S. 157, 178 (1971) may not be afforded in a manner contrary to Title VII.

The Supreme Court found several allegations in the Complaint that when read in the light most favorable to the Plaintiff would support the conclusion that the opportunity to become a partner was "part and parcel of an associate's status with the respondent firm". The Supreme Court held that if those allegations were found to be true at trial that partnership consideration was then a term, condition or privilege of employment. As such, the law firm would have had to consider the plaintiff for partnership without regard to sex.

The law firm did not agree with the plaintiff's position that partnership consideration was a term, condition or privilege of employment. The law firm stressed basic partnership law and the fact that Title VII does not cover employers. The law firm argued that changing the plaintiff's status from associate to partner was equivalent from changing her position from employee to employer. Since employers are not covered by Title VII, the law firm argued that the decision to move or not move an employee to into an area unregulated under Title VII and therefore could not be a violation of Title VII. The law firm contended that the offer of partnership

was not an offer of employment and therefore was not and could not be regulated under Title VII.

The Supreme Court rejected the argument that a partnership's refusal to consider an associate for partnership could not be regulated under Title VII. The Supreme Court held:

"Even if respondent is correct that a partnership invitation is not itself an offer of employment, Title VII would nonetheless apply and preclude discrimination on the basis of sex. The benefit a plaintiff is denied need not be employment to fall within Title VII's protection, it need only be a term, condition or privilege of employment." It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates. ***Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*** 463 U.S. 1073, 1079 (1983). Accordingly, nothing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of the statute. See ***Lucido v Cravath, Swaine & Moore***, 425 F. Supp. 123, 128, 129 (SDNY 1977).

The Supreme Court rejected in total the argument of the law firm that partnership offers were exempt under Title VII because they related to a potential change of the associate's status into an area unregulated by Title VII. The Supreme Court held that since partnership offers relate to "a term, condition or privilege of

employment" they were covered by Title VII even though the actual relationship between the partners themselves might be outside the scope of Title VII regulation.

The law firm also raised two other defenses to Title VII applicability which the Court quickly discounted. The law firm had asserted that Title VII was specifically exempted from regulating partnerships. However, the law firm was unable to point to anything in either the statute or legislative history which supported this contention. There had been during the debate of Title VII an attempt to limit Title VII to company's with over 100 employees. This had not been done and the Supreme Court stated that had Congress wished to limit Title VII applicability from partnerships it could have easily done so. The last defense of the law firm was Constitutionally based. The law firm argued that Title VII applicability would infringe upon the association rights of the partners. The law firm argued that forcing a partnership to accept a person as a partner whom the other partners did not want was tantamount to infringing on their rights of association. The Court rejected this argument in total holding that while private discrimination may be a form of freedom of association it has never been accorded affirmative constitutional protections.

Following its analysis, the Supreme Court remanded the case back for trial on its merits.

POST HISHON CASE LAW

Following the **Hishon** decision, the federal courts wasted little time in expanding Title VII coverage to any virtually every type of employment. These cases are significant in that they demonstrate how similar issues will be handled if they arise in a law firm setting.

One of the first post **Hishon** cases was **Mozee v. Jeffboat, Inc.** 746 F.2d (1984). This case dealt with the effect of a collective bargaining agreement on the alleged discrimination of the employer. In this case, there was a collective bargaining agreement in which it was understood that the supervisory positions were not covered by the collective bargaining agreement. The plaintiff was denied a promotion to foreman and sued under Title VII. The company claimed that the terms of bargaining agreement made Title VII inapplicable. As such, the company argued that the employee could not sue under Title VII to be promoted to a position not covered by Title VII. The District Court agreed with the company holding:

"The positions of foreman, general foreman, superintendent and all other salaried promotions are outside the terms of the collective bargaining agreements and Local Union No. 89. The class, being limited to hourly employees within the bargaining unit of Local Union No. 89, does not include the positions of foreman, general foreman and superintendent. Thus limited, the plaintiffs' claims that defendant used subjective criteria for the selection of these salaried positions is not a proper class action."

The Appellate Court reversed the District Court's decision finding that Title VII applied irrespective of the collective bargaining

agreement and the employer was bound by it. The Court held:"

"We do not think that the fact that the promotion would place the complainant outside of the plaintiff class can minimize the promotion from Title VII scrutiny. The Supreme Court's recent decision in **Hishon vs. King & Spalding**, 467 U.S. 69 (1984) illustrates the error of the District Court's reasoning. In **Hishon**, the Supreme Court decided that although the status of the partner falls outside the domain of Title VII, advancement to partnership in a law firm was a "term, condition or privilege of employment for the purposes of Title VII. Likewise, in this case, consideration for promotion to supervisory positions appears to be a privilege of employment and, as such, promotion decisions may not be made in a discriminatory manner."

This case reinforces the steadily growing amount of case law for the premise that no employer, including a law firm, can ever base promotion decisions upon discriminatory practices. Even if the job being promoted to would not be covered by Title VII, the considerations undertaken for making the decision are governed by Title VII and liability will be imposed if the decision is made based upon illegal discrimination.

In **Martinez v. Oakland Scavenger Co.** 680 F.Supp. 1381, 1388, the black and Spanish surnamed employees of a garbage collection company sued because they were not offered stock purchase rights and special benefits went to employees with stock ownership. The stock was sold by the company usually to family members of the current shareholders who were white. Not all white employees were offered stock rights. The black and Hispanic employees were not

offered the opportunity to purchase the shares and thereby were prevented from sharing in the higher benefits. A suit was brought under Title VII alleging discrimination by the owners in not offering the stock sales to the black and Hispanic employees as well as the white ones.

There had never been a case before under Title VII which dealt with stock sales of the employer and whether that constituted a Title VII violation. The court held:

"Neither the language of the statute nor its legislative history resolves this issue. The Court's only guidance is the U.S. Supreme Court's decision in **Hishon v. King & Spalding** 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59(1984). In **Hishon**, a female attorney in a law office sued under Title VII after she was denied admission to partnership..."

While **Hishon** provides guidance, it does not resolve the issue before this court. First **Hishon** merely held that plaintiff could allege a cause of action under Title VII. Hishon was still required to prove that advancement to partnership was in fact a condition of her employment. Second, the **Hishon** court did not directly discuss whether Title VII extended to the right to **own** a portion of the employer's business in a corporate setting. Third the opportunity for partnership was allegedly an expressed inducement for Hishon in deciding to work for the firm.

The question facing the Court was whether this was a Title VII violation. It was true that black and Spanish surnamed employees were not offered stock rights but not all white employees were offered stock rights either. Usually the stock rights were offered

only to family members of the stockholders. The Court had to decide if the decision not to give black and Hispanic employees stock rights was discrimination or nepotism. The court held:

"This court does not believe that the principles of *Hishon* or Title VII should be applied here. In a law firm, the right to be considered for partnership can historically be deemed a part of an attorney-employee's expectations in employment. But that can not be true in this company. As in most commercial enterprises, an employee's hiring or status does not include the right to become an owner of that enterprise. Here the company made no express or implied promises to its employees that they would all become owners. Nor did the company offer the opportunity of stock ownership as an inducement in the hiring of its employees. The company granted the right of ownership to some, primarily relatives, but not to others and not all whites were offered ownership. While a case could be hypothesized in which a company offers ownership to all white employees, but denies ownership to all minorities, which would then fall within the scope of Title VII, that is not the case here."

The Court held that since there was not a showing of discrimination in the stock sales based on racial lines and there was no express or implied agreement for the company to make the stock sales to minority employees, the company was not obligated to sell stock to the minority employees under Title VII.

Despite the fact that the company was not in violation of Title VII regarding the stock sales, the Court found it in violation for awarding employment benefits based upon stock ownership. The Court held:

"To the extent that the privilege of stock ownership then resulted in special employment benefits to whites over minorities, those benefits can and will be equalized under Title VII."

The significance of this case to a law firm is that wherein **Hishon** dealt with employment within a partnership, this case deals with it in a corporate setting. A law firm that attempts to use stock ownership as a means to freeze out minorities will be governed by Title VII as much as a partnership trying to freeze out minority associates. Selling stock to some associates but not others may not protect a corporate law firm from a Title VII complaint if the sales are made entirely to associates of one sex or with the intent to exclude associates of a particular race.

Up to this point, the discussion has been centered on refusals to make employees part owners of the employer either by making them partners or selling them stock if the employer is a corporation. Another question not settled by **Hishon** was when does a Civil Rights violation occur under 42 U.S.C. section 1981 in the situation where an employer discriminates in denying a promotion. That was the issue addressed in **Bennun v. Rutgers, The State University** 737 F.Supp. 1393 (1990). In this case, the plaintiff claimed that he was denied a promotion from associate professor to full professor based upon his race and filed a suit under the Federal Civil rights section law 42 U.S.C. section 1981 which gives everyone the same rights as white citizens. The Court held:

"In ***Patterson v Mclean Credit Union***, 491 U.S.-, 109 S.Ct. 2363 (1989), the supreme Court dramatically limited the scope of sec 1981 holding it inapplicable to a vast array of post contract discriminatory practices. Nevertheless, the Court left open the possibility that certain discriminatory promotion claims would still be actionable under section 1981. The Court wrote:

'The question whether a promotion claim is actionable under section 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under section 1981... Only where the promotion rises to the level of an opportunity for anew and distinct relation between the employee and the employer is such a claim actionable under section 1981 cf. ***Hishon vs. Spalding*** 467 U.S. 69, (1984) (refusal of law firm to accept associate into partnership).

The dispositive inquiry is, therefore, whether promotion from associate professor to full professor would have created a new and distinct contractual relationship between Bennun and Rutgers. The Court finds that it would have for a variety of reasons."

The similar issue arose in ***Malhotra vs. Cotter & Co.*** 885 F.2d 1307 (1989) the plaintiff who was a federal employee claimed that he was denied a promotion to finance manager because of his race. A complaint under Title VII was time barred but an action could be brought if he could show a violation of section 1981. The court held:

"Noting the statutory language "the same right [as white

people] ... to make ...contracts,' the Supreme Court held in **Patterson** that "The question whether a promotion claim is actionable under section 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer...Only where the promotion rises to the level of an opportunity for anew and distinct relation between the employee and the employer is such a claim actionable under section 1981 cf. **Hishon vs. Spalding** 467 U.S. 69, (1984) (refusal of law firm to accept associate into partnership)." The Court's reference to contract and its citation to **Hishon** suggest that in deciding whether a promotion would create, "anew and distinct relation between the employee and the employer," the focus of inquiry should be on whether the promotion would change the terms of the contractual relationship between the employee and the employer."

The point of law to remember regarding both the **Bennun** and **Malhotra** cases is that in addition to claims under Title VII for sex discrimination, a law firm can also find itself in trouble under section 1981 for racial and perhaps sex discrimination in its promotion practices and policies. The test under is whether the promotion in question would have changed the duties of the employee to the extent that is in essence a new job. The real significance between a discrimination claim under Title VII and section 1981 is the statute of limitations. Section 1981 claims have a five year statute of limitations which is far longer than Title VII claims.

The important point to be borne in mind is that until relatively recently, with the **Hishon**, law firms were virtually

unencumbered or restrained in their dealings with associates. Prior to Hishon, law firms were able to practice both sexual and racial discrimination with the selection of associates without fear of Title VII application. That state of affairs has changed but old attitudes may not have changed.

Law firms that do not realize that they must today abide by Title VII may find themselves facing discrimination lawsuits. Under today's employment laws, law firms must give all of their associates an equal and fair evaluation for partnership, if the potential for partnership was an inducement in hiring the associate or if other associates are made partners. The requirement for doing so arises either under an express or implied contract theory or under the anti-discriminatory employment laws which require an employer to treat all employees doing the same work equally.

CHAPTER THREE

SEXUAL HARASSMENT IN THE LAW OFFICE

INTRODUCTION

Sexual harassment can affect either men or women. In its simplest form, sexual harassment is discrimination or the creation of a hostile work environment directed against a person by virtue of that person's sex. The law pertaining to sexual harassment apply to every employer including law offices and the judiciary. Sexual harassment, as defined by the Equal Employment Opportunity Commission, 20 CFR, Sec. 1604.11 pertains to either physical or verbal conduct and exists when:

1. submission to the conduct is made either explicitly or implicitly a condition of employment'
2. submission to or rejection of such above condition is used as a basis for employment decisions affecting the individual, or
3. such conduct substantially interferes with an individual's work or creates an offensive work environment.

Once an law firm is informed of sexual harassment and does not take sufficient corrective action, then the law firm can be sued in federal court or have a complaint filed with the EEOC. The law firm is responsible, under both state and federal law, not to tolerate sexual harassment of its employees at work.

Sexual harassment does not require overt conduct by a man to a woman. There have been many lawsuits by which women have sued

other women for creating a hostile work environment. Such women have claimed that the other women have, by explicitly sexual or profane language, caused them severe emotional distress. It is now a settled point of law that a person may bring a sexual harassment case without having incurred any loss of benefits or economic damages as a result of the harassment. In ***Bundy vs. Jackson***, (1981) 641 F.2d 934, it was held that a sexual harassment action could be brought against an employer for maintaining a substantially hostile work environment even though no job benefits were lost. The United States Supreme Court in ***MERITOR SAVINGS BANK vs. VINSON*** (1986) 477 U.S. 557 held that an employer who creates or maintains a "hostile work environment" may be liable for sexual harassment even though there has been no economic effect suffered by the plaintiff. The Ninth Circuit Court of Appeals, which covers the West Coast, has held that the test to be used in determining whether any conduct is harassment is that of the "reasonable woman" standard. Therefore, if a reasonable woman would be offended by the conduct, the conduct would be found to be harassment regardless of whether the average reasonable man would not consider it harassment.

One of the most common sources of sexual harassment cases involves the alleged wrongful termination of an employee who does not have a written employment contract. Most employment in the United States is done without executing a written contract. Termination of such employment is therefore "AT THE WILL" of the

employer or law firm. Unless state law requires grounds for the discharge of an employee, an employer, which includes a law firm, may fire an employee who does not have an employment contract **at any time and for no reason at all provided the discharge is not for a discriminatory reason.** The only limitation on an "at-will" employment is that the employer, or law firm, may not fire an "at-will" employee, ie. associate, for an illegal discriminatory reason such as age, sex, religion or natural origin. California is in the minority of states which will find an implied contract not to fire an employee or associate without just cause if the employer or law firm had said or dis anything that created the reasonable belief that an employee or associate would be discharged only for cause. The implied contract theory used in California is not followed in most other states but would apply to law firms doing business in California..

The legal profession is not immune from sexual malpractice suits, as demonstrated by the **Hishon** and **Ezold** cases discussed in Chapters One and Two. As with any partnership, a legal partnership carries with it the liability by each partner for the debts and acts of the other partners. Under general partnership law, this means that each partner will be liable for any sexual harassment judgment obtained against the partnership. In short, the partners have agreed, by forming a partnership, to guaranty payment of any debts or judgments taken against the partnership. Partners are not

liable for the personal non-partnership related debts of the other partners. Under the Uniform Partnership Act, the partnership (and thus the partners) are liable for "any wrongful act or omission of any partner in the ordinary course of the business of the partnership." Where loss or injury is caused to any person by the partnership, the partners are individually liable for payment of the damages. In addition, the partners are liable for the monetary damages that arise from the actions of partnership employee or the partnership. The classic example of liability for a partner's action is the sexual harassment case, ***Rena Weeks vs. Baker & McKenzie and Greenstein***. In 1994, a jury, in San Francisco, awarded a legal secretary \$6.5 million, nearly of which, was punitive damages against **Baker & McKenzie**. The trial court later reduced the judgement against Baker & McKenzie to \$3.5 million. The judgment is under appeal. The plaintiff's attorneys also sought another \$3.3 million as attorney fees under the Fair Employment and Housing Act and private attorney general statutes. This case demonstrates that partners may be personally liable for the acts committed by their partners. When a firm's malpractice insurance policy does not cover intentional torts, such as sexual harassment, then the partnership must pay the judgment itself. If there is no insurance coverage, then the partners may have to take a reduced share of profits in order to pay the judgment.

SEXUAL HARASSMENT CLAIMS UNDER THE CIVIL RIGHTS ACT

Sexual harassment claims can also be pursued against a law firm under the Civil Rights Act of 1991 which also pertains to discrimination in employment. The key provisions of the Act pertain:

1. Compensatory and punitive damages against the employer for victims of intentional discrimination based on sex, religion, disability, race or natural origin. Damages are capped based on the size of the employer.
2. Jury trials in cases involving compensatory and punitive damages.
3. An easier burden of proof for the plaintiff.
4. An expansion of existing law to cover racial harassment and discharge on the job.

Under the Civil Rights Act of 1991, the Rehabilitation Act and the Americans with Disabilities Act were amended to permit victims of intentional discrimination on the basis of sex, disability or religion to sue for compensatory or punitive damages. Victims of racial discrimination were already permitted to sue for such damages under U.S.C. Section 1981. Recovery of the above damages are not permitted in cases on unintentional discrimination due to the impact of neutral employment practices.

Plaintiffs may recover both compensatory and punitive damages for violations of the Civil Rights Act of 1991. However, punitive damages are not recoverable from a government, government agency or political subdivision. In order to get punitive damages, it must be shown that the employer acted with malice or reckless disregard of the employee's civil rights. Recovery for both compensatory (future

pecuniary losses, pain and suffering, etc.) and punitive damages is limited by the size of the employer as follows:

MAXIMUM RECOVERY	NUMBER OF EMPLOYEES
\$50,000	15-100
\$100,000	101-200
\$200,000	201-500
\$300,000	501 OR MORE

There is no limit on compensatory damages for past pecuniary losses. Nor are damages suffered as a result of racial discrimination limited under Title 42 U.S.C. section 1981. As strange as it seems, prior to the Civil Rights Act of 1991, while it was unlawful to discriminate on the basis of race in hiring and promotions it was not unlawful to harass an employee based on race. The United States Supreme Court has held that previous civil rights laws did not protect workers from racial discrimination on the job.

The 1991 Civil Rights Act now permits claims for racial discrimination in the making performance reviews, modification and termination of employment contracts as well as the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. In other words, an employer is no longer permitted, under federal law, to harass employees because of their race.

The 1991 Civil Rights Act makes it easier for an employee to maintain a legal action for an alleged civil rights violation in employment against a law firm. Under the Act, once an employee or associate demonstrates that a particular practice of a law firm causes a disparate impact on minorities and women, then the burden of proof shifts to the law firm to show that the challenged

practice is job related for the position in question and consistent with business with business necessity. The employee may also prove unlawful disparate impact by showing that a less discriminatory alternative is available and the employer refuses to adopt it.

Prior to the 1991 Civil Rights Act, many employers, specifically governmental agencies, routinely adjusted upward the employment test scores for minorities and women. This procedure was called gender or race norming. Supposedly, these practices were intended to adjust for the fact that women and minorities were not exposed to the educational system to the extent of white males. Had they been, the theory went, then they would have actually achieved these higher scores. In December 1991, the federal government prohibited state employment agencies from increasing the scores of minority applicants on federally sanctioned aptitude tests.

Mixed motive discrimination exists when an employer acts, at least in part, for a discriminatory reason but proves that it would have reached the same decision based on nondiscriminatory reasons. As discussed in Chapter two, the Supreme Court upheld in *Hopkins'* supra, upheld an employer's refusal to offer a partnership participation to a woman employee because the decision could be supported by nondiscriminatory reasons. However, the 1991 Civil Rights Act reversed the Supreme Court's holding. Now, when an employer shows in mixed motive cases that the same result would have been taken for nondiscriminatory reasons, the court may prohibit the employer from considering the discriminatory motive in

the future, award declaratory relief, attorney fees and costs. In such cases, the employee or associate still may not recover damages, reinstatement or promotion if it can be proven to the Court that the same action would have been taken in the absence of the impermissible motivating factor.

Prior to the 1991 Civil Rights Act, plaintiffs alleging age discrimination, which is often asserted by women, had two years from the alleged discriminatory act or three years for willful discrimination to file a lawsuit. The time was tolled for up to a year if the EEOC attempted to get voluntary compliance. By comparison, persons claiming racial discrimination under the 1964 Civil Rights Act only had ninety (90) days to file a lawsuit after the EEOC gave the complainant a letter notifying the person of the "right to sue". The Act amends the Age Discrimination in Employment ACT (ADEA). The EEOC is now required to notify the complainant upon termination of the complaint proceedings. The complainant will then have only ninety days to file suit after receipt of the notice. Prior to the 1991 Civil Rights Act, plaintiffs could not recover the fees expended for expert witnesses more than \$40.00. This made getting a recovery in many cases worthless because it could be eaten up by expert witness fees. In the alternative, cases went to trial without experts because of the costs involved. The 1991 Civil Rights Act now awards the plaintiff expert witness fees if the plaintiff should prevail.

It is also against the law to discriminate against a pregnant

woman worker. Most states require an employer to provide unpaid leave for a pregnant woman for up to three months. The federal government requires that employers with more than 25 employees to offer parental leave for up to three months after a child is borne. It is also against the law for an employer to reduce or take away a woman's seniority while she is on pregnancy leave. Pregnancy is not a disability so the employer is not required to furnish any disability benefits. A pregnant woman is entitled to sick leave during the pregnancy.

The United States Supreme Court in *Intern'l Union, UAW vs. Johnson Controls* (1991) 499 U.S. 1196 held that employers cannot deny women the opportunity to work in an environment that might cause genetically deformed children. In that case, the employer, a battery manufacturer, excluded women from working in areas where they would be exposed to chemicals or materials known to cause birth defects. The employer was concerned with the possibility of having to pay higher insurance premiums to cover the anticipated medical treatment of children borne with defects as a result of their mother's exposure. The court found the argument irrelevant. Since the fathers were exposed to the same hazards, the mothers had the right to demand exposure if they wanted it. Regardless of personal feelings on the matter, the Supreme Court has ruled that the employer cannot discriminate even with the best of intentions and legitimate business motives.

Courts have been careful to limit sexual harassment claims to actions which create a hostile work environment rather than to situations of a man merely asking once for a date and being rebuffed. It is a recognized fact that many married persons met their spouses on the job. It would be both hypocritical and virtually useless for a company to attempt to bar company dating or romances. Employers do have a duty to ensue that when an employee rejects the initial advances of another on the job that no harassment or sanctions thereafter follow. This tightrope which employers must walk was highlighted in **Thomkins vs PSE & G Co.** (1976) 422 F. Supp. 553, which recognized the difficulty in deciding between sexual harassment and normal human interchange:

"If the plaintiff's view were to prevail, no supervisor could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit... And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit... If a promotion or raise is later denied to the subordinate, we would need 4,000 federal judges instead of 400."

The key for a plaintiff's success on a sexual harassment claim is whether the conduct created a hostile work environment. In **Henson vs, City of Dundee**, (1982) 682 F.2d 897, the court held that it was sexual harassment for a company to force a woman "to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." What constitutes a hostile work environment is determined on a case by case basis. There is a belief that an employer should not be liable for attentions paid

between individuals that have their basis in the natural behavior between men and women without knowledge that one person has crossed over the line into improper sexual harassment. **Barnes vs. Costle** (1977) 561 F.2d 983. In contrast, in **Bundy vs. Jackson** (1981) 641 F.2d 934, a hostile work environment was found to exist where a male supervisor repeatedly made sexual overtures to the plaintiff and described his sexual prowess with other women. The plaintiff was not fired but since the employer did not act on her complaints, it was liable for permitting the hostile environment to continue. In contrast not all conduct, even if of a sexual nature, may not rise to the level of a creating a hostile work environment. Likewise, in **EEOC vs. Sage Realty Co.** (1980) 507 F.Supp. 599 sexual harassment was found to have occurred where a woman was required to wear a sexually revealing uniform which caused her to receive insulting comments and sexual propositions. In **Rabidue vs. Osceola Refining Co** (1986) 805 F.2d 611 held that poster displays, that were not obscene, had only a minimal effect on the work environment and thus could not support a sexual harassment claim.

The move to abolish all sexual harassment can go too far and impinge and chill the free exercise of free speech. In 1994, Los Angeles sought to prohibit a Captain in the fire department from reading a Playboy magazine on his own time in his own quarters in the fire house as part of its policy to abolish sexual harassment. As additional facts to the case was that there were no women fire

fighters in the fire house. Despite this fact, women twenty miles away in the claimed that sexual harassment was occurring because this man was reading Playboy in private. The Captain, rather than be branded a sexual harasser, challenged the policy in Federal Court and won.

One of the most common forms of sexual harassment claims is that of constructive discharge. In this situation, the plaintiff is forced to leave the job as a result of the alleged sexual harassment. As stated above, loss of a job or economic benefits is no longer a requirement for maintaining a sexual harassment suit. Leaving the job, however, is indirect evidence of the severity of the harassment effects on the person. As with a harassment case, for the employer to be liable it must be shown that the employer either created or permitted the hostile work environment to go on with knowledge of its existence and effects on the plaintiff. ***Broomis vs. Regal Tube Co.*** (1987) 44 FEP U.S. 1119, ***Tomkins vs. Public Serv, Elec & Gas. Co.*** (1977) 568F.2d 1044, ***Muller vs. U.S. Steel Corp.*** (1975) 509 F.2d 923. Where the plaintiff is a minority, there is a possibility that the person was forced out of the job for both sexual and racial reasons. It is therefore possible to sue an employer for both racial and sexual discrimination and harassment. ***Miller vs. Bank of America*** (1979) 600 F.2d 211, ***Sexual Harassment and Race*** 8 Notre Dame J. of Legis 30. (1981).

In the situation of a discharge, once the complaint has set

forth a prima facie case for sexual harassment, the burden of proof shifts to the employer to show that the discharge was for a non-discriminatory reason. *Texas Dept. of Community Affairs vs. Burdine* (450 U.S. 248, *Miller vs. WFLI Radio, Inc.* (1982) 687 F.2d 136. An employer need only show to defeat a sexual harassment claim that the discharge was "for good reason, or no reason, absent discrimination," *Tims vs. Bd. of Ed.* (1971) 552 F.2d 551. The courts will determine, based upon the evidence, whether the discharge was the result of sexual harassment and if the discharge allegedly for cause was merely pretextual. In *Barnes vs. Callaghan* (1977) 559 F.2d 1102, a discharge was found not be pretextual because the employer documented repeated warnings for substandard work and gave the plaintiff a seven month trial period. Likewise, in *Lewis vs. G.M. Corp.* (1977) 557 F.2d 1255 no sexual harassment or discrimination was found to have occurred because the employer proved that discharge was justified with proof of eleven separate citations for substandard work.

In determining whether sexual harassment has occurred, it often becomes necessary to investigate the plaintiff's actions and private life. The United States Supreme Court in *Vinson*, supra held that evidence of the plaintiff's sexually provocative speech and dress at the job is not inadmissible because it relates to whether the sexual advances were unwelcome but, nonetheless, should be weighed against the "potential for unfair prejudice" against the

plaintiff's case. Likewise in *Henson vs. City of Dundee*, supra, the court permitted testimony regarding the plaintiff's affair with a co-worker as being relevant to whether the subsequent resignation was the result of a constructive discharge or other reasons. Some states, such as California, have enacted legislation which limit discovery in a sexual harassment case of a plaintiff's sexual history to only the alleged defendant.

Sexual harassment cases are among the most difficult to prove because it is often impossible to get the evidence to corroborate the plaintiff. Even so, this is no reason for courts to abandon the traditional concept of justice and award judgments without a preponderance of evidence on behalf of the plaintiff.

CHAPTER FOUR
GENDER-BASED DISCRIMINATION CONSIDERATIONS
IN THE LAW OFFICE FOR PREGNANCY

INTRODUCTION

It is against the law for any employer, including a law office, to discriminate against a pregnant worker including an associate. Most states require an employer to provide unpaid leave for a pregnant woman for a maximum of three months. The federal government requires that employers with more than 25 employees offer parental leave for a maximum of three months after the child is born. It is also against the law for an employer to reduce or remove a woman's seniority while she is on pregnancy leave. Pregnancy is not a disability: the employer is not required to furnish disability benefits. A pregnant woman is entitled to sick leave during the pregnancy.

The United States Supreme Court in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* 497 US 187 (1991) held that employers cannot deny women the opportunity to work in an environment that might cause genetically deformed children. The case: The employer was a battery manufacturer who excluded women from working in areas where they would be exposed to chemicals or materials known to

cause birth defects. The employer was concerned with the possibility of having to pay higher insurance premiums to cover the anticipated medical treatment of children born with defects as a result of their mothers' exposure. The court found the argument irrelevant. Since the fathers were exposed to the hazards, the mothers had a right to demand exposure if they wanted it. Regardless of personal feelings in the matter, the Supreme Court has ruled that the employer cannot discriminate even with the best of intentions and legitimate business motives.

PREGNANCY DISCRIMINATION ACT

Until 1978, discrimination based upon pregnancy issues was not an employer practice covered under Title VII of the Civil Rights Act. However that changed when Congress passed in 1978 the Pregnancy Discrimination Act which changed the definition of "sex" in Title VII to include the following:

"Because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not affected but similar in their ability or inability to work..."

(42 U.S.C. sec. 2000e(k))

The effect of this language was to create a standard of equality in which pregnant women workers are to be treated the same as any other temporarily disabled worker. This standard does not bestow any more benefits to the pregnant worker than that given to a

nonpregnant-disabled worker. The Pregnant Discrimination Act, in essence, simply requires equal treatment among all temporarily disabled employees and pregnant women. If a benefit is not provided to non-pregnant temporarily disabled workers, then the benefit need not be offered to pregnant women. This expanded view of Title VII was codified by the EEOC regulation 20 CFR Sec 1604.10(b) which states in pertinent part:

"Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions..."

The EEOC went on state in its regulations that since pregnancy was the same as any other disability, its treatment by the employer should be the same as well.

"Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities."

Several early cases set the standard for determining whether disparate treatment occurred when comparing pregnant workers against non-pregnant disabled workers. On **Newport News Shipbuilding & Dry Dock v. EEOC** 462 US 669, 77 LED 2d 89 (1983) the Supreme Court reviewed an employer's policy which treated the medical

benefits for spouses of employees differently. The husbands of female employees had complete medical coverage whereas the wives of male employees were only covered up to \$500 for childbirth hospitalization. The Supreme found such disparate division of medical benefits a violation of Title VII. The Court held that when an employer adopts a medical plan which covers the medical expenses of the spouses of employees, the employer may not exclude or limit medical conditions related to pregnancy. The Court ruled that allowing an employer to limit the pregnancy benefits to spouses of male employees would have the effect making the male benefit plan package less valuable and comprehensive as the package provided to the female employees. The result of which would be a violation of Title VII since the plans would not be equal based upon sex.

In *EEOC vs. Southwestern Elec. Power Co.* 591 F.Supp. 1288 (1984), the Western District Court of Arkansas applied *Newport News* in a question of equal treatment. The employer permitted any disabled employee a four-week leave. The plaintiff who had used up a four-week maternity leave requested an extension as a preference not as a necessity. The woman refused to return to work and was fired. She thereafter sued for discrimination. The District court ruled in favor of the employer. The Court found that the employer did not give extensions to any disabled persons so there was no discrimination in not giving an extension to the plaintiff.

The issue on leave under the Pregnancy Discrimination Act is

whether the employer treats the leaves given to non-pregnant disabled employees the same as pregnant workers or the pregnant spouses of workers. Unless such leaves are treated the same, the employer will be liable to discrimination under the Act. This can have serious ramifications for a law office. Should a pregnant associate be treated differently than a temporarily disabled non-pregnant associate, the law firm will be exposed to a discrimination suit and potential damages under Title VII.

DISCRIMINATION IN HIRING OR PROMOTION

The basic tenet of Title VII is that an employer may not discriminate against or refuse to hire to promote a woman because she is pregnant. The procedure for Title VII cases is straightforward. The plaintiff must produce evidence of a discriminatory practice by the employer which creates an inference that the employer has discriminated under Title VII. Once that burden has been met, it becomes the employer's burden to prove a legitimate, nondiscriminatory reason and basis for the action. The plaintiff then must overcome the employer's proffered explanation as a pretext in order to prevail.

A pregnant worker can be fired under the right circumstances. The law only prohibits the discharge of a pregnant woman because she is pregnant. Legitimate, non-pregnancy related reasons, can support a discharge., In ***Elbin v. Whirlpool Corp***, 36 FEP 1632 (1985) a pregnant woman was fired because she had missed 75 days of

work during her pregnancy. The woman sued for discrimination. The Court, in examining the case, found that the employer treated all disability absences the same. The court concluded that the plaintiff was an unreliable employee as far as the employer was concerned and upheld the dismissal.

In ***Troupe v. May Dept. Stores Co.*** 20 F3d 734 (1994) the court held that an employer is not required to keep a pregnant worker on if she cannot work because of her pregnancy nor is the employer required to treat a pregnant worker, suffering with morning sickness, better than any other employee.

Where a pregnant employee can show different treatment from that given non-pregnant workers, the employer will be found to have violated Title VII. In ***EEOC v Ackerman, Hood & McQueen, Inc.*** 956 F2d 944 (1992) an employer was found liable for a Title VII violation because the employer had given non-pregnant workers leaves and schedule adjustments without a medical reason yet refused to do so for a pregnant woman who has a written doctor's request for a schedule adjustment. This disparate treatment resulted in the employer being subject to Title VII liability.

Any discharge or change in working conditions for a pregnant worker automatically raises Title VII speculation. It is always incumbent upon the employer to be able to justify any such changes in order to avoid Title VII liability. The mere change in working conditions is generally sufficient for the pregnant employee to

file a complaint for discrimination against the employer. At trial, the employer must be able to defend its decision or face judgment against it. It is not automatic for a complaining woman to win a suit for discrimination simply because the employer discharged her or changed her duties. A presumption may be created of discrimination but it is a rebuttable presumption

Just as an employer may not fire a pregnant woman the employer may not force a pregnant worker to quit. In ***Brinkman vs. State of Kansas Dept. of Corrections*** 863 F.Supp 1479 (1994), a woman sued her employer claiming discrimination. However, the court found that she was unable to tie her dismissal to her pregnancy 8 months earlier in a manner that would refute the employer's claim that she was fired for poor job performance and the abandonment of her job.

Likewise ***Pierson vs. Mrs. Fields Cookies*** 857 F.Supp 867 (1994) a woman claimed that her dismissal was based upon her pregnancy. The employer prevailed by showing to the court that the reason given for her termination was not pretextual. The reason advanced by the employer, poor job performance, was documented adequately documented by the concerns raised by the employer before the employer was even aware of the employee's pregnancy.

An interesting case for the premise that poor job performance need not always be the grounds for discharging a pregnant worker was ***Turic v. Holland*** 849 F. Supp. 544 (1994). In this case a pregnant, unwed worker decided to keep the baby. The woman

discussed here decision with her female co-workers. The co-workers' religious sensibilities were offended to such an extent that job performance in the department suffered. The employee was discharged not because of her pregnancy but because of the controversy in the department. The Court sided with the employer that there was no discrimination. This is a strange fact not apt to be repeated but it does highlight the fluid nature of this type of action. On its face, this case appears to be a harassment action against the woman by other women. However such harassment is not covered by Title VII and maintaining harmony in the office is a legitimate ground for terminating a pregnant employee under this fact pattern.

The only legitimate factor acceptable by the courts in a discharge of a pregnant employee in a Title VII action is whether the employee was unable to perform her job. In ***EEOC v. Cornith, Inc.*** 824 F.Supp, 1302 (1993) the court limited the employer's decision to fire a pregnant employee to only the situation that the employee could not do her job. The employer was prohibited, in that case, from forcing a pregnant employee to take maternity leave out of concern for her health or even potential liability. The Court found, as pretextual, the reason advanced by the employer for firing the employee, who as a waitress was accused being unable to carry her trays. The Court rejected that argument finding that all waitresses got help with their trays from both other waitresses and restaurant workers. As such, there was no discernible distinction

advanced by the employer to justify the firing. Therefore, the employer was found liable, by the Court, for a Title VII violation.

The important consideration to remember is that Title VII does not require the employer to make special accommodations for a pregnant employee if the net effect of doing so would amount to preferential treatment. In ***Armstrong v. Flowers Hospital*** 812 F.Supp. 1183 (1983) a pregnant nurse had refused to treat AIDS patients. The hospital had a policy of firing any nurses to treat AIDS patients regarding of pregnant status. The court found that the risk of contracting AIDS for a pregnant versus a non-pregnant nurse is the same. The only difference was the risk to the fetus and that risk is always present in a pregnancy. The court found that a disparate impact would result if the hospital was ordered to treat pregnant and nonpregnant nurses differently.

In today's world the view of morality and adultery in the employment setting are far different that they were forty years ago. At one time, it was entirely natural for an employer to discharge a unwed woman for becoming pregnant. Today, the wisdom of that decision rests upon the facts of each individual case. In ***Hargett v. Delta Automotive Inc.*** 765 F.Supp. 1487 (1991) an employer was found liable for discharging an employee who became pregnant as a result of an affair with a married customer. The Court had a rule of no fraternization with the customers but had in the past treated other employees differently that it treated the

plaintiff. This unequal treatment resulted in the Court finding a disparate impact on the pregnant employee and the employer was therefore liable under Title VII.

In a case with religious overtones, the Court in ***Vigars v. Valley Christian Center*** 805 F Supp 802 (1992) denied a religious school's motion for summary judgment of the complaint filed by a discharged pregnant employee. The employee had claimed that she was fired because she was pregnant. The employer claimed that the employee was fired because she breached the school's religious beliefs and committed adultery by having the baby of man to whom she was not married. The Court found there to be a triable issue of fact and ordered the case to proceed.

LEAVES OF ABSENCES

The problem that many employers, including law firms, have with pregnant employees is how to factor their pregnancy into the normal workings of the office. An employer cannot adopt policies that favor the pregnant worker because then the employer is favoring the pregnant worker over the nonpregnant workers which is also a violation of Title VII. This was similar to the instance where the female employees were given better pregnancy benefits than those of the spouse of the male employees.

In addition to any problems of having a pregnant worker on the job, the employer must deal with the issues raised in not having the pregnant worker on the job. How should an employer handled

request for leaves of absences? An employer is powerless to dictate to a pregnant employee when she must take a leave of absence. In **Cleveland Board of Education v. LaFleur** 414 US 632 (1974) THE United States Supreme Court held that an employer may not set the time of the maternity leave for the employee. In that case, the School Board had a policy requiring the pregnant teacher to take maternity leave in her fifth month and not to return until the baby was 3 months old. The Court held that mandatory, maternity leave policies were a violation of due process. The Court found that such policies, "needlessly, arbitrarily or capriciously impinge on this vital area of a teacher's constitutional liberty." The Court believed that a policy of mandatory, maternity leave created an irrebuttable presumption that women were unable to perform their duties during this period even though they have medical evidence that they were totally capable of doing so.

While an employer may not force a pregnant employee to take a mandatory, maternity leave, the employer is only required under Title VII to give a voluntary leave to her on the same conditions as it is given to nonpregnant temporarily disable employees. **EEOC vs. Southwestern Elec. Power Co.** 591 F. Supp 1128, supra. As such, while a woman is out of pregnancy leave the employer is required to give to her the type and scope of benefits that it gives to the other nonpregnant temporarily disabled workers. For example, if the worker continues to pay the insurance premiums, pensions benefits

or accrual of seniority while the nonpregnant workers are out on disability, then the employer must do the same for pregnant workers out on maternity leave. Title VII does not require that an employer give a pregnant worker paid leave except in the situation where paid leave is given to nonpregnant workers who are out on disability. In such a situation the employer is required to also give a paid leave to the pregnant employee.

FAMILY AND MEDICAL LEAVE ACT

Child care leave is not the same as maternity leave. An employer may be required under Title VII to give a woman a maternity leave because as a result of the Pregnancy Discrimination Act of 1978, pregnancy is to be treated the same as any other temporary disability. Such is not the case with child care leaves. Which are not considered disabilities under Title VII.

Even though an employer may not be required to give a child care leave under Title VII, the employer may be required to do so under the Family and Medical Leave Act. Congress in 1993 passed the Family and Medical leave Act which covers employers with 50 or more employees. Under the Act, eligible employees are given up to 12 weeks of unpaid leave in a 12-month period in order to care for a family member. This leave is not limited only to women but applies to men as well. Under this act, either sex may take the time to care for a new born child, to bond with adopted or foster children, care for an ill relative or themselves if they are ill. Under the

act, employees may be required to use accrued paid leave as family leave and to provide 30 days' advance notice of the leave whenever possible. The employee may also be required to provide medical certification of the serious illnesses, if any, which are claimed as the basis for the leave. Also, under the Act, an employer can be required to regularly keep the employer updated as to any changes in the intention of returning to work. The Act is enforced by the United States Department of Labor. Some states have adopted their own Family Leave statutes that are more generous than the Federal ACT and also cover employers with lesser number of employees.

CHAPTER FIVE

EXECUTIVE SUMMARY OF THE PRELIMINARY REPORT OF THE

NINTH CIRCUIT TASK FORCE ON GENDER BIAS.

In August 1990, the Ninth Circuit adopted a resolution for the implementation of a gender bias study for the federal courts composing the Circuit. The resolution called for an extensive evaluation of gender bias throughout the Circuit. The study was assigned the responsibility to investigate the effects of gender in such areas of court administration, gender bias within the judiciary, selection of court-appointed counsel and jury instructions. Of special concern was the treatment of women attorneys within the Circuit by Judges and the correction of gender bias situations as they are disclosed.

The Research Agenda, as developed by the Task Force, decided not to focus of "gender bias" per se but rather to study the effects of gender on the Circuit's actual operation. The Task Force recognized that instances of deliberate gender bias are rare or at least difficult to document. Gender bias often arises in subjective and perceptive instances and often without a conscious awareness on the part of the perpetrator that it is occurring. To guide the Task Force in its study, the Task Force developed four key areas which were further subdivided into more specific areas in which

gender bias then evaluated.

The first gender bias area of investigation was a determination of the roles in which women and men attorneys play in the Ninth Circuit. In this area, the Task Force was concerned with the composition and appointment of women as judges in the Circuit. Also, the Task Force was concerned with developing a basis for interpreting and evaluating the "contextual information" of the experiences and views of women attorneys participating and practicing in the Circuit.

The second area designated for gender bias study was the effect of gender on appointments made by the judiciary and in the hiring and promotion processes of women attorneys in both the private and public sectors of the bar. The purpose of this analysis was to develop an objective standard for identifying and evaluating the gender influences present in the professional advancement of women attorneys in the Circuit.

The third area of analysis by the Task Force was the effect of gender on the professional interactions between opposing attorneys appearing before the Circuit both in the courtroom and in out-of-court negotiations. This area was deemed especially worthy of investigation as a means of evaluating how judges viewed the professional competence of women attorneys. Investigating this area was also useful in gauging how the judiciary rates the relative importance and contribution of women attorneys to the legal process as a whole.

The fourth area of investigation, considered significant by the Task Force, was the role that gender plays in the legal decision making process of the Ninth Circuit. This area was investigated to ascertain the extent of influence which gender plays on the decisions rendered both for and against litigants.

In collecting its data, the Task Force employed several means, each with its own inherent strengths and weaknesses in determining the effects of gender bias on the selected areas. The Task Force ultimately determined, upon analyzing the data, that each of its data gathering method disclosed similar patterns and attitudes of gender bias. As a result, the Task Force concluded that the findings accurately reflected the experiences, attitudes and beliefs and practices of the judges and attorneys practicing in the Ninth Circuit.

The Task Force relied extensively upon Public Records for the determination of the demographic characteristics of the judiciary and division along gender lines as to the makeup of the bench, bar committees and appointments of attorneys by the bench. In addition, a Judges Survey was completed by 232 judges who represented over 80 percent of the Circuit. Likewise, an Attorney Survey was completed by 3,531 attorneys who represented about half of the attorneys to whom the survey was mailed.

In addition to the surveys, the Task Force also evaluated nearly 1,000 margin comments submitted in addition to the responses to the surveys. The Task Force also utilized 19 different focus

groups in both general and specialized areas of legal practice. The focus groups were questioned as to the effects of gender on women attorneys in the specific areas under investigation by the Task Force. In particular, the Task Force investigated the areas related to judicial appointments, hiring and promotion in law firms and courtroom acceptance.

The Task Force created a demographic profile of the Circuit. It was concluded that as of 1991, the representation of women on the bench in the Ninth Circuit was generally of a higher proportion than elsewhere in the nation. Of the Judges, 12 percent (12%) were women. In comparison, five federal districts had no women judges at all and in three other districts there was only one woman on the bench and that in the capacity of a part-time magistrate. Likewise, the administrative court system of the Ninth Circuit also reflected similar representations with 8 percent of the administrative judges of the Social Security Administration being women and 27 percent of the immigration judges being women.

The task force found that the number of women attorneys practicing before the Ninth Circuit are roughly consistent with the representation of women judges. Sixteen percent of the practitioners before the Ninth circuit are women attorneys as opposed to 12 percent of the judges being women. There was a significant difference based on gender between the employment of attorneys. It was found that nearly two-thirds of all women attorneys work in public practice. In contrast, one-third of male

attorneys work in offices with women associates comprising less than 10 percent of the attorneys. The Task Force sought to determine whether the lack of women in these offices was the result of the majority of women attorneys electing more lucrative government employment or gender based bias.

The areas of judicial appointments and hiring produced significant divergent opinions among the sexes. Generally, male attorneys believed that judicial appointments and the hiring and promotion practices of law firms were merit-based in today's professional climate. In contrast, women attorneys felt that gender discrimination and gender based biased still plays an important role in judicial appointments and also in the employment practices of law firms.

Women attorneys and judges consistently expressed their feelings that the male domination of the judiciary has worked to the detriment of women lawyers by excluding them from the unofficial networks which influence judicial appointments. Cited in support of this belief was the relatively small number of women appointed to the bench and bar committees. In contrast to this belief was the male view that Task Force statistics showed that only 16 percent of the current practitioners in the Ninth Circuit are women the majority of whom only became attorneys in the last twenty years. As a result, according to many male attorneys, the representation of women in the bar committees, and the like, accurately reflects a correct representation of practitioners who

have earned the right to be those positions. To further highlight this different perception among the genders was the consistently stated view of women attorneys that law firms in general tend to give important cases to men rather than to women with equal qualifications.

Courtroom interactions were also investigated by the Task Force. The Task Force evaluated the variety of perceptions, feelings and predications regarding the interactions of both male and female attorneys in the Ninth Circuit. An interesting fact disclosed by the Task Force is that on the whole both men and women attorneys feel that they have generally received fair treatment from the judges in the Ninth Circuit. This view was also seconded by the Court personnel working for the federal judges.

Even though most women attorneys reported having generally received fair treatment from the Ninth Circuit, most still harbored and supported the belief that women attorneys experience a "variety of interactions that subtly and overtly undercut their own sense of worth." This view was contrasted by male attorneys, in general, who were unaware of any such interactions taking place with women attorneys. In analyzing the data obtained through the attorney survey, the Task Force concluded that it had obtained sufficient data to reliably support a contention that 60% of the women attorneys practicing before the Circuit have experienced unwanted sexual advances or harassment from colleagues, opposing counsel, judges or court personnel.

An interesting and unexpected observation by the Task Force was the effect of age on the perception of gender differences and its elimination. It has long been postulated that most gender bias issues are the result of the ages differences and cultural background of the attorneys involved. Generally, most male attorneys are older than most women attorneys, given the fact that most women attorneys are relatively new to the profession having become so since 1970. It has long been a prevalent belief that older attorneys have a more stereotypical view of the role of women in society which conflicts with women attorneys in today's world. As a result, it had long been speculated that the gender bias concerns of women attorneys will abate as the general ages of the two genders equalize. The Task Force's observation, however, contradicted this belief. The Task Force was surprised by its finding that there was no discernible difference between the perceptions held by men and women attorneys below the age of 40 and those perceptions held by men and women attorneys over the age of 40. What this was concluded as meaning is that there is no reason to believe that gender-based bias in the legal profession should be expected to disappear automatically as the general ages of men and women in the legal profession equalize.

An interesting, but not entirely unexpected, perception documented by the Task Force's Advisory Committee on Federal Benefits found that 45 percent of the lawyer and non-lawyer claim representatives believe that gender influences the adjudication

process. As might be expected, male and female administrative law judges had different views regarding their perceptions of gender influences on decision making by administrative law judges. The Task Force found it important to note that many male and female claim representatives believe that female claims are less likely to be credited by ALJ's than claims made by men. The explanation asserted for this belief was the credibility determinations which the ALJ's must make. It was suspected by the Task Force that as a result of the various roles of men and women in society and physiology, many of the "facially neutral aspects of SSA disability determinations may have gender-differentiated impacts."

The Task Force reached several conclusions regarding gender bias in the Ninth Circuit. A view, asserted by many persons, is that gender bias in the Ninth Circuit has substantially subsided in recent years leaving only isolated and rare instances not represented to the norm. The Task Force's conclusions, however, supported the opposite view. The Task Force concluded that "gender remains relevant-indifferent ways, at different times, but frequently playing a role." The Task Force concluded that sometimes men suffer from gender bias but, on the whole, women attorneys bear the blunt of it in the Ninth Circuit.

As a result of its Task Force's findings, the Ninth Circuit adopted Resolution No. 2, at the August 1992 Ninth Circuit Conference. Resolution urged all members of the Ninth Circuit to continue to make efforts to enhance the inclusion of women in the

work of the circuit, in the committees of the circuit and of the district courts and to eliminate gender bias in the courts. Significant in the vote on the 1992 Resolution was the breakdown of the percentages. The initial 1990 resolution which authorized the creation of the Task Force was passed with a percentage of 58% in support, 35 percent opposed and 7 percent abstaining. The 1992 Resolution, in contrast, passed with 89 percent in support and 11 percent against. The attorney representatives, who voted on the resolutions were 80 percent in support of the 1990 resolution and 99 percent in support of the 1992 resolution. The difference between the levels of support for the Resolution of the Judges and attorneys does raise some concerns regarding the Task Force's findings. The fact that one out of nine judges did not support the report may, to some, create an open question as to whether the Task Force's report was being viewed as too liberal or not truly reflective of the gender bias in the Circuit. In any event, the majority of the Judges of the Ninth Circuit adopted the report and its findings remain one of the most and exhaustive studies ever undertaken regarding gender bias in any Federal judicial system.

Figure 6

Men and women disagree
about the influence of gender on hiring and promotion

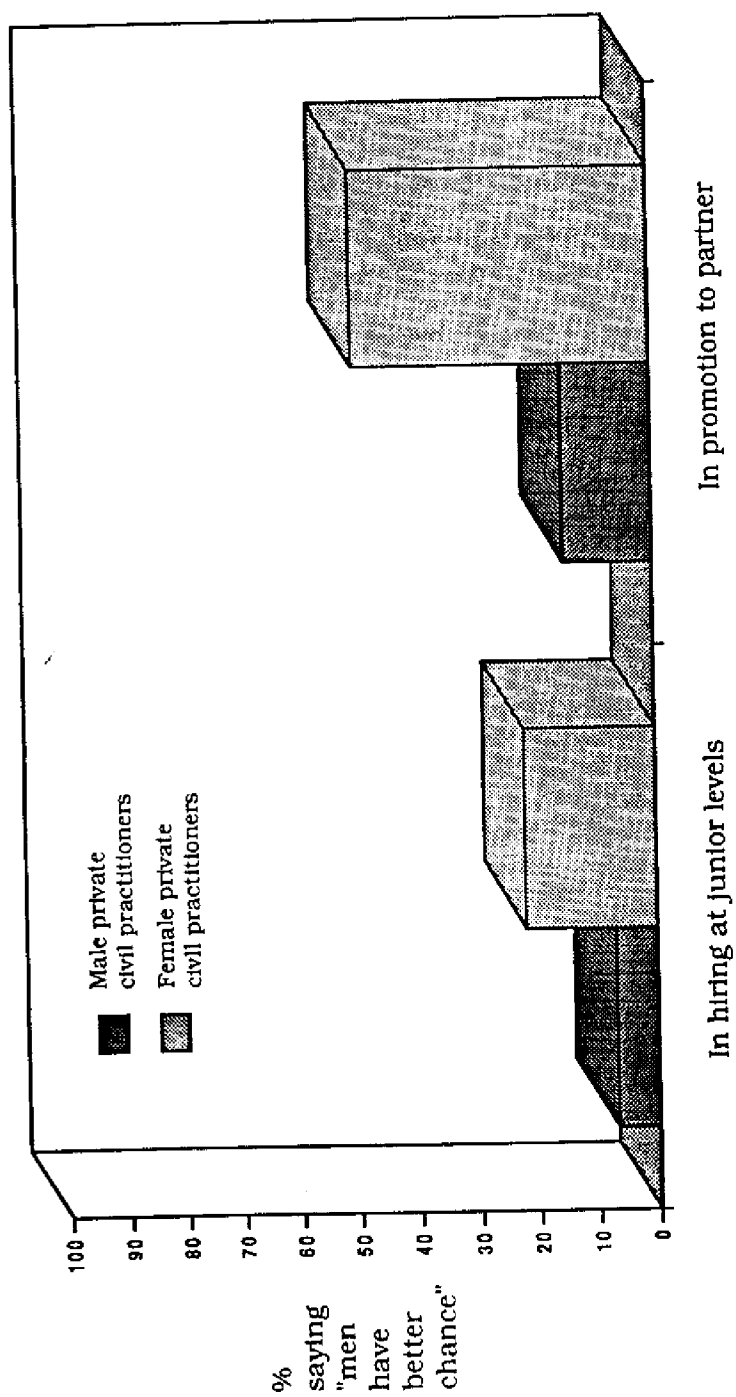
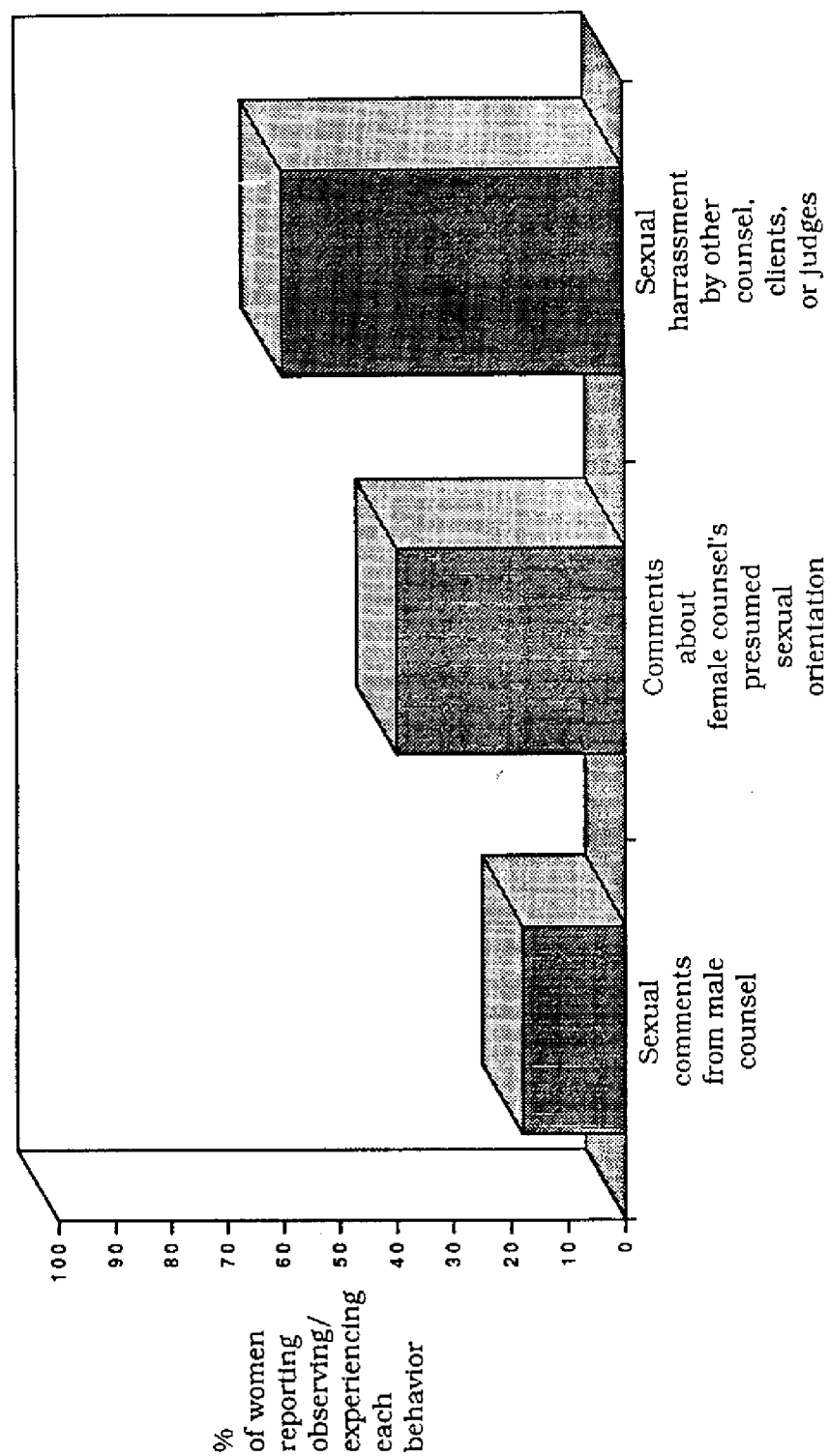
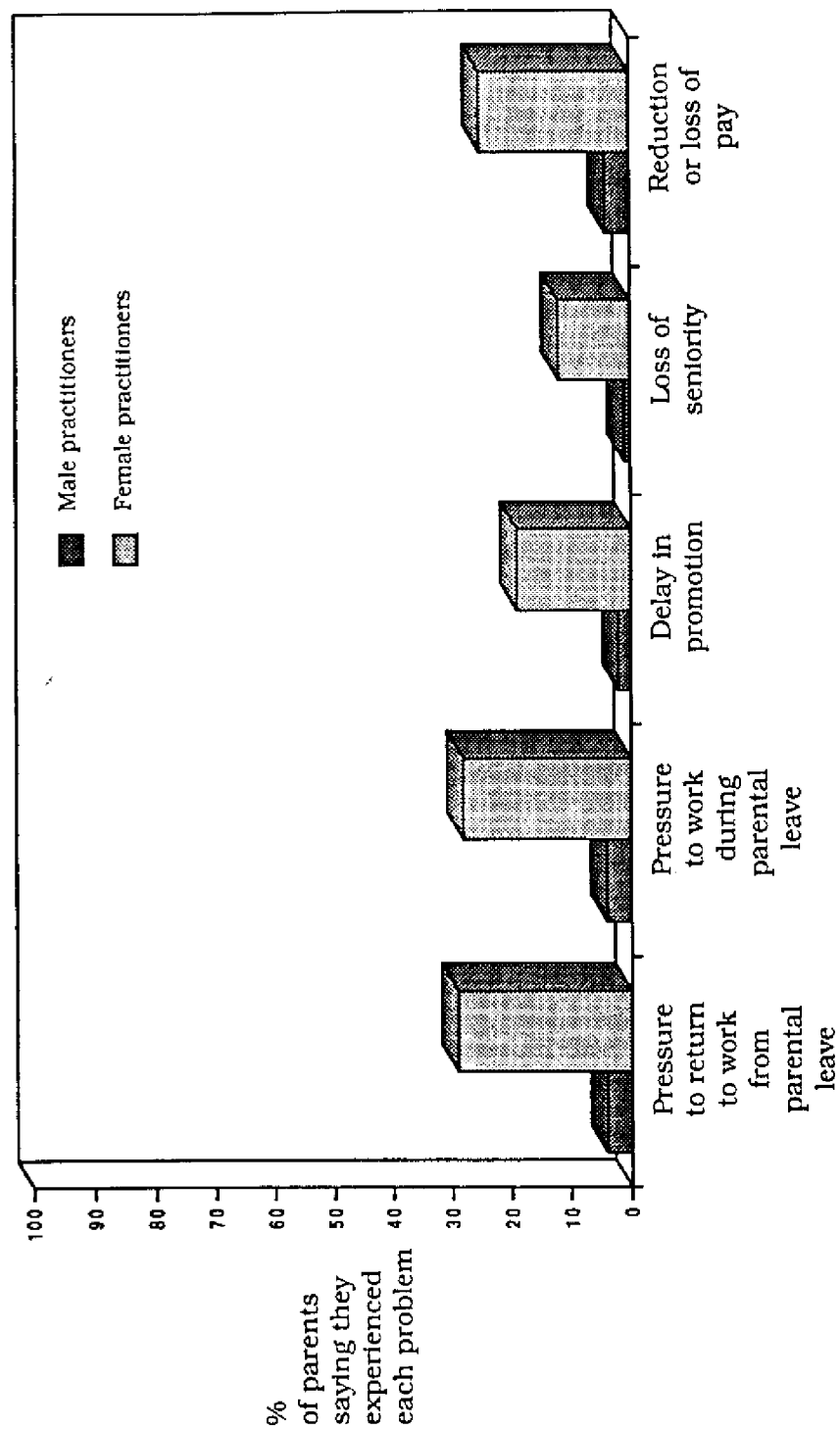


Figure 9
Many female practitioners report
inappropriate sexual comments and harassment



Women are more likely than men to experience negative consequences as a result of parenthood



PART TWO: GENDER BIAS IN GENERAL IN THE LEGAL PROFESSION

A. GENDER BIAS IN DOMESTIC RELATIONS

INTRODUCTION

It is in the area of domestic relations that gender bias is most encountered. The field of domestic relations, also referred to as Family Law, covers child custody, child support and most importantly, divorce. One of the most important aspects in any divorce is the economic reality that it forces upon the parties. Both the husband and the wife after the divorce, will be in a different financial and economic situation. Often after the divorce, the ex-husband and the ex-wife will have markedly different amounts of income coming into their respective households. In 1979, for example, they concentrated 58% of all working women heading family households in the service and clerical areas. In a 1981 study, U.S. Dept. of Labor, *The Female-Male Earnings Gap: A Review of Employment and Earnings Issues*, often cited by feminists, it was determined that women in these jobs were only earning \$61 compared to every \$100 earned by men in general. In reality, the study is distorted because it compared men doing all different types of work with the work done by all women. There is no comparison or relationship based upon identical work performed by men and women. An important point that should be borne in mind is that most of the women, in that study, were engaged in low-paying jobs. As such, the women's desire to do those jobs or

their inability to get a higher-paying job is irrelevant. Money or the lack of it is the single most important factor in determining a person's quality of life. It is the amount of money the spouses have coming into their households, following their divorce, which is important as the basis for the determination of property division, child custody, child support and alimony.

One of the functions of any divorce court is to divide the property in the marital estate (also called the community or family estate), award child custody, set child support. The court also must determine if either spouse should be awarded alimony (spousal support as it is called in some states) from the other spouse. Today, no state requires proof of fault in order to get a divorce although in some states it can still be alleged in the petition. All states have adopted some form of no-fault divorce based upon irreconcilable differences. Until relatively recently, it used to be that a spouse could only get a divorce upon finding some degree of fault against the other spouse. Once the fault was determined, the judge had the discretion to divide the marital property in any fashion to punish the spouse who caused the fault and therefore destroyed the marriage.

With fault no longer being an issue or grounds for a divorce, in most states, the marital property is usually divided equally in accordance with the family law of the state in question. The no-fault laws for divorce grounds have also been carried over, in most states for alimony payments. Most states do not consider fault of

a spouse in making alimony awards. Nonetheless, some states still consider fault for in making property divisions or alimony orders. In Nevada, for instance, which permits no-fault divorce is unclear on the issue of considering fault as a factor for awarding alimony. In *Heim vs. Heim* (1988) 104 Nev. 605, the Nevada Supreme court stated:

"Although Nevada has made incompatibility a ground for divorce and has eliminated the fault concept in establishing grounds for divorce, it has neglected to deal with the question of whether fault should play a role in deciding questions relating to alimony.

Nevada is not alone on this regard, and when the question has been presented to the courts in other states, some have held that in the absence of legislative change corresponding to the enactment of no-fault grounds for divorce, fault should continue to be a factor in awarding alimony or property distribution. Other courts have held that permitting fault to be considered in these situations would be incompatible with the no-fault statutes. See e.g., Annotation, ***Fault in Consideration of Alimony Award*** 86 A.L.R. 3d 1117 (1978); ***Does No-Fault Divorce Portend No-fault Alimony*** 34 Pitt. L. Rev. 486 (1973).... we note, without deciding the point, that the past relations and conduct of the parties might be legitimately considered under the legislative direction that the courts may regard to the "respective merits of the parties."

Fault, in property distributions or alimony awards, is in some states, highly important. Fault may result in higher or lower alimony awards for the supported spouse. In addition, property divisions may, in states using fault as a factor, could likewise be increased or decreased as either punishment or an award for good behavior on the part of the paying spouse.

Following or in conjunction with the property division are the awards for child support and child custody. Following the divorce,

usually the custodial parent, which is most times the mother of the children, must go out and get a job. The reason for this is simply economic necessity. It really just comes down to the fact that most people work to earn money in order to survive, not particularly because they enjoy doing it. A recent survey that came out showed that most people do not like the job they are doing, but do it because they need the money. As a result, a parent who has children must nonetheless support those children and therefore must work. Even if child support is being paid, often it is not enough to guarantee that the person receiving the child support will be able to stay at home and care for the children and do nothing else.

Social mores have changed quite a bit in the last thirty years. Throughout the 1950's, it was considered very improper for people to get divorces, and therefore it was understood under the mores that usually the wife would stay home and tend the children. If there was a divorce, the wife would normally get the children and therefore would receive enough alimony and support so she could continue to stay home and raise the children. Nowadays with the advent of the Women's Rights Movement, it is understood that women have the right to go out and get jobs in the real world and that if they choose to raise children at home, that is their choice. However, it is considered wrong by many people to require the father to pay lifelong or permanent alimony for eighteen years so the ex-wife can stay home and simply raise the children.

It was shown in a 1994 study that 20% of all single family

homes involving children are headed by the father. In homes that are headed by a single father, no one makes the argument that the former spouse, i.e., the mother, should be paying permanent support to the father so that he can stay home and raise the children until they reach eighteen years of age. It is understood today that both spouses have a duty to raise their children and to pay for their support and therefore a job in most instances is considered proper by the custodial parent as much as the non-custodial parent. Merely because a custodial parent works that does not mean that the custodial parent is earning enough money alone to support the family. It is required that both parents to work to support their children. The Census Bureau, for instance, in its report **"Child Support and Alimony: 1983"** concluded that 53% of single mothers failed to receive the court ordered child support payments from for their children. As such, if a parent does not support the child then that parent could be subjected to criminal prosecution.

Every state now has enacted no-fault divorce laws. The purpose of no-fault divorce is just, as the name implies, to provide the means for a person to get a divorce without destroying the character and reputation of the other spouse. Prior to no-fault, when the statutory grounds for divorce did not exist and the couple were just unhappy together, unless one spouse agreed to have his or her character falsely slandered in court, the couple could not get a divorce. There are two types of no-fault states.

The first type of no-fault state is one that permits a divorce only on the grounds of irreconcilable differences, irretrievable breakdown or incompatibility. The jurisdictions, which have adopted this form of no-fault divorce, are: Arizona, California, Colorado, District of Columbia, Florida, Hawaii, Iowa, Kentucky Michigan, Missouri, Montana, Nebraska, Nevada, Oregon, Virginia, Washington and Wyoming. In such jurisdictions, no evidence of fault is admitted into evidence in the court in any fashion. As such, neither spouse can accuse the other spouse of adultery, name a correspondent or attempt, in any way, to blacken the other spouse's name. The second type of no-fault state is one which permits both no-fault and additional fault grounds to be alleged in a petition for a divorce. A person is permitted the option, in such states, to seek a divorce using either fault grounds or no-fault grounds. Fault grounds, are usually used, in those states which still consider fault as a factor in making alimony or child custody decisions.

Besides the spouses, themselves, anyone having an interest in the marital estate may also be brought into the divorce as a party. These parties, do not necessarily have to appear in the divorce proceeding but if their interests are adversely affected by it, they will have the right to appear and defend their position. In the same vein, either spouse may sue third parties and bring them before the divorce court for the determination of the marital's estate interest. For example, one spouse may sue the business

partners of the other spouse for a determination if any of their business should be considered a marital asset. Additionally, some states, such as Iowa, will appoint an attorney to represent the children during their parents' custody battles. Furthermore, some jurisdictions, such as Delaware, District of Columbia, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Nebraska, Washington, West Virginia, Wisconsin and Wyoming require a public officer to be named in an uncontested divorce. The reason behind this requirement is to protect the family and assure that no fraud is occurring or will be practiced. This requirement was enacted in response to assertions by various women's rights groups that women were often taken advantage of and defrauded by their ex-husbands in uncontested divorces.

CHAPTER SIX

GENDER BIAS IN PROPERTY DIVISION

Probably the touchiest area in any type of divorce is the division of property. Virtually all states have some type of law that says in the division of marital property it goes equally among the spouses. Sometimes fault comes into play, but usually courts do not divide property that either spouse owned prior to the marriage or was acquired by gift, devise or by bequest.

As stated, above, some states still employ the fault concept in making property distributions and alimony or support awards even though the divorce itself may be granted without a finding of a fault. In dividing property, a court must first determine what property is actually part of the community or family estate along with the value of such property. This is often the hardest part in property evaluation. It has been consistently asserted that, in the situation of a business asset, that the nonparticipating spouse in that business is at a severe disadvantage. Potential injustices may occur in such instances where the spouse controlling the business has the power to conceal or camouflage assets. In such instances, the non-business spouse is unaware of what the community property is and its value. It is common, unfortunately, for one spouse to transfer property out of the state to conceal it from the other spouse. In the past such conduct has been generally overlooked by the court, but that is changing. In 1995, for instance, a doctor in

Kern County, California was criminal charged in Federal Court for transferring property out of California in violation of a state court's order that no property be transferred until the conclusion of the divorce case. The doctor transferred \$1.6 million to his father in India in violation of the family court's order. The money was subsequently returned following the federal charges being filed. The fact that a Federal Court would permit a criminal complaint being filed to punish the wilful transfer of property in violation of a state court's order is proof of the changing view on property distribution.

In 1983, the National Conference of Commissioners on Uniform state Laws created the Uniform Marital Property Act (UMPA). The purpose behind the creation of the UMPA was to settle the law in a chaotic field and to provide an equal and uniform procedure for the division of marital property. The UMPA was the first attempt to uniformly create a national standard for property division in a divorce rather employ fifty individual standards which often lead to forum shopping and conflicting jurisdictional claims. The UMPA adopts as its standard the position of community property states that property acquired during the marriage as the result of contributions and efforts of both spouses is equally owned. The difference between the UMPA and community property laws is that its provisions governing management and control, survivorship titling and treatment of retirement plans. The UMPA's provisions for the above are based upon equitable distribution concepts and rather

than hard fast laws as do the community property states. One of the major departures of the UMPA from community property laws is in the treatment of appreciation of one spouse's separate property. The UMPA has created an active appreciation rule, section 14(b), wherein if substantial appreciation of one spouse's separate property occurs as the result for the substantial efforts of the other spouse, without compensation therefore, it becomes marital property. Likewise, income generated from individual property including dividends, rent and interest is marital property as well under section 4. The effect of the UMPA is to increase the marital estate and treat income acquired during the marriage as marital property regardless of its source. To date, the only state which has adopted the UMPA is Wisconsin although it has been proposed in at least another dozen legislatures.

Prior to the conscious raising activities of the Women's Movement, fraud or misrepresentation in property settlements were often overlooked and ignored by the courts. One case, in particular was widely used to highlight the indifference of courts to the plight of women in divorce cases. In ***Fisher vs. Wirth*** (1971) 38.A.D. 2d 611, 326 N.Y.S. 308 a couple divorced after nearly forty years of marriage. For the last twenty years of the marriage, the parties had agreed that the husband's salary was to be invested for their retirement. The husband held title in the invested property in his own name. At the divorce, the wife sought a constructive trust on the property to prevent unjust enrichment. The court

denied the constructive trust finding that no fraud had occurred on the husband's part. In denying the wife's petition, the court held that while there

"may be a moral judgment that can be made on the basis of the respondent's conduct and the imperfectly expressed intention of some future benefit to appellant, but that is not enough to set the court in motion."

The court's decision did not recognize any right of the wife to have acquired an interest in the property under even the basis equitable theory of detrimental reliance. There is little evidence, given the facts of the case, that the wife had detrimentally reliance on the statements of the husband that the investment would be used for their "latter days". As a result of that promise, despite not being more specific, the wife stayed in the marriage and did not prepare for her own latter years. That is a classic example of detrimental reliance which the court could have so found. Nor did the court consider the equitable theory of an implied contract at law. The court's decision resulted in the wife, after forty years of marriage, not having any interest in the investments for which her husband had made despite his earlier assurances that they were for the benefit of each.

Today, the trend in family law is to permit both a married and unmarried woman to assert implied contracts and equitable interest in property found, in part, through their efforts. The classic case on "palimony" is the California case, **Marvin vs. Marvin** (1976) 18 Cal.3d 660. The **Marvin** case permits an unmarried person to assert

an implied contract in property acquired by the other person during the relationship if the parties had agreed that such property would belong to both or if the person earning the property promised to take care of the other. Where a woman has given up a promising career in order to become a companion for a man on the promise that he will take care of her, many courts will find and impose an equitable interest in the man's property under the theory of an implied contract at law. If **Fisher**, supra, were to be brought today in California, the courts probably would find the constructive trust earlier denied in New York.

Under the common law, property belonged to the spouse in whose name it was titled. Title, therefore, became the dispositive factor in property division during a divorce. A wife's property award, under the common law, was therefore based upon ownership of the property rather than any promise of sharing by the husband. **Vassel vs. Vassel** (1972) 336 N.Y.S. 2d 887. The common law concept for property division was adopted by thirty-nine states. The remaining states adopted the community property system based upon Spanish law or the Napoleonic Code which gave each spouse an equal interest in property acquired during a marriage except for that property acquired by gift devise or bequest.

One of the noticeable effects of the Women's Movement has been the easing of the common law's division of property based strictly upon title and consideration of "equitable distribution" in making

an award. All states now, by either case law or statute, require their judges to make fair and equitable distributions of marital property. Col. Rev. Stat. Sec 14-10-113, Ill. Stat. Ann ch.40 sec. 503, Md.Cts & Jud. Proc. Ann., sec. 3-65-05(b)(1), Pa.Const. Stat. Ann sec 23-401, **Rothman vs. Rothman** (1974) 65 N.J. 219, **Parrot vs. Parrot** (1982) 292 S.E. 2d 182. In fact, even New York which denied a marital interest in **Fisher**, supra would be compelled to do so today under N.Y. Dom. Rel. Law. sec 236 Part B 5d(6) which requires the court to consider such factors as the duration of the marriage; any equitable claim to, interest in or direct or indirect contribution to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career and career potential of the other party; and any other factor which the court shall expressly find to be just and proper.

Many states have, either by statute or case law, created a presumption for equal division of marital property. Ark. Stat. Ann sec. 34-1214, Wis. Stat. Ann. sec 767.255. **The Guidelines for Property Division of the Domestic Relations Division of the Common Pleas Court of Cuyohoga County, Ohio** (1981) states:

"The rationale supporting the presumption of equal division is that marriage is a voluntary association with implied rights, duties and contributions,... as long as each party chose to remain in the relationship, he or she is deemed to have accepted the other's contributions as more or less equal to his/her own; and that therefore the property generated by the

marriage should therefore be equally divided between the parties upon termination of the relationship.

At times, equity may requires a less than equal division. The requirement of equal division is a rebuttable rule. When departing from equal division, the court should articulate the reasoning behind its decision in order to facilitate understanding by the parties and appellate review.

California, in 1974, revised its domestic relations law by adopting the 1974 Family Law Act. The major effects of the Act were that it removed fault as a requirement for a divorce or as a factor for property division. Prior to the Act, judges could divide community property in any proportion that it deemed just and fault often played an important part in the judicial division of the property. A common saying among California divorce attorneys, prior to 1974, was that the wife would get one-half of the community property and the court would then divide the husband's half. Today, California community property is divided equally and fault is not a factor.

It has been suggested and proposed that to lessen gender bias in property settlements courts should adopt procedure that will make it harder for spouses to conceal assets or hide their value. These recommendations have the effect of being directed primarily against the husbands because usually it is the husbands, by virtue of their control over the business estate of the family estate, who are in the best position to conceal such assets from the court. In accordance with this, it is suggested that courts and legislatures impose mandatory disclosure and inventorying of all community and marital assets. In addition, there should be severe criminal or

contempt sanctions enforced for all willful refusals to cooperate with mandatory disclosure provisions.

The most common problem in a divorce is how to divide the marital assets acquired during the marriage. Often the courts will give the house to the wife because she has the children, and the business, that has an equal amount of value, to the husband because they look at the dollar value as if everything was sold right away. Again, when you do that, the house does not yield income and the wife is forced to look to other sources and means to get the money to survive. The husband, even though he doesn't own the house, owns the business, which in fact produces income. Most people don't own businesses. Most people are just employees, so if you have a husband working for the local phone company, he has a job and from that job he will have to pay support. Usually, the husband will lose the house in the divorce. Usually, when the house is to be sold and the proceeds divided, the wife will have custody of the house until it is sold and divided.

Property of a marriage is divided in accordance with the individual state laws. Some states are referred to as common law states and other states are known as community property states. A common law state permits each spouse to acquire property, in their own names, during the marriage. The earnings of each spouse remains the sole property of the spouse earning it. A community property state, on the other hand, is one which holds that all property acquired during a marriage, except property acquired by gift,

devise or bequest, is owned equally by each spouse. Community property states are Arizona, California, Idaho, Louisiana, New Mexico, Texas and Washington. In the divorce, the Court will divide the marital property in accordance with its state laws. If the parties had entered into a valid marital agreement directing how the property will be distributed in the event of a divorce, the Court will enforce that agreement, if it does not violate state law or public policy. A Court's property division order is only valid for property located within the state. A Court cannot award or divide property located in another state. To get around this problem, a Court may make an inequitable distribution of property in the state and allow the other spouse to keep all of the out-of-state marital property. Given the fact that no-fault divorce is now available, in some form, in all states, the only contestable issues really remaining to be decided by the Court are property division, child custody and support. Marital property, not divided during the divorce, may be divided later by bringing the matter before the Court. This usually happens when property was concealed from the other spouse or occasionally was mistakenly overlooked.

The current trend is to have property acquired, during a marriage, equitably divided regardless of title has been codified by thirteen states: Alaska, Colorado, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania, Utah, Wyoming, Virginia, New Mexico, Texas and Washington. In addition, several states have specifically enacted legislation requiring their Courts

to consider a homemaker's, usually the wife's, contribution towards the other spouse's ability to acquire property in making a division of assets. Colorado Rev. Stat. 14-10-113, Illinois S.H. Ann. Ch.40 Sec. 503(c), Maryland Ann. Code Repl. Vol. Sec. 3-6A-05(b)(1), Massachusetts Ann. Law Ch. 208 Sec. 34, Montana Code Ann. Sec. 40-4-202, Pennsylvania Stat. Supp. 23 Sec. 402. Pennsylvania invalidated the common law sex-based presumptions of ownership of marital property under the cases *DiFlorido vs. DiFlorido* (1975) 331 A.2d 174 and *Butler vs. Butler* (1975) A.2d 477.

Debts are usually divided by the Court in accordance to whether the debts are his, hers or theirs. A joint debt is a debt owed by both spouses of which was created for the benefit of the marriage. A separate debt is one that was incurred solely for the benefit of just one spouse. A debt that affected or benefitted only one spouse will be found to be that spouse's sole debt. Community property states hold that all of the community property can be used to pay a community property debt regardless of who incurred the debt. A community property debt is one that was incurred to benefit the community estate. Examples of community property debts are the bill incurred for putting a new roof on the house or repairing the family car which are community property assets. When a debt is determined to be a community debt, then all of the community property is, likewise, held to be available to pay it. In a community property state, the separate property of the spouse, not

incurring the debt, cannot be attached or used to pay the separate property debts of the other spouse.

A married couple, who no longer wish to live together but who do not want to get a divorce, can enter into a written separation agreement that does everything but acknowledge that the marriage is over. A separation agreement can deal with spousal support, property settlement and even child custody. The parties may agree to use a separation agreement rather than a divorce for a variety of reasons such as the fact that some religions do not recognize divorce, the effect on the children or financial concerns. Many courts will not enforce a separation agreement if the separation has already occurred or occurs soon after the agreement is executed. Some states, such as New Jersey, specifically do not permit their use. Most states, however, do permit separation agreements to some extent and in accordance with their state law. While not openly rejecting separation agreements, North Carolina and Oklahoma, in particular, do not favor them and narrowly construe them.

A separation agreement is, for all intents and purposes, just a special contract between the spouses. It is governed by the same rules as any other contract. There must be a meeting of the minds as to what the agreement is to accomplish and how it is to be structured to reach the desired result. In addition, there must be legal consideration given by each spouse under the agreement. Legal consideration is the promise to do or to refrain from doing

something that the person has a legal right to do or not to do. Without legal consideration being given by each party to a contract, the contract is void from the beginning. The Court has the power to alter, amend or invalidate a separation agreement, if it found that the separation agreement violates state law or is otherwise unfair. The Court will find a separation agreement unfair if one spouse concealed assets or misrepresented facts to the other spouse, if a spouse did not adequate representation or if one spouse took unfair advantage of the other. Most separation agreements deal in part with spousal support. Spousal support waiver provisions are usually enforced if the recipient received a fair property settlement in the separation agreement. There are, however, several states such as New York, New Jersey and Illinois for example, that do not permit a spouse to waive support in separation agreements. Some states, such as Indiana, North Carolina and West Virginia will only rarely enforce such a waiver provision. The reason behind some states' refusal to enforce a support waiver is the fact that all states have laws requiring each spouse to support the other spouse. All states view it as being against their public policy to permit a person to remain in need while married to a spouse who is able to render support. Therefore, some states will not permit a spouse to wave support during the marriage or does so reluctantly even when a separation agreement is employed.

Besides property division in regular marriages, Courts often

find themselves having to divide property in common law marriages. There are still a few states which recognize the doctrine of common law marriages. Under this doctrine, a man and wife living together, as a couple, for a fixed number of years, usually five, will be treated as through a valid marriage has occurred. In such instances, a divorce is needed to terminate their relationship. Likewise, the property acquired by the couple during the term of their relationship will be divided in accordance with that state's divorce law. A recent trial, on point, is **Maglica vs. Maglica**. The couple, though not married, lived together for twenty years. During that time Anthony Maglica formed a flashlight business that grew to a value of \$300 million. Upon termination of their relationship, Mr. Maglica claimed the entire business belonged to him. Mrs. Maglica sued alleging a claim for a breach of fiduciary duty in that the couple had an oral agreement that she had an interest in the business. At trial, the jury awarded Mrs. Maglica \$84 million. This case touched both common law marriages and the oral implied contract, also known as palimony, as discussed in the **Marvin** case *supra*.

The thorniest issue in any divorce and one in which the issue of gender bias comes into play is determining how to divide an asset that is really not divisible. An example of this issue is the situation where one spouse is a professional, with a license in law or a medicine, architecture, etc., which permits that spouse to go

out and practice the profession. The other spouse, in comparison, usually the wife, will not have a professional degree and cannot go out and practice any profession simply because she had once been married to a lawyer, doctor, architect etc. How a professional license is treated in a divorce is an area of ongoing development. Under the common law, a professional license was not an asset to be divided or considered in a divorce. Today that view is changing. Many states, now treat the earning capacity by the licensed spouse as a community asset. Courts of these states will order the licensed spouse to pay a percentage of professional income for the rest of the professional spouse's career to the former spouse. While such treatment may be considered an emerging view, it is still not the majority view. Most states will, in a divorce, value the professional practice on a fair market value basis, as if the practice had been sold immediately, and as if the professional spouse had quit practice. If, for example, the couple have an professional office or practice that is worth \$200,000 as fair market value, many states will treat \$100,000 as belonging to the divorcing spouse and divide it that way, but all future earnings would belong to the licensed spouse.

A common horror story is where someone has worked to support their spouse through medical school, law school, etc., and when the spouse obtained the degree he or she filed for divorce. The inevitable question is what interest or rights does the non-degreed spouse have in the other spouse's degree? Many states have now

adopted the policy to avoid such biases by requiring a spouse, who has been supported by the other spouse, to give the equivalent support to the other spouse. If, for example, a wife worked to put her husband through medical school for five years, the husband would be required to give the equivalent support of whatever it was to put the wife through medical school for five years if she wanted to, or to furnish her some other type of equivalent support for the next five years.

An additional concern in property division is the effect of spousal support. Under the common law, a husband was almost always required to support a wife, even after a divorce, until the wife remarried. An ex-wife, was almost never required to support an ex-husband. Such black letter law has virtually disappeared. Today, spousal support can be awarded to either ex-spouse but it is no longer required to be awarded. Instead, the emerging view today is that alimony or spousal support should only be awarded to the extent necessary for the receiving spouse to acquire the skills necessary to go forth and earn a living without such alimony. It is, however, recognized that because of age or disability, an ex-spouse might need permanent alimony or spousal support because he or she cannot become fully independent. A very real problem in gender bias, as recognized by nearly everyone, is what happens when a long-term marriage falls apart and one spouse has a better earning capacity than the other. In the situation where both spouses are working and earning similar amounts of money, there

probably will not be an award for spousal support because each ex-spouse have similar amounts of disposable income. As long as the ex-spouses are in an equal living situation, there will usually not be an issue of gender bias. For example, where both spouses are living in poverty, they are equally suffering and thus without gender bias. In contrast, however, if after a long marriage one ex-spouse, usually the ex-wife, becomes destitute and the other one is able to lead a fairly decent life, there is usually found a duty to support the destitute ex-spouse. In this situation, courts will consider spousal obligations in making property divisions and thus may support orders or property distributions so as to assure and guarantee that support payments to the ex-spouse will be made.

CHAPTER SEVEN

GENDER BIAS IN SPOUSAL SUPPORT AND ALIMONY

INTRODUCTION

One of the most controversial areas of gender bias in the law is the award by a court of spousal support or alimony. In no other area of law is there such a discernable difference between how men and women are treated as in the overall awards of spousal support and alimony. Prior to the Women's Liberation Movement beginning in the late 1960's, permanent alimony was viewed simply as a result of social mores and served as a form of punishment against the paying spouse (usually the husband) for getting or causing a divorce. Under the common law, the payment of support to the ex-wife continued virtually forever regardless of how many years she was to receive it. Many states actually had laws that forbade the award of alimony to ex-husbands unless the ex-husband was disabled. It took a 1978 United States Supreme Court decision in the case ***Orr vs. Orr*** 440 U.S. 268 to make state laws banning alimony awards to men as an unconstitutional denial of equal protection. Even before the ***Orr*** decision, some states were beginning by statute or case law to ban gender based discrimination for alimony. ***Henderson vs, Henderson*** (1974) 327 A.2d 60, ***Holmes vs. Holmes*** (1978) (Ct. Common Pleas) 127 P.L.J. 196. Many movies (usually comedies), made throughout the 1930's to the 1970's, depicted ex-husbands' efforts to get their ex-wives married so as to cut off the alimony payments that had

been ongoing for years. The common law view was that even an ex-wife in a short term marriage was entitled to lifetime alimony. The basis for the common law view is founded directly upon the institutionalized gender bias of the Victorian Age. Until the 1960's, family law in the United States reflected the societal view that women were primarily homemakers and that they should work outside the home. Therefore, under this view, husbands were required to take care of and support their wives. Divorce, for that reason, was socially unacceptable. Alimony awards were therefore premised with the dual function of both punishing the ex-spouse for causing the dissolution of the marriage and to compensate the ex-wife for the time spent in the marriage. Generally, under the common law, the wife was entitled to lifetime alimony unless the wife caused the dissolution of the marriage usually through unfaithfulness or adultery. As stated above, ex-husbands, in most states could not petition for alimony awards from their ex-wives unless they were disabled, a requirement not imposed on ex-wives.

In the movies, the ex-wife was often portrayed as having no intention of getting remarried because she was free and had a good strong lifetime income in the form of alimony. Therefore, she had no financial reason for remarriage. In the old divorce decrees, the right to receive alimony was usually terminated upon either getting re-married or moving in with someone of the opposite sex. By such provisions in the divorce decrees, states wanted to make sure that if the ex-wife was living with another man, the spousal support

stopped. The reason for such provisions were not only to cut-off unfair alimony payments by the ex-husband but also to assure that the ex-wife did not choose to live in sin and therefore weaken the moral fabric of society. Until relatively, it was often stated that society had a duty to preserve the sanctity of marriage and for that reason it was deliberately made difficult for couples to get a marriage and alimony awards were viewed as means to punish the ex-spouse causing the divorce.

To grant a divorce, a court need only have jurisdiction over the plaintiff spouse. A divorce action is a "rem" action and the "res", the marriage, follows each spouse. Having jurisdiction over the plaintiff spouse gives the court jurisdiction to adjudicate the marital rights of both spouses which includes granting a divorce. The United States Supreme Court in *Williams vs. Williams* 317 U.S.287 held that the domicile of the plaintiff spouse is sufficient for the court to grant a divorce even though the court does not have personam jurisdiction over the other spouse. In such instances, the full faith and credit clause requires every other state to recognize the effects of the divorce. In addition, even when a spouse obtained an ex parte divorce, such as moving to another state to get the divorce, that does not stop the ex-spouse from seeking alimony in another state. Throughout the 1960's, for example, women would come to Reno, Nevada, called the divorce capital of the United States, because of Nevada's easy divorce laws, stay for six weeks and then get a divorce. Nevada did not

have jurisdiction to award alimony because the ex-husband was not before the court. Following the grant of the divorce, the ex-wife could move back to her home state and seek alimony and property division there. In ***Vanderbilt vs. Vanderbilt*** 354 U.S. 116, the United States Supreme Court upheld a New York law which permitted an ex-spouse to seek alimony despite the fact that an ex parte divorce was obtained in another state. Not all states, however, allow their courts to award alimony after a judgment of divorce was rendered in another state. In addition, some states that will allow post ex parte divorce alimony will not grant it to a non resident ex-spouse, usually the wife. The treatment of alimony in the ex parte divorce situation is very important because the plaintiff-spouse's, who is usually the ex-wife, could be seriously jeopardized by getting a divorce in such a manner.

The Women's Rights Movement caused a change in society's views toward marriage and the idea of alimony awards as punishment. The Women's Movement began the first step toward the elimination of institutionalized and de facto gender bias in the legal profession. As a result, no-fault divorce is now available in virtually every state. In addition, it is no longer considered a women's right to receive alimony forever even if she had only been married for just a couple of months. The modern view has developed, in contrast to the earlier common law view, that women owe a duty to themselves to look out for themselves, and therefore be able to earn their own living. As a result of this, courts have backed away from the idea

of permanent alimony, and in its place have substituted formulas and procedures by which they will require one spouse to pay the training and education expenses for the other spouse to be able to support himself.

Under the common law, a husband had a duty to support his wife but the wife had no duty to support her husband. Today, all states have enacted laws which impose the duty upon each spouse to care and support the other spouse while they are married. Such support is defined as providing the necessities of life. Such laws require that once it is proven to a Court by a spouse or interested party, such as a relative or government entity, that the spouse is unable to provide for his or her necessities of life, the Court will require the other spouse to provide them to the extent possible. A spouse is not expected to suffer deprivation or to be forced into bankruptcy as the result of supporting the other spouse. In practice, it is easier for a woman to obtain a support order than it is for a man. Generally, support for a man is only ordered when he is disabled, to the extent that he is unable to care for himself. In the property division of a marital estate, the Court will first divide the debts into his, hers or theirs.

Under the common law, the husband was totally liable for payment of the wife's debts whereas conversely she was not liable for her husband's debts. This difference led to the development of two separate sets governing the property rights and distributions between a husband and wife based upon their sexes. Today, each

spouse is responsible only for their own debts and those created jointly with the other spouse. On a joint credit card, for example, both spouses are liable for the outstanding balance no matter what was purchased or by which spouse. However, the outstanding balance on a spouse's individual credit card, one only in that spouse's name, is owed only by that spouse. The only exception to this treatment occurs when the credit charges were incurred for necessities of life purchased for the other spouse or, in some states, were incurred to benefit the marital estate. In such an event, the other spouse will be required to reimburse the costs incurred in providing those benefits. In community property states, the community property in the marriage is liable for the community property debts of either spouse. A community property debt is defined as any debt incurred by either spouse during the marriage for which the creditor looked to the community property estate for repayment or which was incurred to benefit the community property estate or arose as an obligation from the community estate. The separate property of the spouses remained as discussed above.

A judicial property division is not limited to divorce alone. Property division can also occur in a legal separation in which the same rules will apply. A legal separation is virtually identical to a divorce proceeding except for the fact that the marriage is not ended. The effect of a legal separation is that the parties:

1. remain legally separated;
2. neither spouse is responsible for the debts of the other

spouse after the date of the court's order.

3. child custody and support are determined by the court.
4. the court divided the property of the estate in accordance with state law unless a valid separation agreement was entered by the parties. In such an event, the court adopts the settlement agreement as its order and divides the property as covered therein.

The usual reason for doing a legal separation rather than a divorce is that the couple no longer wish to live together by either for religious or financial reasons do not want to obtain a divorce. A legal separation does not later prevent the parties from obtaining a divorce. In a legal separation, the actual separation of the couple is a requirement for the court to grant a legal separation. If the couple does not separate, then a property settlement portion of the court's order may still be enforced but the other elements of a legal separation will not be given effect. To do otherwise, would be against public policy because it results in a Court being used to redefine the marital relationship for a married couple living together in ways that it is not permitted to do.

As part of a legal separation many couples decide for themselves how their property will be divided through the use of a separation agreement which defines their rights in each other's property along with property acquired during the marriage. A separation agreement is used, as the name implies, when the parties intend to separate and live permanently apart. All states permit

the use of separation agreements if used in a legal separation. However, not all states will enforce a property settlement agreement that is entered without the intent to seek a legal separation. In other words, if the couple simply decides to split the property and live apart, not all states will automatically adopt the property settlement agreement because they deem such an agreement to violate public policy and promote the dissolution of families, as discussed in Chapter One. If a valid separation agreement has been executed and one spouse subsequently moves to another state, it would be prudent to verify if the separation agreement violates the laws of the new state. Each state will enforce a separation agreement validly created in another state but usually only to the extent that it does not violate its own laws. This has caused a great deal of litigation over the enforceability of separation agreements across state lines when not adopted as part of a legal separation.

In any property division, it is important to know whether the division will be made under community property law or the common law. A minority of states: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington and Wisconsin and, to an extent, Oklahoma and Colorado have based their family law under the Spanish law or the Napoleonic Code which hold that all property acquired during a marriage, except property acquired by gift, devise or bequest, to be jointly and equally owned by both spouses. The earnings of both spouses, in a community property state, for

their work performed during the marriage along with their retirement benefits earned during the marriage are also considered to be equally owned by the spouses.

Since community property is held to be owned by each of the spouses equally, it is given special tax treatment upon the death of a spouse. Under federal tax law, when one spouse dies the tax basis of both halves of the community property will be increased, stepped-up, to fair market value. This is a great tax advantage upon a death of a spouse but is of no consequence in a divorce. A tax advantage that community property has in a divorce is that there is no tax liability incurred with one spouse being awarded his or her interest in the community property. Because of the tax implications in holding property as community property, it is important that attorneys and judges properly characterize the status of the property in the marital estate as either community property in nature or common law depending on the applicable law. A couple, who moved from a community property state into a common law state, may have the property divided in accordance to the community property law of the state in which it was acquired and not the state in which they currently reside or where the divorce or separation action was brought.

The Respondent can also file for divorce in the same action as the Petitioner. In such a case, even if the Petitioner subsequently drops the divorce, it will still go forward because of the Respondent's petition. A more complicated situation arises when

both spouses file for divorce separately and in different states. In such an instance, both states may have authority and jurisdiction to grant the divorce. This can cause a great deal of problems in deciding how the divorce and its related issues are handled. Many states have adopted the Uniform Divorce Act which determines which state should handle a divorce when the spouses seek it in different states. Under this Act, jurisdiction is based upon: (1) the respective parties' contacts with the state, (2) where the children, if any, live and (3) where the property of the marriage, if any, is located. The court may also make an order for the division of property located out of the state if the Court has jurisdiction over both of the spouses.

Spousal support is also referred to as alimony. It is support paid in cash or property from one spouse to the other to cover the necessities of life. Spousal support is paid separate and apart from any property settlement and is for recipient spouse's continued care, maintenance and support. Under the common law, a divorced woman was entitled to receive alimony for the rest of her life regardless of the length of marriage with the only proviso that she not remarry. Likewise, the amount of alimony which a wife received under the common law was to be sufficient to keep her in the manner and style to which she had become accustomed. In contrast, under the common law, a husband was not permitted to receive alimony under any circumstances. It took a United States Supreme Court case, **Orr vs. Orr** (1979) 440 U.S. 268 to finally

resolve the issue of whether a man can receive spousal support in a divorce. The Court held:

"Even if sex were a reliable proxy for need and even if the institution of marriage did not discriminate against women, these factors would still not 'adequately satisfy the salient features of' Alabama's statutory scheme

There is no reason therefore to use sex as a proxy with need. Needy males could be helped along with needy females with little if any additional burden on the State."

The common law rule which was ironclad absolutely forbade a husband from receiving spousal support under any conditions or circumstances. Gradually, some states began to recognize the inequity of this position and passed laws permitting a husband to receive some spousal support under strict conditions. However, it was not until the Supreme Court's **Orr** decision that the right was extended to all men. Today, all states have laws that permit men to receive spousal support on the same conditions as women. While the laws permit spousal support for men, in practice, Courts tend to award it only when the man is disabled or is otherwise unable to foreseeably earn a living. The Courts, as a whole, still evaluate more intently the need of men seeking support than is done for women seeking support. Even before the U.S. Supreme Court's decision in **Orr**, states had begun to invalidate the gender based

laws which imposed different requirements for men and women for the award of spousal support, ***Henderson vs. Henderson*** (1974) 327 A.2d 60. As an offshoot of the Women's Rights Movement, men are, today, permitted to receive alimony today if need is shown. Furthermore, most states now only award alimony for the length of time that the Court considers as reasonable for the recipient spouse to acquire the ability to earn a living. In making its support order, the Court looks to the property available to each spouse, their respective ages, and the recipient spouse's need and ability to earn in the future.

The modern view of spousal support has sparked considerable criticism from the feminist movement. It is argued that older women, who were never trained to earn their own living, find themselves with little or no income after a divorce. These women, it is argued, are unreasonably expected to fend for themselves by a certain date when they never had an opportunity to learn or acquire the skills and experience needed to do so., A Court may make temporary support orders while the divorce is pending. Because the support order is temporary, the Court can make its decision without a full consideration of the merits of the issue. A Court will base its temporary support order on the financial statement presented by the Petitioner. The spousal support order will be based on the amount of money the Court determines is needed for the maintenance of the spouse during the divorce. Often temporary support is more important than the final support order because the

spouse requesting the temporary support may have a lot of assets but very little cash. In such an event, the spouse needs temporary support while those assets are converted into cash. When that is done, the spouse may no longer need additional spousal support. In some states, the amount of awarded temporary support is taken into consideration when dividing the property of the marriage. In such states, the paying spouse may receive a credit against the amount of property awarded to the recipient spouse for the temporary spousal support previously paid.

The Court has wide discretion in directing how spousal support payments are to be made. Support payments are usually awarded monthly but, if the circumstances warrant it, then the Court may order the payments to be made in lump sums or even quarterly. A lump sum or quarterly payment of support is usually ordered when the payor spouse receives income all at once. An example of a spouse who may be ordered to pay support in a lump sum may be a farmer who is paid only when his crops are sold. A Court may also order the payor spouse to place sufficient assets into a trust and make the spousal support payments from the income of the trust.

Insurance can also be considered by the Court as an element of spousal support. A Court could order the payor spouse, as part of the support award, to pay for the recipient spouse's health, disability and/or life insurance. Courts will often order that health, car and home insurance be maintained in the recipient spouse during the divorce. Courts tend to split on the issue of

ordering life insurance to be paid because upon the death of the recipient spouse the support obligation ends. However, if there are minor children of the marriage, life insurance on the recipient spouse may be order to protect those children as an additional form of child support. Court ordered insurance is treated the same as any other support obligation. The failure of the payor spouse to furnish and maintain the insurance exposes the payor spouse to contempt charges.

Support orders are fully enforceable Court orders. The willful failure to comply with Court ordered support obligations are held to be contempt against the Court. The payor spouse may be fined and/or jailed for failure to make the support payments if there is no legitimate excuse for the nonpayment. In addition to seeking enforcement through contempt proceedings, the recipient spouse may execute on the support order in the same manner as any other court judgment. Property of the payor spouse may be attached and sold to pay the support obligations. In addition, the wages of the payor spouse may be garnished (seized) to apply to the support payments. Many states have adopted the Uniform Reciprocal Enforcement of Support Act. The states adopting this Act have agreed to enforce the support orders of the Court of the other signatory states. This Act is intended to prevent ex-spouses, ordered to pay support, from evading and avoiding their support obligations by moving to another state. In fact, it is now a federal crime to do so.

Usually a Court will award attorney fees and costs to the

recipient spouse who has had to take the payor spouse to Court to enforce the spousal support award. In addition, there is legislation that will permit recipient spouses to attach the payor spouse's tax refund check. Government agencies as reimbursement permit such attachment for financial assistance rendered to a recipient spouse because the payor spouse 's failure to make court ordered support payments. A recipient spouse, who has not received payment, should report the payor spouse to the local district attorney who may seek enforcement through a criminal proceeding. Attorneys should be careful when representing a recipient spouse on this issue. The attorney, under the canons of Professional responsibility cannot threaten criminal action in order to achieve a civil settlement. Therefore, while the client may threaten the nonpaying spouse with going to the District Attorney, the attorney can only to proceed with civil collection action if the support payments are not resumed.

While a divorce may be granted without the respondent being in the Court, spousal support will not be awarded unless the respondent has been validly served and is subject to the Court's jurisdiction. A Court's jurisdiction over a person, rather than property, is called "personam jurisdiction" and requires that the person either be a resident of the state or have significant contacts with it. All but two states, Maryland and Vermont, treat divorce and spousal support as separate matters. The majority of states will grant a divorce even though they do not have personam

jurisdiction over the respondent spouse sufficient to make a support order. It is possible for a spouse to file a for a divorce in one state and the other spouse to seek spousal support in another. The determining factor on spousal support is which state has personam jurisdiction over the spouse from whom the support award is sought.

Some states still take fault, i.e., the grounds for awarding a divorce, into consideration in awarding spousal support. The rationale for doing so is that the spouse seeking the support should not be rewarded for doing wrong. Likewise, under this rationale, a spouse who did wrong should be punished for causing the divorce. When fault is at issue, spousal support that would otherwise be awardable may be reduced or denied altogether. In states which have straight no-fault divorce laws, spousal support is awarded regardless of fault on the part of any spouse.

All states view spousal support awards as being modifiable whenever changed circumstances warrant it. The following states have statutes which specifically state that spousal support awards are always modifiable:

ALASKA	ARIZONA	CALIFORNIA	COLORADO
CONNECTICUT	FLORIDA	HAWAII	ILLINOIS
IOWA	KANSAS	KENTUCKY	MAINE
MARYLAND	MONTANA	MICHIGAN	MINNESOTA
MISSOURI	NEBRASKA	NEVADA	NEW HAMPSHIRE
NEW JERSEY	NEW YORK	UTAH	VIRGINIA
WASHINGTON	WEST VIRGINIA	WISCONSIN	WYOMING

Even in those states which do not have specific laws stating that support is modifiable, the Courts usually insert clauses in their

final decrees reserving jurisdiction to modify spousal support as the circumstances change. Either party may seek modification of a spousal support award for changed circumstances. The payor spouse may seek to have payments reduced while the recipient may later seek to have them increased.

The most common reasons for a change in spousal support are the remarriage of the recipient spouse or the recipient spouse getting a better paying job. Some states, such as California, Colorado and Illinois, have laws which terminate support immediately upon the recipient spouse's remarriage. A change in the financial status of the payor spouse may also justify the modifying of the support award. Likewise, an increase in assets or a job by the recipient spouse may reduce the need for spousal support. Modification of spousal support is usually made by filing a motion before the Court where the divorce was granted. However, if the recipient has moved, the suit may be filed where the recipient spouse lives but the law employed will usually be the law of the original state.

1. BIAS IN THE DETERMINATION OF SUPPORT OR ALIMONY

Today, both spouses may seek an award of alimony from the other. Alimony or spousal support, as it is called in some states is common. The United States Census figures for 1980 showed that fourteen percent of all divorces alimony was awarded. ***The National Commission on the Observance of The International Women's Year...To***

Form a More Perfect Union 102-09 (1976) conducted a poll of 1522 women in 1975 regarding alimony. The poll found that fourteen percent of the divorced women were awarded alimony but only 46% received that spousal support regularly. In individual states, the percentage of divorces for which alimony is granted can be substantially higher. In 1974, for instance, Florida courts awarded alimony in 24.4% of all divorce cases. As a form of alimony, Florida awarded the family home to the ex-wife 72.4% of the time, the ex-husband received it 7.9% of the time and rest of the time it was sold with the proceeds divided among the parties. Generally, however, it is women who still receive most of the alimony awards. The reason behind awarding women more alimony than men stems from the economic realities of society. Men tend to earn thirty percent more than women. The discrepancy in overall earning capacity between men and women is based upon the fact that men tend to have higher education and work at higher paying jobs. While men earn more money in the higher paid jobs, they also tend to die earlier than women because of those jobs. In 1970, for example, the life expectancy of steel workers, almost entirely men, was 60 years of age when the overall life expectancy of men in general was 65 years of age. In contrast, for the homemaker in 1970, the life expectancy was nearly 71 years of age. As a result of the fact that men tend to earn more than women even though they tend to die sooner, they usually are not awarded alimony. There are exceptions, where the husband stays at home and takes care of the kids or does not earn

as much of as the wife. In such instances, the husband will receive alimony. Statistics, however, should that nearly 90% nationwide of all alimony and spousal support awards go to women. For this reason, this section is devoted to the gender bias factors used in making alimony and spousal support awards to the ex-wife.

A few decades ago, women were not expected to work outside the home and therefore an ex-husband was expected to support the ex-wife until her remarriage. Society's view of that earlier time was that every woman should be married and a divorced woman was expected to seek remarriage. In the 1950's a divorced woman was viewed very negatively by society. Even in Hollywood at the time, a divorce could ruin a woman's screen career. Many Hollywood stars had moral clauses in their contracts which permitted their termination from the studios if their conduct offended the public morals such as getting a divorce. Today, the support award to an ex-wife is primarily designed to train her to be able to go forth and earn a living. The argument raised against such temporary alimony is that it is sometimes unfair against an older divorcee from a long term marriage. Statistics show that older women, no matter how much training they may receive, may not be able to get into the job market. Many of the older women receiving divorces have never worked a day in their lives having been homemakers throughout their adult lives. Many former homemakers have only a high school education which was earned one, two or three decades ago. For such older homemakers, it may simply be unreasonable to

expect them to acquire the skills to be needed to maintain their pre-divorce life style. Under the prior common law view, an ex-husband was required through alimony payments to keep the ex-wife in the style in which he had made her accustomed. Today, the style of living for the ex-wife is a minor consideration for the courts. The courts now determine what amount of alimony and support award would be sufficient to allow the ex-wife to get some type of job training.

In Ohio, a five-year study was undertaken to evaluate the effects of ex-wives life styles when they were able to get one or more years of training. It was found that such women were able to enter into the labor market and get better paying jobs within two years. ***The MLS Mature Women's Cohort: A Socioeconomic Overview***, Ohio State University (1978). This study supported the long held belief that it is cost effective for both the ex-husband and society as well for ex-wives to receive training to support themselves.

This modern view was first touted by the Women's Movement as a means of forcing women to take responsibility for their life and therefore liberating themselves from control by men. Today, many feminist organizations state that the general denial of permanent alimony has actually worked to the detriment of many women. These women organizations now assert that for a court to put limitations on the amount or time for which the ex-wife will receive support can force her into a poverty-stricken situation. In Nevada, a

survey of 25% of its judges showed they rarely or never awarded permanent alimony after a long-term marriage. Another 44% of these judges stated that they sometimes gave permanent alimony. The Nevada Supreme Court in ***Baker vs. Baker*** (1990) 106 Nev. 412 held that permanent or lump sum alimony is appropriate when the spouse paying the alimony (usually the ex-husband) has a much shorter life expectancy than the ex-spouse receiving it (usually the ex-wife).

It is understood that divorced women, as a rule, do not have very marketable job skills. Most divorced women tend to take jobs only in the clerical or low-skill areas, simply because they are not trained for anything else. Being a homemaker does not necessarily train someone to be a fork lift operator. That does not mean that women cannot be trained to be a fork lift operators. This is where the judges come into play to determine out what type of support and how long to render it. A study for spousal support in California covering the 1970's showed that long term divorcees suffered as a result of the divorce. The study showed that California ex-wives with a pre-divorce family income of between \$20,000 and \$30,000 had a median income of only \$6,300 following the divorce. ***"The Alimony Myth: Does No-Fault Divorce Make a Difference."*** ***Family Law Quarterly***, Vol. 14, No.3 (1980). If, for example, the ex-wife has been a housewife for ten years, she may not want to go out and get a job, but would rather continue on as a homemaker and raise the children. In that situation, however,

the ex-husband may not want to support two households and pay to have the ex-wife stay at home. That view is supported by many feminists as well who do not believe that women should be staying at home to raise children. In some instances, where the ex-wife has been a homemaker for many years, no amount of training may be able to put her in the job market because of the time factor. If an ex-wife wants to go to school and become a lawyer, for example, and has no college education, she would be looking at four years of college and three more years of law school. If she is fifty-two years of age, at the time of the divorce, she will be sixty years of age by the time she's an attorney and she may have many problems in getting a job. The age of the ex-wife works against her even though there are age discrimination acts. While someone could not discriminate against her for age alone, the bottom line is she wouldn't have the experience of someone the same age. A woman of the age of fifty or sixty years with a new degree and no experience will be competing against younger people with probably a lot more job related experience. As a practical matter there is discrimination to be expected on that aspect. Judges should bear all these factors in mind when considering whether to award permanent alimony. Where the ex-wife is never reasonably expected to be able to earn a decent living a permanent award of alimony may be proper. If the ex-spouse is able to earn some money after a permanent alimony award is made, the ex-husband will still have to pay support but may have the amount reduced. All states permit the

reduction of an award of permanent alimony when the facts justify it on a case by case basis. In the case *In re Marriage of Branthner* (1977) 67 Cal.App.3d 416, the court recognized that permanent alimony may be required in certain circumstances on a case by case basis:

"In those cases in which the decision of the parties that the woman becomes the homemaker, the marriage is of substantial duration, and at separation the wife is to all intents and purposes unemployable, the husband simply has to face up to the fact that his support responsibilities are going to be of extended duration--perhaps for life. This has nothing to do with feminism, sexism, male chauvinism or any other social ideology. It is ordinary common sense, basic decency and simple justice."

There should be some understanding that training alone will never suffice in all circumstances. Judges need to understand the economic realities present in society. Specifically, Judges need to realize that spouses who were homemakers for many years may never be able to fully support themselves because of their age. In such instances, the award of permanent spousal support is proper.

A judge is willing to give spousal support for four or five years almost routinely, but beyond that, the judge usually rules that at the end of four to five years the ex-wife should be able to find some way to earn income. The ex-wife can become a secretary or whatever by the end of that time. That part of it is true. The ex-wife can get training, but can she get a job? That argument has been used several times, sometimes quite successfully but often only moderately so. While an ex-wife can go out and become a secretary, if she is in her 50's and starting out against someone in her 20's, it

doesn't always work. The national statistics show that 74% of all divorced women with children less than six years of age are in the work force. As a practical matter, most women who have children do work, and the idea of paying support so the ex-wife and mother can stay at home and raise the children is really the exception. In most courts, the ex-husband will be required to pay support, but the wife is going to be required because of the level of support the ex-husband is going to pay, to go out and get a job. The reality of the situation is that most people do not earn enough money to support two families. In any event that income the ex-husband makes has got to be used to support both his new family if he remarries and the children from the former marriage, in addition to any support to be paid to the ex-spouse. The ex-husband usually does not earn enough to fully maintain two separate households unless he is a wealthy person. Many states, such as California and Nevada, have minimum support scales for child support. In these cases the husband or father is expected to pay these minimum amounts, period. These payments come right off the top of the husband's net earnings. If the husband does not make enough money, he must bite the bullet and live at a reduced standard so as to make the payments. The real issue arises on spousal support. How much should a judge order an ex-husband to give the ex-wife in order for her to survive? The average divorce does not involve wealthy people. The average couple earn \$40,000 per year together. Often the wife has never worked and now the ex-husband has to support the ex-wife and their two

children. If the ex-husband remarries he is going to have another wife to support and maybe children from that family. Most states will have a schedule that will guarantee minimum payments for the children of the first marriage, but as for paying spousal support for the ex-wife, that will usually be based upon a few years in order for her to acquire the skills necessary to earn a living. If ex-wife is older, the husband may have to pay alimony for a long period of time. There are no set standards. The Social Security Administration estimated in 1975, that the average full-time homemaker did work that had the value of \$7,500 per year. That was a 1975 figure, so nowadays that figure would be up to around \$20,000 per year in today's money. In a family situation, for example, assume one spouse (usually the wife) who stays home, and the other spouse is earning \$30,000 per year. Using the estimate of the Social Security Administration, the at-home spouse is contributing \$20,000 per year of income at home toward the family income and is, in essence, earning 40% of the total support to the family by what is being done at home.

The need for alimony is often exacerbated if there are minor children in the marriage. A Census Bureau study, **"Child Support and Alimony: 1983"** showed that fifty three percent of single mothers failed to receive support for their children. The lack of child support from the father, whether court ordered or not, has the obvious effect of increasing the monetary concerns of the mother.

The study went on to compare the standard of living of divorced men and women in California. It was determined that the standard of living for divorced men increased by 42% following a divorce whereas the standard of living for divorced women actually decreased by up to 72%. In 1979, for instance, 58% of all women heading family households worked in the clerical and service area. In 1985, such jobs were paying \$61 for every \$100 earned by men. The payment for the jobs are based upon the availability of people willing to work for that pay. Women without sufficient job training simply lack the ability to get, as a whole, better paying jobs.

A study that was conducted in the late 1970's showed that only 23.8% of all alimony awards were permanent (paid for an indefinite period of time). Over 76% were rehabilitative alimony awards paid for a period of time to allow the spouse to be retrained and earn a skill to support herself. In the cases where such rehabilitative alimony was granted, women with children received higher alimony payments than women without children and non-working ex-wives received higher alimony payments than working ex-wives. All of this is rather interesting when it is considered that the purpose of the alimony payments is for training. In this case, Courts tend to base their determination on how much alimony is to be awarded on the income of the recipient spouse. Most interesting is the fact the Courts award more alimony to working women with children when, as a concept, child support is supposed to be awarded separate from alimony. Child support is not supposed to be related to alimony.

Regardless of whether or not alimony is awarded, child support is supposed to be awarded separately to the custodial parent. To give more alimony simply because there are children is to give child support twice. Nonetheless, studies show that this frequently occurs and that is a form of reverse gender bias. When considering spousal support, gender bias comes into play because most judges do not understand the economic reality of a divorce. In making support awards, judges should consider the earning capacity of the ex-wife and her ability to actually acquire sufficient training to get a job, given her age and physical condition. While such is very important and it can be hard to do. Most judges have taken the view to be politically correct they only have to order a set amount of income for a period of time, and then let the ex-spouse, usually the ex-wife, pull herself up by the bootstraps and get a job. If they use anything other than that, they risk the criticism that they are being patronizing. In reality that is the wrong consideration because judges should always look out for the best interest of the people who are before the court. It is wrong for Judges to view a case in with a pre-conceived notions that they should never award permanent alimony because there are recognized circumstances where it should be awarded. In most long-term marriages, it may, in fact, be the only just decision, because the ex-spouse (often the ex-wife who needs the support) cannot realistically be expected to earn a decent living, regardless of the amount of retraining. Judges should be aware of that, and if they are not, they may be unintentionally

creating de facto gender bias in the opposite direction by assuming that everyone is equal, when in these situations they may not be equal. It is very easy for a judge to be politically correct, and rule that in five years anyone, including an ex-spouse without a marketable skill, can acquire the skills to be self-sufficient. But, in reality, that may not be true and therefore work an hardship on the ex-spouse. In many states, the amount of alimony or spousal support which a spouse receives is based on the property division. The equitable distribution of property, as now followed in most states, was, for example, codified in the Wisconsin Marital Property Act. Wisconsin reformed its common law based family law. ***The Wisconsin Marital Property Act: Highlights of the Wisconsin Experience in Developing a Model For Comprehensive Common-Law Reform***, 1 Wisconsin Women's Journal 5.

Collection of alimony can be a problem. A court order does not always guarantee payment. According to the Statistical Abstracts of the United States, 1985, only forty percent of the divorced women actually received their court ordered alimony.

CHAPTER EIGHT

GENDER BIAS IN CHILD CUSTODY AND SUPPORT

INTRODUCTION

One obvious instance of gender bias occurs in the award of child custody. Unlike most forms of gender bias, in child custody the discrimination is often practiced against the father. Until very recently, many states had laws that automatically awarded child custody to the mother unless the father could prove that she was unfit. The view that women are naturally the better parent, while no longer written into the law, is still widely pervasive. Today, all states have statutes that require that child custody awards be made only on the best interests of the child. In practice, however, the presumption still remains that it is in the best interest of the child to be with the mother. Now while Judges still tend to be paternalistic in their view of child custody that can work toward the detriment of certain women. For some judges the non-traditional life styles of the mother may override their traditional belief that the children belong with the mother. In particular, some judges believe that it is in the best interests of a child to be raised by a fit, straight father or grandparent rather than a lesbian. Other judges feel that while a lesbian could raise a daughter it would still be in the best interests to have a boy raised by the father or grandparent who is fit to do so. This has been an ongoing debate. Only a few years ago, society would not even have considered

awarding child custody to homosexual parent over that of a straight and otherwise fit parent. Gay liberation has, however, has resulted laws being enacted in some states that require homosexuals be treated on the same basis as straight persons in the awards of child custody. The effects of baby being raised by a homosexual parent has never been fully documented. As such, in many states, judges still retain the right to consider sexual preference on the part of a parent in making child custody awards.

There is no reason to believe that men are inherently unfit to raise their children. In fact, up to the 20th Century, child custody was usually awarded to the father. ***Father's Rights and Feminism: The Maternal Presumption Revisited***, 1 Harv. Women's L.J. 107. The earlier common law, presumed that fathers, given their management and control of family assets and the ability to earn a living, were in the best position to properly raise and provide for the children. The New Hampshire Supreme Court stated the common law presumption for child custody in ***State vs. Richardson*** (1980) 40 N.H. 272:

"It is a well-settled doctrine of common law that the father is entitled to the custody of minor children... that he is bound for their maintenance and nurture, and he has the corresponding right to their obedience and their services.

The view that men were by the very nature of their economic position, better suited to raise minor children had throughout the 19th Century been the rule rather than today, the exception. The New York Court of Appeals held in ***People ex. rel. Nickerson*** (1837) 19 Wend 16:

"In this country, the hopes of the child in respect to its education and further advancement, is mainly dependent on the father, for this he toils through life, the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relationship would not only tend to wither these motives but necessarily in time, alienate the father's natural affections..."

The Court went on to further find that no evidence had been presented to show that the best interests of the child would be served, "pecuniary or otherwise, to commit custody to the mother." Under the common law, the father's obligation to support his children only existed for as long as he had custody. Children were viewed, in the 19th century, as virtual chattels of the parents having custody and the obligation to support the children followed the custodial parent alone. A father without custody was generally presumed not to have a duty to support the children. **Brow vs. Brightman** (1883) 137 Mass. 187.

Beginning in the late 19th century, was the development of the "Tender Years Doctrine" which held that young children were better off with their mothers. **The Tender Years Presumption in Child Custody Disputes** 15 J. Fam.L 423. The Tender Years Doctrine held sway in custody awards throughout the 1970's until replaced with the broader concept, "Best Interests of the Child". The "Best Interests" doctrine requires that custody of children should be given to the parent or other person which would have the best effect on the child. Only Utah, still has the tender years doctrine codified in statute although the Utah Supreme Court rejected its use in **Pusey**

vs. Pusey (1986) 728 P.2d. 117 and applied the best interest's test. More than thirty-five states have expressly rejected the tender year's doctrine whereas the remaining states apply the tender year's doctrine in conjunction with the best interest's test when all other factors are equal.

The facts regarding child custody and the impact on American society are alarming, **Family Facts**. As of 1995, forty percent of all first time marriages end in divorce, as compared to only 6% in 1960. The United States has led the world in the percent of fatherless families, since 1986, when it passed Sweden. In 1960, 5 million children lived in single-parent families whereas in 1993 that number was 18 million. The number of children in such families grew as well from 63.7 million in 1960 to 66.9 million in 1993. A study of living arrangements with children of single parents showed that only 3.5% lived with their father. Forty percent of single parent children had not seen their fathers for over a year and more than 50% of such children had never been in their father's home.

As bad as the above statistics appear, they bode even worse for society as large. Seventy-two percent of adolescent murderers grew up without fathers. Sixty percent of all rapists likewise grew up without fathers. Seventy percent of all children in juvenile reform institutions were from single parent homes. Behavioral studies show that children exhibiting violent behavior are eleven times more likely to live in a single parent home. Children from low earning

two parent homes out achieve children from high income single parent homes by nearly two to one. In 1960, 5.3% of all live births were to unwed mothers. As of 1993, the percent of live births to single mothers reached 30% and are expected to reach 40% by the year 2000.

I. BIAS IN CUSTODY CONSIDERATIONS

Family law is the generic term for the body of law dealing with the personal relationships of families and the rights of all members therein. Family law is the most litigated field in civil law. As much as sixty percent (60%) of all civil filings involve some area of Family law. The most commonly contested areas of family Law are, not unexpectedly, child custody and support. Only relatively recently have states eliminated fault as a requirement for obtaining a divorce. As such, the major areas of contention left in a divorce are property division, spousal support, child custody and child support. With recent influx of women into the non-traditional work force, the traditional nuclear family has been reduced. As there are more working mothers appearing in divorce courts, states have begun to rethink their traditional notions of always awarding child custody to the mothers. Many states have enacted laws requiring joint child custody and even mandate that their Courts presume, until proven otherwise, that fathers are equal with mothers in ability to rear their children. These actions have served to increase litigation and further fill court dockets.

In every state, the Court having jurisdiction over the child and one parent is the proper forum for bringing an action for child

custody and support. In making its decision, the tenet of what guides the Court is the best interest of the child. While the parents may agree among themselves, the issues of child custody and support, any such agreement does not bind the Court. The Court will not award child custody to any parent whom it feels is unfit. The Court looks at many factors when it makes its decision what is in the best interest of the child. Some basic factors which the Court weighs in making its decision are:

1. the age, health and sex of the child;
2. the age, health and sex of each parent;
3. the home environment of each parent;
4. the character of each parent;
5. any criminal record of any parent; and
6. the financial ability of each parent to support a child.

To aid in its determination, the Court may appoint a social worker to investigate the parents and to make a recommendation on custody. The traditional view, still held by many judges, is that the mother should always have custody. This belief was based upon the belief that since mothers did not work outside the home they were best able to raise the children provided they received adequate support. Since many mothers now work full time, many states now recognize that the traditional reason for awarding custody to the mother no longer exists. In such states, fathers are given the opportunity to seek child custody on an ostensibly equal footing with the mothers.

Children cannot select the parent with whom custody will be

awarded. Nevertheless, most courts will, at least, listen to their preference and try to understand their reason for it. The child's preference is one factor but not the only one upon which a Court will base its decision. The Court is always to be guided by the desire to do that which is in the best interest of the child. When everything is taken into consideration, the preference of the child may be an important factor if not the deciding one. The Court will consider the weight to be given to the child's preference. A younger child's desire will naturally be given less weight than that of an older teenager.

Generally, most courts feel that it is in the best interests of a child to be raised in a two parent home. Thus, if the non-custodial parent remarries and seeks custody, the court may consider that to be an important enough change as to merit a modification of its custody order. The Bureau of Census, U.S. Dept. Of Commerce's, report on ***Characteristics of Households and Persons Receiving Selected Non-Cash Benefits: 1980*** found that families headed by single women had a median income of \$10,830 as compared to \$18,775 for single men and married couples who had a median income of \$23,180. This translates into a belief that, annually alone, a father is usually in a better financial position to provide for the child, especially if remarried. The importance of a remarriage increases if the stepparent is a homemaker and the custodial parent has a full-time job. The Court may then feel that the homemaking

stepparent may be able to spend more quality time, both caring and nurturing, the child, **Webb vs. Webb** (1981) 7 FLR 3051, **Binosky vs. Binosky** (1980) 405 N.E.2d 1112. If the child is not of school age and the custodial parent must put the child in day care while working, the Court could decide that the better environment would be with the other parent who could raise the child at home. One area of gender bias often occurs when a non-custodial mother remarries. Generally, a stepfather's presence in the home is not considered sufficient to merit a change in custody because the stepfather is usually not going to stay at home be the primary caregiver to the child. **Simmons vs. Simmons** (1978) 576 P.2d 589.

It was not so long ago that a parent living with a person of the opposite sex was automatically denied child custody. Such conduct was perceived to be immoral and universally believed to create a harmful environment in which to raise children, **Simmons vs. Simmons** supra. As a result of the Women's Movement, today's view of such conduct is not so well-defined. In **Gould vs. Gould** (1984) 118 Wis.2d 493, the Court refused to take custody away from a divorced mother living with a man and give it to the remarried father unless it could be shown that the mother's relationship was harmful to the child. The court is required to do what is in the best interest of the child but that often is a subjective determination. As such, the Court is often called upon to determine if a custodial parent's home life poses moral or psychological harm to the child. Many Courts,

particularly in California, will not consider such a relationship by itself be destructive to the normal development of the child. Courts, in other states, have viewed the matter differently and have even gone so far as to order the unmarried partner of a non-custodial parent out of the home when the child visits. It is all dependent upon the perceived effect such a relationship will have on the child's normal development.

Should the Court find that neither parent is capable of providing for the needs of the child, then the child may be placed into a foster home until the custodial parent, or non-custodial parent, are found to be able to properly care for the child. In an extreme case, the Court may terminate parental rights and place the child up for adoption. Such interference with a parent's parental rights is extreme and exercised only when the welfare of the child is in jeopardy.

Joint custody exists in two parts: physical custody which determines the amount of time the child depends with each parent and legal custody which requires the parents to jointly make decisions about the child's education, health and overall welfare. Joint custody is used predominantly by a couple who feel that it affords the best means to provide the most stable environment in which to raise the children. The concept of joint custody has been gaining ground in the last few years although not without opposition. Some states, such as California, now require that preference be given to joint custody petitions unless it is in the best interests of the

child not to do so. The traditional form of custody is sole legal and physical custody to just one parent. In the traditional custody arrangement, the non-custodial parent, usually the father, has no input into the manner in which his child is raised. this arrangement has long been recognized as both weakening the parental bond and fostering juvenile delinquency. Joint custody has been touted as a means of maintaining stability in the child's life following the parents' divorce. Joint custody works best when the parents agree to work together for the sake of their children and establish a joint goal for which they strive to attain. In the situation where one or both parents are unable to work together, the court will terminate the joint custody and award one parent the sole and legal custody. It is usually very difficult to terminate joint custody and the court is not apt to award sole physical custody to the non-cooperative spouse without good reason.

A child custody award is never final. The Court always retains the power to change the custody order when the best interest of the child warrant it. For example, if it can be demonstrated that a stepparent poses a risk to the child's safety such as by child abuse or drug abuse, then the court will change child custody. In fact, many states now will terminate child custody if a stepparent has a pattern of spousal abuse because it is considered an unhealthy atmosphere to raise children. The problem with this scenario is that it is heavily dependent on the elusive element of proof. It has become almost axiomatic in child custody cases for one parent to

accuse the other parent, a stepparent or friend of the other parent of child or drug abuse to gain child custody. The problem that results is that it often slanders innocent people, crowds the legal systems with frivolous complaints and delays the processing of legitimate complaints. Even so, there is complete agreement that all necessary steps must be taken to protect the child from such dangers. Toward that end, when an unwholesome environment is expected, a parent should amass all the proof possible and pursue relief through the child protective services of the child's county of residence. Because a child custody award is never final, it can and should be modified when the facts call for it. The original custody order was made with certain facts in mind. As the facts change upon which the custody order was made then modification of the custody order may be warranted.

The most common modification of a child custody award is a change resulting from the custodial parent's wish to move out of state. Generally, the move will adversely affect the visitation rights of the non-custodial parent and the court must consider the effects of the proposed move on all parties. In decision whether to permit the custodial parent to take the children out of state, the court will consider, among other factors:

1. the age of the child;
2. the effect on the child in being away from the custodial parent;
3. the effect of the move on the visitation rights of the non-

custodial parent;

4. the closeness of the relationship with the non-custodial parent; and
5. whether the move is just to deny visitation to the non-custodial parent.

Moving out of state is a common ground for modifying custody order. In such an event, the courts often permit the custodial parent to take the child out of the state but gives the non-custodial parent one or more months of custody during the summer and alternate holidays.

Just as the child custody order may be modified so too can the child support order be modified when circumstance change. Remarriage of either the custodial or non-custodial parent is an important factor for the court to consider in determining whether a child support award should be modified. Modification of a child support award may go up as well as down depending on the circumstances resulting from the remarriage. Child support is based upon disposable income which is the amount of income a parent has left over after all of the necessities of life have been paid. When a parent remarries, the new stepparent may be contributing to the cost of running the home and thus may actually increase the parent's disposable income. On the other hand, if the stepparent does not work or contribute to the cost of running the home or has new children, then the disposable income may, in contrast, go down. This could be grounds for reducing the child support for the payor spouse

or increasing child support for the recipient spouse depending on whom it was that remarried.

In a few states, if the non-custodial parent is denied visitation by the custodial parent, then the non-custodial parent may be excused from the paying of child support. Most states, including California, however, treat the requirement to pay child support separate and unrelated to child visitation. The majority view is that the non-custodial parent can always go to court and gain redress if the custodial parent interferes with visitation and therefore there is no justification in resorting to self-help and not paying child support. Often, this has resulted in the committing of many injustices. The non-custodial parent, usually the father, who has been denied visitation for years, may suddenly face criminal prosecution and a huge judgment for back child support. Recent studies have shown that when a father is permitted to see the child then support payments are made more than 90% of the time. When, however, child visitation is deliberately prevented then the drops to less than 40%.

Child napping is the taking of a child by a non-custodial parent in violation of a valid custody order. It is usually a felony punishable for up to five years and a termination of all parental rights. In addition, it is also a federal offense. Since most custody awards are to mothers, it is not surprising that most child nappers are fathers although it is usually only the child napping committed by mothers which is highlighted by the media. As, however,

more courts are rendering joint custody awards, the number of women engaging in child napping has been steadily increasing. The reasons for child napping vary but the one most often cited is the feeling that the ex-spouse is exposing the child to an unwholesome or immoral atmosphere and that child napping is the only means to protect the child. The following steps should be taken when child napping has occurred:

1. The local police should be contacted immediately and a missing person's report completed;
2. A report should be filed immediately with the FBI's National Crime Information Center's computer. If local authorities refuse to do it, then the report should be made directly with the FBI;
3. The National Center for Missing and Exploited Children should be contacted at 1-800-843-56788 for local support groups;
4. The local district attorney should be contacted to determine if criminal prosecution is possible. If there was no custody order in effect, then no crime may have been committed.
5. A petition should also be filed with the Court by the non-child napping spouse to terminate parental rights and obtain full custody. If the court had not previously entered a custody order, no crime will exist until the order is entered. For this reason, it should be done as

soon as possible.

Both parents have legal rights and obligations toward their children. Neither parent can unilaterally interfere with the rights and obligations for the other parent. Even though a divorce may be pending, visitation and contact with a child cannot be denied without a court order. Usually during a divorce, temporary court orders are obtained which specify child visitation rights. These court visitation orders are not final and may be modified in the final custody order.

Feminist organizations have objected to a judge's use of financial considerations in making a child custody award. The argument has been advanced that financial considerations should be employed in determining child custody because it usually benefits the father. It is argued that a father often earns more than a mother and therefore has more money available to dote on the child. To base a child custody award simply upon disposable income of the parent is, in essence, simply selling the child to the more affluent parent. In *Dempsey vs. Dempsey* (1980) 96 Mich.App. 276 it was held to be error to base a father's custody award solely upon his superior financial wherewithal when the mother had been furnishing the child care. While it is true that financial consideration should not be the sole ground for awarding child custody it, nonetheless, it should be a factor to be considered. Not to consider financial security for the child is to negate an important factor in the favor of one parent, usually the father. It is true that child support is

intended to reduce the importance of the non-custodial parent's financial wherewithal but it does not, in reality replace it.

The best interests of the child is not determined solely upon which parent has the nicest home or best toys. In ***Gould v. Gould***, (1984) 116 Wis.2d 493, the court refused to award custody solely based upon financial considerations:

"While the economic well-being of child of divorced parents must be provided for, it is best achieved by the court's making appropriate child support and maintenance awards and by focusing judicial resources on enforcement of awards and not by considering financial ability as a criterion for custody."

Intangible factors such as parental love, attention and support are more important. Nonetheless, even of these factors are heavily influenced by the financial security of the parent. If for example, both parents are loving and fit, a parent who must work sixty hours per week will have less time to spend raising the child than a parent who can afford to stay home and tend the child's interests. This has always been the primary reason for warding child custody to the mother. The belief that most women, even if they remarry will stay at home and raise the child has been the primary reason for awarding child custody to the mother. In order to lessen gender bias in custody decisions it is recommended that judges give weight to the importance and strength of the emotional bond between the child and the primary custodial parent when evaluating what custody would be in the best interests of the child. **"Justice for Women"**, Nev. Sup. Court Gender Bias Task Force.

The traditional view that women will stay at home and therefore are entitled to child custody has been turned on its head in recent years. Today a large number of mothers work the same hours as the fathers. Therefore, if the father is a fit parent there is no reason to award custody to the mother on the sole belief that she will be available at home to raise the child. In such an instance, the question is who is the better parent to raise the child when both parents work. Today, most women with children work. Many states have begun to recognize this fact and hold that a working mother is not be held unfit to raise children simply because she is working. The California Supreme Court in *Burchard v. Garay* 724 P.2d 496 held that since

"over 50% of mothers and 80% of divorced mothers work, the courts must not presume that a working mother is a less satisfactory parent or less fully committed to the care of her child."

This issue was highly publicized in the divorce of Marsha Clark the prosecutor in the O.J. Simpson murder trial. The ex-husband of Marsha Clark sought custody of their children alleging that the overtime she was spending was adversely affecting her child rearing responsibilities. Feminists immediately attacked the father as a sexist merely because he wanted custody of his children based upon a belief that they were being neglected. The argument raised was not that custody should be terminated because Marsha Clark was working but because of the allegation that the work unreasonably interfered with her parental responsibilities. The reason that most women get

child custody is the traditional belief that they have more time to spend with the child. Now that most women work that basic assumption is no longer valid. If Marsha Clark was man, Matt Clark, with custody and the mother brought the action on the same grounds, there would not been the hue and cry that Matt Clark was being punished because he was a working father. As an aside, the press stated that Marsha Clark earns almost twice that of her ex-husband. As such, financial considerations favor Marsha Clark over her husband a fact that many feminists loudly assert in her favor while, in the past, having espoused its nonuse when the use favored fathers.

One of the hardest child custody problems occurs when the non-custodial parent, usually, the father remarries. In such situation, the father can offer a conventional and traditional home environment with both a father and stepmother being present. In such a situation, the court must consider whether it is better for the child to have two parents or just one. The best interests of the child are supposedly at issue and not the personal wants and desires of the parents. Feminist organizations take the position that remarriage of the father should not result in modification of the mother's custody rights. Such a view is not the law. Child custody rights are always modifiable if the circumstance merit it. The traditional basis for awarding child custody has been made on the belief that two parents are better than one but when only one parent can have custody it should be the mother because of her ability to stay at home and dote o the child. If both parents are fit and the

father is remarried with a stay at home wife, then that situation is closer to the traditional view than a single working mother raising a child.

There have been many instances where women have attempted to sabotage the father's right to participate in the raising of a child. A classic case of this occurred in 1991 in California. In this case, the mother who was given custody of a girl remarried and moved with her new husband to Germany. While in Germany she sent a letter to the father stating that the child died. Several years later, the father received notice that the stepfather wanted to adopt the child. This was the first time that the father learned that his daughter had not died and was alive and well. The father objected to the adoption and wanted to have custody of the child. A family law judge in California terminated the father's parental rights in the child because he had no contact with the child for years. The appellate court reversed and granted the father limited visitation rights recognizing, by implication, that the mother's actions probably poisoned any attempt to ever have a true father-daughter relationship. This case highlights the extent which gender bias afflicts the judiciary. The court, in essence, condoned the mother for her actions of interfering with the father's visitation rights. The result of this was that the court ended up letting the mother retain nearly complete control of the child. The mother was not even found to be in contempt of court for her actions in interfering with the father's visitation rights.

A relatively new concept in child custody is that of joint custody. In joint custody, both the father and mother have equal right to make decisions affecting the child but only one spouse is given physical custody of the child. The purpose of joint custody is to keep the non-custodial parent, usually the father, involved in the raising of the child. Joint custody has its own set of problems that are not present in the sole custody relationship. Joint Custody requires both parents to work together to raise the child. Often that is not possible. In making a joint custody order, a judge should investigate the ability of both parents to work together in an ongoing spirit of cooperation and decision-making. In implementing a joint custody order, a judge considers the viability of court order mediated or counseling. Joint custody usually gives one parent the physical custody of the child but both parents have the right to make decisions regarding how the child is raised. **Joint Custody: An Alternative for Divorced Parents** 26 U.C.L.A. L.Rev. 1084 (1979). Legal custody vests both parents with the rights to make decisions regarding child residency, medical care, religious training and discipline. **Burger v. San Francisco** (1953) 41 Cal. 2d 608. Joint Custody is followed in over half the states. The remaining states still follow the common law wherein only one parent is given physical and legal custody with the other parent being given only a specific visitation schedule and ordered to pay a specific amount of child support. **Joint Custody Awards;**

Towards the development of Judicial Standards 48 Fordham L. Rev. 105.

Several states, Connecticut, Hawaii, Kentucky, Maine, Michigan, Minnesota, Montana, North Carolina, Oregon and Pennsylvania, give their courts the option of awarding joint custody when in the best interests of the child. Criticism of the option statute is that it fails to establish any limits or guidelines for the court in awarding joint custody. Opponents of joint custody feel that many courts simply award joint custody as an option to avoid hurting the feelings of the parent who would otherwise be denied legal custody. ***Dodd v. Dodd*** (1978) 83 Misc 2d 641, 402 N.Y.S. 401. This option can also have the effect of forcing parents who are not in agreement to work together. Sometimes the parents can work the differences out without court intervention often they cannot and then the court must step forward and terminate the joint custody and award sole custody to only one parent. ***Joint Custody***, 13 Fam. L.Q. 345. Some states, Kansas, Louisiana, Massachusetts, Ohio, Texas and Wisconsin, will award joint legal custody only where both parents request it. The court retains the authority to deny joint custody when it finds it in the best interest of the child to do so. New York permits joint custody awards by case law only where the parents agree. ***Braiman v. Braiman*** (1978) 44 N.Y.2d 584. Similar to the joint custody option is the right of a court to award it upon the request of either parent which is permitted in California, Hawaii, Michigan, Montana,

New Hampshire and Pennsylvania. As with the option statutes, a court can end up forcing parents who cannot work together to do so in order to raise their children.

Many states, including California, Connecticut, Florida, Idaho, Michigan, Nevada, New Hampshire and New Mexico, have enacted statutes requiring their courts to first consider joint custody before awarding separate child custody to just one parent. This position was taken to combat the discriminatory view of many old time judges who still believe that a mother should always be awarded custody unless the father proves her to be unfit. Many other states have bills pending to enact a joint custody presumption requirement. Under these presumptions statutes, it is presumed that joint custody is in the best interests of the child unless proven otherwise.

A minority view for the award of child custody is to base it upon the primary care presumption. The West Virginia Supreme Court in its decision **Garska v. McCoy** (1981) 278 S.E.2d 357 adopted the presumption that children should be awarded to the parent who has been the primary care giver. The Minnesota Supreme Court in **Pikula v. Pikula** (1985) 374 N.W.2d 705 also applied the primary care provider, "absent a showing that parent is unfit to be the custodian". Washington, by statute, requires that the greatest weight be given to the "relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performance of parental

functions relating to the daily needs of the child". Most states have not adopted the primary caregiver test because it is a very narrow test which applies to only one standard. Most judges want to make as complete a determination as possible and therefore want to consider all relevant factors before making a determination and not be limited to just one element.

II. BIAS IN CHILD SUPPORT

A parent has a duty imposed by law to support all children born or adopted by the person. As such courts, have a duty to both set reasonable child support and to insure their collection from the parent. Until very recently, courts have failed to oversee collection of child support. Today, however, all states are now attempting to enforce child support. In 1984 Congress enacted the **Child Enforcement Amendment Act (CSEA)** to aid judges in the enforcement of child support order. Under **CSEA**, judges can order the following remedies for the failure to pay child support:

- (1) wage withholding on both state and sister state order;
- (2) the posting of bonds, securities or pledging of property to secure child support payments;
- (3) imposition of child support liens on any property; and
- (4) interception of Federal and State tax refunds for payment of child support.

The CSEA was enacted to aid judges in their duties to ensure collection of court ordered child support. Following **CSEA**, Congress enacted the **Family Support Act of 1988 (FSA)**. The main advantage of the FSA is that it permits family judges to order wage withholding

even though the non-custodial parent is not in arrears. The FSA requires automatic wage withholding from the non-custodial parent unless the court finds good cause for not requiring it or the parties agree in writing to another arrangement.

The nonpayment of child support has a very prejudicial effect upon the life style of most children. Most single parents need very desperately the child support payments ordered by the court. The failure of the non-custodial parent often forces the custodial parent onto the government welfare rolls. One of the main reasons that parents refuse to pay their court ordered awards is that the custodial parent, usually the mother, interferes with the non-custodial parent's rights to participate in visitation and raising of the child. Nearly all states today separate child support from visitation. In California, for instance, unless a custodial parent has actually concealed the child, the non-custodial parent still has the duty to make court ordered support awards. Today, the intentional refusal to make court ordered awards is a criminal offense in itself where in the past it was merely subject to a contempt action in most states.

In setting child support awards, the trend is to base it upon all of the income available in the non-custodial household. The Nevada Supreme Court, for instance, in **Jackson v. Jackson** No. 27153 (Dec. 1995) held that a district court may consider a cohabitant's contributions to household expenses under the "relative income of the Parties" factor of NRS 125B.080 in setting child support awards.

III. BIAS EFFECT OF EX-SPOUSE'S BANKRUPTCY

A. ON SPOUSAL AND CHILD SUPPORT

Under section 523(a)(5), courts ordered payments for the support of a child or former spouse are non-dischargeable. However there are variations on this theme for which a debtor must be aware. **WHERE BACK CHILD SUPPORT IS AT ISSUE, CARE MUST BE TAKEN TO DETERMINE IF CRIMINAL CHARGES HAVE BEEN FILED BECAUSE IT MIGHT BE A CRIMINAL ACT, QUITE APART FROM THE BANKRUPTCY LAW, NOT TO HAVE PAID IT.** The non-dischargeable debts for spousal or child support under 11 U.S.C. section 523(a)(7) are:

"[D]ebts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt -

- (a) is assigned to another entity, voluntarily, or by operation of law or otherwise;
- (b) includes a liability designation as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support.

Once a court orders a parent to make child support payments, the obligation to make those payments then become non-dischargeable. In re Harrell 33 B.R. 989 (1983). The obligation to make child support payments, ordered by a court, is not discharged even if it is assigned to a state or governmental agency. In other words, if a county or state agency provides benefits to a family because of the debtor's failure to make court ordered support payments, the state

or other governmental agency is assigned the right to receive reimbursement. That right to receive reimbursement for the support payments made by the state for the support of debtor's child cannot be discharged (as it once was) by the debtor's subsequent bankruptcy.

The general rule is that claims of third parties for property or services provided for a child's support are dischargeable by a parent, *In re Lo Grasso*, 23 F.Supp. 340. There is, however, case law which holds that where a parent deserts or neglect the children, then the debts for the property or services which have been provided by third parties are not dischargeable, *In re Meyers* 12 F.2d 938.

In order for debtor's child support obligation to be non-dischargeable, there must be a court order requiring the support payments to be made. All states have laws that impose upon a parent the duty to support a child. In addition, the parent can be sued for the value of the child support provided by third parties. However, those debts are dischargeable unless reduced to a judgment prior to the debtor-parent filing for bankruptcy protection. For example, if a mother deserted her children and an aunt raised them, then the aunt would be entitled for reimbursement from the mother for the child support. If the mother files for bankruptcy relief before the aunt gets a judgment for reimbursement, then the obligation to reimburse the father for the back child support is discharged. However if the aunt obtained a court order requiring the mother to reimburse the aunt for the back support, then the debt for back

support is not dischargeable.

Spousal support, also referred to as alimony, requires either a court order or an agreement obligating the debtor to make support payments in order for the obligation to make the payments to be non-dischargeable. The debtor may agree to make spousal support payments through a marital agreement or a property settlement agreement and such support payments are non-dischargeable. Without either a court judgment ordering a debtor to make spousal support payments or an agreement requiring them to be made, the debtor's obligation to make support payments can be terminated in a bankruptcy.

When parties are not married, unless the relationship qualifies as a common law marriage, the debtor may be discharged from any obligation to make support payments to the other party through a bankruptcy proceeding.

THE BANKRUPTCY ACT OF 1994 AMENDED THE AUTOMATIC STAY UNDER SECTION 362 TO STATE THAT COLLECTION OF SPOUSAL OR CHILD SUPPORT PAYMENTS FROM PROPERTY WHICH IS NOT PART OF THE BANKRUPTCY ESTATE AND IS NOT SUBJECT TO THE AUTOMATIC STAY. The 1994 Act also prohibited the Automatic Stay from blocking commencement or continuation of proceedings to enforce alimony and child support during the bankruptcy case. In a Chapter 13 case, property acquired during the life of the Chapter 13 Plan is considered property of the estate. Under the Bankruptcy Act of 1994, child and spousal support claims now have priority over and are to be paid before both general

unsecured claims and tax claims. In addition, the Bankruptcy Act of 1994 prohibits both the Trustee and the debtor from the recovery of any property transferred to a spouse or a child in connection with a divorce or separation made within one year of the filing of the bankruptcy petition. Before this amendment, both the trustee and the debtor were each permitted to avoid such payments made within a year of the bankruptcy filing as a creditor preference or a payment not supported by reasonable equivalent consideration. Section 522 of the Bankruptcy Code was amended, under the 1994 Bankruptcy Act, to prohibit a debtor from being able to avoid a judgment lien on otherwise exempt property for child or support payments.

Regardless if the debts are collected or incurred during the bankruptcy, the obligation survives the bankruptcy and the debtor must still pay it in full.

B. BIAS ON PROPERTY SETTLEMENT

The Bankruptcy Act of 1994 had a profound impact on property settlement agreements. Prior to the Act, property settlement agreements, unlike support obligations, were dischargeable in a bankruptcy. Even pension payments under a property settlement agreement were held to be dischargeable in a bankruptcy.

The 1994 Bankruptcy Act changed the law, on this issue, dramatically. The Act added section 523(a)(15) which holds that a debt incurred in a property settlement agreement that is neither for spousal or child support can be discharged only if:

(a) the debtor does not have the ability to pay such debt from

the income or property of the debtor in excess of what is needed to support the debtor and the debtor's dependents, or

- (b) after balancing the hardships between the debtor and the holder of the obligation (spouse, former spouse or child) the benefit to the debtor from the discharge outweighs the detriment caused by the discharge to the holder of the obligation.

The discharge of a property settlement agreement is, in essence, to be denied only when doing so would have a substantial detriment to the debtor's spouse that outweighs the debtor's need for a fresh start.

However, a discharge of property settlement agreement can be a double edged sword for the debtor. By discharging the obligation to make a property settlement, the debtor may have more resources with which to pay increased child or spousal support. Such a case occurred in Nevada where a doctor was ordered to pay \$3,000 per month in alimony for five years and \$1.25 million in a property settlement for purchase of his ex-wife's interest in the medical practice. The doctor filed a bankruptcy petition and discharged the obligation, under the pre-1994 law. The ex-wife then moved the Nevada court to increase alimony payments and was awarded \$7,500 for life or until remarriage. The award was upheld in federal court.

Overall, the discharge may have benefitted the doctor more than the ex-wife because even with the extra monthly payments, the amount

paid is less than the interest payments on the \$1.25 million which were discharged in the bankruptcy.

One important difference between property settlement and child spousal payments in a bankruptcy is that the property settlement will be set aside unless a complaint for non-dischargeability is timely filed. On the other hand, spousal and child support payments are not dischargeable so no complaint against their dischargeability is required to be filed. As such unless a complaint for non-dischargeability of the property settlement agreement is filed within sixty days of the first meeting of creditors, which is usually within 100 days, of the filing of the bankruptcy petition, the discharge will be granted.

PART B: GENDER BIAS IN DOMESTIC VIOLENCE

INTRODUCTION

One of the most newsworthy topics today is that of domestic violence. It has certainly become the politically popular topic of the 1990's. The 1994 Federal Crime Bill contained the ***Violence Against Women's Act*** and President Clinton created a ***Violence Against Women Department in the Department of Justice***. The trial of O.J. Simpson for the 1994 murder of Nicole Simpson and her alleged lover Ronald Goldman focused national attention on domestic violence. The news media played almost daily for several months a 911 call made by Nicole in 1989 where O.J. Simpson broker into her home to scream at her for having sex with another man while their children were upstairs. Simpson did plead guilty to battering Nicole in 1989 and as a result of that incident was the immediate prime suspect for Nicole's murder five years later. The case of Nicole Simpson is an example of domestic violence, whether the victim is man or women. The victim in such a relationship seldom leaves after the first beating. Often after a beating there is a period of reconciliation which the victim frequently describes as the best and most loving part of the relationship. It is common for a complainant to withdraw a spousal battery complaint prior to trial. As a result, there are many judges which will jail a complaint who fails to prosecute or refuses to testify at the trial of her spouse on the complaint. In

the Nicole Simpson case, even after their divorce and all that had occurred between them, according to the press she wanted a reconciliation and shortly before her death had gone on a vacation with Simpson.

Domestic violence is said to be the most common type of all crimes even though the frequency of its occurrence is often arrived at by conjecture. Some feminist groups for instances have stated that as many as 90% of all women have been battered. Such a figure seems extreme and calculated to engender political support for an ideology of the victimization of women. The more realistic studies for domestic violence, nonetheless, provide alarming estimates for its occurrence. An article in the Nevada Trial Lawyers Association in NTLA Advocate (Nov. 1888) ***Domestic Violence Is A Crime*** stated:

"Domestic violence is one of the most common of all crimes. Acts of domestic violence occur every 18 seconds in the United States. About 1/2 of all couples experience at least one incident; in 1/4 of these couples, violence is a common occurrence. Twenty percent of all murders in this country are committed within the family and 13 percent are committed by spouses.

Most family violence is committed against women. Ninety-five percent of all spousal assaults are committed by men. Twenty one percent of all women who use the hospital emergency surgical service are battered.

Six million American women are beaten each year by their husbands or boyfriends. Four thousand of them are killed. Battering is the single major cause of injury to women more frequent than auto accidents, muggings and rapes combined. One in four female suicides were victims of family violence."

The problem of domestic violence is great and should not be trivialized but any discussion of it should be based upon actual

numbers. In Nevada, a state of about 1.25 million persons, from July 1, 1986 through September 30, 1987, there were 5,400 reports of domestic battery of which 3,904 reports resulted in arrests. In 1988, 4,033 women received temporary protective shelter in a domestic violence program. This tends to translate into approximately 10,000 women per year turning to the government for assistance in Nevada for domestic abuse. Out of approximately 300,000 women that is one out of thirty or 3 percent which is a significantly less than the amount estimated by most organizations.

The history behind spousal abuse had its basis in the English common law. Women throughout the middle ages were considered to be the property of the husband. Married women, themselves, while possessing few rights also had little responsibility or accountability for their actions. In the middle ages, if a woman was to commit a crime such as murder, it was her husband who would be punished with prison or even death. In the J.W. Blackstone Commentaries (7th ed. 1775) the right of a husband to punish or beat a wife was explained as follows:

"For, he is to answer for her behavior, the law thought it reasonable to intrust him with the power of restraining her, by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children."

Under the common law, a husband was permitted to beat a wife with a stick not thicker than his thumb. The husband was not permitted to cause severe injury or kill her. As stated above, the chastisement was limited to that permitted under English law to be

inflicted on children or apprentice employees.

The English law was carried over into New World and served as a basis for American law included the right of a husband to discipline a wife. The old views, however, that a wife was the property of the husband or that husband and wife were one with that one being the husband are no longer followed anywhere in the United States. Beginning in the later half of the 19th Century, courts began rejecting the right of a husband to chastise a wife. **Fulgham vs. State** (1871) 46 Ala, 143, **Powell vs. Benthall** (1904) 136 N.C. 145. Today, the basis for a husband claiming a right to punish a wife for her behavior no longer exists anywhere in the united States. Today, in fact, a husband, is not even personally liable for the debts incurred that are not necessary for her or the family's maintenance of life or support. Since a husband can no longer go to prison or face death for the actions of a wife, the husband no longer has a vested interest to protect by punishing or beating a wife for her behavior.

Today, it is clear that neither spouse may legally commit battery upon the other spouse. Spousal battery is a crime in each state. Despite the fact that spousal battery is a crime the question remains what rights a spouse may have beyond a criminal conviction. In this area, the law far from settled or uniform and gender bias still remains as a force to be recognized. The Nevada Supreme Court's Gender Bias Task Force's Report, **"Justice For Women"** made

the following pertinent recommendations:

- "1. Judges, court administrators and district attorneys should provide leadership in promoting and encouraging community education programs designed to increase awareness of domestic violence issues.
2. Funds should be provided from the appropriate court of law enforcement budgets for the professional training of police, judges and attorneys about the prevention of and remedies for domestic violence...

4. Judges, when appropriate, should require that release of persons arrested for spousal battery be conditioned upon (a) no physical contact with the victim, and (b) no verbal threats to the victim pending resolution of the case...

6. Lay advocates from domestic violence programs should be permitted to participate in order to render support and non- legal assistance, unless their presence is found to be disruptive...

8. The judiciary and district attorney's offices should strongly support measures that will provide public and private funding to support a permanent "Advocate" position... that will encourage the development and training of volunteers to provide assistance to victims of spousal battery in rural areas....

10. Committees composed of representatives of the courts, city and district attorneys offices, city and county law enforcement officers, and local domestic violence assistance groups should develop a written protocol regarding acceptable and recommended law enforcement responses. The protocol should be made available to all enforcement officers, prosecutors, judges, and others involved in the handling of domestic violence cases."

These recommendations mirror today's view that domestic is it the duty and responsibility of the legal profession to take a leading role in the abolishment of domestic violence in society.

CHAPTER NINE

GENDER VIOLENCE IN DOMESTIC VIOLENCE CASES

The trend today is to prosecute spousal battery cases, when ever possible, even if the victim refuses to cooperate. Nearly 40% of all district attorney offices have implemented procedures and policies for taking cases to trial, even over the objections of the victims. Such prosecutions, no longer rest solely on the testimony of the alleged victim. Instead, the prosecutions, go forward over the objections of the victim when they can be supported by independent evidence such as 911 calls, eyewitness accounts and medical records. The key to successful prosecution is presentation of evidence to explain why a domestic partner, usually a woman, might lie to protect an abusive partner. The strategy was first pioneered by the District Attorney's office in San Diego, California in the mid 1980's. It has developed so well that it was chosen as the national model by the National Council of Juvenile and Family Court Judges. San Diego District Attorneys have trained police and prosecutors in 22 states on the implementing and use of the model. As a result of the tough prosecution of battering cases in San Diego, the domestic murder rate dropped by 30 in 1985, the year of implementation of the policy to 20 in 1990 and only seven in 1994. It is estimated that nearly 100 women are alive in San Diego in 1995 due directly to the successful development of the national.

1. BIAS IN CIVIL SUITS FOR SPOUSAL BATTERY

While a battered spouse may have the batterer criminally prosecuted, in many states, the battered spouse is prevented from suing the batterer in for the damages suffered. The doctrine of spousal immunity was strongly affixed to American jurisprudence throughout the 1960's. Under the spousal immunity theory, a married couple is considered to be one unit and the law does not permit a plaintiff to bring an action against himself or herself. A suit of wife against a husband was considered a suit by herself against herself and was therefore barred. Another rationale for the marital bar against suing a spouse for battery is a residue of the common law which held that such suits tended to destroy the marriage. In 1983, nine states, had enacted legislation which permitted an abused spouse seeking a protective order to sue the battering spouse for certain damages such as loss of earnings, out-of-pocket expenses and attorney fees, Alaska, California, Illinois, Maine, Massachusetts, Mississippi, New Hampshire, New York and New Jersey.

Under the impetus of the Women's Movement, the lack of viability for maintenance of the interspousal immunity doctrine has been generally recognized. Today, spousal immunity has been abolished in most states. As late as 1988, the District of Columbia and the following states retained some form of spousal immunity. Delaware, Florida, Georgia, Hawaii, Kansas, Mississippi, Missouri, Montana, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington and Wyoming. In many of the nineteen states which still permit spousal immunity it is limited to

unintentional torts. A spouse, in many of the remaining states, can sue a spouse for intentional torts such as battery. Texas: **Bounds vs. Caudle** (1977) 560 S.W.2d 925, Illinois, Kansas and Oregon. A few of the states which still retain spousal immunity hold that the immunity ceases once the parties are divorced or if one spouse dies prior to bringing the action. **Sanchez vs. Olivarez** (1958) 94 N.J. Super. 61, **Pickens vs. Pickens** (1970) 255 Ind. 119.

One confusing issue regarding suits for battery is in what court should they be brought. Many decisions have held that suits for spousal battery should not be brought in a divorce court and instead should be brought in a separate action. In **Windaver vs. O'Connor** (1971) 107 Ariz. 267, the court held that divorce action is a very specific type of legal proceeding which by its nature is not good one to try torts actions. **Goldman vs. Wexler** (1983) 122 Mich.App. 744 also held that a divorce action was not the proper place for bringing a tort action against a spouse. Two reasons are advanced for not permitting a tort claim to be tried in a divorce action. The first reason is that it often touches upon issues that would require a jury to be employed for their adjudication which is usually not permitted in a divorce action. Secondly, the trying of a tort action may have the effect of improperly influencing the alimony award for the battered spouse. **Taylor vs. Taylor** (1980) 378 So.2d 1352.

One of the most controversial aspects of a civil suit for

battery arises in the area of spousal rape. Under the common law, there was no such crime as spousal rape. Therefore, one spouse could neither criminally prosecute or sue for civil damages the other spouse for rape. The interesting aspect of this spousal rape exemption was that some states would permit a civil suit for battery, as discussed above, as long as the battery was not the rape itself. In other words, a husband could, in a few states, be sued for the damages for hitting the wife but not raping her. As of 1988, eighteen states had totally abolished the spousal rape exemption with the remaining thirty two states keeping a marital rape exemption for civil suits to some extent. Courts in Alabama, Florida, Georgia, Massachusetts, New Jersey, New York and Virginia have struck down the marital rape exemption by case law. **Merton vs. State** (1987) 400 So.2d 1310, **Florida vs. Smith** (1981) 401 So.2d 1826, **State vs. Warren** (1985) 336 S.E.2d 221, **Commonwealth vs. Chretein** (1981) 417 N.E.2d 1203, **People vs. Liberta** (1984) 64 N.Y.2d 152, **New Jersey vs. Smith** (1981) 425 A.2d 38, **Weishaupt vs. Commonwealth** (1984) 315 S.E.2d 847. Besides barring a spouse from persecuting for rape, fifteen states had laws barring rape persecution for a man living with a woman or between voluntary social companions. National Center on Women and Family law, **Marital Rape Exemption: A State by State Summary** (1987). The reasons often advanced against having a crime for spousal rape are the difficulty in proving lack of consent and, once again, the state's benefit in

preserving a marriage. Spousal rape is hard to prove by its very nature. The issue often turns upon consent. In such a situation, without supporting information, it would be hard, if not impossible, to prove that the sex was not consensual and afterwards being made simply to punish the other spouse. For this reason many prosecutors have refused to prosecute spousal rape case unless there is a high degree of corroboration or they will charge a lower degree of rape than a stranger rape case. In the same vein, some judges feel that a courtroom is the proper forum to adjudicate problems in family relationships. To help sensitize prosecutors and judges to the issues of spousal rape, the Justice department issued the ***Final Report, Attorney General's Task Force on Family Violence*** (1984). The report concluded that prosecutors:

"must approach cases of family violence from a fresh perspective and be flexible and sensitive in dealing with the emotional complexities of the cases..."

judges and the sentences they impose can strongly re-enforce the message that violence is a serious criminal matter for which the criminal will be held accountable."

The report recommends that: that prosecutors maintain regular contact with the alleged victim so as to assure the person that the case is being prosecuted diligently. In addition, the report recommends that judges impose as a bail condition that the defendant away from the alleged victim and that, upon conviction, some incarceration be imposed along with work furloughs when family support is necessary.

The problems attendant in a spousal rape case were highlighted quite dramatically in classic spousal rape case, in 1993, of **John Wayne Bobbitt** in which his wife cut off his penis for allegedly raping her. Mr. Bobbitt was tried for spousal rape and found not guilty. This case simply pitted his word against the wife's. The most telling evidence was an defense expert who testified that the wife's panties were not ripped off her as she had claimed but instead were actually cut by a knife or scissors which tended to show she had lied. In addition, her case was not helped when a former woman co-worker testified that Mrs. Bobbitt stated that she would castrate her husband if she ever caught him cheating on her. Following, Mr. Bobbitt's acquittal, the wife was criminally prosecuted because she no longer had a valid claim of self-defense. The wife then claimed, for the first time, the defense of battered wife syndrome. Lorena Bobbitt was convicted of criminal mayhem but was found to be mentally incompetent at the time. As such, she was sentenced to a month of confinement for mental observation and when adjudged sane was released.

The issue of whether a battered spouse may now sue the batterer is now moot. The 1994 Federal Crime Act has a provision in it which permits a battered spouse to sue the battering spouse, in federal court for the battery. This Federal Crime Act supersedes all state laws and any state tort immunity which a spouse may have under state law. As such, a battered spouse may now sue for damages regardless of state law. This Act revitalized divorce attorneys who now have

been using the threats of suits for domestic violence as settlement tools for property divisions for their clients. Of course, as with any federal action, in order to prosecute the action, the attorney must believe that the action has merit or will be subject to Rule 11 sanctions.

2. BIAS IN STALKING LAWS

The FBI's, "Uniform Crime Reports, Crime in the United States 13 (1988), contained statistics which showed that nearly 30% of all murdered women in the United States were slain by either their husbands or boyfriends. Quite often the murder occurs soon after the women has left the man. It is the act of leaving the man which acts as the triggering event which results in the murder. It is to stop the cycle of violence that courts and legislatures have been looking at enacting new legislation and, more strongly, enforcing, existing laws. At the center of this review, are protective orders from the courts and the implementation of stalker legislation.

Traditionally, courts would issue a temporary restraining order to get a couple apart during a divorce. The restraining orders are usually quite easy to get and are often mutual which means both spouses must stay away from each other. The problem with a restraining order is that it usually only works against a person who is not violent and will obey the law. Because of the emotion engendered in the case, a person with a violent or emotional nature may not be able to appreciate the force behind the order and, as

such, the order may not act to prevent violence. The violation of a TRO can result in being punished for either civil or criminal contempt depending upon the decision of the court. As a violation for criminal contempt, the punishment was usually limited under state law to that of a misdemeanor which usually a maximum penalty of six months in custody. In the past, the enforcement of TRO's were given little priority by law enforcement agencies. The reason behind this is that the courts' they often treated such violations as civil contempt that filtered down to law enforcement as not as importantly as criminal matters.

The Nevada Supreme Court's Gender Bias Task Force's report, ***Justice For Women*** studied the problems encountered in enforcing protective orders:

"Forty-three percent of attorneys and judges who responded to the survey reported their opinions that victims of domestic violence whose lives are seriously endangered do not always receive protection order. The executive director of Temporary Assistance for Domestic Crisis, Inc. in Clark County, presented testimony at the Las Vegas hearing which indicates that it may take several days or a week to obtain a protection order in Las Vegas. According to the testimony, orders can only be obtained during business hours on weekdays. Domestic violence workers in Las Vegas could not remember a single case in which a batterer was ordered to leave the home in order to protect the women and children. Thirty-six percent of survey respondent expressed their belief that "never" or only "sometime" are orders granted directing the batterer to vacate the shared residence when a woman is in a shelter or otherwise out of the home."

The Nevada Task Force also pointed out bias existing in judicial officials which often work to detriment to women:

"Another barrier to legal recourse by battery victims is the disfavor sometimes suffered in the courts by battered women who, at the time of trial, do not appear to have physically

victimized. Forty-five percent of all survey respondents indicated their belief that 'at least sometimes' battered women appearing in court are asked why they have no visible injuries; forty-seven percent of the responding lawyers and twenty-eight percent of responding judges share this perception. Personal testimony before the Task Force confirms these views. One expert witness testified that she witnesses a judge state that no pictures from her hospital visit or from CAAW's record would be admissible in his courtroom. That (the victim) 'looked fine' now, so that the case would be thrown out and the charges dismissed."

The Task Force report highlights the problems faced by women in sometimes being able to go to court or the district attorney's office for relief from domestic abuse. The TRO is not always granted and therefore the women may be without legal recourse to keep an abusive spouse from following or otherwise communicating with her. The results of will often have disastrous results. The woman will begin to feel alone and abandoned by the courts. Law enforcement will be less inclined to hear her complaints because a court has seen fit to dismiss her fears of spousal abuse. As a result, a woman could be placed at a heightened risk of violence the mere fact of having the TRO denied because the very act of bringing the TRO motion could further infuriate the person against whom it was sought. Adding to this, the fact that the TRO was not granted means that the person thus enraged can continue to follow and communicate with the woman without any type of law enforcement interference until a crime is committed.

In response to the mixed signals sent by the courts regarding the availability and enforceability of their protective orders and to stem the killing of primarily women by their former spouses or

boyfriends, many states have now enacted stalker legislation. Under this type of legislation, if a person, regardless of sex, stalks or creates a reasonable belief of fear in another on impending danger, then that person has committed a felony. It is not necessary for the person to have violated a TRO in order for the stalking legislation to apply. In addition, some states have also made the violation of a TRO a crime in itself rather than leaving it to the court to determine if the violation of the TRO should be treated as civil or criminal contempt.

The stalking legislation is usually not limited to just the domestic situation, although that is where most often it occurs. Celebrities, of both sexes, have also been stalked by people both of the same and opposite sex. For example, David Letterman was stalked by a woman who once broke into his home and insisted that she was married to him. Rebecca Shaeffer was slain by a man who had a delusion that she was in love with him, in addition, Michael J. Fox and Johnny Carson were also stalked by women. Stalking laws are designed to stop the stalker before a violent crime has been committed. Even politicians are stalked such when John Hinckley stalked and shot President Reagan. The Gannet News Service, Apr. 1992, ***Stalked by Strangers, Women Seek Protection*** pointed out that while 80% of all stalkers are men, 20%, one out of five, were women so that stalking is not a male only crime.

California, in 1990, enacted the first stalking law in Penal Code section 646.9 that became the basis for most other states'

stalking laws:

"(a) any person who wilfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury of his or her immediate, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of or more than one thousand dollars, or by both that fine or imprisonment."

The California statute was implemented in response to the need to "provide law enforcement with the tools necessary to arrest (persons engaged in stalking) before they can make good on their threats" to injure the intended victim or family. Memorandum of Senator Edward R. Royce to Senate Constitutional Amendments (April 1990). The California statute was initially drafted with the view of preventing stalking in a domestic relation setting but was expanded to cover all reasonable aspects of stalking.

By 1994, thirty-five other states have followed California's lead and have also adopted stalker legislation. Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin.

The fact that such a large majority of states have now enacted stalking legislation is proof of the fact that domestic violence is no longer to be tolerated. In reality the stalking legislation has

the benefit of protection both the stalker and the victim. If a stalker is arrested prior to committing violence, then the stalker will obviously spend so time in jail but far less than if the stalker actually injured or murdered the victim wherein the stalker might be imprisoned for life or be sentenced to death, if a murder was committed. A stalking conviction might be considered as a court enforced cooling off period when the stalker is unable to emotionally permit the former spouse or mate to withdraw from the relationship. In such a situation, the incarceration of the stalker will result in no future stalking occurring after the release of the stalker because time has operated to help mend the emotional pain the stalker had felt when the former spouse or mate left. When viewed in this manner, incarceration may not only be for the benefit of the intended victim but for the stalker as well.

CHAPTER TEN

GENDER BIAS IN THE CRIMINAL COURT SYSTEM

INTRODUCTION

Gender bias in the legal profession has not been limited to just the law office to domestic relations. Women commit crimes as well as men but their treatment in the criminal justice system is often markedly different than accorded men convicted of the same offense. In almost all situations, gender bias in the criminal setting works to the benefit of the woman. In other words, criminal women often get better treatment and sentencing than men as a result of reverse gender bias. One of the best example of this was in the **JOHN WAYNE BOBBITT** case. Mr. Bobbitt's wife has cut off his penis in an effort to castrate him claiming at first, it was an act of defense for spousal rape. Mr. Bobbitt was tried first and found not guilty at a trial where numerous inconsistencies were brought. Mrs. Bobbitt was then tried on a lesser charge. After raising the battered wife defense, she was found guilty but mentally incompetent at the time. The sentence was a month of confinement for mental observation before being released. The difference between this case and what would have happened had a man mutilated a woman is clear. When a man attacks a woman or rapes her under the influence of alcohol, upon conviction he is never released from jail after serving a month and being declared sane.

Another classic example of gender bias in the criminal courts

system is in the area of statutory rape. Most states have laws that hold that it is statutory rape for a male to have sex with a woman below the age of eighteen years but there is no similar protection to boys. In most states, statutory rape is a strict liability crime, such as in Nevada, and therefore even if the woman lies about her age and tricks the man into having sex, that is no defense and he can still be prosecuted. In California, a boy of sixteen years of age was convicted of statutory rape of his seventeen years nine month old girl friend even though the sex was consensual, the idea of sex was hers and she furnished the condom. The girl friend was not charged with any crime whatsoever. In a minority of states, such as California, permit a defendant in a consensual statutory rape case to argue reasonable mistake of the woman's age as a defense. It is the feeling as, enacted in the laws of most states, that young boys will never be sexually preyed upon or misused by older women and therefore do not the protection of the state which is, in itself, a blatant case of gender bias.

The differences between how men and women are treated in the criminal justice system has its roots in the Victorian system of beliefs that held that women were morally much better than men. As such, they were almost never thought to be able to commit the violent crimes of which men were capable and were charged with lesser crimes only in the most dire of circumstance. This classic example of this view was in the **Lizzie Borton** murder trial of her parents. Lizzie, who was born and raised into a Victorian home, was

charged with killing her wealthy father and mother. Despite what would normally be considered overwhelming evidence, an all male jury would not convict on the belief that no proper woman would kill her parents especially in the gruesome manner in which they had been slain. This killing has engendered more introspection and analysis of the treatment in the judicial system than any other ever held. Books, movies and stage plays have been written to highlight and attempt to explain the biases and beliefs of highly respected and independent men which prevented them from believing that a woman was incapable of murder.

It has long been recognized that women defendants' receive preferential treatment in the criminal justice system. In **"Female Criminality"**, 3 Nat'l Probation and Parole A.J. 1 (1957) it was held that "our society is disproportionately soft on the female offender throughout the whole legal process. This represents a male dominated society's showing deference to the symbol of woman..." The desire, impetus or bias to continue to afford women preferential treatment in the criminal justice system is changing in large part due to the increasing number of women defendants appearing in courts. Society has been changing over the last few decades and so has the woman criminal. Today, for example, in Los Angeles, there are women's gangs that are just as involved in criminal activity and gang violence as are male gangs. From 1960 to 1974 for instance, arrest statistics showed that arrests for women

crimes increased from 10.9% of all such arrests to 19.4%. **Women Offenders: Myth vs. Reality**, The Female Offender (1976). It is this increasing influx of women, more than any other factor, which is forcing a reevaluation of how women are treated in the criminal justice system. If the preferential treatment afforded women is ineffective in halting feminine crime then the argument for abolishing such preferential treatment is strengthened. It is only by studying the effects of gender based sentencing and treatment in the criminal justice system can the propriety of continuing such preferential treatment be evaluated. Several studies on gender-based treatment have been conducted which together show that gender-based bias exists throughout the United States. The major reports are a 1971 California study, **The Influence of Social and Legal Factors on Sentence Disposition** 4 Journal of Criminal Justice (1976) and a 1974 study of seven judicial districts in Alabama. **Alabama Law Review Summer Project 1975: A study of Differential Treatment Accorded Female Defendants in Alabama Criminal Courts.**" 27 Alabama Law Review 676. It is the research findings of these reports which are discussed herein.

1. SENTENCING

The major complaint hurled against the Alabama study is that it draws its data only from Alabama and therefore lends itself to a regional analysis only. This argument is only surface deep. The Alabama study by its makeup has both rural and urban counties to

provide a standardized model. In addition, Alabama has both very poor and very wealthy cities. The California study was based upon 32,964 felony arrests from twelve Northern California counties from 1969 to 1971. The California study evaluated the data on the basis of disposition and length of sentence. The California study created two categories for its results. The Bivariate category analyzed the data based only on sex and the sentence imposed on the person. The Standardized category considered the variables of charge, prior record of the defendant and criminal status. When combined with the California study, the two reports create an excellent representative model for the nation at a whole. Together, the two studies provide an excellent analysis of the ingrained prejudices and bias that compose the gender bias present in the criminal justice system.

The National Advisory Commission on Criminal Justice Standards and Goals, *Report of Corrections* (1973) reported that thirty times as many men as women were in state prisons. In Alabama, for instance, in 1974 there were approximately 4,000 inmates of which only 120 were women. The director of the Alabama Pardons and Parole Board actively looks for ways to grant women parole more so than for men. The Alabama study shows, in Table One, that men are sentenced to jail or prison terms of between one half and twice as long as women for similar offenses.

TABLE ONE

MEAN SENTENCE: OFFENDER CONVICTED OF SIMILAR OFFENSES

OFFENSE	MALE	FEMALE
WILLFUL HOMICIDE	14.4	9.1
BURGLARY	3.7	3.0
FORGERY, FRAUD, LARCENY BY CHECK	3.8	2.2
DRUG VIOLATIONS	3.6	3.9
GRAND LARCENY	3.5	1.7

The Alabama Study concluded regarding sentencing that:

"On the whole, female defendants received shorter sentences than did male defendants. The percentage of women who were sentenced to less than one year was twice that of men. Only one of five men was sentenced to one year, while one of three women received this sentence. While 75 percent of all male defendants received sentences of three years or less, well over 90 percent of all female defendants came within this category. Indeed, the most severe sentences for female defendants were one 10-year sentence and one thirty-year sentence: these two women constituted 3 percent of all women sentenced, while three times that percentage of male defendants were sentenced to ten years or more."

The California study shows that women were almost twice as likely to receive probation than men, while men were almost twice as likely to go to go to prison on the bivariate scale and the figures were almost equal for county jail sentences.

TABLE TWO
SENTENCING BY SEX

SENTENCE	BIVARIATE (%)		STANDARDIZED (%)	
	M	F	M	F
PRISON				
URBAN	21	11	20	20
RURAL	19	8	18	17
JAIL				
URBAN	47	41	47	46
RURAL	50	43	50	44
PROBATION				
URBAN	23	40	24	32
RURAL	17	34	17	25
OTHER, INCLUDING FINE AND SUSPENDED SENTENCE				
URBAN	10	7	10	8
RURAL	15	5	15	4

An interesting point in the California study is that when a woman's prior criminal record is controlled for in the Standardized category, the differences between men and women are narrowed considerably. This tends to show that judges are more willing to go easy on a first time woman defendant rather than a repeat woman offender. The more often a woman repeat offender appears in the court the harsher is her treatment until it almost, but not quite, reaches equality with that of men.

The California study shows that women are more likely to receive sentences of less than sixty days and 180 days than men. On

the other hand, men are more often, by more than 50%, to receive a sentence longer than 180 days than women.

TABLE THREE
LENGTH OF SENTENCE BY SEX

SENTENCE	BIVARIATE (%)		STANDARDIZED (%)	
	M	F	M	F
60 DAYS OR LESS				
URBAN	19	27	19	23
RURAL	27	38	27	34
61 DAYS TO 180 DAYS				
URBAN	26	36	27	40
RURAL	29	37	29	32
MORE THAN 180 DAYS				
URBAN	55	36	54	37
RURAL	45	26	44	34

The California study corresponds with the Alabama study that women serve less time in jail than men. The disparity between the sentence served by men and women is greater in the urban area.

The Alabama study also disclosed significant differences when race was also considered along with sex. The report concluded:

"An even more striking result was the variance derived from a racial breakdown of the prior criminal records. Although the prior conviction rate among black males of 60 percent was higher than the figure for white males, the conviction rate of 47 percent among black females was the lowest of all groups and was substantially lower than the 94 percent figure for white females. The deviation between prior conviction rates for black and white women suggest that law enforcement authorities are less willing to arrest white women unless they are confident that the evidence is sufficient to produce a conviction."

The Alabama study did show that black women served less time than

black men just as white women served a lesser sentence, as a whole, than similarly convicted white men.

2. REASONS FOR THE GENDER-BASED TREATMENT

The reasons often advanced for the gender-based treatment between men and women are due in large part to the fact that most judges are men and they have different views on how men and women operate. The Alabama study conducted two surveys of judges on the roles of women and disclosed and quantified distinct biases in the favor of women. The judicial surveys of the role of women and their personality and psychological traits covered herein.

TABLE FOUR
THE FEMININE ROLE

STATEMENT	MEAN SCORE OF JUDGES		
	OLD	MID	YOUNG
IN MARRIAGE, THE HUSBAND SHOULD MAKE THE THE MAJOR DECISIONS	2.9	2.9	2.0
ONE OF THE MOST IMPORTANT THINGS A MOTHER CAN DO FOR HER DAUGHTER IS TO PREPARE HER FOR THE DUTIES OF BEING A WIFE	1.9	1.9	2.0
FOR A GIRL, SOCIAL POISE IS MORE IMPORTANT THAN GRADE POINT AVERAGE	3.0	3.4	4.0
IN MARRIAGE, THE MAJOR RESPONSIBILITY OF OF THE WIFE IS TO KEEP HER HUSBAND AND CHILDREN HAPPY	2.7	2.9	4.0
IT SHOULD BE EASIER FOR WOMEN TO BE EXCUSED FROM JURY THAN MEN TO BE EXCUSED	2.4	2.8	4.0
MEAN OF MEAN SCORES BY AGE GROUP	2.6	2.8	3.2

The survey used a five-point score from one which is strongly disagree to five which is strongly agree.

The judicial survey showed that the judges placed most importance on a woman's preparation for marriage and working to keep the family content and happy.

Following the judicial survey of the feminine role was one on judicial attitudes of the feminine personality and psychological traits. The results of this survey again disclosed a strong inclination toward or acceptance of the traditional Victorian beliefs of women, which are not those which are today generally espoused by feminists. The survey is shown below in Table Five

TABLE FIVE

PERSONALITY AND PSYCHOLOGICAL TRAITS				
STATEMENT	MEAN SCORE OF JUDGES			
	OLD	MID	YOUNG	
WOMEN ARE MORE EMOTIONAL THAN MEN	2.1	2.3	2.0	
WOMEN ARE MORE SYMPATHETIC THAN MEN	2.5	2.9	3.9	
WOMEN ARE MORE ARTISTICALLY INCLINED THAN MEN	2.4	2.8	4.0	
MEN ARE BETTER LEADERS THAN WOMEN	2.6	2.4	3.0	
MEN ARE BETTER ABLE TO REASON LOGICALLY THAN WOMEN	2.6	3.2	4.0	
MEN ARE MORE AGGRESSIVE THAN WOMEN	2.4	2.7	2.0	
MEAN OF MEAN SCORES BY AGE GROUP	2.5	2.7	3.0	

The survey used a five-point score from one which is strongly

disagree to five which is strongly agree.

The survey shows that most of the judges believed that women possess in greater amount the emotional, sympathetic, less aggressive and more caring qualities than men and which are considered positive. In addition, the survey disclosed that the judges felt that women made less effective leaders and were less able to act logically. Judges, being only human, be they men or women, will act on what they believe to be best, which, of course, is based on their foundational beliefs. In 1992, a California judge, was censored by feminist groups because he sentenced a women defendant to lesser charge than her male accomplice. The Judge had stated as his reason that the woman had been under a Svengali-like influence of the man and thus had little will of her own. Feminist groups objected to the gender-based sentence because it perpetrated a stereotype that women were unable to act for themselves and, therefore, were manipulable by men. Taken to its extreme, the judge's comments could be used to support the belief of the male jurors in the Lizzie Borton case that property women do not commit crimes.

The Alabama study made the following conclusions regarding gender bias in the criminal justice system:

"In many of the areas within the Alabama criminal justice system there was found differential treatment of male and female defendants. Probably the most significant differences concerned the results of the cases and the length of sentences given. Female defendants were more likely to have their charges reduced and, upon conviction, women defendants were more likely to receive shorter sentences than were imposed on

men. However, in other areas of the criminal justice system, some of which involved great individual discretion, it was found that defendants received similar treatment regardless of sex. This was true in the amount of bond that was set for each defendant and for those defendants who received suspended sentences."

"The results of the factor analysis indicate that lawyers's attitudes toward women are more complex than originally thought....

The results indicate that in many ways lawyers view women in a traditional manner. This is especially true in regards to toward the feminine role, personality characteristics and psychological traits. Caring for the home and children tend to be seen as important roles- roles that entitle a woman who becomes a defendant in a criminal action to special consideration. There is strong agreement that women are not as fit as men and a strong pocket of resistance to women even becoming lawyers. With regard to sentencing, a distinct bias is seen in favor of women."

The results of these studies is that gender bias works for women defendants in the criminal justice system. There is little objective basis for the belief that women criminals should be punished less harshly than men committing the same crime. A dead person is not less dead if killed by a woman than man. Nor is robbery victim any less missing the stolen merchandise simply because it was taken by a woman. Furthermore, a retailer who loses property to a woman passing a bad check is every bit as injured as a by a bad passing a bad check.

The U.S. Justice Department has kept track of criminal conviction statistics for two decades who document gender in sentencing. The statistics show that following conviction nineteen men are sentenced to jail for every woman. For burglary, nine men are arrested for every woman yet thirty men go to jail for every

woman, more than three times as many for the same offense. For aggravated assault, ten men are arrested for every woman but seventy-nine men are jailed as opposed to each woman for the same offense. Even for the white collar crime of fraud, for which more women are arrested than men, the fact is that men are still jailed at the rate of nine men for every woman.

The Department of Justice also disclosed pre-conviction biases in favor of women over men as well. Statistically, women accused of felonies were given pretrial releases 81% of the time as compared to only 59% for men. Women are released on their own recognizance nearly twice as often as men.

The Justice Department statistics also show that men receive significantly longer sentences for the same crimes as women. Generally, men receive 47% greater sentences than women committing the same offense with the one exception being aggravated assault. A study conducted by Matthew Zingraff and Randall Thomson in the *International Journal of the Sociology of Law* concluded that except for the crime of fraud, "women and men with comparable backgrounds do not receive comparable sentence lengths." Zingraff and Thomson further concluded that gender played a more determinative role in sentencing than race, age or prior convictions. In support of this conclusion is cited the Justice Department statistic that husbands convicts of killing their wives serve an average sentence of 17.5 years whereas women who kill their husbands serve an average sentence of only six years.

The argument of racism has been advanced to explain the disparity of sentencing between women and men. However, the statistics do not bear out such a relationship. When race is removed from the statistics, gender bias is still present. Justice Department statistics show that five blacks are imprisoned for every white person which is a difference of 20%. In comparison, seven men are arrested for every woman while nineteen men are imprisoned for every woman which is a difference of 170%.

The belief that women are somehow less likely to commit crimes and especially violent crimes is fallacious and not borne out by the statistics. Each year an estimated 700 mothers murder their children. The case of Susan Smith in South Carolina, who drowned her children in 1994 so she could be with her lover, is not unique. The case only received greater media coverage than usual. Likewise, statistics show that more than half of the child abuse in the country is committed by the mother. These statistics do not, in any way, lessen the gravity of crimes committed by men. Rather, they show that women, who commit harmful crimes to society, are receiving less than adequate punishment to society's detriment. There is no benefit to society in not punishing a child abuser or murderer simply because that person is a woman. The child is none the less abused or dead simply because a woman committed the abuse or offense.

Court actions mean things. When courts fail to equally punish people for their actions, two things result. The person punished

more harshly feels that discriminated against and the person punished less harshly feels as though the criminal justice system is a joke. Today, society is beset with young juvenile offenders who have little fear of the criminal system because even for the most egregious crimes will spend very little time in jail if caught. Add to this fact that many of the youthful offenders are female, the message being sent by gender bias is that female criminals will not only be treated preferentially while minors but such preferential treatment will also continue when they become adults. The normal moral and social controls by which women are taught to obey the law is dramatically reduced when women perceive that they can, in fact, commit crimes and, if not, actually escape punishment completely will, nonetheless, have a strong likelihood of lesser punishment than a male accomplice.

CHAPTER ELEVEN

JUDICIAL DUTY TO AVOID GENDER BIAS AND SEXUAL HARASSMENT

Under the Canons of Judicial Conduct (CJC) Canon 3 (1972) and Canon 1 (1990), a judge is mandated to dispense all judicial duties in an impartial and diligent manner. A judge is required to place the judicial responsibilities of the office above all other considerations. A judge is required to remain ever faithful to the law and to work to maintain confidence in it. *In re Hague* (1982) 315 N.W.2d 524, a judge was disciplined for routinely dismissing gun control and prostitution cases because disagreements with the law despite instructions not to do so from higher courts. In the conduct of the court, the judge is required to be patient, dignified and courteous to all and is to require persons appearing in the court to be so also. In the conduct of the court and the rulings made therein, a Judge is not to be influenced by "partisan interests, public clamor or fear of criticism. A judge should conduct all judicial business in a prompt and efficient manner. In operating a court, a judge's appointments should be necessary and based upon merit. A judge should avoid nepotism or favoritism and the compensation for the appointees should be no more than the fair market value for the services.

A judge should conduct the court so as to give everyone a full right to be heard. A judge may not let sexual bias or prejudice

interfere with the obligation to conduct a full and fair hearing. A judge must operate a courtroom so that justice is served. The atmosphere of the court must be such that a defendant is granted a full and fair trial with an impartial jury. **Illinois vs. Allen** (1970) 397 U.S. 337, **Mayberry vs. Pennsylvania** (1971) 400 U.S. 455. A judge is under an obligation to disqualify himself or herself whenever the circumstances arise that the judge's impartiality may be reasonably questioned.

A judge's conduct out of court must be exemplary or else the judge may be subject for discipline conduct which brings the judiciary into disrepute. In the case **In re Roth** (1982) 645 P.2d 1064 a judge was disciplined for breaking a car window and slapping his estranged wife when he found her in a car with another man. In the **Matter of Lawson** (1991) 590 A.2d 1132, a judge was disciplined for drunk driving. Discipline was appropriate for not only failing to obey the law, something a judge is always required to do, but also for conduct off the bench which brought the court into disrepute.

The governing principle for any judicial conduct is that it does not create the appearance of impropriety CJC 2A. This principle applies to a judges's conduct both on and off a bench. Canon 2(A) and (B) of the CJC (1972) reads as follows;

- "A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

- B. A judge should not allow family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others, nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness."

In furtherance of this duty, the Code of Judicial Conduct covers, as an example, several specific types of conduct for which a judge may not engage both on and off the bench.

A judge is prohibited from permitting outside relationships from affecting the judge's conduct or judgment. Under this canon, such outside relationships include, but are not limited to familial, social or political relationships. The gist of this prohibition is that a judge must recuse himself or herself from any action in which some type of outside personal relationship will exert direct or indirect influence or pressure on the ruling which the Judge must make.

The A.B.A. Committee on Professional Ethics have issued both formal and informal opinions regarding a judge's duty under Canon 2. The formal opinions are official opinions on the general practice in question whereas informal opinion are opinions furnished on the request of judges regarding specific proposed conduct. Under Op. 110, a judge, for example, who is permitted to have an outside practice of law, could not serve as a judge in a criminal case for nonsupport of the husband, when the judge represented the wife in the dissolution.

The most controversial aspect of CJC Canon 2 is CJC Canon 2C

which forbids a judge being a member of an organization that currently practices "invidious discrimination" based upon race, sex, religion or national origin. Specifically exempted under CJC 2C is membership in an "intimate, purely private organization" the membership in which could not be constitutionally prohibited. In addition, membership is permitted in an organization which otherwise would be prohibited if the organization is "dedicated to the preservation of religious, ethnic or cultural values of legitimate concern to its members." Some states, such as California, have added or propose to add to their CJC a provision that a Judge may not belong to an organization which discriminates based upon sexual preference. In California, a dispute has arisen because such a provision would expose a Judge for discipline for serving as counselor or even driving a child to a Boys Scouts of America function because the Boys Scouts do not support homosexuality. It is asserted that such conduct by the Judges would be perceived as support for the anti-homosexuality position of the Boy Scouts and thus is support of an organization supporting invidious discrimination. Under the Comment to CJC 2C, when a Judge discovers that the organization practices invidious discrimination which is not otherwise permitted, the Judge must either resign promptly from the organization or work to end the discriminatory practice. If the organization does not change its discrimination practice within one year, then the Judge must resign from the organization.

A recent case evidencing a judges' requirement to avoid the appearance of impropriety is ***Fitch vs. Commission on Judicial Performance*** (1995) 95 D.A.R. 1842. The California Supreme Court, therein, censured a Judge for frequently making sexually offensive comments to female court personnel and occasionally touching those staffers improperly. The Court ruled that the conduct was "such as to bring the judicial conduct into disrepute, being conduct damaging to the esteem for the judiciary held by the members of the public who observed such."

In avoiding the appearance of impropriety, a judge is required to comply with the law in all instances and also to conduct all personal affairs in a manner as so promote public confidence in the judiciary. The CJC imposes upon judges the duty to avoid all irresponsible and improper conduct. By virtue of the position a judge, a person agrees to lead a life with restrictions on the person's conduct that are imposed on the ordinary individual. A judge is considered to always be under public scrutiny. Therefore the conduct of the judge is always susceptible to review and comment and where it exposes the judiciary to disrepute, that conduct is subject to discipline.

JUDICIAL HANDLING OF SEXUAL HARASSMENT MATTERS

As stated above, judges are required to handle sexual harassment cases in a neutral sex blind manner. In reality, it is often hard for judges to divorce themselves from their perceived

sexual beliefs and stereotypes. It is a commonly held belief that women would not lie about experiencing and therefore if a woman said it occurred then it did. This belief is contrary to the concept of innocent until proven guilty. It has always been the hallmark of American Jurisprudence that a plaintiff be required to prove the allegations in any complaint in order to get a recovery. The belief that an unsubstantiated allegation, should, in itself, be the basis of a judgment is unique to sexual harassment and rape field. Until 1975, California had a jury instruction which required the jury to examine the complainant's testimony with caution. The standard California rape instruction used to state, in part:

"A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent...., the law requires that you examine the testimony of the female person named in the information with caution."

People vs. Rincon-Pineda (1975) 538 P.2d 247. The debate upon the sanctity of a woman's complaint for sexual harassment hit the forefront of American consciousness in the **Anita Hill vs. Clarence Thomas** debate. At the U.S. Supreme Court confirmation hearing, Ms. Hill claimed that years earlier Clarence Thomas had sexually harassed her while she worked for him in the EEOC. The hearings were televised Judge Thomas was subsequently confirmed to the United States Supreme Court. The interesting factor of the hearing was that immediately after the hearings a pole of American public who viewed the hearings and had them fresh in their minds concluded

by more than 66% that no sexual harassment had occurred. A year later in which feminist groups continually berated Justice Thomas, who never responded to the personal attacks, a poll showed that nearly 60% now believed that sexual harassment has occurred. This highlights, not guilt or innocence, but the power of the press to convince people that what they had seen and heard for themselves was not what they thought. Because of the very fact that people may view conduct from different perspectives, it is important that judges and juries avoid both liberal or conservative biases and instead adjudicate matters in sex neutral context to the extent possible.

II. ELIMINATION OF SUBSTANCE ABUSE IN THE LEGAL PROFESSION

INTRODUCTION

Under the Canons of Professional Responsibility, an attorney should never represent a client when the attorney's abilities, both mental and physical, are being impaired by drugs of any type. It does not make any difference if the drugs that are causing the problem are legal or illegal. As long as the attorney's thought process is affected, the attorney cannot provide good competent legal services to the client. For that reason, an impaired attorney is not permitted to represent the client. California goes much further in how it punishes attorneys for substance abuse as evidenced in how it treats drunk driving attorneys. A California attorney, who receives a second drunk driving conviction, risks losing the license to practice law. In fact, a second drunk driving conviction for an attorney usually will result in the attorney's bar license being lifted unless the attorney enters and completes some type of drug treatment program. In addition, the attorney will usually be required to take courses in professional ethics as well. All of these sanctions for drunk diving will be imposed regardless of whether or not the drunk driving had anything to do with the furnishing of legal services to a client.

The treatment and sanctions imposed against an impaired

attorney often will be determined by the circumstances of the case. In California, for example, if an attorney is drunk in the law office and gives advice to a client which is correct, then the attorney has not violated the canons of professional responsibility because his advice was correct and therefore was not impaired mentally. Yet, if the same attorney gets in a car, is subsequently gets pulled over and blows a .11 ppm blood alcohol level on the alcohol breath test, the attorney is guilty of drunk driving. As a result thereof, the attorney could be susceptible for state bar disciplinary action, not for any improper or impaired legal advice given to the client, but because the attorney had operated a motor vehicle with a .01 ppm of alcohol in his system above the legal limit. The argument is that the attorney was knowingly breaking the law by driving with that high elevation of alcohol. Therefore, the attorney is being punished because an attorney is not supposed to knowingly violate the law. Many attorneys feel that disciplinary action against an attorney for acts that do not relate to the practice of law or which do not evidence moral turpitude should not be the basis of a disciplinary action. Many attorneys therefore feel that the drunk driving action should not give rise to a disciplinary action. This view, while once the majority view is becoming, if it has not already, become the minority view. Many state bars, follow the California example, and now discipline attorneys for drunk driving convictions. The trend now is to discipline an attorney for any criminal violation, regardless of

how trivial. As such, an attorney using an illegal drug will usually be disciplined regardless of the fact that the drug usage had no effect on the attorney's practice of law. In addition, drunk driving or any other alcohol related crime will also usually expose the attorney to disciplinary action regardless of whether the alcohol affected the attorney's practice of law.

As a practical matter an attorney is not allowed to use illegal drugs and just by having them, the attorney will be exposed to sanctions. When an attorney is using legal drugs, the attorney has to be careful that the usage does not adversely affect the attorney's practice of law. Substance abuse, involving drugs, in the legal profession covers not only the use of the drug, but also its sale. The penalties for drug use are less than for actual sale or dealing in a drug. There have been cases for both possession and sale in which attorneys have been disciplined. The Colorado Supreme Court in May 1992, suspended attorney, Lawrence David Rhodes, for three years after his entering a guilty plea in the El Paso County District Court to one count of distribution of a controlled substance, cocaine. **COLORADO LAWYER** (Aug. 1992). The court concluded that the distribution of cocaine is a serious crime as defined by CRCP rule 241.16(E), and also agreed with the state bar that the attorney's conduct violated Disciplinary Rule 1-102(A)(6), as engaging in conduct that adversely reflects on his fitness to practice law. This case highlights the premise that while the act itself, drug distribution, did not have anything to do with the

practice of law, the attorney can still be sanctioned for violating the law. Simply by virtue of being an attorney, a lawyer is held to the high standard of not doing anything that violates the law. In this case, since the attorney pled guilty to distributing cocaine, the court used a criminal conviction for a major felony, as just about every other court will, as grounds for professional discipline.

In another Colorado disciplinary case, attorney Richard Arnold Anderson was suspended for three years, in part, because of his failure to report to the court that he had a 1983 conviction for driving while his abilities were impaired. **COLORADO LAWYER** (July 1992). In other words, this appears to be nothing more than a drunk driving incident, but since the attorney did not report it, the court combined that fact along with other instances of alleged misconduct. Again, this highlight the fact that substance abuse should also cover alcohol as well as drug related offenses.

In a widely publicized case, a federal attorney, who was assigned to prosecuting drug cases, was arrested and charged with various drug crimes. The former deputy U.S. attorney was hooked on cocaine. To satisfy his habit, he was using the cocaine seized in cases that he was handling. As a result, some of his convictions had to be overturned. The former prosecutor ended up going to prison and losing his license on top of it. The importance of this case was not in the fact that prosecutors are treated the same as regular attorneys. Instead, its significance stems from the

knowledge that even a drug prosecuting attorney, who daily dealt with drug criminals, was unable to prevent himself from becoming so drug addicted as to become unable from stop himself from stealing drugs in his possession to satisfy his drug cravings. This case shows how quickly as person can lose all ability to make moral judgments when under the onerous influence of drug addiction.

Attorneys and judges, even though members of the legal profession, are just as susceptible, if not more so, to turning to alcohol or drugs to alleviate the pressures of their profession. Attorneys, and particularly trial attorneys, have always had a higher than an average incidence of alcoholism than in society as a whole. The pressure to win and do the best job possible for the client leads many attorneys to turn to stimulates, such as drugs, to do their job and then further drugs or alcohol to come down from the high and be able to relax. The yolo effect of this cycle of drug abuse grows steadily worse until the person is unable to function without a daily dosage of drugs. Substance abuse, whether from alcohol or drug, which results in an attorney's addiction, is today recognized as an illness. Even so, substance abuse is not a defense to disciplinary action for improper representation. An attorney who voluntarily closes an office so as to obtain treatment will have that factor taken into consideration in any disciplinary action for mitigation purposes but it will not stave off such an action altogether.

In order to understand substance abuse in the legal

profession, it is necessary to first understand what substance abuse is and how it affects individuals. To help achieve this understanding, substance abuse is discussed first in general terms and then later in more specific terms with a final discussion on the treatment modes available to attorneys. To fully understand substance abuse in the legal profession, legal professionals must understand the effects on substance abuse both on them and their families. Substance abusers often abuse their families and have higher instances of debilitating and life shortening diseases. All of which tend to seriously affect the competency and ability by which the attorney or judge performs his or her professional duties. Another aspect of an attorney's alcoholism is that law firms may not wish to employ the attorney due to the potential health costs which usually are incurred by an alcoholic employee. This book strives to educate attorneys of the effects of both alcohol and drug abuse both financially and morally on society and legal profession.

CHAPTER TWELVE

ALCOHOL ABUSE

The most commonly abused drug is the legal drug of alcohol. In government statistics for substance abuse alcohol use is usually not considered. In fact, most studies on substance abuse are concerned only with the use of illegal drugs such as heroin, cocaine and the like. If alcohol use were to be factored into the studies then the numbers would go up quite considerably. Often there is also a relationship between the victims and assailants in drug related homicides. In 1984 in New York City, 24% of all homicides victims between the ages of thirty-one and forty years were related to drugs. In addition, eighteen percent of the assailants in those cases, were related to drugs. In the terms of sex, 90% of all 1984 New York City homicides involving male victims were drug related and only 10% percent of the female victims were drug related. Along ethnicity, 42% of all black 1984 New York homicides involved drugs, and 49% of Hispanic deaths involved drugs as well. What this tends to point out more than anything else is that people will commit crimes in order to pay for their drug habits.

In *"The Economic Costs of Alcohol Abuse and Alcoholism -1975,* Final Report to the National Institute of Alcohol and Alcoholism, 1977, it was concluded that alcohol abuse cost America \$43 billion in 1975. Adjusted to present value, in 1994, the figure would be in

excess of \$120 billion. The major costs were in loss of production, nearly \$20 billion and increased medical services another \$13 billion. Motor vehicles accidents also accounted for another \$5 billion. The effects of alcohol abuse span all of society. Legal professionals are not immune from alcoholism or its effects. Judges and attorneys can also be alcoholics and as such add to the loss of production and increased medical costs endured by society at large.

The National Institute on Alcohol Abuse and Alcoholism (NIAAA) commissioned the Rand Corporation to issue a report on alcoholism in the United States, **The Rand Report** published as ***Alcoholism and Treatment*** (1978) by John Wiley & Sons. Inc. One of the most interesting conclusions of the Rand Report was that treatment can be effective. The report found that untreated clients had a "natural" remission of around fifty percent whereas clients involved in treatment programs such as Alcoholics Anonymous (AA) or more formal programs had a remission rate of seventy percent. Alcoholism is not viewed as a disease that can be cured but only one in which the cravings can be placed into remission. Remission in the report was defined as including both abstention and "normal" social drinking not to intoxication. The report was unable to establish a pattern of treatment which would be effective for all alcoholics. The study concluded that treatment should be tailored to the individual needs of each person. A second Rand Report was issued in 1980 **The Course of Alcoholism: Four Years After Treatment**

often referred to as Rand Report II. The second report confirmed that some alcoholics were able to resume social drinking but, in general, the report was less optimistic than the earlier report. The second report, for the first time identified two types of alcoholics. The first type of alcoholics were those under the age of forty and were less likely to relapse into alcoholism if they resumed social drinking. It was concluded that alcoholics under the age of forty who attempted total abstinence were more likely to have a total relapse than those alcoholics under forty who engaged in social drinking. For alcoholics above the age of forty, the report concluded that total abstinence was the best treatment procedure. In making its conclusions, the report considered that the social pressures to drink in persons below forty years of age are such that for younger persons it is better to have a social drink than total abstinence and risk the falling off the wagon. In short controlled drinking in younger alcoholics may be better than a total abstinence. The second report found that four years after the original study 46% were in remission (28% of whom were abstaining and the remaining 18% engaging in controlled drinking). Only 15% of the original group had been in continuous remission for the entire four year period meaning 31% of the above 46% have fallen off the wagon at least once during this period. Of the original group 54% were still having alcoholic problems four years after the end of the first study. The second report found that men were better at total abstinence (57%) than women. It was found in

the second report that regular attendance at AA meetings gave a person the best chance of recovery but it was no guarantee against a relapse. Alcoholics Anonymous (AA) members who attended infrequently were found to have a higher rate of relapse than a person who never attended AA. The highest rate of relapse occurred most often within the first six months of entering the AA program. As with the first report, the second report was unable to recommend any one general treatment for all alcoholics.

The perception of the alcoholic is male. In reality, however, it is women who often experience the worst effects of alcoholism. In ***The Invisible Alcoholics: Women and Alcohol Abuse in America***, Marian Sandmaier pointed out the severe effects of alcohol on women. Although not widely known, a third of all alcoholics are women. Society does not accept a woman's drinking on the same par as a man's. A drunken man may be viewed with distaste by universally a drunken woman is viewed with shame and a degree of disgust. This of course, would be the same view for a drunken woman attorney or judge. Within the last twenty years, the percentage of alcoholic women has been increasing faster than that of men. In 1939, the percentage of women drinkers in the United States was 45% which increased to 66% in 1981. From 1974 to 1981, the number of women drinkers increased 5% whereas the number of male drinkers actually reduced 2%. Given the trends in woman drinking, by the year 2010, it is estimated than women will be a full half of all drinkers. As the number of women drinkers increased so has the

number of women alcoholics. In AA, the number of women rose from 22% in 1968 to 29% in 1977 and 32% of all new members between 1974 and 1977. In addition to more women drinking than before, they are also doing it earlier. In 1968, only 15% of teenage girls admitted drinking whereas in 1974 the percentage had jumped to 54%. Women, more so than men, tend to use prescription drugs such as tranquilizers than are men. The use of the two tend to create in women alcoholics a dual dependency both on alcohol and drugs which makes it difficult to break the alcoholic addiction. A survey of AA members in 1977 disclosed that 29% of the women as compared to only 15% of the men were addicted to drugs in addition to alcohol. In addition, of the new AA members of thirty years of age and under, a full 55% of the women as compared to only 36% of the men were dually addicted, ***The Invisible Alcoholics***. Alcohol has even more deleterious effects on women than it has on men. Blood level concentrations are higher in women than men for the same dose of alcohol due to women's higher fat content. Alcoholic women have higher gynecological and obstetrical problems than ordinary women. Alcoholic women also have a higher number of miscarriages and hysterectomies in addition to infertility problems. In addition, alcoholic women have a significantly higher susceptibility to cirrhosis of the liver than men. The progression of alcoholism in women is significantly faster than in men. In men, alcoholism tends to be a slow disease taking up to fifteen years to fully develop. In women, however, alcoholism tends to fully develop in just a few

years. In women, depression tends to foreshadow drinking problems far more often than in men. In short, women, are more susceptible to men to becoming alcoholics and given the approaching equality in the number of men and women drinkers, it is projected that within twenty years the number of alcoholic women may actually exceed the number of alcoholic men.

An interesting aspect of alcoholism is its effect on homosexuals. In **"Alcoholism: The Dark Side of Gay"**, The Magazine 6, no 3. (1980) it was estimated that 25% of homosexuals were alcoholics as opposed to only 10% of the straight population. In Los Angeles County, a 1975 study concluded that nearly one-third of all homosexuals in the county regularly abused alcohol. One of the reasons advanced for the higher alcoholism rate was the life of homosexuals. In **"Introductory Address to the National Council on Alcoholism Forum Session on Alcohol Abuse in the Gay Community,"** NIAAA Information and Feature Service, no. 75 (1980) it was estimated that homosexuals visit bars nineteen times per month and have an average of six drinks per visit. The profile of the average homosexual alcoholic is someone in the mid-30's and having engaged in heavy drinking for at least ten years. In **The Invisible Alcoholics** it was concluded that lesbians appear to have more problems with alcohol than gay men. A study of gay men versus lesbian women showed that 35% of the lesbians had problems with alcohol as opposed to 5% of straight women and 28% of gay men.

Chronic alcoholism has many permanent or long lasting effects on an individual. One of the most noticeable effects of alcoholism is the effect which it has on the memory. Two researchers Ben Morgan Jones and Marilyn K. Jones conducted studies on alcohol impairment on two groups. One group received a high dose of alcohol and the other group a low dose of alcohol. After each dose, each member was shown a list of twelve items and tested on their ability to recall them. Those persons given a high dose of alcohol (1.04 grams of alcohol per kilogram of body weight). It was found that both groups had about equal ability to recall, after the lists were taken away, if given an immediate memory test. It was, however, found that the high dosage members had significantly poorer short term memory than the low dosage group in that five minutes after the lists were taken away the low dosage group was much better at recalling the items on the list. One of the most frequent complaints of chronic alcoholics is poor long term memory. Chronic alcohol abuse has severe long term and permanent effects on the brain. One of the most common organic effects of chronic alcoholism is **KORSAKOFF'S PSYCHOSIS** (KP) which is characterized by confusion and memory failure. In addition, KP can also show symptoms of time disorientation, emotional insight and loss of insight. The effects of KP generally only effect a person after years of steady long term heavy drinking. Under KP, immediate memory recall is essentially unimpaired while both short term and long term memory is evenly effected. The effects of KP are not reversible although

treatment is generally through nutritional supplements. Alcoholics with a history of heavy drinking for ten years or more often fare much worse on performing abstract tasks than non-alcoholics. In addition, there appears to be an age correlation to the severity of KP in that age seems to increase the effects of KP. It has been found that alcoholics of fifty years of age with ten years of heavy drinking have significantly worse memory recall than alcoholics of forty years of age who also have ten years of heavy drinking. Women, in particular, are severely afflicted with memory problems resulting from alcohol. The research of the Jones' disclosed that as a woman gets older, alcohol will have greater impact on memory ability. This leads to the conclusion that cognitive impairment in women, as the result of alcohol, increases with age. In the legal profession, memory loss and impairment of mental capacity is extremely hazardous to the practice of the profession. Attorneys who cannot read and retain the information necessary long enough to prepare a case or draft necessary document preparation, will invariably make errors that will both harm their clients' interests and expose themselves to claims of malpractice. An attorney lives by his or her memory. If legal knowledge is lost or inaccessible as a result of alcoholism, then the person has lost the ability to practice law effectively.

One of the most important impacts that alcoholism has upon a person is its effect on the person's employability. Many states and the Federal Government laws, such as the Federal Rehabilitation Act

and the American with Disabilities Act, define alcoholism as a disability and prohibit employment discrimination because of it. By law, there cannot be discrimination in employment based upon a person's alcoholism unless the employer is unable reasonably to accommodate the person's alcoholism. Nonetheless, as a practical matter, employers do not like to hire alcoholics and avoid it whenever they can do so. In today's job market, hiring a person who is not an alcoholic is relatively easy for an employer. As such, the employer can usually justify hiring a non-alcoholic over an alcoholic as long as the non-alcoholic employee has the same qualifications as the alcoholic. One main reason that employers do not wish to hire alcoholics is usually the increased medical problems that afflict alcoholics. The result is that an employer's medical insurance increases substantially when there are alcoholic employees. Alcoholics are susceptible to many more diseases than non-alcoholics. Among the most common diseases afflicting alcoholics are some of the most expensive diseases to treat such as cancer, cirrhosis and hepatitis. The risk of cancer, in several different forms, increases substantially among alcoholics. The risk of alcoholics for both getting and dying from cancer of the mouth, pharynx, larynx, esophagus, liver and lung increases as a person's consumption increases with the highest risk being born by the alcoholic. In the United States, studies estimate that between 6.1% and 27.9% of all cancer cases are related to alcohol, ***The Encyclopedia of Alcoholism***, Robert O'Brien (1982). Alcohol, by its

own nature is not a carcinogen in itself. Rather, it is considered a co-carcinogen a substance that will speed up the development of cancer in the presence of another carcinogen. It is estimated that a person who both drinks and smokes heavily runs a fifteen-times greater chance of developing some form of cancer than a person who does not drink or smoke. As such an alcoholic who smokes runs a far greater risk of developing cancer than an alcoholic who does not smoke. The most noticeable cancers are in the mouth, pharynx, larynx and esophagus. In fact, between 60% and 80% of the cases of esophagus cancer involve persons with a history of serious alcohol abuse. A 1977 study in France concluded that esophageal cancer for person who both drinks and smoke heavily is forty-four times greater than for persons who neither drink or smoke. The study also found that the rate was only eighteen times greater than persons who simply drank heavily and was only five times greater for heavy smokers. This study confirmed the fact that for esophageal cancer, alcohol was a co-carcinogen. One of the organs most affected by alcohol is the liver. Alcoholics have a much higher incidence of primary liver cancer, hepatoma, than non-alcoholics. The ***Third Special Report to the U.S. Congress on Alcohol and Health*** concluded that between 64% and 90% of all deaths involving primary liver cancer were related to alcohol. The report raised the premise that primary liver cancer has two stages. The first stage is actual damage due to alcohol abuse and the second being actual malignancy

caused by a secondary carcinogen acting upon the damage caused by the alcohol. A disease closely associated with alcohol is cirrhosis of the liver. Usually, cirrhosis appears as a companion disease to primary liver cancer. Cirrhosis is the most widely known alcoholic disease. Cirrhosis is defined by the U.S. Dept. of Health as "a chronic inflammation disease of the liver in which functioning liver cells are replaced by scar tissue." Cirrhosis results in the formation of fibrous tissue and nodule formation in the liver that impedes its functioning. While cirrhosis can be caused by any injury to the liver, its primary cause is that of chronic alcohol abuse. Cirrhosis, when caused by alcohol, takes between five and seven years of steady drinking. As cirrhosis develops, liver cells are slowly being replaced by scar tissue. The scar tissue is unable to do the work of the replaced liver cells that results in a reduced liver function. Liver damage due to cirrhosis is irreparable. Cirrhosis affects approximately 10% of alcoholics. There is a genetic factor involved in the development of cirrhosis in that different ethnic groups develop the disease at different rates. The ***Fourth Special Report to the U.S. Congress on Alcohol and Health*** documented that American Jews have a lower than average rate of cirrhosis whereas American Indian have a much higher rate of incidence. Cirrhosis mortality among blacks is almost twice that of white people with the rate for urban black males increasing to a ten times than of similar urban white males. Women may be even

more susceptible to cirrhosis than men. A study reported in the **British Medical Journal** concluded that cirrhosis was changing from a disease of predominantly middle-aged and elderly men to a predominantly feminine disease. Between 1970 and 1977, the report showed that the number of women admitted to British hospitals for cirrhosis increased by four times. There is no successful treatment for cirrhosis. Only by complete abstinence can a person afflicted with cirrhosis have a chance of long term survival. A study reported in **The Encyclopedia of Alcoholism** showed that the five-year survival rate of those with portal cirrhosis, the most common type afflicting alcoholics, was only 63% for total abstainers while only 40.5% of those who continued to drink survived five years.

One of the most tragic aspects of alcoholism is the effect it has upon those closest to the alcoholic. The person, who suffers almost as much as the alcoholic, is the alcoholic's spouse. The FBI's **Uniform Crime Reports** shows that 25% of all murders are intrafamilial affairs and that 12% of all murders are spousal killings. In 1978, researchers M.A. Stuart and C.S. de Blobs disclosed in a paper **"Is Alcoholism Related to Physical Abuse of Wives and Children"** that 65% of mothers who had abused their sons had themselves been abused by their husbands. Alcoholism has been shown to have a direct effect of family violence. In **The Vicious Circle of Alcoholism and Family Violence**, Alcoholism 1, no 3 (1981) it was estimated that between 60% and 80% of all cases of family

violence involve alcoholic drinking either before or after the incident. The study concluded that as the amount of alcohol a person drinks increases, so to does the possibility of family violence. The pattern of alcoholism and family violence often repeats itself in succeeding generations. An alcoholic abuser often is seen as drinking and abusing their spousal and children as a means to reassert some degree of control in their lives. Spousal violence is documented to increase in bad economic times and among families with financial problems. To treat an abusive alcoholic, it is necessary to involve the entire family in order to resolve deep-seated feelings and hostility that might otherwise sabotage the treatment.

Besides the devastating effect alcoholism may have upon a person, it also has a severe effect of the alcoholic's children. The effects of a parent's alcoholism on a child is especially insidious. In ***A Dangerous Pleasure*** by Geraldine Youcha (1978), studies were conducted reached the conclusion that a child's pattern as an adult will often mirror that of the parents. The daughters of alcoholics appear to be especially vulnerable to becoming alcoholics themselves. Between 20% and 50% of the daughters of alcoholics become alcoholics themselves. In addition, many daughters of alcoholics will marry an alcoholic even if they themselves are not alcoholics. In ***Dangerous Pleasure***, it was noted that, in a West Coast chapter of Al-Anon, an alcoholic treatment

program, one half of the women spouses of the alcoholics undergoing treatment had themselves an alcoholic parent. The children of alcoholics are often in a state of confusion regarding their places and expected conduct in the family. Often in the alcoholic family, the alcoholic parent vacillates between being a kind caring parent to that of an abusive monster. The children, in such a family, often develop special coping techniques that leave them dysfunctional in society. In fact, even if the alcoholic parent subsequently sobers up, the relationship with the children often does not improve or does so at an extremely slow rate.

Another effect of a parent's alcoholism on a child is that of child abuse. It is estimated that at least 20% or 200,000 of the one million per year cases of child abuse and child neglect are the result of alcoholism. The **FOURTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH** concluded that alcohol is a factor in as many as one-third of all child abuse cases. One of the interesting side effects of an alcoholic parent on the cycle of child abuse is that appears generational. A study conducted by Lt. Cdr. Daniel W. Behling of the Naval Regional Medical Center, Long Beach reported that 63% of abused children had at least one grandparent who was an alcoholic or otherwise alcohol. One form of child abuse is that of incest. The **National Study on Child Neglect and Abuse Reporting in Denver, Colorado** concluded that alcohol was a factor in one-third of all father-daughter incest cases. The

counselor at one alcohol treatment program has stated that half of the women involved in the program had engaged in incestuous affairs with their fathers or brothers.

The most widely known aspect of alcoholism is the dependence and addiction that it fosters. The dependence manifests its most visible form in delirium tremens also known as the D.T's. Delirium tremens makes its appearance in the final stage of withdrawal from alcohol following a long period of heavy drinking. Delirium tremens is a form of alcohol psychosis the symptoms of which can include visual and auditory hallucinations, confusion, disorientation, agitation, restlessness and insomnia. The D.T's last for between three and four days. Sedation is sometimes an option only very conservatively because any sedation sufficient to mask all symptoms will severely suppress the patients respiratory functions as well. During the period of the D.T's, the patient is essentially unable to work. This would be especially true in the legal profession wherein a judge or attorney suffering through the D.T.'s would be unable to make the reasonable thoughtful decisions needed on a moment to moment basis to try a case, render a judicial decision or handle a client's legal matter. In addition, a legal professional suffering from D.T's would usually be short tempered and may mistreat or insult staff, clients, co-workers or other professional all of which would tend to demean the profession and would expose the person to disciplinary actions.

One of the most appalling aspects of alcoholism is that it has

a tendency to promote suicide. Every study taken on alcoholism and suicide shows a strong correlation between the two. In **"Mortality Among Female Alcoholics"**, Scandinavian Journal of Social Medicine 3 (1975), it was reported that female alcoholics have a 30-times greater likelihood of committing suicide than the general population. Studies have also shown that alcoholics attempt suicide more often than non-alcoholics. Between 15% and 64% of all persons making an unsuccessful suicide attempt had been drinking shortly before the attempt. Alcohol was a factor in 80% of all successful suicides. A Duke University medical Center study showed that twenty-six of the twenty-nine persons attempting suicide were intoxicated at the time of their suicide attempt. The presence of alcohol in so many attempts and even more so in the actual suicides shows that alcohol clouds the judgment and removes the inhibition against suicide. In **"Alcoholism and Mortality"** Population Trends 7 (1977) it was shown that, in general, women attempt suicide more often than men but that men were more often successful in their attempts. The figures for attempted suicides among alcoholic women are alarming. Alcoholic women attempt suicides more often than non-alcoholic women and their rate of actual suicides is twenty-three times that

of the general population. In short, while men are more successful at suicides than women as a whole, alcoholic women are more successful, as a subgroup, than men in committing suicide. This

propensity among alcoholics to commit suicide should always be born in mind especially by alcoholics. Legal professionals are not immune from alcoholism and its effects, including suicide. In addition alcoholic women, even though they may be attorneys or judges, have a higher risk of attempting and completing a suicide. Knowing the potential risk of a suicide among such legal practitioners should prompt employers and co-workers to suggest alcohol treatment and counseling. In addition, if the person is depressed special attention should be paid to the person because one of the effects of alcohol is to magnify such feelings of depression which often results in a suicide attempt.

1. ALCOHOLISM IN THE LEGAL PROFESSION

The legal profession is not immune from the effects of alcoholism. In fact, given the stress generated in litigation it is hardly surprising to find that there is a large alcohol problem in the legal profession. In 1986, it was estimated in *Cocaine Blues*, 72 A.B.A.J. 25 that between forty percent and sixty percent of all disciplinary cases involved alcohol or chemical dependency in some form. In addition to alcoholism on the part of attorneys, there is also the problem of alcoholism with employees. Loss of productivity is a main characteristic of alcoholism. yet, with many Federal Acts to ban discrimination the firing of an alcoholic employee is difficult. The Federal Rehabilitation Act and the American with Disabilities Act both recognize alcoholism and drug addiction as disabilities. Since both alcoholism and drug addiction are

protected disabilities, a person who is an alcoholic or a drug addict can only be fired if, after the employer attempts to make a reasonable accommodation to the person, it is found that the alcoholic or drug addict still cannot do the job properly. In the legal profession, having an alcoholic or drug impaired attorney or staff member on board is similar to a ticking time bomb. Unless the person gets treatment the person will get worse and will eventually commit acts that will expose the employer to a malpractice claim.

Alcohol affects an attorney's judgment. A large portion of the disciplinary action imposed against attorneys involved improper actions by the attorney when the attorney was impaired by alcohol or drug use. One of the major instances of discipline is improper trust account management resulting from alcohol impairment. Attorneys are in a position through their clients' trust accounts that they can raise money through unscrupulous means as a result of their loss in judgment. Another case in which an attorney was disciplined involving the use of alcohol involved attorney Kenneth A. Senn, in which he was publicly censured for having fired a gun over his wife's head while he was drunk, **COLORADO LAWYER** (June 1992). Mr. Senn was under alcohol influence as opposed to drug influence, but nonetheless the resulting criminal activity involved was such that it stemmed from his lack of control. The above instances are more related to situations where the attorney becomes drunk or otherwise disabled and cannot conform his conduct to that required by the law. An attorney may get arrested for drunk

driving or lose his temper and get into a fight, or in the case of Mr. Senn, shoot a gun over his wife's head, all of which may lead to disciplinary action. In Mr. Senn's disciplinary action, he argued that professional discipline is not appropriate for misdemeanor conduct not related to the practice of law. The court rejected this defense and imposed the public censure stating that Mr. Senn's "conduct was the result of a very critical failure of judgment which was at odds' with the respondent's duty to uphold the law." In any event, these are instances of the effects of alcohol abuse upon some attorneys.

Drug addiction by attorneys and other legal professionals is just as much a concern as alcohol addiction. A drug addicted attorney simply cannot practice law competently in all situations. There are several signs for drug addiction getting out of hand for an attorney. Eventually as the drug addiction increases, an attorney will:

1. begin missing court appearances,
2. fail to take necessary depositions or the depositions, when taken, are not taken competently,
3. fail to give competent legal advice to clients' and
4. fail to timely and competently prosecute or handle legal matters for clients.

As the foregoing conduct begins to become the normal operation for the impaired attorney, the attorney's due of due care owed to the clients disappears. Eventually, and it is only a matter of time,

the attorney will commit an act, which would not have been done had not the attorney not been impaired, which harms a client and results in a malpractice claim and possible disciplinary being taken against the attorney.

CHAPTER THIRTEEN

DRUG ABUSE

INTRODUCTION

Drug use in this country, both legal and illegal, is at an all time high. The Federal Government through its *Drug Use Forecasting Program* (D.U.F.) test the urine of arrested persons in custody who have submitted to voluntary testing. The *D.U.F.* Program tests for the presence of 10 drugs. In most cities, according to the federal government's own statistics, more than 50% of those tested were found to have been recently using drugs. In twenty three cities that participated in the program in 1990, the rate of males that tested positive for drugs ranged between 30% to 78%. For females the rate was between 39% to 76%. In 8 of the 23 cities in which the tests were conducted, 70% or more of the women arrested tested positive. The test results showed that twenty percent of both the men and women tested positive for two or more drugs. The most common drug that was found, in people who were arrested for drug crimes, was cocaine. When it comes to the drug of choice, cocaine is the leader but it is followed very closely by marijuana and hashish. In later years, heroin has been making a comeback, as has LSD. It is interesting that marijuana is making a comeback. In fact in 1989, of all people who were jailed in both federal and state prisons, 9% were there for marijuana and hashish crimes and not any other drugs. This tends to show that marijuana, even though it is

not anywhere near as addictive or dangerous as cocaine or heroin, its use results in much higher rates of incarceration than most of the other drugs.

There is very strong evidence of a relationship between drug use and crime. Usually the thought is that because the drugs are so expensive, a crime has to be resorted to in order to pay for the habit. As a practical matter, for example, if heroin were legal, it would be cheaper to produce than aspirin because it comes from natural sources. The problem is that heroin is not legal and the cost is through the roof for it, and people who become addicted to it have to pay the higher price. That is not to extol the legalization of drugs but rather to point out the relationship between the cost of drugs and the crime they spur. That does not mean that there isn't a relationship between people committing crimes because they are on drugs. It is the function of drugs to change people's perception of reality. By changing their perception of reality, people will do things that they would not normally do. This is why under the law they have the defense of voluntary and involuntary intoxication to determine diminished capacity.

The 1990 D.U.F. figures show that people who were under the influence of drugs committed 336,000 reported crimes of violence. This works out to roughly 5.6% of all violent crimes in the nation in 1990 that were committed by people using drugs. It is not known how many people who committed the crimes were doing this for lack of reason and how many people were doing this for lack of money.

For example, there were 130,260 rapes in 1990, of which 7.4% were related to drug use, which is approximately 8,400. In robbery, which is more of a financial motive, there were 1,149,710 robberies of which 9.1% were committed by people under the influence of drugs. This translates to close to 150,000 robberies by people who were on drugs. In assaults, not involving a robbery, where people are beating up other people, nearly 5% of the perpetrators were on illegal drugs of some type. The largest number of crimes was in assault, 4.7 million, and 5% of that number is 235,000 which represent drug related assaults.

It is important to understand the difference between various drugs and how they are rated. The Drug Enforcement Administration, DEA, has a schedule of five different types of drugs rated by their abuse potential from highest to lowest. Schedule 1 DEA drugs are heroin, LSD, hashish, marijuana, methaqualone and designer drugs. The effects of Schedule 1 drugs are rather unpredictable. There are severe psychological and physical dependence and sometimes even death. There is generally no medical use for these types of drugs. There is, however, a severe disagreement on marijuana. Marijuana has traditionally, for thousands of years, been used as a medicinal drug and it was legal in this country until the Food and Drug Act of 1932. Dr. Dean Edell, a noted radio doctor, once stated he has a medical book in his office that was written in the early 1930's that lists sixty five different ailments that for which marijuana could be used as a treatment. Marijuana is very popular as a

treatment for nausea caused by chemotherapy in the treatment of cancer. California has a synthetic drug called marinol, a pill for just that purpose, but it is recognized that smoking marijuana is significantly better because it gets in the system right away and a pill has to be absorbed. The Federal government continues to refuse to acknowledge that marijuana has any medicinal benefit at all. There have been several cities across the country that have in essence decriminalized marijuana for people suffering from AIDS and so forth for people who need the drug as part of their treatment.

The Schedule 2 drugs have a high abuse potential rather than the highest. Included under this schedule are morphine, PCP, codeine, cocaine, methadone, demarol, benzedrine and dexidrine. They can lead to severe psychological or physical dependence; however, there is some medical use for these drugs especially, codeine and demarol as pain killers. For the drugs with a medium potential of abuse, which are classified as Schedule 3 drugs, are codeine with aspirin or tylenol, and some amphetamines and anabolic steroids. Schedule 3 drugs can lead to moderate or low physical dependence or high psychological dependence, and are recognized as having medicinal uses and are widely accepted as such. The Schedule 4 drugs on the DEA list are Darvon and Talwyn (registered trade names), phenobarbital, equanil, miltown, librium, diazepam are rated as having a low potential of abuse. These drugs may lead to limited physical or psychological dependence, but they do have medicinal use. These drugs cannot simply be banned totally, because

they do have medical uses. As such, they are in fact regulated. The lowest ones, Schedule 5, are over-the-counter or prescription drugs with codeine, lomatil, robitussin AC, and again they have medicinal uses. Any drug which requires a prescription to be used must be held only by people who have that prescription. Even though the drug would be legal if an attorney had the prescription, if an attorney did not have the prescription for a drug in the attorney's possession, then the attorney is in violation of the law.

There was an instance in Northern California where the husband had a prescription to have the drug but not his wife. The husband's prescription had run out but he had not used all his pills and had a few of them in this jacket pocket. The wife grabbed his coat to wear while going on a simple errand. While wearing the jacket, the wife was stopped for suspicion of drunk driving and a search uncovered her husband's prescription drugs on her. The wife was charged for possession for having the drugs without a prescription, and technically there was a violation there. At trial, the defense had to be prove that she did not know her husband's prescription was in the pocket and that her husband did in fact once have a valid prescription. Mere possession of an illegal drug or a legal drug without a valid prescription is a crime itself, use is not required. In addition, the possession of illegal drugs which may result in prosecution may not even be sufficient to cause a high. There have been many cases reported in which people have been convicted for having drugs that were not even in sufficient

quantity to have an effect. In some instances, the prosecution is permitted to even weigh the paper in which the drug is wrapped, if is to be smoked, in determining the amount of the drug that is present.

Drugs have an effect on their users' lives in addition to exposing them to criminal prosecution and possible imprisonment. The most important non-medical effect of drugs is the effect it has on a user's health. Drug addiction has several potential devastating effects on an individual. Such potential results include death, medical emergencies resulting from overdosing, injuries caused as a result of being under the influence of drugs, exposure to diseases such as HIV as a result of intravenous drug usage and chronic physical problems as a result of drug use. In 1990, the Drug Abuse Network (DAWN) surveyed medical examiners in twenty-seven metropolitan areas. DAWN discovered that 71% of drug related deaths were male, 53% of such deaths were white, 29% were black and 16% were Hispanic. Alcohol was also found to be present with drugs in 40% of the deaths. The most frequently used drugs causing death were cocaine (43%) and heroin or morphine (34%). From 1980 to 1989, the number of deaths attributable to drug use increased from 58%, NCHS, ***"Advanced Report of Final Mortality Statistics, 1989"***, ***Monthly Vital Statistics Report***, V. 40 (Jan. 1991).

Besides death or harm of the user, drug abuse often also

affects innocent people as well. The most common effects of a person's drug abuse upon others is that a spreading disease or causing accidents. The Center of Disease Control (CDC) estimated that 60% of children below thirteen years of age with AIDS contracted it from their mothers who were either intravenous drug users or has sex with partners who were IV drug users. In 1990, nearly 12,000 of the 43,000 persons known to have AIDS were IV drug users. Another disastrous effect of drug use among women is that they may acquire pass drug addiction to their infants. The General Accounting Office has estimated that drug-exposed infants for each year range between 14,000 to 375,000. To combat this flood, many states have passed legislation making it a crime for a mother to use drugs while carrying a child. In such states, doctors are required to test a mother's blood during an examination and after birth and to report positive findings to the district attorney for prosecution. The effects of this law, after highly visible prosecutions, have been generally worse for the child. It has been alleged that drug using mothers, knowing that a positive result will result in prosecution, have been either getting an abortions without having a blood test taken or are not getting prenatal care. The number of women getting prenatal care in states, adopting such laws, has dropped significantly. In addition, the number of children being born with prenatal injuries or prematurely, which could have been avoided had prenatal care been given has also increased in those states.

Accidents caused by persons under the influence of drugs is a major cost to society. The most common type of drug-related accident is that of a motor vehicle accident. The Maryland Institute of Emergency Medical Services reports that between January 1988 and July 1989, 7% of persons injured in vehicle accidents and 10% of motorcycle drivers injured in accidents were under the influence of drugs. A study of 643 New York City drivers injured in the same period showed that 18.2% were positive for cocaine use. A study of by the National Transportation Safety Board (NTSB) of 181 fatal crashes in eight states in 1987 and 1988 discovered that 33% of the drivers tested positive for alcohol or drug use. These accidents caused 207 deaths. A 1986 NTSB study of 317 tractor trailer drivers tested at a weighing station found that 29% tested positive for drugs or alcohol. The most commonly discovered drug was marijuana at 16% and other stimulants at 15%.

Besides the effects on the individual or other persons as a result of drug abuse, another result is on the loss of productivity for the nation as a whole. There have been many studies which consistently show that drug abuse among workers seriously impairs the worker's ability to function on the job. In a study of postal workers, 2,500 workers were given preemployment urinalysis. It was found that employees testing positive for marijuana use were 1.6 times more likely to quit or be fired, 1.5 times more likely to be have an accident, twice more likely to be injured on the job, 1.5 times more likely to be disciplined, and 1.8 times more likely to

be absent that those workers who tested negative for drug use, ***"The Efficacy of Preemployment Drug Screening For Marijuana and Cocaine In Predicting Employment Outcome"***, Journal of the American Medical Association, Nov. 1990. A 1985 National Household Survey on Drug Abuse discovered that 12% of full time employed adults admitted using marijuana within thirty days and another 4% of the full time workers admitted to currently using cocaine. Part-time employees also admitted to using drugs in a similar ratio. In the 1990 National Household Survey of Drug Abuse, the proportions of employees admitting marijuana use had fallen to 6% and for cocaine the percent had fallen to 1%. While the drug is significant, it still represents an estimated use of drugs by employees of nearly seven million persons. Also, it is unclear if the number of persons reporting usage actually fell because people really quit drug use or if employees failed to report their drug use for fear of having it discovered by their employer.

Drug usage affects American society on many levels. In many instances, the discussion of the effects of drug use mirrors that of alcohol. For that reason, this chapter deals with the areas where drug abuse differs from alcohol. The main differences between alcohol abuse and drug abuse are in relationship between drugs and crime and society's response to drug abuse.

1. DRUGS AND CRIME

Drugs have become one of the major factors in crime in the

United States. The U.S. Department of Justice's Bureau of Justice Statistics (BJS) conducted a survey of jail inmates in 1989. The survey found that 75% of all jail (city or county) inmates had used drugs in their lifetime. The survey also disclosed that 40% of the inmates had used drugs in the month prior to their offenses and that 27% had been under the influence of drugs at the time of their offense, Table One. For state prison inmates the use of drugs was even higher. Nearly two-thirds of the state inmates reported that they used drugs at least once a week for the month at some time. More than a third of all prison inmates stated that they had been under the influence of drugs at the time of their offense, Table Two.

TABLE ONE

OFFENSE COMMITTED UNDER THE INFLUENCE OF	PERCENT OF JAIL INMATES		PERCENT OF STATE PRISON INMATES		
	1983	1989	1974	1979	1986
ANY DRUG	30%	27%	25%	32%	35%
MAJOR DRUG					
COCAINE	6%	14%	1%	5%	11%
HEROIN	6	5	16	9	7
PCP	2	1	--	2	2
LSD	1	<1	2	1	1
OTHER DRUGS					
MARIJUANA	17%	9%	10%	18%	19%
AMPHETAMINES	4	2	5	5	4
BARBITURATES	3	1	6	6	3
METHAQUALONE	2	<1	--	--	2
OTHER DRUGS	2	<1	3	2	4

SOURCE: BJS, DRUG USE AND CRIME SPECIAL REPORT NCJ 111940, JULY 1980, TABLE 1,2 AND BJS, PROFILE OF ALL JAIL INMATES, 1989, SPECIAL REPORT, NCJ-129097, APRIL 1991, TABLE 13,8.

TABLE TWO

TYPE OF DRUG USE	PERCENT OF ALL STATE PRISON INMATES	
	1979	1986
UNDER THE INFLUENCE OF DRUGS AT THE OF CURRENT OFFENSE	32%	35%
EVER USED DRUGS REGULARLY		
ANY DRUG	63	62
A MAJOR DRUG	33	35
USED DRUGS DAILY IN THE MONTH BEFORE THE CURRENT OFFENSE		
ANY DRUG	40	43
A MAJOR DRUG	14	19

NOTE: MAJOR DRUGS INCLUDE HEROIN, METHADONE, COCAINE, LSD, AND PCP. REGULAR USE IS ONCE A WEEK OR MORE FOR AT LEAST A MONTH IN THE PAST. SOURCE: BJS, PROFILE OF STATE PRISON INMATES SPECIAL REPORT, NCJ-109926, JAN. 1988, TABLE 11,6.

The most important statistic confirmed in the BJS was that 13% of the inmates stated that they committed their crimes to get money to support their habit. Cocaine and crack users composed the largest group of criminals who committed crimes to support their habits at 39%. This figure supports the belief of many people that it is the high price of illegal drugs when coupled with addiction that the major cause of drug related crimes. The high price of drugs is directly related to their illegality. The harder it is for a person to get the drug for which the person is addicted, the more that person will pay for the drug. Pharmaceutical companies have stated that if heroin, for example, were legal, it would be cheaper to produce than aspirin. The same relationship also exists for cocaine. It is simply because these substances are illegal that their price is so high.

The price of drugs is so high now that it is virtually impossible for the average person to afford illegal drugs, on a regular basis, without resorting to the crimes. Unless a person is wealthy or a member of the Hollywood in-crowd, that person will never be able to satiate the drug addiction through the wages derived from normal work. The result of having to supply the high cost of a drug habit had been to turn many women into prostitutes both to earn money for the habit and the fact that many "Johns" and pimps supply the women with their drugs and men, not being able to prostitute themselves or turn to serious crime. The DUF estimated in 1990 that 81% of the women and 41% of the men, usually young boys, arrested for prostitution and tested for drugs had a positive result. The DUF statistics compiled, as a result of voluntarily testing arrestees in 1990, show that drugs were a factor in crimes for which most persons, men and women, were arrested, TABLE THREE.

TABLE THREE

ARREST CHARGE	POSITIVE OF ANY DRUG	
	MALE	FEMALE
DRUG SALE/ POSSESSION	79%	81%
BURGLARY	68	58
ROBBERY	66	66
LARCENY-THEFT	64	59
STOLEN VEHICLE	60	65
STOLEN PROPERTY	59	59
HOMICIDE	52	49
FRAUD/FORGERY	50	55
PROSTITUTION	49	81
ASSAULT	48	50

NOTE: 19,883 MEN WERE TESTED AND 7,947 WOMEN IN 21 CITIES. DRUGS INCLUDED COCAINE, OPIATES, PCP, MARIJUANA, AMPHETAMINES, METHADONE, METHAQUALONE, BENZODIAZEPINES, BARBITURATES and PROPOXYPHENE.

SOURCE: NIJ, 1990 DRUG FORECASTING PROGRAM (DUF).

This survey supports the premise that drug related crime is driven in this country by the economic reality that the drug abuser needs the proceeds from the crime to support the addiction.

While addicts commit crime to get drugs, there is an entirely different reason of drug crime from the pusher and distributor. Because of the huge amounts of money which can be made by selling drugs, an entire underground drug industry has developed. The best analysis is with that of prohibition. When the United States adopted the Volstead Amendment banning alcohol, organized crime developed to fill the need and desires of the American public for alcohol. Prior to prohibition, alcohol was both legal and cheap. During prohibition, organized crime developed with such figures as Al Capone, Lucky Luciano, Legs Diamond, who shot their way to the top and made hundreds of million in untaxed dollars. With its illegal alcohol profits, organized crime invested into legitimate businesses and now many of the wealthiest families in America try to downplay the fact that their wealth had its origins in "rum running." The same is happening now with drugs. Today's drug dealers see what happened in prohibition where multimillions of dollars were made and respectability bought with that money. Drug dealers are every bit as willing to kill competitors as Al Capone had been at the St. Valentine's Massacre. Today, it is not uncommon to turn on the television evening news and hear of a drug related murders and innocent people being slain in drive-by shootings.

There is only one reason that people deal in drugs and that is to make money either for themselves or to fund their habit. The profits in the drug trade are unbelievable. The Office of National Drug Control Policy estimated that in 1990, drug users spent \$18 billion for cocaine, \$12 billion for heroin, \$9 billion for marijuana and \$2 billion for other illegal drugs. The Select Committee on National Narcotics Abuse and Control estimated that drug abuse was several times higher at around \$140 billion in 1987. Whatever the figure, it is huge and the profits themselves are not taxed. Marijuana, for instance, is the largest cash crop in California. The growing of marijuana is a double insult to society. Not only is growing marijuana is illegal but the profits derived from the sales are not taxed. The uncollected taxes of drug sales cost the state and federal government hundreds of millions of dollars each year. The incredible profits available in drug dealing has induced many people, otherwise law-abiding, to enter the field. In 1980, the arrest for manufacturing and sale of drugs accounted for only 22% of all drug arrest. In 1990, manufacturing and sale arrests have risen to 32% of all drug arrests.

At this time, drug usage is generally viewed as a criminal offense punishable by imprisonment not treatment. The Uniform Crime reports (UCR) estimated that state and local agencies made nearly 1.1 million arrests for drug abuse in 1990. The ordinary cost for processing each arrest is estimated to be \$200. This translates into nearly \$20 million just to arrest drug offenders, nearly two-

thirds of whom were merely for possession. The DEA, which concentrates mainly upon dealers, in contrast, for the entire United States made only 21,799 arrests in 1990. The five hundred to one disparity in state versus federal arrests is the fact the state punishes users almost as harshly as dealers. The UCR that state and local drug related arrests, most of which are for possession, have risen from 6% of all arrests in 1980 to 8% in 1990.

The FBI crime statistics show that while drugs are a national concern it is most prevalent in the cities, Table Four. In addition, the FBI statistics show that drug use in the West and Northeast is almost three times the rate in the Midwest and the South has almost twice a rate of the Midwest, Table Five.

TABLE FOUR

DRUG ARRESTS BY CITIES

POPULATION OF JURISDICTION	DRUG ARREST PER 100,000 POPULATION
CITIES	
250,000 AND OVER	914.8
100,000 TO 249,999	666.1
50,000 TO 99,999	413.5
25,000 TO 49,999	334
10,000 TO 24,999	249.9
UNDER 10,000	236.6
COUNTIES	
SUBURBAN AREAS	309.7
RURAL COUNTIES	210.8

SOURCE: FBI, CRIME IN THE UNITED STATES 1990.

TABLE FIVE

DRUG ARREST BY AREA

<u>REGION</u>	<u>NUMBER OF ARREST PER 1,000 POPULATION</u>
WEST	623.1
NORTHEAST	547.6
SOUTH	410.5
MIDWEST	233.9

SOURCE: FBI, CRIME IN THE UNITED STATES 1990.

Many explanations have been offered to explain the differences between the arrest rates in rural versus metropolitan areas and the Midwest versus the rest on the nation. One of the most commonly advanced explanations is that drug arrests are higher in the West, south and northeast because that is where most of the drugs enter this country and it is also where most of the big cities are located. In response, people in the Midwest point the fact that it is referred to in a derogatory manner as the Bible Belt. Nonetheless, many people in the Midwest point to the strong spiritual belief of its people as proof that persons with such strength of character and religious belief have no need to resort to artificial stimulation to cope with life. In any event, while drug use is lower in the Midwest, it is not nonexistent. Likewise, while drug use in small towns is a quarter of what it is in the large cities, it, nevertheless, is present. As such, it is clear that drug abuse is a national concern and is not, limited, as it was once thought, to the inner cities. As such responding to drug abuse requires a national consensus.

2. RESPONDING TO DRUG ABUSE

The traditional response to the drug problem in the United States has been to jail the addict and then pusher. This has resulted in building more prisons. Today, the United States has more people in prison, mainly for drug related offenses, than any other nation in the world. The costs for incarcerating a person in a state prison tends to run \$25,000 per year as an average. The high cost of jailing people, often for mere drug possession, has resulted in many states having to reduce social services to its citizens in order to pay for the imprisonment of otherwise nonviolent drug addicts. The cost for drug abuse to American society, in all its form are high and it has resulted in all segments of society looking for ways to curb the costs incurred in punishing people for their drug addiction, Table Eight.

TABLE EIGHT

COSTS OF ILLEGAL DRUG USE

<u>TYPE OF COST</u>	<u>MILLIONS</u>
PUBLIC AND PRIVATE CRIME COSTS	
FEDERAL DRUG EXPENDITURES (1991)	\$10,841
ALL LAW ENFORCEMENT	\$7,157
INTERDICTION	\$2,028
INVESTIGATION	\$1,288
INTERNATIONAL	\$640
PROSECUTION	\$584
CORRECTIONS	\$1,265
INTELLIGENCE	\$104
STATE AND LOCAL ASSISTANCE	\$1,016
REGULATORY COMPLIANCE	\$31
DRUG PREVENTION	\$1,483

DRUG TREATMENT	\$1,752
ALL RESEARCH AND DEVELOPMENT	\$450
HEALTH CARE COSTS FOR ILLEGAL DRUG USERS (1985)	\$2,272
SHORT-STAY HOSPITALS	\$1,272
SPECIALTY INSTITUTIONS	\$570
OFFICE-BASED PHYSICIANS	\$52
SUPPORT SERVICES	\$201
OTHER PROFESSIONAL SERVICES	\$17
MEDICAL CARE FOR AIDS RELATED CASES	\$126
SUPPORT SERVICES FOR AIDS CASES	\$64

SOURCES: THE WHITE HOUSE ONDCOP, THE NATIONAL DRUG CONTROL STRATEGY, BUDGET SUMMARY, JAN. 1992, BJS, JUSTICE EXPENDITURE AND EMPLOYMENT SURVEY, 1988, THE ADMAHA, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1985.

In response to high cost of drug addiction on American society in all its forms, government has moved to expand its war on drugs beyond that of mere imprisonment. A 1990 Gallup poll showed that 40% of those surveyed favored teaching young people in schools about the dangers of drug abuse. This tactic has now been adopted by all schools as a means of restricting the growth of drug abuse by limiting the number of people using drugs by educating them of its deleterious results.

The growing effects of drugs on society have resulted in society as a whole becoming willing to certain violations of privacy in order to fight drug abuse. A 1989 Gallup poll showed that more than 90% of those surveyed favored mandatory drug testing was appropriate for persons involved in safety sensitive jobs. The percentage favoring mandatory job testing fell, in the poll to only 61% for persons not involved in safety-related jobs such as office workers. As of 1991, 11 states had adopted laws regulating

workplace testing. Another fourteen states had introduced legislation for regulating employer drug testing in their states. The Bureau of Labor statistics conducted a survey in 1998 and found that 3% of all private nonagricultural businesses (145,000 businesses) had drug testing programs. Twenty percent of employees of private nonagricultural companies worked for businesses that had some form of drug testing policy. The BLS estimated in its 1988 ***Survey of Employer Anti-Drug Programs*** that 953,100 workers were tested in the previous year for drug use. In addition, four million job applicants were tested for drug use in 1988. The BLS discovered that 9% of the workers and 12% of the applicants tested for drug use yielded a positive result.

In an effort to deal with the increasing number of drug addicts entering the criminal justice system, many states have begun viewing drug addiction as a disease rather than a criminal offense. A 1989, Harris poll showed that people were very much in favor of spending more money on education and drug treatment in an effort to fight drug abuse in society, Table Six.

TABLE SIX

1989 HARRIS POLL

"WOULD YOU FAVOR OR OPPOSE SPENDING SPENDING MORE MONEY ON, AND RAISING YOUR TAXES TO PAY FOR...?"	PERCENT OF RESPONDENTS WHO		
	FAVOR	OPPOSE	NOT SURE
AN EDUCATIONAL CAMPAIGN TO CONVINCE YOUNG PEOPLE AND OTHER NOT TO USE DRUGS	79%	19%	2%
A SHARP INCREASE IN THE PRISONS AVAILABLE FOR LOCKING UP CONVICTED DRUG PUSHERS	71%	26%	3%
THE EXPANSION OF DRUG REHABILITATION CENTERS SO THAT ANY ADDICT CAN BE IMMEDIATELY ADMITTED FOR TREATMENT	67%	28%	5%
AN INCREASE IN AID TO BOLIVIA, PERU, AND COLUMBIA TO COMBAT COCAINE TRAFFIC FROM THOSE COUNTRIES TO THE U.S.	50%	45%	5%

SOURCE: THE HARRIS POLL AUG 17, 1989, as presented in BJS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1989 NCJ-124224, 1990 TABLE 2.87, 202.

A May 1990, Associated Press poll mirrored the Harris poll and found that 57% of those polled felt that placing addicts in treatment facilities was more effective in dealing with drug addicts than imprisonment. As such, many states have created drug courts to handle drug cases separately from other crimes.

Reflecting the growing belief that drug addiction should be treated as a disease where possible, many states, have today, enacted legislation, which permits judges to sentence first time offenders to treatment facilities rather than prison. If the offenders complete the treatment facility and remain clean for a period of time, as proven by random tests, the drug conviction will be

dismissed from the offender's record. If the offender cannot remain clean, then the offender will be sentenced to jail. A Treatment Outcome Prospective Study (TOPS) have found that court ordered treatment programs tend to be more effective than a person entering treatment voluntarily or upon referral by friends or counselors, Table Seven.

TABLE SEVEN

PERCENT OF CLIENTS IN TREATMENT MODALITY

REFERRAL SOURCE	OUTPATIENT METHADONE	OUTPATIENT DRUG FREE	RESIDENTIAL
ALL	100%	100%	100%
SELF	48	19	24
FAMILY/FRIENDS	31	21	19
CRIMINAL JUSTICE	3	31	31
OTHER (HEALTH PROFESSIONALS SPIRITUAL LEADERS, COUNSELORS	18	29	26

SOURCE: NIDA, "THE CRIMINAL JUSTICE CLIENT IN DRUG TREATMENT" in **COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE** (1988) 57-80. TABLE 1,60.

The study reflected in Table Seven shows that court ordered treatment is the most effective type of drug treatment program. The reason for this is the additional motivation which it provides. While a person may be motivated to voluntarily enter a drug treatment program for personal reasons, such as keeping a family together and keeping a job, court ordered treatment adds the incentive of keeping the person out of jail. However even with this additional incentive, not all drug abusers are able to complete the

program and thereby remain out of jail.

One of the most innovative programs for fighting drug abuse has been the 1988 Anti-Drug Abuse Act. Under this Act, both state and federal judges have the authority to deny certain federal benefits to persons convicted of drug possession or drug trafficking. Under the Act, 406 specific federal benefits may be denied to persons convicted of drug related offenses. Among such denied benefits are the denial of student loans, small business loans, radio and television broadcast licenses, research grants and fellowships, pilot and maritime licenses, physicians' prescription writing authority, Federal contracts and purchase orders and contracts and purchase orders by Federal grantees or contractors. Under this Act, a person convicted of drug possession can be denied benefits for up to one year for the first offense and up to five years for subsequent offense. For drug trafficking offenses, benefits can be denied for up to five years for the first offense and up to ten years for subsequent offenses. The Act, however, does not permit judges to deny a convicted drug offender of the following federal benefits, social security, public welfare, disability and veterans benefits and public housing. The purpose under this Act is to add additional punishment to drug abuser as a deterrent to drug abuse. Whether such additional punishment is a deterrent to drug abuse is unclear. If a person is willing to face jail as a potential risk for using drug the belief that the additional risk of losing a student loan will change that behavior

is speculative.

While the Anti-Drug Abuse act does not permit public housing benefits to be cut off as a result of a drug related conviction, the U.S. Department of Housing has instituted a program that permits its 3,300 Public Housing Authorities and Residence Management Corporations to deny public housing to drug dealers and users. All public housing leases now contain clauses that require the lessee to refrain from using drugs as a condition of obtaining public housing. The standard of proof for denying or revoking public housing is that of "preponderance of the evidence" rather than "beyond reasonable doubt" which makes it easier for the housing agency to deny housing assistance to suspected drug abusers or to evict current tenants for drug use.

Any discussion of the responses to drug abuse would be incomplete unless it included asset forfeiture. Under the asset forfeiture laws, the Federal government and many states may confiscate from criminals the fruits of their criminal drug activities controlled substances, equipment used in the drug activity, money derived from the drug activity and property purchased with drug profits. As of 1992, the federal Government and forty-three states also permit the forfeiture of real property acquired with drug profits. There are two types of asset forfeiture statutes, criminal forfeiture and civil forfeiture.

Under the Federal criminal forfeiture law, property that is subject to criminal forfeiture can be specified in the criminal

indictment of the defendant or can be added later in a bill of particulars that modifies the indictment. If the defendant is convicted, the court can declare the property forfeited at the final judgment. Claims by innocent third parties as the property are heard by the court after conviction but before the final order or forfeiture. The Attorney has the authority in federal forfeiture cases to remit or mitigate the forfeiture if its implementation would be unduly harsh. Such mitigation is usually limited to lien holders or innocent family members who would be inequitably harmed if the forfeiture occurred.

The civil forfeiture of drug assets is often the preferred method for both the Federal government and forty-nine states. Under the civil forfeiture statutes, the burden of proof is only "by a preponderance of the evidence". In addition, in many forfeiture statutes hearsay evidence is permitted which permits the government to conceal the names of their informants and undercover agents.

One of the most unique methods of addressing drug abuse is for the states to tax the profits. As of 1991, 21 states had adopted laws for the taxing of drug profits, ***A Guide to State Controlled Substance Acts***, National Criminal Justice Association (1991). Generally, the taxes take the form of stamps, sales or excise taxes that are generally around \$3.5 per gram of marijuana and 4200 for each gram of a controlled substance. A person in possession is required to purchase the tax stamps for the drugs, usually

anonymously. If the person is arrested for drug possession and is found not to have the tax stamps, then the person can be also convicted of tax evasion irrespective of the outcome of the drug case.

Despite the various alternatives discussed above, the most common response to drug abuse still remain imprisonment. According to the BJS, 71% of those convicted, in State Courts, of drug trafficking are incarcerated as opposed to 72% of aggravated assault or 65% of larceny, *BJS, Felony Sentences in State Courts*, Bulletin NCJ-126923 (1990). In Federal Courts, 91% of those convicted of drug trafficking are incarcerated as opposed to 84% for burglary, 78% for rape, 62% for assault and 34% for larceny. Those persons convicted of murder in Federal Courts have only a slightly greater percentage of incarceration than drug traffickers at 93%.

While new responses are being sought for drug abuse are being sought, there is still no belief among politicians that drug laws should be decriminalized. While a few states, such as California, have made the possession of a small amount of marijuana an infraction, possession of any other illegal drug, regardless of the amount, is still usually a felony. Drug use is still, for the foreseeable future, going to remain largely illegal. As such, all of the problems discussed above which flow from an expensive, illegal and addictive substance will continue to plague American society.

CHAPTER FOURTEEN

SUBSTANCE ABUSE IN EMPLOYMENT AND TESTING

INTRODUCTION

Substance abuse among employees is one of the major concerns among employers. Employers, including those in the legal profession, do not like to employ known alcoholics. When employers can legally do so, sometimes when they cannot, they select a non-alcoholic over an equally qualified alcoholic. In addition to problems with the hiring of an alcoholic, employers also face problems of what to do when an existing employee who is found to be an alcoholic. Many states, along with the federal government, have passed laws that seriously impinge upon an employer's rights to discipline or fire an employee for alcoholism. The result of these laws have been to make employers, to a certain degree, the primary caretaker of alcoholics. The social responsibility to care for alcoholics have been, in many instances, shifted from society to the employer. Under today's laws, an employer may feel compelled to continue to employ an unproductive alcoholic employee rather than risk a wrongful discharge suit based upon the employee's alcoholism. The cost for defending such suits can cost an employer in excess of \$100,000 so that many employers cannot afford the risk incurred in firing an alcoholic employee. To help alleviate the problem by having an alcoholic employee, many employers are looking at drug testing as a means of weeding out potential employees and

predicating continued employment upon passing random tests. The questions regarding drug testing are how and when it can be utilized.

Substance abuse, as a whole, severely affects the nation's productivity. The productivity is severely reduced when an employee becomes involved in substance abuse. Statistics show that the substance abusers, as a whole, are three times more likely to be late or absent on the job and nearly times as likely to be involved in accidents than a non-abuser. The ***White House Conference for a Drug-Free America*** in 1988 concluded that drug abuse among workers poses a real and substantial risk to both the abuser and co-workers. Substance abusers are, by statistics, to be injured on the job at a rate five times that of co-workers who do not use alcohol or drugs. The annual cost of drug use to American business is estimated to be \$60 billion of which over half is related to lost productivity. A study of the productivity of alcoholics conducted by Laurence Miller concluded that, "there was a significant association between current quantity of alcohol consumed per drinking occasion and impairment on neuropsychological tasks. Most seriously affected were the processes of abstraction, adaptive abilities and concept formation. ***Problems of Mass Screening for Misused Drugs***, Substance Abuse in the Workplace, John Morgan, M.D. Another study conducted by **The National Drug Institute** in Danvers Massachusetts concluded that drug use among employees cost

employers \$7,2360 per year in lost productivity, increased medical expenses and destruction of property as a result of the employee's conduct on the job. Insurance experts estimate that at least \$50 billion per year of the total insurance premium paid by employers is to cover substance abuse illnesses and treatment. A study of **Research Triangle Institute** in 1980 concluded that employers lost \$47 billion in lost productivity, medical expenses and property damage as a result of employee substance abuse.

1. SUBSTANCE ABUSE ON THE JOB

It is estimated that 10% of the nation's workforce is alcoholic and that alcohol was a factor in almost half of all industrial accidents, ***Drug Testing at Work,*** Beverly Potter (1990). In 1986, the former head of the Federal Drug Enforcement Administration, Peter B. Bensinger, estimated that in any month seven million persons were abusing legal prescription drugs such as stimulants, barbiturates, tranquilizers and sedatives. Such persons are bringing such substances in greater numbers to the job. ***"High on the Job"***, Glamour (Aug. 1986). The CONSAD Research Corporation did a 1975 national survey of industrial drug use using 197 firms, ***"Drug Abusers in the Job"*** Occupational Medicine (June 1981). The study concluded that drug abuse effects all races, educational and classes. As part of the study, employees of twenty of the companies (2,500) were surveyed as to their drug use. It was found that 17% of the surveyed employees admitted to using illegal or nonmedical

drugs.

Generally, anyone can be a substance abuser. However, the common profile for a drug user on the job is a person below forty years of age with limited seniority or authority on the job. The use of drugs has spread from the ghetto throughout society. In 1977, the most common patient in drug treatment centers were predominantly black males seeking treatment for heroin. By contrast, in 1984, the most common patients in treatment centers were low to middle class white men seeking treatment for cocaine addiction. The **National Institute on Drug Abuse** estimated in 1986 that nearly two-thirds of new persons entering the workforce have, at least once, used illegal drugs. The most common type of drugs used on the job are prescription drugs. The National Institute For Drug Abuse estimates that prescription drug abuse account for 60% of all hospital emergency room admissions and 70% of all drug related deaths.

There have are several reasons postulated for the use of employees of drugs or alcohol on the job. A reason often advanced by workers in support of their substance use is a perception that they are able to do their job better. Truck drivers have, for instance, often claimed that the use of stimulants, such as amphetamines, allows them to stay awake longer and to operate their trucks safer. Attorneys and judges have often justified the use of drugs, especially cocaine, for its ability to allow them to work longer on important tasks rather than having to break for sleep.

Attorneys, using cocaine, have also stated that it improves their creativity and therefore is an advantage in trial work or negotiations for clients. Workers have also justified the use of drugs on the job as a means to tolerate and alleviate boredom. Such workers claim that their jobs are so routine and predictable that they are of no interest to them. Without a challenge being posed, these workers claim that drug or alcohol use is the only way that they can tolerate the job.

The most common reason advanced for a person using a drug on the job with the knowledge that discovery of the drug use may result in termination is addiction. Many persons, who use drugs or alcohol on the job, are in fact addicted. Often the employee needs the alcohol or drug to either prevent withdrawal or to cancel the effects of other drugs which they have taken. Most drugs have some kind of side effects such as hangover, depression or anxiety. In order to overcome these symptoms, many substance abusers will take additional drugs or turn to alcohol.

One of the most important reasons that an employer does not want an employee to use drugs or alcohol on the job is the potential liability to third parties who may be harmed by the employee while on the job. The common law theory of *Respondeat Superior* is still alive and kicking. Employers still remain responsible for the torts and actions committed by their employees during the scope of their job. This means, quite simply, that if a drunken employee injures a people while on the job, the employer is

responsible for the damages. This issue was highlighted in the in the 1980's when several railroad accidents were attributed to engineers who had marijuana in their system. The railroads were sued for the wrongful deaths and personal injuries suffered by the passengers in the accidents. Likewise, in the legal profession, lawyers are responsible for the actions of the employees under their control. In such a situation, the fact that employees may commit malpractice, while under the influence of drugs or alcohol, will not be a defense against a claim of malpractice against the attorney. In addition, where attorneys practice law together in a partnership form, each partner is responsible for the malpractice damages caused by the other partners. Drug or alcohol abuse by the partner committing the malpractice will not relieve the other partners of their personal liability for payment of the malpractice award.

One of the biggest problems facing employers is what to do once a substance abusing employee has been identified. An employer is, generally, not permitted to fire an employee simply the person is a substance abuser. There are several laws that come into play whenever an employer seeks to take action against a substance abuser. The federal Age Discrimination in Employment Act precludes an employer from discriminating against a person, over the age of forty years, in a job on the basis of age. Many alcoholics are over the age of forty and therefore they can claim that any action being taken against them is because of their age and not because of alcoholism.

By claiming that the alcoholism charge is a pretext for age discrimination, alcoholic workers, or other substance abusers over the age of forty, shift the burden of proof to the employer to prove that no discrimination was intended. The Federal Rehabilitation Act of 1973 prohibited contractors with the federal contracts and employers receiving federal grants from engaging in discrimination on the basis of a person's handicapped status. A handicapped individual is, under 29 U.S.C. section 706(7)(B) defined as:

"person who (I) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment...(S)uch term does not include any individual who is an alcoholic or drug abuse whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."

The interesting aspect of this section is that while drug abusers and alcoholics are disabled within the meaning of the Act, they are only protected if their addiction does not interfere with their performance of the job in question. Therefore, nearly, alcoholism and drug addiction are considered disabilities under this Act unless proven otherwise. Thus, employers having federal contracts more than \$25,000, either directly or through a subcontract, cannot discriminate against a person from the alcoholism or drug addition. In **Rodgers vs. Lehman** (1989) 869 F.2d. 253, the court set forth the test to be followed for determining whether an employer violated the act:

"1. When the agency suspects that an employee's poor job

performance results from alcoholism, it should inform the employee of available counseling services.

2. If the employee's unsatisfactory job performance continues, the agency must provide the employee with a 'firm choice' between treatment and discipline. The agency must clearly and unequivocally warn the employee that unsatisfactory job performance caused by drinking will result in discipline, eventually the termination of employment.
3. Unless in a particular case it is clear that inpatient treatment is immediately required, the employee must be permitted to participate initially in outpatient treatment of sufficient duration to assure him a reasonable opportunity for cure. If he continues to drink while participating in that treatment, the agency may impose progressive discipline upon him for any resulting job related misconduct.
4. If the employee ceases to participate in the outpatient treatment, is discharged for non-cooperation or continues to drink after completion of that treatment and is guilty of job related misconduct, the agency must, before discharging him, afford him an opportunity to participate in an inpatient program, using accrued or unpaid leave, unless the agency can establish that it would suffer an undue hardship from the employee's absence.
5. If the employee completes the program but thereafter relapses, and as a result fails to perform his job satisfactorily, a decision by the agency to discharge him will be presumed to be reasonable. **Only in a rare case, such as where a recovering alcoholic has had a single relapse after a prolonged period of abstinence can this presumption be rebutted."**

The employer in such a situation is required to make reasonable accommodation for the person's drug addiction or alcoholism. An employer is not required to permit an employee to use drugs or alcohol on the job. In addition to the Vocational Rehabilitation Act, Congress enacted, in 1992, the Americans With Disabilities Act (ADA) which prohibits employers from discriminating against persons with disabilities in employment. The ADA requires employers to make

reasonable accommodations to persons with disabilities. The test set forth in **Rodgers**, supra, is the one most often to be employed in determining if there has also been discrimination under the ADA.

In addition to the federal laws regarding the hiring of alcoholics and drug users, many states had also enacted their own laws as well. California, for instance, in Government Code sections 19230 and 19231 require state agencies make reasonable accommodation for a person's alcoholism or drug addiction. Section 19230 states that it is the government policy "to encourage and enable individuals with a disability to participate fully in the social and economic life of the state." As such state agencies are required to "make reasonable accommodation to known physical or mental limitations of an otherwise qualified applicant or employee who is an individual with a disability." **Gonzales vs. California Personnel Department of Education** (1995) 95 D.A.R. 896.

Employers should do everything possible to identify and help employees suffering from substance abuse. The worst thing that an employer can do is to ignore the problem in the hope that it will either go away or not get any worse. Substance abuse, by its very nature, is one that tends to get worse unless treated. One of the best ways to get started in the development of a drug and alcohol free workplace is for the employer to conduct a survey of the workforce so as to discover what problems actually exist. Employee records often yield the first indication of a potential problem with

substance abuse. Excessive job absences or medical claims may be an indication of substance abuse problems. Employee records are, however only as good as they are maintained. If the reports do not keep trace of an employee's work history then they are not of much benefit to the employer. A review of the employee records should be conducted in addition to touring the workplace and speaking with the employees. The most important preventive act that an employer can do is to institute a drug and alcohol free policy and insist on its enforcement. Employees should be made aware of the employer's drug free policy and that all drugs, including alcohol, should be banned from the workplace. As part of its anti-drug policy, an employer should adopt containment procedures for investigating employees for alcohol and drug use prior to the development of problems. The final aspect in any good drug control program is to provide assistance to employees in overcoming their problems. As shown in test set forth in **Rodgers**, supra, an employer, in accordance with the Americans With Disabilities Act, must reasonably accommodate employees suffering from substance abuse. Since such employees can no longer be automatically fired, it makes better sense to get treatment for them rather than risk the employees making mistakes that would ultimately cost the employer more than the treatment. In the legal profession, such treatment would certainly pay for itself. For a law firm not to offer treatment to an impaired attorney or secretary and to simply keep them as employees is a malpractice action waiting to be filed. It is also certain that such persons will, unless they receive

treatment, commit legal malpractice for which the law firm will be liable. Only in the field of medicine are impaired professionals more likely to commit malpractice than in the legal profession. Therefore, it becomes very important for law firms to institute policies and procedures for identifying and providing assistance to their employees who are engaged in the cycle of substance abuse. This should be done not only because it is a nice thing to do but also for the employer's own self-protection.

2. DRUG AND ALCOHOL TESTING BY EMPLOYERS

Employers do not, as a rule, want to have substance abusers work for them. Employers do not appreciate the increased potential for liability for civil suits deriving from actions of an employee while under the influence of drugs or alcohol. In addition, employers do not want to have productivity decreased or medical insurance premiums increase because of employees' use of drugs or alcohol. Employers are turning to drug and alcohol testing as a means of keeping their employees off drugs and alcohol. Most major sports, for instance, will immediately suspend a player and require entering into a treatment facility as a prerequisite to rejoining the club. Employers do not tell their employees to use drugs or be under the influence of alcohol for basic reason, to avoid loss of productivity and to keep medical insurance premiums down.

One of the most common reasons advanced by employers for the use of mandatory drug testing is for industrial accident investigation.

Southern Pacific Transportation Company was one of the first employers to institute a program which made drug testing mandatory following an accident. Following the policy's adoption, the number of accidents have been dramatically reduced. For the two years prior to the institution of the program, Southern Pacific had 15,082 accidents of the job. For the first two years in which the program was in effect, industrial accidents dropped by 69% to only 4,865. In addition, personal injuries suffered as a result of such accidents also dropped 24%. As such, millions of dollars in workers' compensation claims were saved as result of the implementation of the plan.

Another advantage of drug testing is its tool as a means of controlling drug abuse. In the Navy, it has been documented that following the institution of a random urinalysis program, positive drug results dropped from 48% in 1980 to only 21% in 1982. When Southern Pacific Transportation Company instituted its drug testing program 23% of those tested were positive for drugs. Two years later, only 6.5% of those employees tested by Southern Pacific had a positive result. The drug testing on the job as a deterrent to drug use is a very effective tool.

To accomplish their goal of having a drug free workplace many employers are turning to mandatory drug and alcohol testing as a condition for hiring and keeping a job. The use of mandatory drug and alcohol testing by employers is not always permitted under the law. Both state and federal laws define the circumstances when an employer

can test employees.

When it comes to drug testing, the issues are different depending whether the employer is a public employer or private employer. The 1988 Drug Free Workplace Act, while not expressly mandating drug testing, requires employers to adopt anti-drug programs. Drug testing in government employment is far more likely to be permitted because of the inherent need of the government not to have impaired workers, especially in the safety area. To further drug testing in federal employment, President Reagan issued Executive Order 12564 giving discretion to federal agencies to conduct testing. Under the order, any testing must be conducted by the federal agency itself and upon an initial positive result there must be confirmation by a more reliable test. If the drug retest also gives a positive result, then the employee must be offered the choice of counseling and rehabilitation prior to termination. Discharge can only occur if counseling is rejected or, if accepted, the employee later tests positive in two subsequent tests. Guidelines were issued in 1988 by the Department of Health and Human Services to govern the testing procedures for federal employees.

Drug and alcohol testing has been widely instituted in the federal government. The Department of Defense began testing all of its federal civilian employees in 1987. The Department of Transportation (DOT), following a series of railroad accidents in which alcohol or drugs were factors, not utilizes random drug testing. The DOT has instituted a random testing program for the

30,000 federal air traffic controllers, fire fighters and railroad safety inspectors along with its own 26,000 employees. The Federal Aviation Administration also requires all airline flight crews to submit to blood alcohol tests when requested by local law enforcement officers. The United States Justice Department even began testing in 1987 of employees in sensitive positions. The Attorney General's Office issued a statement that, "It is doubly important for the agency with primary responsibility to ensure that its employees are drug free."

Generally, drug testing of public employees is easier to accomplish than for employees in the private sector. The Seventh Circuit court of Appeals in *Johnson vs. Martin* (1991) 943 F.2d 15 held that probationary police officers had no protected interest in their jobs. As such, they suffered no injury when the results of the failed drug test were only placed in the file. In *Sellig vs. Koehler* (April 19, 1990) No. 39577, the New York Supreme Court upheld the random drug testing of probationary correctional employees. The court found that the membership in a police or paramilitary organization lessens the privacy expectations of the person. As such, a random test for such members does not violate any right of privacy.

In *International Brotherhood of Teamsters vs. Dept. of Trans.* (1991) 932 F.2d 1292, the Ninth Circuit of Appeals upheld the drug testing of truck drivers. Although not government workers, the court found that because truckers were in a heavily regulated industry,

they have a reduced expectation of privacy since it is expected for them to regularly submit to physical examinations.

Most employers are private employers. As such, employee drug testing by an employer must be in accordance with applicable state laws. The objection most often raised against drug and alcohol testing is that it violates the employee's right of privacy. An individual's right of privacy derives under the common law right of privacy and, in some states, by a state's constitutional right of privacy. Under the common law, individuals were presumed to have a right of privacy unrelated to the Constitution, **Restatement 2d of Torts section 652(B)**. The common law right of privacy exists only so long as the intrusion in question would violate the sensibilities of a reasonable person, *Rugg vs. McCarty* (1970) 173 Colo. 170, 476 P.2d 753. Under the purview of the common law right of privacy, if circumstances present a legitimate reason for the test, the privacy invasion properly would be upheld. On the other hand, random testing without any legitimate basis or purpose being served would probably not be upheld. Today, the common law right of privacy, which an individual, possesses can be lost in a collective bargaining agreement. *Schlacter-Jones vs. Gen. Tel.* (1991) 936 F.2d 435, *Clark vs. Newport News Shipbuilding* (1991) 937 F.2d 934.

Violation of an employee's right of privacy could expose an employer to liability under two different causes of action depending on the circumstances of the case. An employer, who publicly discloses

the results of a failed drug or alcohol test, could be sued for the public disclosure of private facts. Under this tort, truth is not a defense. Likewise, if the employer disclosed the information to the public in such a manner as to place the employee in a false light, even though the results are correct, the employer may be sued for that tort as well. In **Bratt vs. IBM** (1986) 785 F.2d 352 an employer was found liable for the improper disclosure of medical information. In **Love vs. Southern Bell Tel.** (1972) 263 So.2d 460, an employer was found liable for invasion of privacy for asking highly offensive questions while conducting a polygraph while testing for drug use. In **Borse vs. Pierce Goods Shop, Inc.** (1992) 963 F.2d 611, the Third Circuit Court of Appeals held that the common law right of privacy could also support a claim for wrongful termination

Not all states hold that mandatory drug testing is a violation of the common law right of privacy. In **Groves vs. Goodyear Tire** (1991) 70 Ohio App.3d 656, an Ohio court held that:

"The courts appear to be supportive of employers' attempts to create a safe working environment by holding that drug testing does not constitute an invasion of the employees' common law right of privacy."

In Ohio, employers do have the right to mandate drug testing of employees at least to the extent necessary to maintain a safe work environment.

In **Mares vs. Conagra Poultry Co.** (1991), 773 F.Supp.248, a Colorado federal court found that there was no violation of the common law right of privacy where an employee was required to furnish

information regarding medications being taken as a condition of employment. In making this decision, the court relied upon recent U.S. Supreme Court decisions and held that the disclosure of such medical information was not a significant invasion of the right of privacy.

In **Capua vs. City of Plainfield** (1986) 643 F. Supp 1507, a New Jersey city conducted a surprise urine test of all of its 244 police and firefighters following an anonymous tip that some of them were abusing drugs. As a result of the test, twenty employees tested positively and either were forced to resign or were fired. Sixteen of the officers filed a federal suit. The court found on behalf of the plaintiffs that the mass test violated their constitutional rights against unreasonable searches and seizures. The court held,

"The threat posed by widespread use is real. The need to combat it manifest. But it is important not to permit fear and panic to overcome our fundamental principles and protections." The court held that individual testing could occur under the, "individualized reasonable suspicion" standard. The wholesale mass testing without reasonable suspicions of particular individuals, however, was unreasonable. "Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life."

In **Koch vs. Harrah's Club** (D. Nev. Sept 12. 1990) No. 23740 the court upheld the testing of hair samples as a requirement for pre-employment. The court held that the employer's interests in having a drug-free workplace was a legitimate one and that the testing was a reasonable attempt to achieve it.

A New Jersey federal court in **Jevic vs. Coca Cola** (D.N.J. June 6, 1990) Civ. Act. No.89-4431 that requiring an applicant to consent to a drug test as a condition to employment did not violate the person's right of privacy. The court held that, "the efforts of the private sector to combat drug use through policies which reasonably balance the interest of the employer and country with the legitimate concerns of the prospective employee." The court in this case adopted the balancing test of the employer's interest to the intrusiveness of the test employer and found that the effects on the plaintiff's privacy rights were minimal.

In New York, a court upheld the right of employers to conduct testing but required the test to be accurate. The court permitted a lawsuit from a plaintiff claiming the test was inaccurate, **Doe vs. Roe**, (1990) 539 N.Y.S. 876.

In **Kelley vs. Schlumberger** (1988) 849 F.2d 41, the First Circuit Court of Appeals upheld a \$125,000 verdict for infliction of emotional distress and invasion of privacy to the plaintiff who had been fired as a result of a positive urine test showing off-duty marijuana use.

In **McDonald vs. Hunter** (1987) 809 F.2d 1302, the Eight Circuit Court of Appeals ruled unconstitutional the routine searches of prison guards and their vehicles by the Iowa Department of Corrections. Under the holding of this case, drug testing of prison guards is only permitted where reasonable suspicion exists for a

guard abusing drugs.

In addition to the common law right of privacy, some states have adopted provisions in their state constitutions to provide a Constitutional right of privacy. Eleven states, Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Montana, South Carolina and Washington, have adopted individual rights of privacy for their citizens.

In **White vs. Davis** (1975) 13 Cal.3d 757 and **Rulon-Miller vs IBM** (1984) 162 Cal.App.3d 241, California courts have held that the state constitutional right of privacy prevents private individual invasion of privacy. In **Luck vs. So. Pac. Trans. Co.** (1990) 218 Cal.App.3d an employee was able to sue an employer for a dismissal based upon a refusal to submit to a drug test and collected \$485,042 in damages. In **Hill vs. NCAA** (1994) No. S01818180, the California Supreme Court held that the right to privacy applied to the NCAA which mandated drug testing of athletes. The California Supreme Court, however, balanced the right of privacy with the "NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs." In doing so, the court concluded that the testing was justified.

In **State vs. Helfrich** (1979) 600 P.2d 816, a Montana court also ruled that the state constitutional privacy rights prevented intrusion into the privacy of individuals by private organizations or individuals.

While Alaska recognizes a state constitutional right of privacy,

that right is limited when the public interests in protecting health and safety conflicts with it. **Luedtke vs. Nabors Alaska Drilling** (1989) 768 P.2d 1123.

Florida has held that the state constitutional right of privacy, as regards employee drug and alcohol testing, is preempted by the Labor Management Relations Act, **Horne vs. Southern Bell Telephone & Telegraph** (1992) 793 F.Supp. 315.

In **Kelly vs. Mercoid Corp.** (1991) 776 F.Supp. 1246, an Illinois District Court held that privacy actions may be preempted by the Labor Management Relations Act. Where a collective bargaining agreement exists, the court will determine if the agreement gives the employer the right to insist on mandatory drug testing. If the right exists, then it will be enforced.

In Louisiana, **Holthus vs. Louisiana State Racing Commission** (1991) 580 So.2d 469, permitted drug testing for the purposes of granting licenses. The court balanced the state right of privacy against the public interest in a drug free horse racing industry.

In Massachusetts, **Folmsbee vs. Tech. Tool Grinding & Supply Inc.** (1994) No. Bk-6397, the discharge of a woman who refused to submit to a strip search and urine test was upheld. The Court held that it was necessary for the strip search to conclude that no vials of urine were hidden to defeat the test. The test was held to be proper and not violation the woman's right of privacy. In **Gauthier vs. Police Comm'r** (1990) 557 N.E.2d 1374 and **O'Connor vs. Police Comm'r** (1990)

557 N.E.2d 1146, the Massachusetts Supreme Judicial Court upheld the drug testing of police as not infringing upon their right of privacy. The court held that,

"the public interest in discovering and deterring drug use by police officers outweighs the intrusiveness of the search."

In addition to blood and alcohol tests for discovering drug or alcohol abuse, some states also permit the use of polygraphs, commonly referred to as lie detectors. The use of polygraphs in employee testing is the most regulated form of employee testing. In 1988, Congress enacted the Federal Employee Polygraph Protection Act that covers all forms of testing an employee's honesty. Many states have also enacted their own laws regarding employee honesty tests. Rhode Island and specifically banned the use of polygraphs in making employment decisions. Seven other states, California, Delaware, Idaho, Maryland, Minnesota, Washington and Wisconsin, limit its use in employment decisions. New Jersey law specifically permits a polygraph use to detect specific drug-related activities of employees. The use of drug tests as a source of drug testing has its limitations. In many states, polygraph tests cannot be admitted into evidence at courts. Even when polygraph tests are permitted, the employer may be subject to a lawsuit for the infliction of emotional distress or the invasion of privacy if the questions asked are beyond the scope or purpose of the test. In *O'Brien vs. Papa Gino's* (1986) 780 F.2d 1067, the First Circuit Court of Appeals upheld a jury verdict for invasion of privacy against an employer who had asked

highly offensive questions as part of the polygraph exam. A positive polygraph test, however, can create reasonable suspicion of drug abuse so that a blood or urine test could be ordered.

When considering the use of drug testing in employment, a review of state law regarding an individual's right of privacy should be conducted prior to the actual testing. The trend today is for courts to permit employers to mandate drug or alcohol testing when the testing is related to safety or is otherwise job related. In states, which have a constitutional right of privacy there is a balancing between the right of the individual and the reason for the test. In the legal profession, drug tests have seldom been used except where an attorney is a prosecutor in drug cases. In the balancing of drug tests for attorneys, the right of privacy would usually outweigh any safety issue raised by the employer. However, in government employment of attorneys, drug tests are usually upheld. In ***Wilner vs. Thornburgh*** (1991) 928 F.2d 1185, the testing of attorney applicants for the Antitrust Division of the U.S. Department of Justice was upheld as serving a legitimate governmental purpose.

CHAPTER FIFTEEN

SUBSTANCE ABUSE IN THE LEGAL PROFESSION

INTRODUCTION

The legal profession is not immune from the effects of alcoholism or drug abuse. In fact, given the stress generated in litigation it is hardly surprising to find that there is a large substance abuse problem in the legal profession. In 1986, it was estimated in Cocaine Blues, 72 A.B.A.J. 25 that between forty percent and sixty percent of all disciplinary cases involved alcohol or chemical dependency in some form. In addition to alcoholism on the part of attorneys, there is also the problem of alcoholism with their employees. Lost of productivity is a main characteristic of alcoholism. Yet, because of many Federal employments Acts, the firing of an alcoholic employee is difficult. The Federal Rehabilitation Act and the American with Disabilities Act each recognize alcoholism and drug addiction as disabilities. Under state and federal laws, both alcoholism and drug addiction are protected disabilities. As such, an attorney, who is an alcoholic or drug addict, can only be fired if, after the employer attempts to make a reasonable accommodation for the employee's condition. Only one it is determined that the alcoholic or drug-addicted attorney still cannot do the job properly. Following the attempted accommodation, can the attorney be fired. In the legal profession, having an alcoholic or drug impaired attorney

or staff member on board is similar to a ticking time bomb. Unless the person gets treatment the person will get worse and will eventually commit acts that will expose the employer to a malpractice claim.

Today, alcoholism is recognized, in employment law, as a disease rather than a character flaw in the individual, ***Enabling - How We Help the Alcohol Drink***, 73 Ill. B.J. 42. Alcohol affects an attorney's judgment. A large portion of the disciplinary actions brought against attorneys involve improper actions done by attorneys when impaired by alcohol or drug use. One of the major instances of discipline is improper trust account management resulting from alcohol impairment. Attorneys are in a position, through their control of clients' trust accounts, to appropriate the funds as a result of a loss in their judgment. In disciplinary proceedings, it makes little difference if the attorney were done under the influence of alcohol as opposed to the influence of drugs. The punishment is usually the same. In the past, the defense to a disciplinary action, had been to argue that professional discipline was not appropriate for misdemeanor conduct not related to the practice of law. Today, that is no longer the case due in large part to the society's growing intolerance of drunk driving.. Another example of alcoholic playing a factor in attorney discipline is the New York case of ***In Re the Matter of Wheelan***, 1991) 571 N.Y.S2d 774 in which the attorney was disciplined for having two counts of drinking while intoxicated and

three degree assault. Despite the fact that none of these cases directly related to the attorney's ability or competence to practice law or involved improper or negligent representation of a client, the attorney was, nonetheless disciplined by the state bar.

Drug addiction by attorneys and other legal professionals is just as much a concern as alcohol addiction. A drug-addicted attorney cannot simply practice law competently in all situations. There are several signs for drug addiction getting out of hand for an attorney. Eventually as the drug addiction increases, an attorney will:

1. begin missing court appearances,
2. fail to take necessary depositions or the depositions, when taken, are not taken competently,
3. fail to give competent legal advice to clients' and
4. fail to timely and competently prosecute or handle legal matters for clients, and
5. invasion of the clients' trust accounts, ***Enabling - How We Help the Alcoholic Drink***, supra.

As this conduct begins to become the normal operation for the impaired attorney, the attorney's due of due care owed to the clients disappears. Eventually, and it is only a matter of time, the attorney will commit an act, which would not have been committed if the attorney's judgment not been impaired. Such action ends up harming a client, results in a malpractice claim and possibly disciplinary being taken against the attorney.

As with alcohol related crimes, crimes, by an attorney, in which drugs are a factor will also result in professional discipline even though the drug use was not related to the actual practice of law. In the case, ***In Re Scarnavack*** (1985) 108 Ill.2d 465, 485 N.E.2d 1,

an attorney was censured for the conviction of the federal offense of possession of cocaine. The Court held that the censure was appropriate because drug possession was "conduct involving moral turpitude." In a subsequent case, the Illinois Supreme Court considered the progress the attorney made in rehabilitating himself from his drug addiction as a mitigating factor in the disciplinary action for a guilty plea in state court for possession of cocaine, ***In Re Lunardi*** (1989) 127 Ill.2d 413, 537 N.E.2d 767. In California, an attorney's license was suspended for five years for the possession of LSD, ***In Re Nadrach***, 44 Cal.3d 271, 243 Cal.Rptr. 218. In Colorado, the possession of a controlled substance was grounds for imposing a three-year suspension on an attorney with drug treatment being a mitigating factor in the sentence, ***People vs. Geller***, (1988) 753 P.2d 235. Kansas publicly censured and ordered an attorney to complete 100 hours of pro bono service for a conviction of possessing cocaine. Florida imposed a 90-day suspension on an attorney along with two years of probation and the requirement to enter its Lawyers' Assistance Program for possession of cocaine, ***Florida Bar vs. Weintraub*** (1988) 528 So.2d 367. These cases show that states bars now view drug use in a very different light than in the past. Regardless of whether the drug use was casual or addictive, state disciplinary agencies will severely punish the attorney.

Substance abuse in the legal profession has an effect on all legal professionals. Anything that diminishes the legal profession

in the eyes of the public effects how, each and every attorney, is also viewed. It is now recognized by every state bar and the ABA that substance abuse among attorneys should no longer be thought of as just an individual problem but rather as one affecting the entire legal profession. Toward that end, both the ABA and each state bar have adopted disciplinary procedures for the abusing attorney. In addition, disciplinary proceedings can be brought against other attorneys who fail to report suspected attorneys who may be engaging in substance abuse. Discussed herein are the practical effects of substance abuse on the legal profession and the responsibilities of all attorneys to combat it.

1. DUTY TO REPORT SUSPICIONS OF SUBSTANCE ABUSE

The first problem faced by a state bar in eliminating substance abuse is the identification of the attorneys and judges who are substance abusers. At this point, the state bars run into what has been called "the conspiracy of silence" and "the greatest obstacle to better regulation of the legal profession," *Lawyers and Judges Handbook on Alcoholism*, K. Wolf & B. Thomas. The problem has always been, and it is not limited merely to the legal profession, that people generally do not want to get involved in matters for which they are not personally effected. This is especially true when the conducted observed is not a crime and, especially so, when the perceived conduct only gives rise to a suspicion of a problem with drugs or alcohol. The existence of the conspiracy of silence was

discussed in *The Lawyer's Duty to Report Professional Misconduct*, 20

Ariz. Law Rev. 509 (1978) which stated:

"(O)n study of the complaints received by a state disciplinary agency found that 277 complaints were received over a two-year period, 34 or less that 13% were filed by lawyers.... A survey conducted in Boston revealed that over 60% of the attorneys responding would not report a flagrant and serious ethical violation...A Lay member of the state disciplinary body reports that even members of that agency often failed to initiate an investigation of an attorney suspected of misconduct."

It is only natural that fellow attorneys and friends would not want to injure a friend or fellow attorney by reporting a suspicion that was not true. The mere reporting of the suspicion would get into the permanent record of the suspected attorneys. Should the suspected attorney subsequently seek a judicial appointment, the allegation would come up again and result, merely because of the allegation, in the attorney not receiving the appointment. To say that this could not happen would be unrealistic in the extreme.

Even though attorneys and judges may not wish to report suspected substance abuse by other attorneys and judges, they are required to do so and may actually be disciplined for not making the report. Disciplinary Rule 1-102 of the ABA Model Code of Professional Responsibility, which is still followed by some states, prohibits attorneys from engaging in "illegal conduct involving moral turpitude," (DR 1-102(A)(3) or engaging in "illegal conduct which is prejudicial to the administration of justice", (DR 1-102(A)(5). Under DR-103(A), attorneys are required to report any unprivileged knowledge of a fellow attorney's or judge's violation of DR 1-102.

Case law, under DR 1-102 has been held to include reporting an attorney or judge's substance abuse to the state disciplinary agency. The duty to report suspected substance abusers is also covered in Model Rule 8.3(a) of the ABA Model Rule of Professional Conduct that requires an attorney to report fellow attorneys and judges to the disciplinary agency whenever there is raised, "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The duty to report an attorney suspected of an ethical violation and the seriousness for which the state bar views this duty was highlighted in the case, *In re Himmel*, (1988) 125 Ill.2d 531, 490 M.E.2d 1062. In *Himmel*, the case did not involve drugs or substance abuse but rather knowledge by the disciplined attorney of another attorney's conversion of client trust funds. The disciplined attorney did not report his knowledge claiming attorney client privilege. The Illinois Supreme Court rejected that defense and suspended the attorney for one year.

The ABA Standing Committee on Ethics and Professional Responsibility has stated that, "In those instances in which a lawyer is required to report the professional misconduct of another, the lawyer's failure to report would itself violate Rule 8.4(a)." (Misconduct), Formal Opinion 94-383 (1994). When the knowledge of the ethical violation arises in the course of representing a client, the attorney may be precluded under Model Rule 1.6, from revealing the information without first obtaining the client's consent, *In re*

Ethics Advisory Panel Opinion, (1993) 627 A.2d 317.

The most troubling aspect of the duty to report derives from the situation in which it most often arises. The attorney most often observes another attorney's impairment or other ethical violation while being that impaired attorney's associate or partner. It has, in the past, been alleged, that partners and associates have an attorney-client relationship between themselves which precludes an associate or partner from reporting suspicions of misconduct that was discovered as a result of the relationship. This defense has been rejected by several courts. In the case, **In the Matter of Curran**, (1994) 5098 N.W.2d 429, the Wisconsin Supreme Court held that requirement of an attorney to report ethical violations extended to the activities of partners and associates of the attorney's law firm. In a New York case, **Wieder vs. Skala** (1992) 609 N.E.2d 105, the court held that it is an implied and essential element of every employment contract between a law firm and the attorneys working for the firm that the ethical standards, rules and obligations imposed by the state's Canons of Professional Responsibility will be followed. This includes the obligation of attorneys working for the firm to report any suspected ethical violations by other attorneys working for the firm to the state disciplinary agency. **The Connecticut Bar Association's Committee on Professional Ethics**, in its **Informal Opinion 89-21** (1989), held that an attorney was subject for discipline for not reporting his partner's failure to file a lawsuit

within the statute of limitations. The Committee took the position that the attorney had the duty to report his partner even though by making the report he "may have been reporting himself."

Generally, the cases to date for which any attorney has been sanctioned for not reporting ethical violations have not involved substance abuse. However, given the extreme importance which is now being paid to eradicating substance abuse, it is only a matter of time until disciplinary action arising from a failure to report another attorney's or judge's suspected substance abuse are filed. By prosecuting such cases, state bars will be reinforcing their position that substance abuse will not be tolerated in the legal profession. As such, attorneys are forced to report their suspicions of other attorneys' or judges' impairment in order to protect themselves from discipline. In short, a lawyer or judge who does not report reasonable suspicions of substance abuse to the state bar, is treated much as an aider and abettor of a crime. As such, an attorney who does not report suspicions of another attorney's impairment may be subject to discipline.

An interesting issue is whether an attorney can be sued by third parties for damages incurred by the attorney who was not reported. For instance, if an attorney, who was not a partner of attorney, knew the attorney was impaired and handling an estate. By not reporting the impaired attorney as required by the disciplinary rules, will that attorney be liable for the losses sustained by the estate as a result of the other attorney's impairment? Of course, it would have

to be proven that such damages could have been avoided had the impaired attorney been timely reported. In other words, does the duty to report suspected attorneys of abuse give rise to an implied duty to the clients of that attorney? Is an attorney liable for negligence to the clients of any impaired attorney which the first attorney had a duty to report and did not? It would seem that when an attorney fails to report an impaired attorney in violation of the ethical duty to do so, the first attorney may, indeed, become subject to the damages incurred by the clients of that attorney that would have been avoided had the report been made. As with any lawsuit, the proof of damages would have to be made and division thereof made between damages occurring prior to the time that the report should have been made and afterward. Even so, though, it appears that a complaint for negligence could be filed, by the clients of impaired an attorney, against an attorney who knew of the impairment and failed to report it. In such a suit, it is unclear as to whether a malpractice policy would cover the attorney. An insurance company may take the position that its coverage is limited to the practice of law not the violation of ethical duties. If so, a malpractice insurance company could allege, in its defense, that extending coverage would make it responsible for paying the damages caused by an attorney's drunk driving because drunk driving also violates the ethical standards of an attorney while not related to the actual performance of legal work for a client.

2. DISCIPLINARY ACTION FOR SUBSTANCE ABUSE

It has only been within the last two decades that substance abuse, in and of itself, has become grounds for disciplinary action. In the past, unless the substance abuse related to another ethical violation, such as misappropriation of client trust funds, it was not addressed by the state disciplinary agencies. Today, however, an attorney may be disciplined for substance regardless of whether it affects the attorney's law practice. The substance abuse, itself, has become the grounds for discipline. Most state bars take the position that the discipline for substance is not for punishment but, instead, is for deterrence from future use. The effect is, however, the same in each instance. The punishment meted out to the impaired attorney depends on the state law in question. Some states take into account the attorney's willingness to undergo treatment as a mitigating factor. Other states, given weight to treatment as a mitigating factor for certain violations.

Oregon is a state, for instance, which mitigates an attorney's punishment for substance abuse on both the facts of the case and the willingness of the attorney to seek help. In the case, ***In Re Germundson***, 301 Or. 656, 724 P.2d 795, the court held, in a case involving ethical violation involving loans with a client and the handling of a client's estate, that:

"Abuse of alcohol or other mind-altering substances is a common factor in professional misconduct as it is in criminal and civil cases. In disciplinary cases, we distinguish its role is assessing culpability from its significance in determining what is required to protect the public against future misconduct. Culpability under the disciplinary rules require different

mental elements which may range from intent through knowledge and negligence to strict liability and it is possible that a lawyer's innocent dependency on some drug without his knowledge may incapacitate him from the required degree of mental judgment. See In Re Holman 297 Or. 36, 682 P.2d. 243.

The object of professional discipline is not punishment but deterrence and protection of the public against future unprofessional conduct. Having considered the evidence of the accused's professional misconduct and of his determined effort's to avoid the future use of alcohol, we conclude that disciplinary action similar to that imposed in the case In Re Paauwe, 298 Or. 215, 691 P.2d 97 (1984) is appropriate here."

In this case, the attorney was suspended for sixty-three days, ordered to refrain from the use of alcohol and ordered to participate in a substance abuse program in order to retain his license to practice law. As seen in the above holding, Oregon places a great deal of weight upon the attorney's willingness to receive help as a mitigating factor in determining punishment.

In contrast to Oregon that holds that an attorney's willingness to seek treatment as a mitigating factor, New Jersey holds that the misappropriation of client funds is grounds for disbarment irrespective of whether substance abuse is a factor and the attorney is willing to enter treatment. In the case, In Re Hein, 104 N.J. 297, 516 A.2d 1105 (1986), the New Jersey Supreme Court disbarred an attorney for violating three disciplinary rules and misappropriating less than \$1,500 of client's funds. The disciplinary violations were neglect of legal matters generally, DR. 6-101(a), failure to carry out a client's contract of employment, DR. 7-101(A)(2), and misrepresentation of legal matters to clients, DR. 1-102 (A)(4). Mr.

Hein argued that this problems were the result of an alcohol dependency problem which he was seeking treatment. Mr. Hein also argued that his alcohol impairment prevented him from forming the necessary criminal intent to misappropriate the funds. The Illinois Supreme Court was unmoved by Mr. Hein's defense and did not consider his alcohol treatment program as a mitigating factor or even the fact that less than \$1,500 in client funds had been misappropriated. The Court held, that Mr. Hein did, "did not demonstrate ...the kind of loss of competency, comprehension or will that can excuse misconduct." The court after voting 7-0 for disbarment stated in its opinion that the, "primary concern must remain protection of the public interest and maintenance of the confidence of the public and integrity of the Bar."

In a subsequently similar case dealing with alcohol dependency and misappropriation of client funds, In Re Crowley 105 N.J. 89, 519 A.2d 361, the Illinois Supreme Court ignored a recommendation of the Disciplinary Review Board (DRB) and disbarred the attorney:

"We respect the views of the DRB and the AAC and have ourselves struggled to resolve the dilemma of recognizing alcohol as the disease that it is, while recognizing the devastating effect that misappropriation has had upon the public confidence in the bar and the court whatever the cause of the misappropriation.

In four recent cases, In Re Hein 104 N.J. 297, 516 A.2d 1105 (1986), In Re Romana 104 N.J. 306 (1986), In Re Canfield 104 N.J. 34, 516 A.2d 1114 (1986) and In Re Ryle 105 N.J. 10, 518 A.2d 1103 (1987), we found it necessary to disbar attorneys of previously good record whose dependence on drugs and alcohol had contributed to or caused the loss of judgment that led to misappropriation of clients funds. We do not find the circumstances of this case markedly different in degree or

kind."

New Jersey has adopted the ironclad rule that misappropriation of client funds is automatic disbarment regardless of any steps taken in mitigation and regardless of the amounts actually misappropriated. It seems rather harsh for any attorney to lose his license because of a dependency on alcohol or drug which only involved the misappropriation of less than \$1,500. Nonetheless, in New Jersey, there is no mitigation permitted, even when drug or alcohol addiction was a factor, for the misappropriation of funds regardless of the amount.

Most states have adopted a mitigating approach when dealing with impaired attorneys. The majority of states do not follow New Jersey's lead to automatically disbar attorneys in situation involving misappropriation of client funds. Minnesota was one of the first states to adopt a mitigating factors approach in determining discipline for impaired attorneys, *The Disability Defense: How It Serves to Mitigate Charges of Professional Misconduct by Attorneys*, 12 Wm. Mitchell Law Review 119 (1985).

Many states have followed Minnesota's lead and permit mitigating factors to be presented in determining the discipline to be meted out to an impaired attorney.

An example of the use on mitigation in substance abuse disciplinary actions is that of the District of Columbia case, *In Re Kersey* (1987) 520 A.2d 321. The Board of Professional Responsibility

found therein that Mr. Kersey's "pattern of dishonesty and deceit was so pervasive that disbarment was the only appropriate sanction." The violations included four complaints of conduct involving dishonesty, five complaints of failing to respond to the bar inquires, an improper withdrawal from a case without taking steps to protect a client's interest, two complaints of neglect, a complaint involving the intentional failure to pursue the lawful objectives of a client, one complaint of intentionally prejudicing a client, three complaints of commingling funds two of which involved misappropriation of funds, four complaints of failure to maintain records and three complaints to pay over client funds. Mr. Kersey through himself on the mercy of the court and alleged that alcoholism had been a problem since high school. Mr. Kersey asked the court to mitigate the disbarment because he had entered into an alcohol detoxification program. The court considered Mr. Kersey's appeal for mitigation. The court recognized that alcoholism is a mitigating factor in disciplinary factors in many states. The Court went on to approach a "but for" test in order for alcoholism to be considered a mitigating factor. The court held that for mitigation the "but for" standard "must be met in order to prove causation in disciplinary actions." The court held that in order for mitigation to apply, the attorney must convince the court that the only reason the misconduct occurred was that the attorney had been impaired as a result of alcoholism. In this case, the court stated, that it believed Mr. Kersey and held that but for his alcoholism none of the misconduct

would have occurred. In disciplining Mr. Kersey, the court placed him on probation for five years with a sobriety monitor and a financial monitor to assure compliance with the record keeping rules of the bar.

There is a world of difference between the treatment of New Jersey in Hein and the District of Columbia in **Kersey**. In **Hein**, the attorney was disbarred for misappropriating less than \$1,500 despite entering into a treatment program. In **Kersey**, the attorney misappropriated funds in two cases, failed to pay clients in three cases and commingled funds. The degree of culpability in **Kersey** was significantly worse than in **Hein** by several degrees of magnitude. However, in New Jersey, the attorney was disbarred whereas in the District of Columbia the attorney was only placed on probation and ordered not to do it again. This points out that attorney discipline is not uniform throughout the United States. Attorneys are disciplined in accordance with the laws of the state in which they are licensed. In the case of an attorney licensed in multiple jurisdictions the attorney will face discipline separately in each state. If for example, Mr. Hein had been licensed in both New Jersey and the District of Columbia, he would have been disbarred in New Jersey but would probably only have been placed on probation in the District of Columbia.

The key to the use of mitigation in disciplining attorneys for substance abuse is the likelihood of their rehabilitation and

recovery. One of the first states to recognize rehabilitation and recovery from chemical or alcohol dependency was South Dakota, In the case ***In Re Walker***, (1977) 254 N.W.2d 452, the attorney was an alcoholic. Mr. Walker was disciplined for a failure to file tax returns, driving while intoxicated and neglect of his legal duties. The Referee in the ***Walker*** stated the only reason he was not recommending disbarment was the fact that Mr. Walker was an alcoholic. Based upon the Referee's recommendations, the Court imposed a two-year suspension subject to the attorney not drinking or violating any disciplinary rules. The court stated that its disciplinary programs were not to punish attorneys but rather to protect the public. The court was satisfied that Mr. Walker had rehabilitated himself and when coupled with his continued abstinence from alcohol a short period of suspension rather than outright disbarment would adequately service the public interest.

A similar holding on rehabilitation and recovery was made in Illinois in the case ***In Re Driscoll***, (1979) 85 Ill.2d 312, 423 N.E.2d 873. Mr. Driscoll had twice converted client funds for his own personal use. The disciplinary agency had recommended Mr. Driscoll's disbarment. Mr. Driscoll appealed the agency's recommendation. At the time the court heard the appeal, Mr. Driscoll had finally overcome his alcohol addiction. Mr. Driscoll proven to the court that he has abstained from alcohol for more than two years and was both physically and mentally fit to practice law. The Court recognized the

progress Mr. Driscoll had made in overcoming his alcoholism. instead of disbarment, the Court imposed a 6-month suspension and ordered Mr. Driscoll to continue participation in an alcohol treatment program. The court justified the reduced discipline because Mr. Driscoll no longer posed a danger to his client and that a greater punishment was not warranted given his rehabilitation. This case differs from Hein, supra, where the New Jersey attorney was disbarred for a relatively minor conversion of client funds despite rehabilitation.

The California Supreme Court adopted the **Walker** holding in its decision **Tenner vs. State Bar** (1980) 28 Cal.3d 202, 617 P.2d 486. The Court stated that the prime purpose of disciplinary actions were to protect the public and not to punish attorneys for their substance abuse. In this case, where the attorney had forged document and misappropriated client funds, the Court imposed probation rather than disbarment on the conditions that the attorney repay the clients, abstain from alcohol and enter an alcohol treatment program.

The Disciplinary Board of the Supreme Court of Pennsylvania in the case, **In Re Anonymous**, (1979) No. 8 D.R. 76, 12 Pa D.C. 3d 417, permitted a recovered and rehabilitated attorney to return to practice without being placed on probation. The rehabilitated attorney was found not to pose a risk to the public so probation was not necessary.

The majority of states will take into account an attorney's willingness to seek treatment and to rehabilitate himself in

determining whether an attorney should be disbarred, suspended or placed on probation as a result of conduct performed while under an addiction to drugs or alcohol. There is no guarantee that just because an attorney enters into a drug or alcohol treatment program that he or she will not be disbarred. The willingness to seek treatment is an important factor in determining the sanctions to be meted out to the attorney but it is not the only factor. The primary purpose of discipline, as often stated by the courts, is to protect the public. Therefore, the effects of the sanctions on the attorney are often secondary to the message that the disciplinary board or court is attempting to send to the public.

3. EMPLOYEE ASSISTANCE PROGRAMS

The question often arises as to what obligations an employer, in the legal profession, owes an impaired employee. That question has been answered by a variety of state and federal employment laws, the most important of which is the Americans With Disabilities Act, ADA. Under the ADA and similar state acts, an employer is not permitted to discriminate against an employee because of a disability. Both alcohol and drug addictions are considered protected disabilities under the ADA. The ADA requires that instead of firing an employee because of drug addiction or alcoholism must make a reasonable accommodation for the employee's chemical dependent. This usually translates into the employer being required to offer the employee a drug rehabilitation program as an alternative to firing the employee.

If the employee agrees to enter the program and passes random drug or alcohol tests then the employee cannot, under the ADA and many state laws, be fired because of the past alcohol or drug use.

The significance to the legal employer is that, perhaps, in no other field do people work so hard with their minds. Any chemical agent that interferes with the functioning of an attorney, paralegal, or legal secretary will severely effect the quality of work of that person. For this reason. law firms and legal departments do not want chemically dependent people working for them. The risk of a malpractice action increases significantly for attorneys who are chemically dependent. The potential of malpractice claims against a law firm increases even more when members of the support staff are also chemically dependent. Nonetheless, these law firms, as with any other employer, are no longer permitted to fire someone just because they are drug addicts or alcoholics without first attempting to accommodate their disability.

As a result, it has become necessary for employers to consider the creation of an Employee Assistance Program, (EAP). The most effective EAP requires the law firm to have a written policy setting forth the intended treatment and the firm's strong policy in having both drug and alcohol dependency treated as a condition for continued employment, ***A History of Job-Based Alcoholism Programs*** 1900-1955, 11 J. Drug Issues 171 (1981). The success of the EAP often is dependent on the degree of confidentiality maintained by the employer. Failure to maintain such confidentiality may expose the employer to an

invasion of privacy suit for the public disclosure of private facts.

Almost all states bars have also developed their own Lawyers' Assistance Program (LAP) for the members of the state bar. These LAP's are usually not open to the support staff of a law firm so the firm must therefore establish an EAP program of its own for the non-attorney employees. In many instance, the employer simply agrees to pay for the attendance of the employee in a drug or alcohol treatment program such as Alcoholics Anonymous or Narcotics Anonymous. Many law firm, however, wish to run their own EAP in order to assure compliance and have control over the treatment given the employee. In running an EAP program, the law firm should hire qualified counselors and trained professional to conduct the treatment. The advantage of employers in running their own ears is that they can virtually guarantee confidentiality. In the legal profession, confidence in the law firm or attorney is the basis upon which a practice is built. If the pubic discover that an attorney or the keep members of an attorney's staff are attending drug or alcohol treatment programs that will lessen the confidence of the clients and potential clients in the firm. For this reason, many large law firms have their own training and counseling programs which are closed to outside participants. As such, so no one, who is not involved with the law firm will know who is attempting the program. This prevents an outside participant in the treatment program from casually mentioning that a member from a law firm is seeking drug or alcohol treatment.

It is very important that law firms adopt some type of employee assistance policy for their non-attorney employees. As for their attorney employees, many state bars now have LAP's for which their attorneys can attend. If the employer does not want their impaired attorneys to attend a state bar LAP, the employer may send the attorney to outside an LAP or create a LAP of its own. LAPs and their operations, as they relate to attorneys, are discussed in the next . In deciding whether to send an impaired attorney to an outside LAP or to conduct one of its own, a law firm must evaluate the requirement to report an impaired attorney to the state bar. In some states, the duty to report an impaired attorney is mandatory regardless of whether the attorneys is attending an in-house or independent LAP. In most states, as long the attorney is attending an LAP, there is no requirement to report the impaired attorney. The reason for not reporting an impaired attorney, who is receiving treatment, is that it may interfere with the treatment. Getting the attorney treated, afterall, is the very reason behind requiring the report to be made, ***"The Lawyer's Duty to Report Another's lawyer's Unethical Violations in the Wake oh Himmel"***, 1989 University of Illinois Law Review, page 977.

CHAPTER SIXTEEN

TREATMENT FOR THE IMPAIRED ATTORNEY

INTRODUCTION

There is no easy cure for substance abuse. By its very nature an addiction is difficult to overcome. If it were easy to beat a drug or alcohol addiction, then the person was not really addicted. It has been as a result of the recognition of this difficulty to overcome an addiction that treatment programs have been created to assist an impaired legal professional in overcoming an addiction. Studies indicate that substance abuse is especially acute in the legal profession. While, for example, ten percent of the population is thought to suffer from alcoholism, an Oregon State Bar study estimated that 15 percent of its attorneys and a Washington State Bar study estimated that 18 percent of its attorneys were suffering from alcohol addiction. ***"Are Lawyers Distressed?... and How!"***, Washington State Bar News, Feb. 1988, Substance Abuse Workshop, Annual Meeting of the ABA, Aug. 1988.

The high number of impaired attorneys has been affecting the reputation of the legal profession. There is a strong relationship between the number of impaired attorneys nationwide and the number of grievance complaints and malpractice claims filed against attorneys. It is estimated that between forty percent and sixty percent of all disciplinary actions nationwide involve attorneys with either a drug or alcohol dependency problem, ***"Helping Alcoholic***

Lawyers," ABA Journal, Nov. 1986. The state bars of Arizona, California and Oregon have estimated that drug or alcohol addiction among their attorneys involved in disciplinary actions is even higher than the national average at between fifty percent and seventy percent, **Substance Abuse Workshop**, Annual meeting of the ABA, Aug. 1988.

Oregon has been in the forefront of studying and providing treatment assistance to impaired attorneys. The Professional Liability Fund of the Oregon Bar has conducted two studies on the problem of substance abuse. The first studied 100 disciplined attorneys to determine the percentage of whom were chemically dependent at the time of the incident. The study discovered that sixty-two percent of the attorneys were chemically dependent at the time. This figure was higher than the highest rate, 60%, estimated for the national average. In a follow up study, the Oregon Bar compared the malpractice claim rate against attorneys both prior to entering treatment and one year afterward. It was found that while prior to entering treatment, sixty percent of the attorneys had a malpractice claim filed against them. After one year of treatment, the number of attorneys, of these attorneys, who had new claims file against them dropped to just two percent. The success of the treatment in reducing malpractice claims had resulted in the reduction of malpractice premiums in Oregon of ten percent, **Substance Abuse Workshop**, Annual meeting of the ABA, Aug. 1988. The reduction

in malpractice premium rates helped all Oregonian attorneys and as such it further added to the impetus of getting all impaired attorneys into treatment. The Oregon State Bar studies proved that is a direct correlation between malpractice insurance rate and the number of impaired attorneys receiving treatment. As such, there is a financial incentive, in addition to their professional duty to do so, for all unimpaired attorneys to report impaired attorneys to the state bar.

Texas, in 1988, surveyed its grievance committees, for its seventeen bar districts, on the number of impaired appearing before them. The Texas bar found that substance abuse was a factor in 9.2% of all inquiries, which are the initial allegations of wrongdoing against an attorney. In Texas, if the inquiry involves circumstances that would be a violation of the Code of Professional responsibility, a Formal Complaint is filed. It was found that 10.6% of all complaints against attorneys included substance abuse. If the complaint against an attorney warrants discipline and a judgment cannot be negotiated with the attorney, then a petition is filed with the District Court. The Texas Bar found that 14.3% of all disciplinary petitions against attorneys involved substance abuse. The Texas Bar survey found that alcohol was a factor in 41% of all inquiries and that other drugs were factors in another 16% of the inquiries. The Texas state bar also showed that only 18% of its grievance committees referred their disciplined attorneys to specialized treatment programs.

The recognition of the fact that substance abuse in a problem in the legal profession has been slow to develop. The fact that Texas only referred 18% of its impaired attorneys to treatment, as late 1988, demonstrates that rehabilitation was not given a high priority. That view has since changed. Today, substance abuse is viewed as serious problems and is treated accordingly by both state bars and courts. In 1988, 86% of all state bars have instituted treatment programs for their attorneys. This was done not only for the reason of helping those attorneys but also to reduce the high malpractice premiums paid by all of their members.

1. TREATMENT PROGRAMS FOR ATTORNEYS

Every state bar has developed its own treatment program for impaired attorneys. One of the most common treatment programs is for the state bar to approve or certify a nonprofit treatment organizations for use by their impaired attorneys, either in place or, in addition, to any program of their own. In Colorado, for example, Concerned Lawyers, Inc., CLI, is a nonprofit corporation for use by drug or alcohol impaired attorneys. The members of CLI volunteer to assist attorneys in overcoming their addiction by providing counseling, encouragement and, when necessary, acting in liaison with grievance proceedings. The CLI attorneys will also assist in keeping the impaired attorney's office functioning while the person is receiving treatment. CLI's attorneys assist by keeping files up to date, making court appearances and getting continuances as necessary. The CLI utilizes the "Twelve Steps" approach developed

by Anonymous (AA) and used in various forms by Cocaine Anonymous (CA), and Narcotics Anonymous (NA). Each of these organizations, demand complete abstinence from alcohol and mood altering drugs and are grounded on providing peer assistance. In the above programs, the intent is to aid in the attorney's recovery not to punish or criticize. As such, these organizations are not judgmental.

(a) TWELVE STEPS PROGRAMS

The most effective treat programs are based upon the twelve steps system originally developed by Alcoholics Anonymous. The program is devoted to sobriety through self-help and mutual support. Founded in 1935, AA's stated purpose is:

"Alcoholics Anonymous is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help recover from their alcoholism.

The only requirement for membership is a desire to stop drinking. There are no dues or fees for AA membership; we are self-supporting through their own contributions. AA is not allied with any sect, denomination, politics, organization or institution; does not wish to engage in any controversy, neither endorses nor opposes any causes. Our primary purpose is to stay sober and help others achieve sobriety."

It is the desire of the participant to stop drinking that is the core of the AA's effectiveness. This desire to quit also serves as the basis for the drug treatment programs founded upon the AA model. Because of the shared desire to quit, the AA groups, though loosely organized, are strongly cohesive and provide substantial support and moral assistance to the members to maintain their sobriety. The commitment of the members to help each other is evidenced by the fact

that members are given the phone numbers of peer members, also called "sponsors," to call, at any time, that they feel the need to speak with someone to avoid drinking.

Alcoholics Anonymous has adopted, **Twelve Traditions**, as a guide for its operations. These twelve traditions are:

- "1. Our common welfare should come first: personal recovery depends upon AA unity.
2. For our groups purpose there is but one ultimate authority - a loving God as he may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern.
3. The only requirement for AA membership is a desire to stop drinking.
4. Each group should be autonomous except in matters affecting other groups or AA as a whole.
5. Each group has but one primary purpose - to carry its message to the alcoholic who still suffers.
6. An AA group ought never endorse, finance, or lend the AA name to any related facility or outside enterprise, lest problems of money, property, and prestige divert us from out primary purpose.
7. Every AA group ought to be fully self-supporting, declining outside contributions.
8. Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers.
9. AA, as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve.
10. Alcoholics Anonymous has no opinions on outside issues; hence the AA name ought never to be drawn into public controversy.
11. Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity

at the level of press, radio and films.

12. Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles before personalities."

The Twelve Traditions stress that the purpose of AA is to place the responsibility for a member's success on the individual. Leaders in AA exist only to serve the members and that the groups themselves are autonomous. The groups are encouraged to be self-supporting while not seeking outside contributions. AA is to maintain a policy of non involvement in outside issues not related to achieving and maintaining sobriety in both members and society.

The purpose of AA is to stress the will, power and worth of the individual. It is through a member's recognition of self-worth and merit along with the concern of fellow members for everyone's desire to achieve sobriety that creates a cohesive and caring group to achieve that sobriety.

Studies conducted by Alcoholics Anonymous shows that dual dependency on both alcohol and drugs among its members have been increasing. Table 1 shows that women have a higher percentage of dual chemical dependency than men.

TABLE ONE**ESTIMATED DRUG ADDICTION AMONG AA MEMBERS (1980)**

	THOSE 30 YEARS YEARS OR LESS	THOSE COMING TO A.A SINCE SINCE LAST SURVEY	TOTAL SAMPLE
WOMEN	63%	35%	34%
MEN	51%	24%	20%
ALL	55%	27%	24%
<hr/> (1977) <hr/>			
WOMEN	55%	29%	28%
MEN	36%	15%	14%
ALL	43%	19%	18%

Source: Federal Service Office, Alcoholics Anonymous

The percentage of women members have been growing steadily which is a reflection of the increasing number of female alcoholics in society. In 1968, the percentage of women members was 22% which increased to 31% in 1980. Between 1977 and 1980, 34% of all new members to AA were women. The largest increase in new members has been in the age group thirty years or less which grew, between 1977 and 1980, from 11.3% and 14.7%. In addition to the increase in the number of women members and members below thirty years of age, the percentage of members with dual drug and alcohol abuse also increased from 18% in 1977 to 24% in 1980.

Membership in AA has been steadily increasing. Table 2 shows the membership growth in AA from 1968 through 1980.

TABLE TWO
ALCOHOLIC ANONYMOUS MEMBERSHIP

	REPORTED MEMBERSHIP OF U.S. and CANADIAN GROUPS	SIZE OF SAMPLE
1968	170,000	11,355
1971	210,000	7,194
1974	331,000	13,467
1977	404,000	15,163
1980	476,000	24,950

Source: *General Service Office, Alcoholics Anonymous*

It is estimated that only 5% to 10% of all alcoholics are members of AA. Since 10% of the population is thought to be an alcoholic, this means no more than 1% of the general population is receiving alcoholic treatment in AA. This means than 90% of the alcoholics in America either are not receiving treatment for their alcoholism or, in some instances, receiving it elsewhere.

Alcoholics Anonymous claims an overall success rate of 75%. AA claims a success rate of 50% from members with no relapse and another 25% from members who have a relapse and subsequently return for further help. There have been studies that support an AA success rate of between 50% and 60%. AA has grown into a worldwide organization with s throughout the United States. In 1958, there were 6,000 groups with worldwide membership of about 150,000. In 1980, worldwide membership exceeded one million members.

Alcoholic Anonymous is a nonprofit corporation. AA has two operating bodies, World Services, Ins., and Grapevine, Inc. Each of

the governing bodies has a separate board of trustees. On a local level, the organization is intentional kept small and relatively informal. The leadership of local groups is rotated. The purpose of the leadership rotation in the local groups is to keep the members from developing a dependence on a particular leader for their sobriety but to reinforce the belief that sobriety comes from the internal desire to be sober. Alcoholics Anonymous has two types of meeting, open and closed. All AA open meetings are open to the public regardless of whether a person has been or intends to join AA. Attendance at closed AA meetings is restricted to alcoholics regardless of whether they are AA members or not. The closed meetings are themselves further divided into "step" meetings attributed to one of AA's twelve steps.

Alcoholics Anonymous is structured around a twelve-step program leading to sobriety. The Twelve Steps stresses personal responsibility and a faith in a divine power as a basis for which a person can work toward sobriety. The Twelve Steps of Alcoholics Anonymous are:

- "1. We admitted we were powerless over alcohol - that our lives had become unmanageable.
2. Came to believe that a power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God as we understood him.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being

the exact nature of our wrongs.

6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people whenever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as a result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs."

The Twelve Steps program is structured around the awakening and strengthening of spiritual faith although the program is nondenominational. In the beginning, the program stresses the acknowledgment of the member that the use of alcohol has gotten out of hand. No treatment can be effective as long as the person denies that there is a problem, be it with alcohol or any other drug. Only after the person recognizes and believes that there is a real problem with alcohol can real process toward achieving sobriety be made. The second and third steps regard the realization that there is a Supreme Being with whose help sobriety can be obtained if the person has faith and belief in the Supreme Being as He is understood. Once the first three steps are accomplished, a member is in position to

advance to the remaining steps. The steps, four through twelve, are designed for the development of spiritual belief and the realization of the harms inflicted upon others as a result of the alcoholism. The creation of a new self-image based upon recognized self-worth and by reinforced by the goal of helping others achieve sobriety is at the center of the Twelve Steps.

While there is a deep root in the spiritual belief of a Supreme Being, AA is not a cult. Members are free to come and go and, in fact, few members ever stay longer than ten years. AA is premised upon the belief that alcoholism is the manifestation of the alcoholic's poor self-esteem or the sense of an inability to control his or her life. AA, as with most treatment programs, stress the need to abstain while attending meetings. The AA slogan is, "Don't drink and go to meetings." AA believes that the self-worth and personal development fostered in the meetings will replace a member's dependency of alcoholic to compensate to the lack of self-worth or control. It is certainly true that, while attending meetings, members do not drink. It is by attending such meetings and not drinking over an extended period of time that the members come to realize that they do not need alcohol or other drugs in their lives and that, in fact, their lives will be significantly better without them. The twelve Steps are designed to help a member recognize his or her own value as an individual and the ability to contribute to society and to their families without the use of alcohol or drugs.

From the very beginning, AA strives to get its members to

recognize that he is "powerless over alcohol". New members are urged to come to one meeting per day for three months, ninety meetings in ninety days. This is a crash program designed to keep the new member as occupied as possible during the first few months of membership. It is this period which is considered the most important time frame for AA membership, It is during this period that the member will most likely make the decision to stick with the program or quit. People turning to AA are usually desperate for some type of help.

AA, by its structured program, is geared to keeping a person as far away from the desire for alcohol as possible. Each new member is given a "sponsor" an experienced member. The sponsor is there for the new member to confine and when to talk the new member through periods of anxiety. When a member has slipped off the wagon and resumed drinking, two AA members will visit that person and attempt to persuade the person to cease drinking and to resume sobriety.

Alcoholics Anonymous has become a mainstay in the treatment of alcoholism and drug addiction. As a result, many state bars refer their attorneys to AA for alcoholism treatment because its dedication to building strong self-worth and character as a basis for sobriety. Even in organizations which do not stress the AA's belief in a Supreme Being as a source of inspiration, the AA's tenets of developing self-worth and character are still utilized as a basis upon which their programs are built.

b. THE ABA PROPOSAL OF TREATMENT

The American Bar Association issued a preliminary draft on January 1, 1990, entitled **"MODEL LAW FIRM/LEGAL DEPARTMENT PERSONNEL IMPAIRMENT POLICY AND GUIDELINES"**. The report accompanying the preliminary draft stated that:

"This effort is in keeping with the ABA's commitment to assisting lawyers and their support personnel who have impairment problems through early intervention, counseling, treatment and rehabilitation by qualified outside agencies or persons. It is hoped that the model policy statement will not only offer guidance to the legal profession but also will be an impetus for other professionals and organizations to do the same. In this way, the ABA hopes to make a meaningful contribution not only to those affected but, by addressing drug and alcohol abuse, to assuring a drug free America.

The policy statement and guidelines have been developed to be adapted to different settings, from large to small law firms, corporate and public legal departments, legal services agencies and bar association offices."

The stated purpose of the draft help set forth guidelines and procedures for every legal office, be it public or private, large or small, for the dealing with impaired legal professionals. The draft stated as follows:

"The policy of (the entity) is to establish and maintain effective methods for providing assistance to its personnel, both professional and administrative, who have impairments of varying natures and securities. The conditions can range from minor problems that affect work performance to major disabilities or impairments, including drug and alcohol abuse and dependency. The policy is to accomplish this objective through early intervention, counseling, treatment and rehabilitation by qualified outside agencies and persons."

The ABA recognized the need for such a policy and guidelines in the accompanying report which stated:

"Impairment of professional and administrative personnel directly and adversely affects the ability of a law firm or legal department to provide quality legal services and can lead to exposure to unnecessary professional liability, to the violation of professional conduct standards, to loss of public esteem, and even to criminal law violations. Major contributors to impairment are clinical depression, chemical dependency and drug or alcohol abuse. Alcoholism and other chemical dependency taken together have been estimated to be a factor in 40 to 60 percent of professional discipline cases."

The ABA has long recognized the deleterious effects of substance abuse and has supported virtually every major piece of substance abuse legislation pertaining to identification and treatment such as the Alcoholism and Intoxication Treatment Act (1972), the Drug Dependence Treatment and Rehabilitation Act (1974) and the Uniform Alcoholism and treatment Act (1975).

The ABA draft and accompanying report recognize that drug and alcohol related offenses are treated by most state bars as a basis for professional discipline. However, most state bars take into consideration, as a mitigating factor, the willingness of an attorney to enter into drug or alcohol rehabilitation programs. In the disciplinary action, In re Lundardi (1989) 127 Ill.2d 413, 537 N.E.2d 767, an attorney had pled guilty to the possession of cocaine. In disciplining the attorney, the court viewed in mitigation that the fact that the attorney had a "remarkable" recovery and had performed more hours of community service than required under the criminal sentence. In the case, **People vs. Geller** (1988) 753 P.2d.

235, a Colorado court held that entrance into a rehabilitative program was a mitigation factor in imposing a three-year suspension for a criminal conviction of possession of an unlawful substance. In ***Florida vs. Weintraub*** (1988) 528 So.2d 367, an attorney was suspended for ninety days with two years of probations for the possession of cocaine provided the attorney completed the Florida Lawyer's Assistance Program.

The ABA recommends that any drug or alcohol assistance program set up by a law firm or legal department should be structured to promote self-referral as its primary source of admissions although admissions through referrals should also be accommodated. The existence of the assistance program should be widely publicized throughout the sponsoring organization along with the procedures for entry into it.

The cost for such assistance program is recommended by the ABA to be, borne, at least, partially by the organization, i.e., the employer. The ABA states that, "Insurance coverage may be available for some of the treatment and rehabilitative services. Law firms and legal departments should aggressively seek such insurance and should encourage insurers to provide coverage for a range of treatment and rehabilitative services." The ABA takes the position that the employer owes a responsibility to their employees to make available treatment for drug and alcohol addiction. This draft was written prior to the enactment of the American with Disabilities Act (ADA) in 1992. Nonetheless, the ADA now imposes the duty upon employers to

make reasonable accommodation to their employees' disabilities that include drug and alcohol addiction. Therefore, before employees can be fired from a law firm or legal department because of their drug or alcohol addiction, the employer must have made a reasonable attempt to accommodate them. This will usually be held to mean offering treatment or rehabilitative services if the employer can afford it.

The draft report left open the issue of reporting an attorney's participation to the state disciplinary agency. The draft stated:

"5.2 While a primary ingredient for the successful implementation and operation of this policy statement is confidentiality, when the unprivileged disclosure of violations of criminal law occur within the context of (the entity's) impaired personnel policy, there may be an obligation to notify law enforcement authorities. In some instances, moreover, lawyers who receive such unprivileged disclosures may have an overriding obligation under applicable professional conduct standards to report to an appropriate professional disciplinary agency. In most instances, however, there will be neither a criminal law nor a professional conduct violation, and confidentiality may be maintained."

The ABA's conclusion that, in most instances, an attorney's participation in an assistance program usually would not need to be reported because no professional violation has occurred, is not realistic. Model Rule 8.3(a) requires an attorney to report suspicions which raise, "a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The very fact that an attorney participates in a lawyer assistance program raises the inference that the attorney has a substance abuse problem. Few persons would ever enroll in such a program unless they

actually had such a problem. Whether or not such an attorney must be reported depends on the law of the state in question. Some states view that an attorney's participation in such an assistance group is similar to an attorney-client relationship. Therefore, in such states, fellow attorneys participating in the group, are not required to disclose the attendance, Delaware 8.3(c), Illinois Rule 4-101, Kansas Rule 8.3(c), Maine Rule 3.2(e)(3), New Hampshire Rule 8.3(c), Oregon DR 1-103 (E), South Dakota Rule 8.3(d), Washington Rule 12.11 and 12.17, West Virginia Rule 8.3(d), and Wisconsin Rule 8.3(c)(2). While many states hold that participants in a lawyer assistance program do not have to report any of the participant's substance abuse or may even be barred from doing so, attorneys outside the program who become aware of fellow attorneys participating in the program, from a non-privileged source, may, nonetheless, be required to report those attorneys to the disciplinary board. As a practical matter, as long as an attorney runs the risk of the state bar discovering the attendance in a voluntary substance abuse program, the attorney will be less likely to enter into the program. State bars should consider adopting a rule that no attorneys are required to report suspected substance abuse of an attorney while they know the attorney is participating in a state bar approved treatment program. Such a rule will insure confidentiality as long as the person is participating in the program. If the person fails to complete the program, the program itself can then turn the attorney over to disciplinary agency.

In addition to the above preliminary draft for law firms and legal departments, on June 13, 1990, the ABA's Commission on Impaired Attorneys issued a report to the House of Delegates regarding assistance programs operated by state and local bar association. The ABA recommended in this report that:

"The American Bar Association approve the guiding principles set forth below to assist state and local bar association in the development and maintenance of effective programs to identify and assist lawyers impaired by alcoholism and other substance abuse.

1. A statewide lawyer assistance program should be established and supported as a standing committee of the bar.
2. The confidentiality of those who seek help from a lawyer assistance program must be maintained through a rule of court or a legislative act.
3. Members of the profession who serve in lawyers assistance programs should be immune from civil liability,
4. Strong, but not exclusive, ties with the recovering community should be maintained.
5. Strong working relationships should be maintained between state and local programs and their sponsoring organizations.
6. Monitoring programs should be created to insure that all attorneys comply with any term of probation and to assist them in their recovery and return to practice.
7. Disciplinary agencies should establish and maintain a system for the referral of lawyers with substance abuse problems to the substance abuse program.
8. An educational element should be developed to inform the public, the judiciary, the bar, law students and the

disciplinary agencies of the assistance that is available for those in need.

9. A substance abuse lecture should be part of the continuing legal education of each bar and the curriculum of each law school.

10. A periodic review of the program should be accomplished."

The ABA created this Commission in 1988 when the scope of impaired attorneys was finally begun to be recognized. The Commission was charged with the responsibility of investigating and making recommendations for the identification and treatment of an association wide treatment program for impaired attorneys and other legal professionals.

The most important recommendation of the Commission is that statewide lawyer assistance programs be developed. The purpose of such a program should be directed toward fostering recovery rather than punishment for prior actions of the impaired attorneys during periods of their impairment. The most important aspect of the program, as seen by the Commission, should be confidentiality. Confidentiality, would run counter to the duty of attorneys to report suspected substance abuse to disciplinary agencies. Nevertheless, the Commission concluded that confidentiality was absolutely necessary for the success of any such program. Without such confidentiality, attorneys would be reluctant to voluntarily enter the state program because they could be subject to immediate disciplinary action. Without such confidentiality, impaired attorneys seeking treatment would turn to an outside treatment organization that may not be able

to function as well as a state bar organization. State bar organizations generally have attorney volunteers, much like **Concerned Lawyers, Inc.**, in Colorado, who would assist the attorney in keeping the office open during the period of rehabilitation. Organizations like **Cocaine Anonymous, Narcotics Anonymous, Alcoholics Anonymous**, would not have those types of volunteers available to help the impaired attorney. A comparison of the effectiveness of confidentiality to achieving a desired result is that, in many states, that a doctor must report a pregnant mother when drugs are found in her system. Once reported, the mother is subject to prosecution for child endangerment. The results of these laws is that some mothers, who have used drugs, are refusing to get basic prenatal care out of fear that their drug use will be discovered. This conduct has translated into a huge rise of miscarriages or child defects which could have been prevented with basic prenatal care.

By infringing on the mother's expectation of privacy to help the child of a drug using mother, the government has, in reality, increased the risk of a different and more devastating type of injury to society. The Commission recognized that the lack of confidentiality could result in an impaired attorney trying to keep an office open alone while seeking treatment or, worse, not seeking treatment at all. These additional pressures could result in otherwise prevented acts of malpractice being committed.

The Commission recommended that attorneys assisting impaired

attorneys in a state program be made immune from civil liability. This is an important recommendation because the value of a state bar program over that of a general treatment program is the assistance which other attorneys to offer an attorney so as to keep the office open. The assistance is offered to avoid committing malpractice while the attorney is undergoing treatment. This recommendation recognizes that it is very difficult to find volunteer attorneys who would be willing to assist impaired attorneys. This is especially true when the volunteer attorney might be sued for malpractice as a result of assisting the impaired attorney. In practical terms, there are few attorneys who would be willing to volunteer the time necessary to effectively assist an impaired attorney if, by doing so, they become exposed to malpractice liability to the clients' of that attorney.

The Commission recognized that any state or local bar program should be dedicated to providing a high standard of quality in its assistance. Toward that end, the program should develop a close working relationship with the sponsoring organizations. An important aspect of any attorney assistance program is to inform both the public and its attorneys that the program exists. In 1988, for instance, a survey of Texas attorneys disclosed that 73% of its members did not know that the state bar had such a treatment program. It makes no sense for a state bar, nonprofit organization or employer to have an attorney assistance program if no one knows that it exists or how to access it.

When attorneys are referred to the assistance program as a

condition to keeping their license as a result of disciplinary action, there is no longer a need for confidentiality between the program and the disciplinary agency. In fact, as a condition to the attorney's keeping of the bar license, the attorney must complete the program. It is therefore recognized that in such instances an effective method of monitoring the attorney's progress is needed. In addition, it is understood that the attorney's progress in overcoming the substance abuse should be reported to the disciplinary agency so that compliance with the disciplinary order can be ascertained.

The Commission recommended that periodic reviews be undertaken on each bar supported assistance program to assure that it is being conducted in conformity with the recommendations set forth in the Commission's report. Most of the recommendations of the Commission have been adopted by state bars in their lawyer assistance programs. The most controversial aspect of the proposal is that confidentiality. Not all state bars have granted confidentiality to their programs. In such state bars, an attorney's entrance into a program will be reported to the disciplinary agency of the state bar. The disciplinary agency may then either investigate the attorney or just keep track of the attorney's progress. The problem with this situation is that the state bar can decide, at any time, that the attorney poses a risk to his or her clients and step in to temporarily close the office. For this reason, as stated above, many impaired attorneys, in those states where the confidentiality is not guaranteed, will not seek assistance from the state bar. These

attorneys will either choose to go it alone or seek assistance from an outside agency. In either event, the state bar is without input in the treatment of the individual and has no control over the quality of assistance for which the impaired attorney is receiving or the effectiveness of the program in which the impaired attorney is enrolled.