

WOMEN: WHAT *DO* THEY—AND MEN—WANT IN COURT?

by JUDITH A. KALUZNY

In a ton of law, there is not one ounce of love.
~ English Proverb

A few years ago, fulfilling the state bar's requirement that every three years lawyers shall have one hour of education regarding biases, I attended a gender bias session featuring Marjorie Fuller, Esq., and Justice Sheila Sonenshine (Retired). A fellow attorney scoffed to me, "This is the past. It's all done and over now."

That gender bias still thrives, especially in family law, was brought home to me once again in a recent family law bar lunch presentation. The subject was private judging. A panelist was illustrating the advantages of private conferencing with the parties to get past blockages to settlement. He described a case wherein there was something holding up settlement and he couldn't tell what it was

until finally he met separately with the wife. She told him, the man smiled, that she was upset by her picture in their beauty salon having been replaced by that of the new girlfriend. They all laughed—all five panelists—in front of the room full of family law lawyers (although I am not sure the women lawyers laughed so loud or long).

How does this illustrate gender bias? If you don't understand it, you may have it. Women have concerns that

are emotional and have no place in the business of divorce. Men have concerns that *are* the business of divorce. Oh, they may be emotional, but we can all understand a man's attachment to his money or his rage when his property, read wife, leaves him for someone else. We don't laugh at that emotionality. We are amused by the little lady's petty concerns. We pretend that the emotional fallout from divorce is irrelevant, that divorce is strictly dollars and cents.

I recall a divorce in the late 1970s in which a psychologist tried to tell a father how much he was hurting the children in fighting for custody. His lawyer told the judge in chambers that the father had no

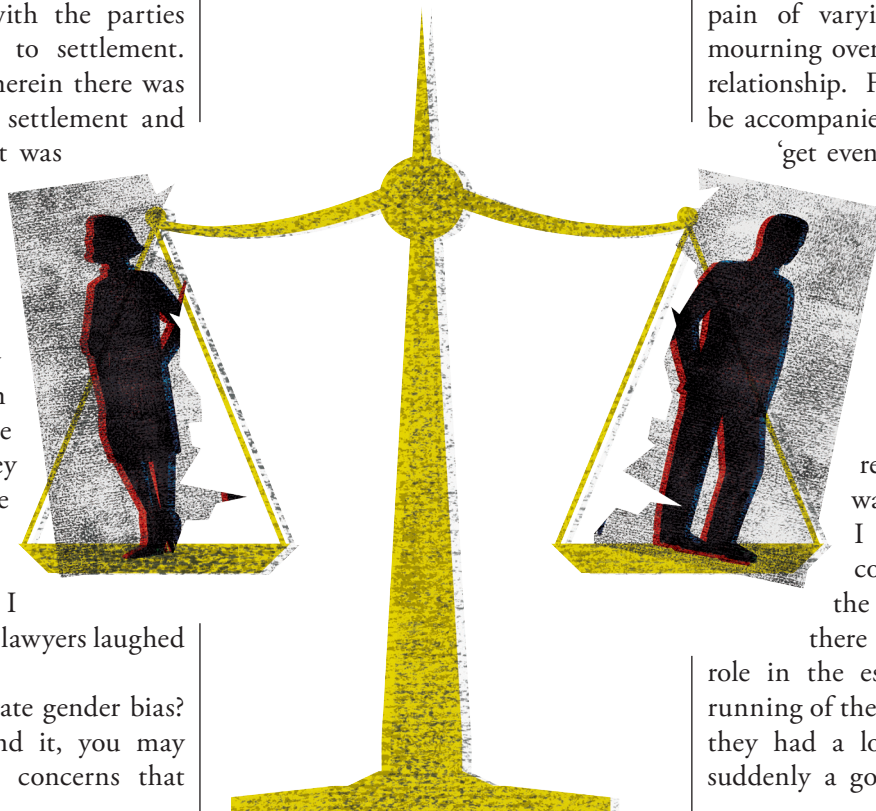
chance of actually getting custody, but "he needs his day in court." The judge nodded sympathetically. We had a trial. The psychologist was called, and paid. Yet the day before, when a woman was asking for her "day in court" in regard to visitation, the judge said, "Counsel, can't you control your client?"

And yet we see the emotional fallout in repeated requests for modification. If a person is not able to express her or his grievances in the divorce process, chances are the resentments will linger and contaminate one's life. The popular culture leads one to look to the court system for justice. We dismiss what was referred to in a *FACES* newsletter as the Mourning Stage. "During this period, one or both parties may feel separation pain of varying degrees. There is a mourning over the loss of the marriage relationship. Feelings of sadness may be accompanied by hurt, anger, blame, 'get even,' or punishing the other

party. *This stage cannot be rushed through.*"

Mary O'Connor, *Dissolution Process*, F.A.C.E.S. Newsletter, Vol. 1 Issue 6 (Sept. 1995) (emphasis added).

As for the woman referred to: if her picture was featured in a business, I imagine that was a community business, and the fact that her picture was there indicates an important role in the establishment and/or the running of the business. Quite possibly, they had a long-term marriage. And suddenly a goodly portion of her life



was cavalierly obliterated as if it never happened. Funny, she cares. She feels pain. She is angry.

As part of my research into how family law could better serve the public, I discovered the 2008 Judicial Council survey of citizens asking what they want from the courts. When it came to family law, people wanted “a chance to tell their story,” and “a fair process.” In reality, in the litigated divorce, people often do not get a chance to tell their story or a fair process.

Based on Supervising Judge Clay Smith’s statistics given at our annual family law State of the Union report, each divorce case is allotted two hours and nine minutes of court time. Judge Smith noted that 14,000 petitions for divorce or separation were filed last year, plus 13,000 requests for the court to make orders or rule on a motion in a case. With nineteen judges working from 9:00 a.m. to noon, and 1:30 p.m. to 4:30 p.m., the official court day of six hours, and considering about 247 working days a year, that number of hearings with at most 28,158 hours gives a case a maximum of two hours and nine minutes. How much procedural fairness and justice can be dispensed in a divorce in two hours and nine minutes? Temporary orders? Custody? Child support? Spousal support? Value of a business? Forensic accountant reports? Attorney fee awards?

So not many stories get told. A judicial officer says, “Tell me what this is about, counsel . . . if you were to put that on, here’s what I’d do . . . now go out in the hallway and write it up.” Seldom do the parties get to speak to anyone in authority who will listen carefully.

Procedural fairness, wrote Douglas G. Denton, senior court services analyst for the Judicial Council, has four key elements: respect, voice, neutrality, and trust. “Voice. People want the opportunity to tell their side of the story, to explain their situation and views to an authority who listens carefully.” Douglas G. Denton, *Procedural Fairness in the California Courts*, Judicial Council of California Fact Sheet (May

2011), *available at* <http://www.courts.ca.gov/documents/pfcc.pdf>. “Trust. People observe behavior or look for actions to indicate that they can trust the character and sincerity of those in authority, and that those in authority are aware of and sincerely concerned with their needs (e.g., they look for conduct that is benevolent and caring).” *Id.* Treating a person’s grief and concern as an occasion of amusement is not likely to promote trust.

In an article for Mediate.com, Joe and Susan Epstein wrote:

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Acknowledgment of emotional factors empowers parties, creates a legitimate sense of control and fairness. . . . In short, by addressing emotions mediators and negotiators will unlock the door to key motivations, interests, and needs facing parties The focus on the emotional issues of grief, anger, and fear will often allow the parties to untie the knot which stands as a barrier to resolution of legal disputes. It takes an empathetic negotiator and/or empathetic mediator to zero in on these underlying dynamics. Joe and Susan Epstein, *Grief, Anger, and Fear in Mediation*, Mediate.com (Sept. 2010), <http://www.mediate.com/mobile/article.cfm?id=6513>.

Before no-fault divorce, there were almost no contested custody cases, one long-time lawyer told me as we waited for clients outside the mediation rooms in 1977. Husbands and wives in those days could air all their grievances to prove who caused the divorce and get more property and money. With no-fault, all those bad things are not relevant except with regard to being a parent.

Perhaps a new stage in the divorce process could be established: the preliminary “truth and reconciliation” meeting to tell grievances. Opposing counsel in family law could arrange a new sort of “four-way” conference, making it a five-way with a new sort of divorce coach or other trained mediator. Get rid of the obstacles to settlement in the first week of the process instead of slogging through a miasma of hostility, blame, guilt, and resentment for two years.

Surely it will take more than “at least one hour dealing with the elimination of bias in the legal profession by reason of but not limited to sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation” every three years to acquire the empathy lawyers ought to have for women and men entangled in the litigated divorce.



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