

# **O** **N THE BENCH**

**JUDICIAL RESPONSES TO GENDER BIAS**

**NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS**

This pamphlet has been prepared by the New York State Judicial Committee on Women in the Courts, a committee appointed by the Chief Judge of New York to assure equal justice, equal treatment, and equal opportunity. Originally established in 1986 in response to a task force report detailing the effects of gender bias in New York State courts, the Committee primarily addresses concerns of women as litigants, attorneys, and employees within the court system.

“A judge ... is more than a moderator; [a judge] is affirmatively charged with securing a fair trial, and [a judge] must intervene sua sponte to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. **Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.**”

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Hon. Learned Hand

*Brown v. Walter*

62 F.2d 798, 800 (2d Cir. 1933)

**J**udges, no matter how experienced or how great their stores of good will, at some point may find themselves unsure about how to react when confronted with potentially difficult courtroom incidents in which gender is implicated. The fault may lie with the overheated words of attorneys or the unmindful actions of court employees; the answer may be neither obvious nor easily discerned. Yet, as Judge Learned Hand so acutely observed six decades ago, it is the job of judges to respond decisively, set matters straight, and so secure the fairness of the proceedings before them.

In an attempt to assist judges in meeting these challenges, the New York State Judicial Committee on Women in the Courts has prepared this pamphlet. It presents a series of scenarios, all of which have been taken from real life examples of gender bias that have come to the attention of the Committee within the past two years. Some of these scenarios draw on the very words that so recently have given offense. None is ancient history.

The scenarios are followed by suggested responses supplied by New York State trial judges, and, while they are all appropriate responses, they are by no means the only possibilities. They are offered in the hope that exploring these dilemmas away from the heat of courtrooms will help judges to hone the instincts on which they must rely if they are to respond effectively and with authority to difficult situations.

# Scenario One

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During a calendar call, an attorney, who has been negotiating a complicated settlement with an insurance company's lawyer, asks to be heard. She is visibly angry. She tells you that, while discussing the case in the hallway outside the courtroom, her adversary has treated her, she says, "in a degrading and demeaning fashion." Before she has a chance to expound on the incident—and before you have an opportunity to respond in any way—the opposing lawyer interjects, "Your honor, I am sorry if I have offended counsel—or should I say counselette—but, hey, she should know, if you can't stand the heat, you'd better get out of the kitchen."

## RESPONSES SUGGESTED BY SITTING JUDGES

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1. Have the attorneys appear in the robing room. On the record the participants should state what happened. Opposing counsel should be admonished for his comments, made initially, and, if appropriate, for what occurred in the hallway. Counsel should be told that any repeat conduct will result in the transcripts being forwarded to the disciplinary committee.
2. "Counselor, I was not privy to what occurred in the hallway. However, the comment you have just made in my presence is offensive and unprofessional. I am placing you on notice that such comments are not acceptable either in or outside the courtroom."
3. This is a situation calling for an off-the-record "robing room" conference with counsel. First, it is necessary to defuse the obvious acrimony between counsel. In the process, it is important for the Court to point out to counsel that personal attack—based on gender or any other individual qualities—is totally inappropriate and offensive. Second, and practically

speaking, it is important to help counsel clear the air so that settlement may be achieved, and the importance of this practical consequence should also be brought to counsels' attention.

## COMMENTARY

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When a lawyer makes this kind of remark, a judge must respond. While the precise nature of the response will depend on many things, including the stage in the proceedings, the judge's relations with the lawyers or the lawyers' relations with each other, a response—immediate and unequivocal—is essential.

## Scenario Two

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As you are leaving the bench for lunch, an attorney with several cases before you—let’s call her Attorney A—approaches you and tells you this story:

Attorney A says that she arrived a few minutes before the clerk’s office was open because she had a busy schedule and wanted to be get through filing papers early. Two women joined her and a short line formed. A male attorney—let’s call him Attorney B—then arrived and went directly to the front of the line. Attorney A politely told him that there were others there before him and suggested that he take his place in the queue. Attorney B refused. Another attorney, also male, joined Attorney B at the front before the clerk’s office was ready to do business. When the clerk arrived, the clerk turned to Attorney B and asked how she could help him. Attorney A said that she had arrived before Attorney B and that she would like to conduct her business so that she could leave. The clerk ignored her and helped not only Attorney B but the second male attorney before attending to Attorney A’s papers.

Attorney A says that this is one more example of the gender bias she has experienced in the clerk’s office, that she is regularly asked if she is an attorney, and even occasionally called “Hon.” She says she is turning to you for help.

You know the clerk fairly well, and you think it is possible that she is an equal opportunity offender, i.e., that she finds ways to offend everyone, men as well as women.

### RESPONSES SUGGESTED BY SITTING JUDGES

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1. I am assuming from the facts in the scenario that the judge has a degree of rapport with Attorney A. I would first attempt to defuse Attorney A’s concerns by suggesting that despite appearances this might not be a gender bias incident. In particular, I might suggest to Attorney A that the events had

to do with this particular clerk's approach to the job. However, I do think the scenario indicates that there is a problem that should be addressed. Accordingly, I would take up the issue with the appropriate administrator and suggest that a first come, first served procedure be developed and adhered to. This will eliminate problems in the future.

2. First, approach the Clerk and notify her that you've received some general complaints concerning preferential treatment of some attorneys over other people, without mentioning the specific incident. Suggest a possible solution to help customers in order of arrival to avoid a possible claim of discrimination. If the suggestion is rebuffed, I would advise the attorney to file a complaint against the clerk.
3. Tell Attorney A you would like to have a positive impact on the future behavior of the clerk and ask her permission to speak to the clerk and use this as an example of improper procedures at the clerk's office.

## COMMENTARY

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If a lawyer complains to a judge about the behavior of nonjudicial personnel and the offensive conduct took place outside the courtroom, the judge's role may be limited, but he or she should see that the appropriate person—the chief clerk or the administrative judge, for example—knows about the complaint. Also, the lawyer should receive an assurance that this kind of behavior is a matter of concern both to the judge and the court system. Often the assurance will be implicit in a cordial response to the complaint.



# Scenario Three

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In the midst of insistent but gentle cross-examination in litigation over a automobile collision the defense lawyer addresses the plaintiff (a woman) by her first name although all other witnesses up until now have been addressed by last names and appropriate titles. Cross-examination of the next witness, the physician (also a woman) who treated the plaintiff at the hospital emergency room following the crash, begins with the attorney addressing the witness as Dr. but, when the questioning moves to the physician's professional judgment, the defense attorney again slips into use of the first name.

## RESPONSES SUGGESTED BY SITTING JUDGES

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1. I would call the cross-examining counsel to the bench and instruct him to address all witnesses by their appropriate title. Thereafter, I would allow the cross-examination to continue. If the action was repeated, I would admonish the defense attorney in the presence of the jury.
2. I maintain in my courtroom a list of 10 rules to practice in [my part] that are distributed to all attorneys. Among those rules is the instruction that all parties be addressed by their surnames, including all witnesses, attorneys and clients. In the event that this rule is not followed, I have no compunction about correcting the examiner directly before the jury by saying simply, "Excuse me, Counsel, I believe the witness is Ms.\_\_\_\_\_, Dr.\_\_\_\_\_, etc." I would do this, of course, only after providing a direction privately at the bench regarding the attorney's informality. I also try to refer to court staff, officers, clerks and reporters, as well as jurors, by their surnames, if possible, introducing staff to the jury at the beginning of *voir dire*.

## COMMENTARY

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Although this kind of behavior is almost invariably the product of calculation on the part of an attorney—and it is never acceptable—nonetheless, with a jury present, it is best to give the offending attorney a warning before he or she is reprimanded in open court.

*Fair Speech: Gender Neutral Language in the Courts*, a pamphlet published by the New York State court system, may be a helpful resource when issues of language arise. On the subject of informal versus formal forms of address it says “ Using first names to refer to litigants and witnesses should be avoided not only because the informality is inappropriate to the courtroom setting but also because it is patronizing. The motives for calling someone Maria or Jeanette may be habit on the part of a court official or an attempt by a woman’s own lawyer to put her at ease. However, all litigants, including defendants in criminal cases, deserve a proper form of address, and the dignity conferred by the formal designation may do more to make a witness comfortable than the intimacy implied by the use of a first name.”

# Scenario Four

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During a break in the proceedings, while the jury is deliberating, you hear two court officers telling sexually offensive jokes. They are talking to each other, but nonetheless you hear quite clearly what they are saying.

## RESPONSES SUGGESTED BY SITTING JUDGES

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1. I would confront the court officers. While they are in uniform in the courtroom they represent the court. Offensive jokes demean the court and cause the public to lose confidence in our judicial system. I would have them stop.
2. I would ask them to stop. If the situation occurred again, I would again tell them to stop and follow up with a report to their supervisor, if appropriate.
3. Tell them, "A lot of people find that kind of talk offensive ... including me."

## COMMENTARY

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A response is necessary. If a judge hears conversations of nonjudicial personnel, others may as well. The level of response, of course, will depend on the particulars of the situation, but neglecting to condemn unacceptable behavior creates the risk of appearing to condone it.

# Scenario Five

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During a side bar discussion about setting a date for sentencing, a Legal Aid attorney mentions that she is planning a long weekend with her husband and child. The assistant district attorney says, “I didn’t know you were married. With the way you’ve been handling this case, I thought you were a lesbian.”

## RESPONSES SUGGESTED BY SITTING JUDGES

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1. Because the remark was made in front of the Judge, it requires a clear message that remarks about an adversary’s sexuality are inappropriate and unprofessional.
2. “Why would you say a stupid thing like that, counselor? Someone once said it is better to keep your mouth shut and seem a fool then to open it and remove all doubt. I suggest you follow that motto.”

## COMMENTARY

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An unambiguous response is critical. The offending attorney should know the judge has found this behavior unacceptable. Also, the target of the remarks needs a defense, which she cannot mount herself without making the situation worse.

A tougher response, in the form of a letter to the district attorney, the imposition of sanctions, a citation for contempt, or a referral to a disciplinary committee, also may be necessary depending on the exact circumstances of the attack. Judges might acquaint themselves with these alternatives so that they can use them with confidence when necessary.

# Appendix

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“A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.”

“A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge’s direction and control to refrain from such words or conduct.”

“ A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others.”

**Code of Judicial Conduct**  
**22 NYCRR Part 100.3 (B)**

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