

Women and the Law

Overwhelming Evidence: Reports on Gender Bias In the Courts

Lynn Hecht Schafran

Editor's Note: The ill effects of gender bias in the courts have increasingly been recognized in the last decade. In this article and the two following, women who have been closely involved in the gender bias movement report on the findings of special court task forces and speculate on future developments.

When TRIAL published an issue on women and the law in August 1983, the gender bias task force movement was in its infancy. The first of these task forces, the New Jersey Supreme Court Task Force on Women in the Courts, established in 1982, had yet to publish its report. The women's rights attorneys who had been calling attention to gender bias in the courts for more than a decade were still regarded with skepticism or ignored.

Then, in November 1983, the New Jersey task force released its findings at the state's annual judicial college. The *New York Times* carried a front-page

Lynn Hecht Schafran is an attorney and director of the National Judicial Education Program to Promote Equality for Women and Men in the Courts, a project of the NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges. She is an adviser to supreme court task forces on gender bias across the country.

article entitled "Panel in Jersey Finds Bias Against Women in the Courts," and women lawyers and judges throughout the country began requesting that their own chief justices initiate similar blue-ribbon investigations. The Conference of Chief Justices featured a program about gender bias in the courts at its 1986 annual meeting and in 1988 adopted a resolution urging every chief justice to establish a task force devoted to the study of gender bias in the courts.¹

As of December 1989, 30 states had gender bias task forces appointed by the chief justice (or, in a few instances, the state bar association) in some stage of formation, collecting data or implementing reforms. Nine of these states—Florida, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, and Washington state—had published their findings.² Individually and collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims.³

Task Force Findings

The Supreme Court task forces on gender bias in the courts are composed of appellate and trial judges, lawyers, bar leaders, law professors, court administrators, judicial educators, legislators, community leaders, and social scientists. The task forces employ a wide range of data-collection methods. These include public hearings with testimony from

judges, lawyers, litigants, law professors, experts, and community organizations; regional meetings with judges and lawyers; listening sessions with litigants; reviews of transcripts, written decisions, and relevant existing research; empirical studies; focus groups with practitioners and court employees; and surveys of judges, lawyers, and court personnel.

The nine task forces that have reported investigated gender bias in divorce, in child support, and in domestic violence and the treatment of women as participants in the court system. Several reported on rape, damage awards, juvenile and adult sentencing, and the status of women court employees. Florida examined prostitution. Minnesota inquired into employment discrimination cases.

Although the severity of the problems documented varies in certain instances from state to state, there is an overall uniformity. In the words of the New York Task Force on Women in the Courts, "Gender bias against women litigants, lawyers and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity." Following is an overview of the nine task forces' findings.

Divorce

After divorce, the standard of living of mothers and children plunges, while that of fathers often improves. The courts are directly implicated in this

trend. Many divorcing women are effectively denied access to the courts because judges disregard the statutory directive to award appropriate interim and final counsel and expert fees to the economically dependent spouse, who in the vast majority of cases is the wife.

The Nevada Supreme Court Gender Bias Task Force described women undergoing divorce in that state as having to "beg [the court], piecemeal, for a few dollars which she must prove is 'needed' to prosecute her action or defense" while "the husband spends freely from community funds for his own legal needs." Experienced family law practitioners are refusing to represent women because of the losses involved in these cases.

Women's unpaid work as homemakers and child-rearers, in family businesses, and on family farms is devalued or ignored in the division of property and

the award of alimony. In many states, women receive significantly less than half of the marital assets, but even where courts divide the property evenly, the result is often inequitable. Husbands receive most of the liquid and income-producing property. Half the marital assets cannot compensate for the fact that in most marriages the principal asset is the husband's earning capacity, to which the wife contributed by subordinating her own.

Alimony of any kind, rehabilitative or indefinite, is rarely awarded; when it is awarded, it is poorly enforced. The findings of the Washington State Task Force on Gender and Justice are illustrative. In its examination of 700 dissolution case files from 11 counties, this task force found that alimony was awarded in only 10 percent of cases, and that in 84 percent of those cases the award was of limited duration.

Judges have unrealistic ideas about the employment potential of older homemakers; women with young children; and women who, although they are in the paid work force, have subordinated their careers to those of their husbands and to the needs of the family. Some judges appear to rest their decisions on the impermissible and erroneous assumption that all women remarry after divorce so they will be taken care of by another man.

Child Support

The failure to award and enforce adequate child support is epidemic, even in states whose task forces reported after the federal Child Support Enforcement Amendments of 1984, which required child support guidelines and new enforcement mechanisms. This is an expression of gender bias because when courts protect fathers' income and stan-

Jodie Foster playing a rape victim in The Accused. The state supreme court task forces addressed biased treatment of rape victims.



dards of living it is mothers, who by family agreement are the overwhelming majority of custodial parents, who must shoulder the burden of child support alone. For many women this translates into working multiple jobs, going on welfare, and living on the edge of poverty.

Child support guidelines understate the costs of rearing children. Some judges and hearing officers refuse to use the guidelines or treat them as a ceiling rather than looking at individual family needs. Enforcement is often a nightmare. Judge Charles McClure testified to the Florida Supreme Court Gender Bias Study Commission that when he first became involved in enforcing child support, he saw women in his courtroom who had been to court so many times without success that they had "the look of a prisoner of war."

Many women give up on enforcement because the repeated court appearances necessitated by adjournments granted the obligator jeopardize their employment. In response to task force surveys, judges claim that they are willing to use all available sanctions, including jail, to force nonpaying parents to comply, but they rarely do so.

Custody

With respect to custody, the task forces confirmed that some judges and hearing officers have great difficulty accepting men as primary caretakers, or as able to care for infants, with obvious consequences for decisions about custody and visitation. Nonetheless, fathers are far more successful in custody disputes than is commonly perceived. The Massachusetts Supreme Judicial Court Gender Bias Study reported that fathers who actively seek custody obtain either primary or joint physical custody in more than 70 percent of cases.

The task forces also found that custody awards often punish women who breach the stereotype of the ideal mother, because, for example, they work outside the home or have a sexual relationship outside marriage. There is a growing tendency to award custody to the wealthier parent rather than to award child support. Given women's and men's unequal earning power, this constitutes a paternal preference.

There is also significant indifference to spouse abuse in custody cases. Many judges do not understand why a man who beats his wife but not his child should not be awarded custody.

ously assuming that husbands' violence against their wives ends with divorce, so requests for supervised visitation can be denied.

Domestic Violence

Domestic violence continues to be an area in which women experience significant bias, despite major statutory reforms to provide them with civil and criminal protections. Courts show little understanding of the circumstances under which battered women survive and the ways in which the cycle of violence, economic dependence, lack of

[REDACTED]

The judge testified that women in his courtroom seeking child-support enforcement had been to court so many times without success that they had 'the look of a prisoner of war.'

[REDACTED]

support from family and community, and fear of the batterer combine to keep women in these situations. The Maryland Special Joint Committee on Gender Bias in the Courts cited a judge who said he did not believe a petitioner's story of her husband's holding a gun to her head "because I don't believe that anything like this could happen to me." This statement was confirmed in the court transcript.

Instead of focusing on why men batter and what can be done to stop them, many judges and court personnel ask battered women what they did to provoke the violence, subject them to demeaning and sexist comments, shuttle them from court to court, and issue mutual orders of protection when the respondent has not filed a cross-petition and there is no evidence that the petitioner was violent. These women are then castigated for failing to go forward with their cases. Although initial orders of protection are granted with greater frequency than they were in the past, violators are rarely punished in any meaningful way.

Rape, Juveniles, and Prostitution

As with domestic violence cases, rape cases also are often viewed from the wrong end of the telescope, with the complainant rather than the defendant

being put on trial. Her dress, demeanor, conduct, associations, and lifestyle rather than his threats and use of force become the focus. Although evidence suggests that courts are treating stranger-rape cases with greater seriousness and sensitivity than in the past, nonstranger rape, now understood to be the majority of rapes, is still minimized and trivialized. As Justice Rosalie Wahl, chair of the Minnesota Task Force on Gender Fairness in the Courts, stated, "Judicial procedures for handling 'acquaintance rape' promises to be one of the major upcoming issues with which the legal system must learn to deal effectively and with fairness to the victim."

The conflicting stereotypes about women's sexuality evident in rape cases—women are purity incarnate or seductive temptresses—are evident in juvenile justice and prostitution cases as well. Girls, but not boys, are punished for status offenses such as "running away" and "in-correctibility," the subtext being a determination to prevent girls from engaging in sexual activity, which is acceptable for boys.

In prostitution cases, women are jailed while their male clients go free, as if the women alone are responsible for the crime. The Florida task force noted the justice system's major failure to acknowledge that many young women run away and engage in prostitution as the only way to survive because they are running from rape in their own homes.

Damages

Damages cases, like divorce cases, often devalue women's unpaid work as homemakers and mothers. The New Jersey Supreme Court Task Force on Women in the Courts found that the state's model jury charge virtually precluded recognition for work in the home and that some judges were refusing, and some lawyers were failing to make, offers of proof on the economic value of homemaker work. The Rhode Island Supreme Court Committee on the Treatment of Women in the Courts, while in its investigation phase, secured legislation authorizing recovery for the value of unpaid homemaker work in damages cases and recognizing that this value is not limited to moneys expended to replace the homemaker's service.

Court Environment

The gender-biased treatment of women litigants, witnesses, lawyers, and court personnel is a matter of concern everywhere. Even women judges and jurors are not immune. Women of color

are subjected to particular disrespect. As the Massachusetts task force wrote, "From their entrance into the courthouse and throughout their participation in the business of the courts . . . [women] are faced with unnecessary and unacceptable obstacles that can only be explained in terms of their gender."

Most fundamental is the fact that women's credibility is often devalued on the basis of sex rather than substance. Women are not believed simply because they are women. Women in the courts, particularly women lawyers, are sometimes subjected to demeaning forms of address, comments on their physical appearance and clothing, sexist remarks and "jokes," unwanted touching, and verbal and physical sexual harassment.

Although some judges and court personnel engage in this kind of behavior, male lawyers were repeatedly cited as the worst offenders. Male lawyers were also cited as refusing to take direction from female court employees and as treating them like their personal secretaries.

Female lawyers do not receive their fair share of appointments to challenging and lucrative fee-generating cases. Women seeking judgeships experience biased questioning from bar selection

committees and unwarranted low marks from lawyers on these committees and in the community who are hostile to increasing the number of women on the bench.

Implications for the Trial Bar

The task forces' focus is the judiciary, but the trial bar is implicated in the groups' findings as well. Gender bias in decision-making often reflects gender bias in advocacy, whether by omission or commission. Both reflect the gender bias in our culture and in our legal education. If trial lawyers are to become truly effective advocates for their female clients, so too continuing legal education must address the way gender bias affects the litigation process, just as judicial education is beginning to explore how gender distorts the decision-making process.

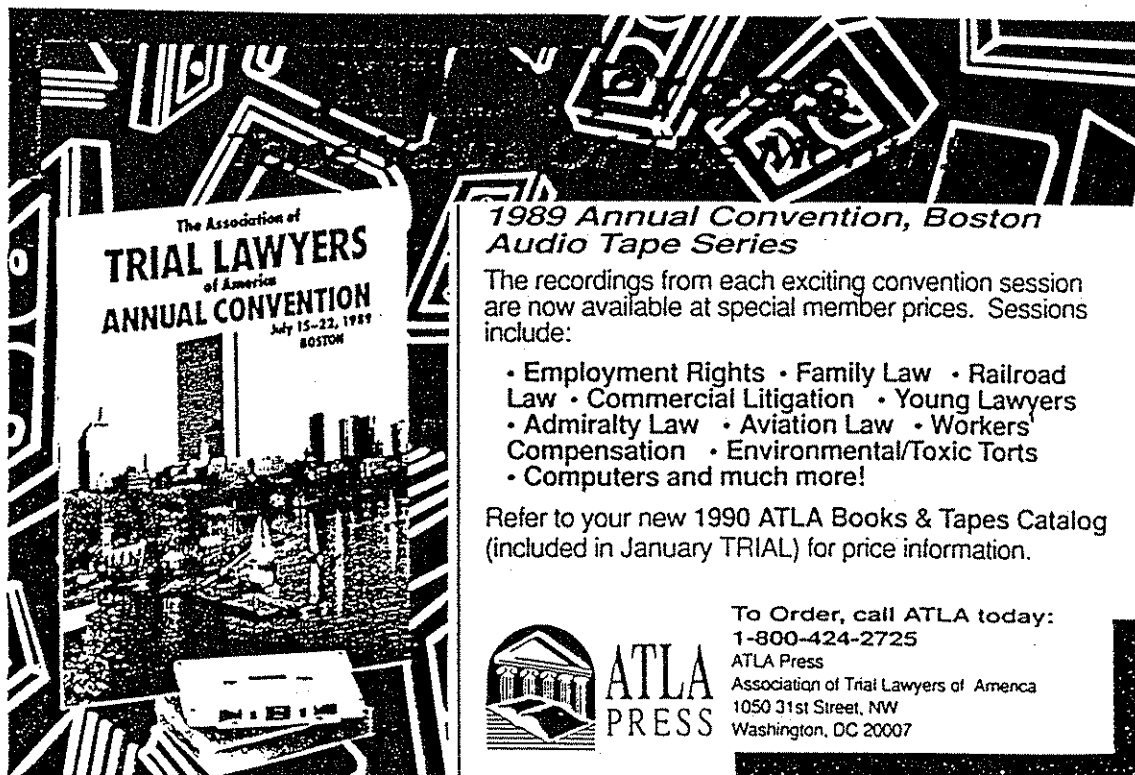
Given that law schools are just beginning to integrate gender bias issues into their curricula, it is not surprising that few lawyers now in practice are attuned to these issues. Because few women were allowed to attend law school until the 1970s, most men practicing today have had little experience with women as professional peers. Consequently,

they are uncomfortable with women attorneys and exhibit the demeaning behavior documented in the task force reports.

Biased attitudes toward women are fostered and reinforced in casebooks. A well-known property casebook published in the 1960s advised that "land, like woman, was meant to be possessed." A recent analysis of the fourth edition of a popular contracts casebook demonstrates how it reinforces the view that "men's" work is more important than "women's" work, presents few cases in which women are "characters," and chooses cases in which women occupy a narrow range of stereotyped life experiences, as someone's relative or in a stereotypically female job.⁴

An analysis of the seven most widely used criminal law texts demonstrates that, in these texts, domestic violence is virtually invisible, rape is considered only from the defense point of view, and the "reasonable" individual is always the average, middle-class, white man.⁵

The consequences of law schools' failure to open students' eyes to the realities of women's and men's lives and the ways in which sex stereotypes can cloud a lawyer's judgment are illustrated by a



The Association of
TRIAL LAWYERS
of America
ANNUAL CONVENTION
July 15-22, 1989
BOSTON


**1989 Annual Convention, Boston
Audio Tape Series**

The recordings from each exciting convention session are now available at special member prices. Sessions include:

- Employment Rights • Family Law • Railroad Law • Commercial Litigation • Young Lawyers
- Admiralty Law • Aviation Law • Workers Compensation • Environmental/Toxic Torts
- Computers and much more!

Refer to your new 1990 ATLA Books & Tapes Catalog (included in January TRIAL) for price information.

To Order, call ATLA today:
1-800-424-2725
ATLA Press
Association of Trial Lawyers of America
1050 31st Street, NW
Washington, DC 20007

 **ATLA
PRESS**

recent sexual harassment case. In 1988, a Washington, D.C., judge presenting a program about gender bias in torts and damages asked several lawyers whether they had clients who might serve as speakers. One male attorney responded with a letter about a sexual harassment case he almost refused to take because on the telephone the victim sounded "hysterical." When he finally met with her—at his female secretary's urging—he thought her story of outrageous abuse from a distinguished company division head seemed "crazy."

After the woman's psychiatrist and psychologist told this lawyer that they believed her, he went forward with the case. On the eve of trial he learned of two other women sexually harassed by the same man in the same way and that although all three women had complained to their employer's internal Equal Employment Opportunity office, nothing was done. The case settled. The lawyer said he related this story at length because of the importance of the conference's work.⁶

"I do not think I am any less sensitive than most lawyers, but in this case, I was about to reject a meritorious case because it seemed to be too awful to

believe. And I was mistaking the client's desperate cries for justice with hysteria."

This lawyer's failure to appreciate the high level of sexual harassment and violence in women's lives and his labeling this woman with the classically sexist epithet "hysterical" is by no means unique. Continuing legal education is essential to bridge the gap in understanding and life experience this case illustrates. Moreover, although women are far more aware than men of gender-biased behavior because they are its object, no one is born understanding the economic consequences of divorce, rape trauma syndrome, or how gender bias in the medical profession leads to delayed diagnosis. The context-free, abstract theorizing that is the hallmark of most legal education fails to provide lawyers with the concrete understanding of the reality of women's lives that is essential to effective advocacy.

Codes of Conduct

Even litigators whose substantive law specialties appear to present no issues of gender bias (and there are far fewer of these than one might think) need to understand how gender bias may be affecting their professional interactions

with lawyers of the opposite sex, and that they may be disciplined for gender-biased behavior.

It is not uncommon for male lawyers to assert that gender-biased behavior is just another litigation tactic and perfectly acceptable. The hollowness of this argument becomes apparent when we compare it with attitudes toward racial and religious slurs in the courtroom. Although some lawyers engage in this kind of behavior, no one defends it publicly as an acceptable litigation tactic. However, because sex discrimination is in many ways the last publicly acceptable form of discrimination, many lawyers simply do not understand the meaning of what they are doing.

In 1985, I participated in a program about gender bias at the Florida Bar Association annual meeting. One of my co-panelists, a male criminal defense attorney, recounted a case in which he deliberately made a sexist remark to a female prosecutor to break her rhythm during cross-examination. He said it would never occur to him to use a racial slur to distract a minority adversary, but that until he read the background materials for the bar program and listened to the discussion, he had not understood

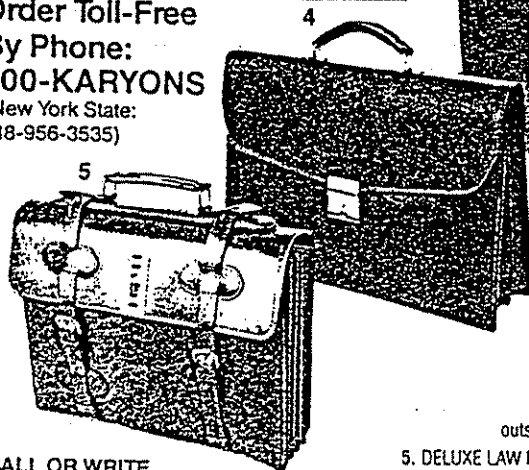
SATISFACTION GUARANTEED! Lawyers consider them the best cases in the field!

KARYON™ "LITIGATION" CASES

Only Therman Sells World Famous Karyon™ Cases.

NOW — SAVE 35%

Order Toll-Free
By Phone:
800-KARYONS
(New York State:
718-956-3535)



1. CLASSIC LITIGATION CASE.

Top-grain cowhide with wrap-around corners. Two inside dividers and solid brass key locks. Specify brown, saddle or black. 18" x 12½" x 7" (Retail \$198.00) \$128.50. 20" x 12½" x 8" (Retail \$210.00) \$136.50. Also available with 2 combination locks, \$15.00 additional.

2. ROYAL LAW GRIP BAG. Top-grain cowhide with two expandable pockets, reinforced corners and solid brass key lock. Specify brown or black. 18" x 12½" x 7" (Retail \$215.00) \$138.00. 20" x 13" x 8" (Retail \$230.00) \$149.00.

3. STYLISH LAW BRIEF. Top-grain cowhide with extra wide gusset, brass combination lock, comfortable double handles. 18" x 14" x 8½". Specify brown or saddle. (Retail \$245.00) \$159.00.

4. THE KARYON™ BARRISTER. Elegantly tailored in supple leather with two inside dividers and outside pocket. Solid brass combination lock. 17" x 11½" x 6½". In brown. (Retail \$335.00) \$217.00.

5. DELUXE LAW FOUR POCKET VIP BAG. In top-grain cowhide, deep gussets for extra expansion and roomy utility pocket. Specify brown or saddle. 18" x 13" x 9". (Retail \$220.00) \$143.00.

ADDITIONAL DISCOUNTS ON QUANTITY ORDERS.

M-2

CALL OR WRITE
FOR FREE CATALOG.

To order send check or charge to
VISA/MasterCharge.

Toll-free phone orders: 800-KARYONS
(In N.Y. State: 718-956-3535)



We pay all shipping in Continental USA. N.Y. State residents add sales tax.



KARYON™ CAREER CASES BY
THERMAN LEATHER GOODS CO., INC.

38-01 23rd Avenue, Long Island City, N.Y. 11105

AQUATIC INJURY SEMINAR

Diving Injuries/Drownings

Above-ground pool cases
In-ground pool cases
Theories of Liability
"Meet the Experts"

Bankruptcies
Biomechanics of the Injury
Rehabilitation Trends
Combatting Defenses

Trial Strategy

April 5 - 7, 1990 - The Mayflower Hotel - Washington, D.C.

SPONSORED BY:

THE AQUATIC INJURY SAFETY GROUP - AN ATLA SANCTIONED LITIGATION GROUP

CALL OR WRITE FOR INFORMATION:
MSG

5111 West Main Street - Belleville, IL 62223 - (618) 234-8221 or (618) 234-8395

You be the judge of our commercials. Because everyone will be the judge of yours.



When your television commercials appear on the air, they will be judged, you can be certain.

Potential clients will make decisions—in 30 seconds—about your professionalism. Your competence. Your ability to represent them.

Alma Productions is the acknowledged leader in quality filmed television commercials for personal

injury practices. And we've just produced 20 new commercials in Hollywood, with a nationally recognized director-cinematographer team. They're priced very competitively, even with videotaped commercials.

We've won national awards for our work. We've also won enthusiastic endorsements from law firms that have seen dramatic increases in new clients, as a direct result of our program.

But don't take our word for it. Take our new demonstration cassette. And judge for yourself whether anything else can even come close.

For a free cassette call: 1-800-999-ALMA

ALMA PRODUCTIONS

1800 Gaylord St., Denver, Colorado 80206

that what he did to the female prosecutor was equally unacceptable.

The proposed amendments to the American Bar Association Code of Judicial Conduct relating to this kind of conduct should be of direct concern to all lawyers. A new section in Canon 3 not only requires judges to refrain from biased behavior themselves, but obligates them to eliminate such behavior on the part of those under their direction and control. Lawyers are cited in particular.

When and how judges should intervene in these situations is the subject of increasing discussion in judicial education. Lawyers who persist in biased behavior, both in the courts and at depositions, will find themselves accountable to the judiciary. There is also a trend toward interdicting gender-biased behavior through the codes of professional responsibility.

Recommendations for Bar Associations

The numerous recommendations for reform in the gender bias task force reports include many addressed directly to the bar. The task forces recommend continuing legal education about every aspect of domestic violence and the economic consequences of divorce and child support. They encourage bar associations to become involved with rape crisis centers and prosecutors in educating the public, as well as the bar, about rape. They ask that bar members be educated about the nature, incidence, and consequences of gender-biased conduct in the courts and the need to demonstrate respect for female court personnel.

Bar associations and judicial nominating commissions are asked to examine the judicial appointments process to eliminate gender bias against female candidates and ensure that possible gender bias against those seeking judgeships is thoroughly explored.

In some of the states whose task forces have reported, the organized bar has already made a strong response. In New York, the State Bar Association, followed by many county and city bar associations, established special committees to implement the task force's recommendations. These committees have drafted reports and legislation, presented educational programs for lawyers and judges, and pursued administrative reforms. The New York State Bar Association Special Committee on Women in the

Courts secured amendments to the state's professional responsibility code respecting gender bias in hiring and treatment.

Several New Jersey bar associations presented programs about the economic value of homemaker work in damages cases. According to a former president of the New Jersey Trial Lawyers Association, where the damages are significant, lawyers are now making full offers of proof on this issue.

New Jersey bar associations also took action to improve their own treatment of women in the profession, such as increasing the number of women committee members and chairs. The New Jersey task force counts as one of its signal accomplishments the elimination of the performance by a female stripper at one county bar's annual clambake.

Recently, a colleague, Professor Norma Wikler, and I evaluated the impact of the New Jersey task force four years after its report.⁷ Under the auspices of the Women Judges' Fund for Justice, we examined the status of the task force's recommendations and the amelioration of the gender bias documented in case outcome and court interaction. We found significant improvements in the courts and the bar, particularly in the area of behavior toward women attorneys on the part of male judges and attorneys.

The progress in New Jersey demonstrates that with leadership from all segments of the bench and bar, the task force reports can promote the learning and reform that is essential if we are to eliminate gender bias in the profession and the courts. □

Notes

- ¹ This resolution also called for separate task forces on minority group concerns. Six states now have such task forces.
- ² For information about obtaining these reports, contact the author at 99 Hudson Street, 12th Floor, New York, NY 10013.
- ³ For a complete review of the history, see Schafran, *Gender Bias in the Courts*, 21 ARIZ. ST. L.J. 237 (1989).
- ⁴ Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).
- ⁵ Erickson, *Sex Bias in the Teaching of Criminal Law*, 42 RUTGERS L. REV. (1990).
- ⁶ For the entire letter, see Schafran, *Lawyers' Lives, Clients' Lives: Can Women Liberate the Profession?* 34 VILL. L. REV. 1105 (1989).
- ⁷ N. Wikler and L. Schafran, *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States* (Women Judges' Fund for Justice, Washington, D.C. 1989).

BOARDWALK SEMINAR 1990



Association of Trial Lawyers of America
• New Jersey •

CAESARS

ATLANTIC CITY

FRIDAY AND SATURDAY APRIL 20 & 21, 1990

STATE OF THE ART TRIAL TECHNIQUES

Medical insights and litigation techniques

- Personal Injury
- Criminal
- Toxic Torts
- Matrimonial
- Paralegal/Legal Assistant

Please rush me a brochure
as soon as they are available.

Mail To:

ATLA-NJ
15 South Main Street
Edison, New Jersey 08837

Name _____

Firm Name _____

Address _____

City, State, Zip _____

Tel. # () _____