

GENDER BIAS AND THE LAW WORKSHOP

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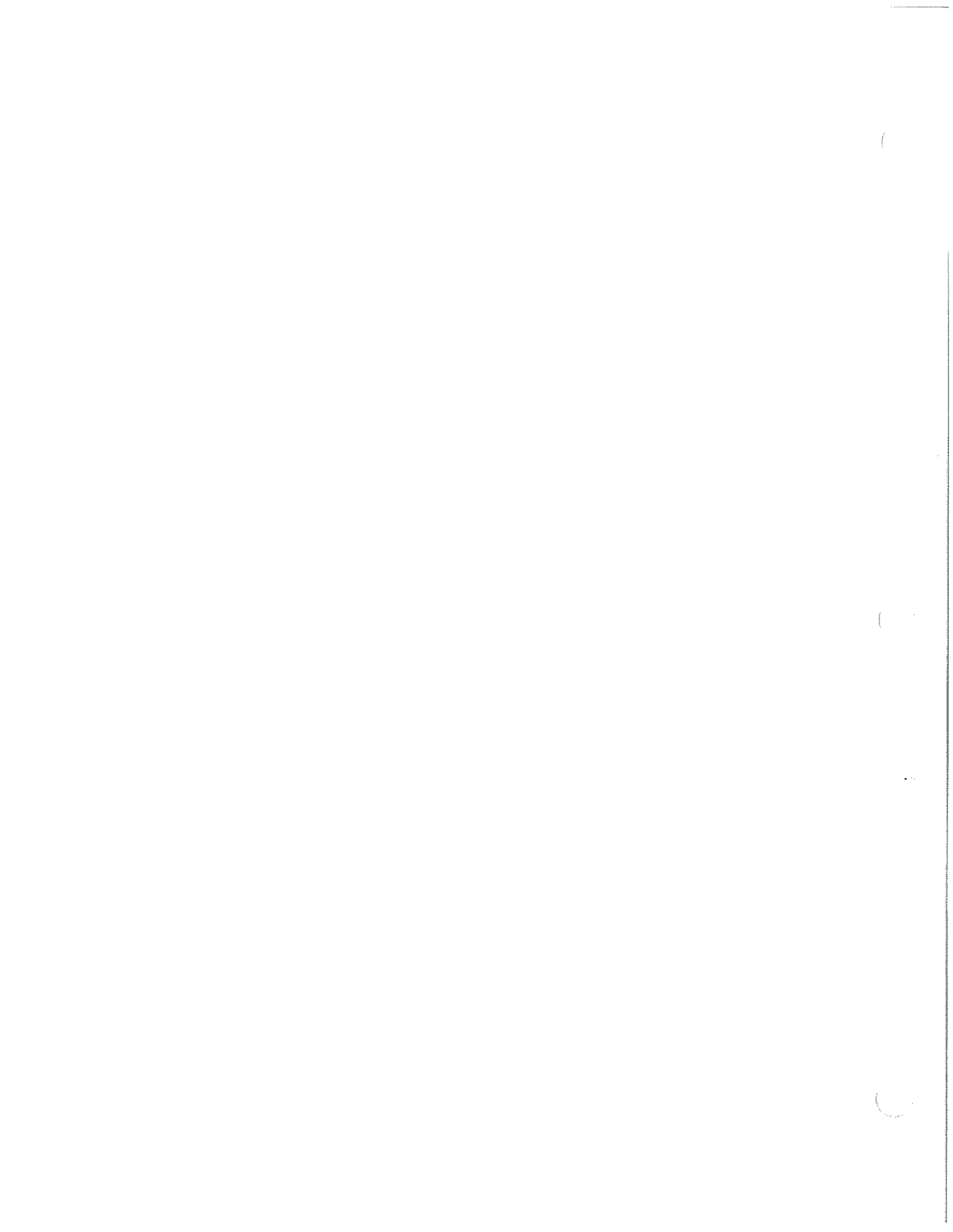
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**21ST ANNUAL ADVANCED FAMILY LAW COURSE
State Bar of Texas
August 1995**

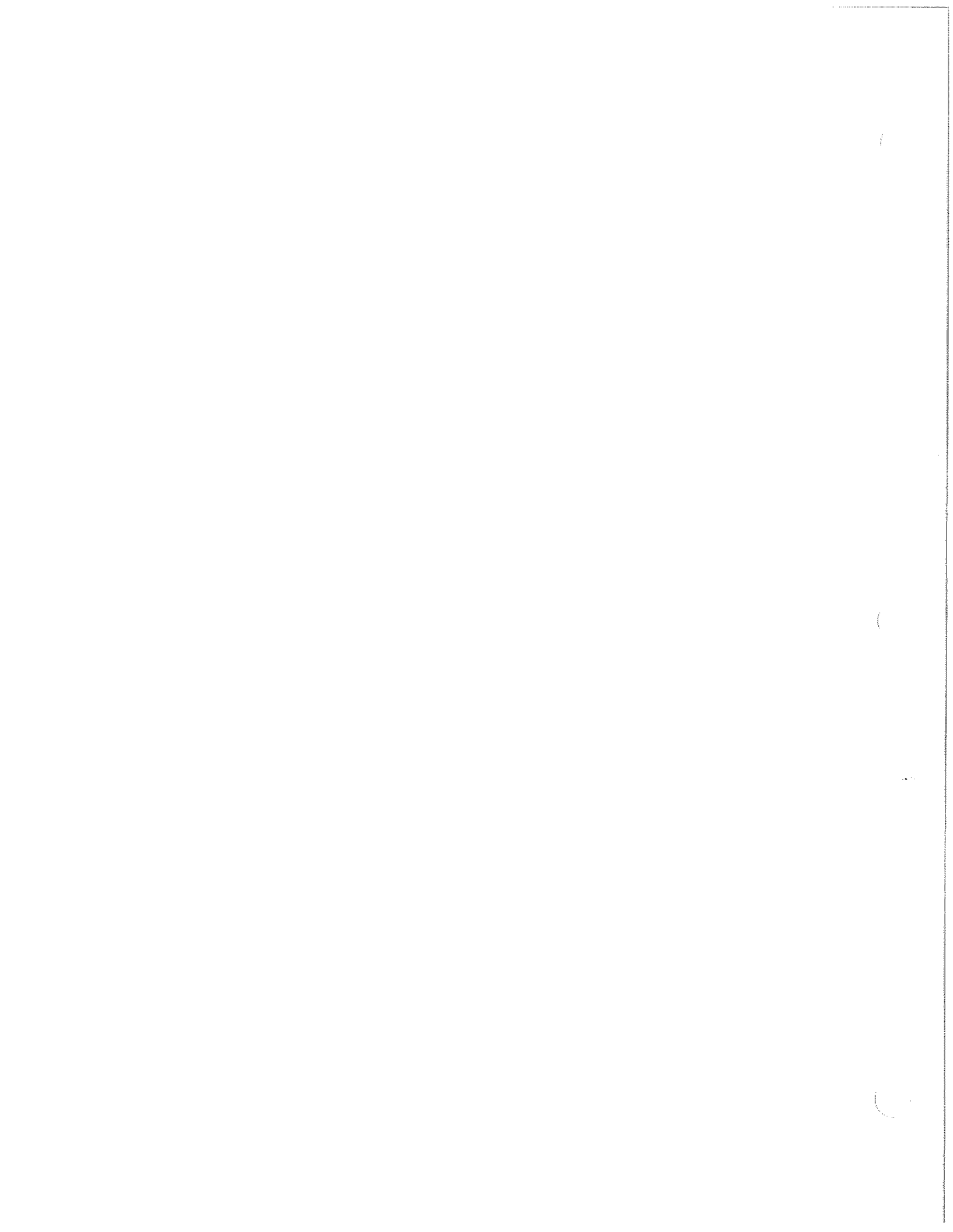


**Gender Bias in Our Courts and Practice
Fact or Fiction?**

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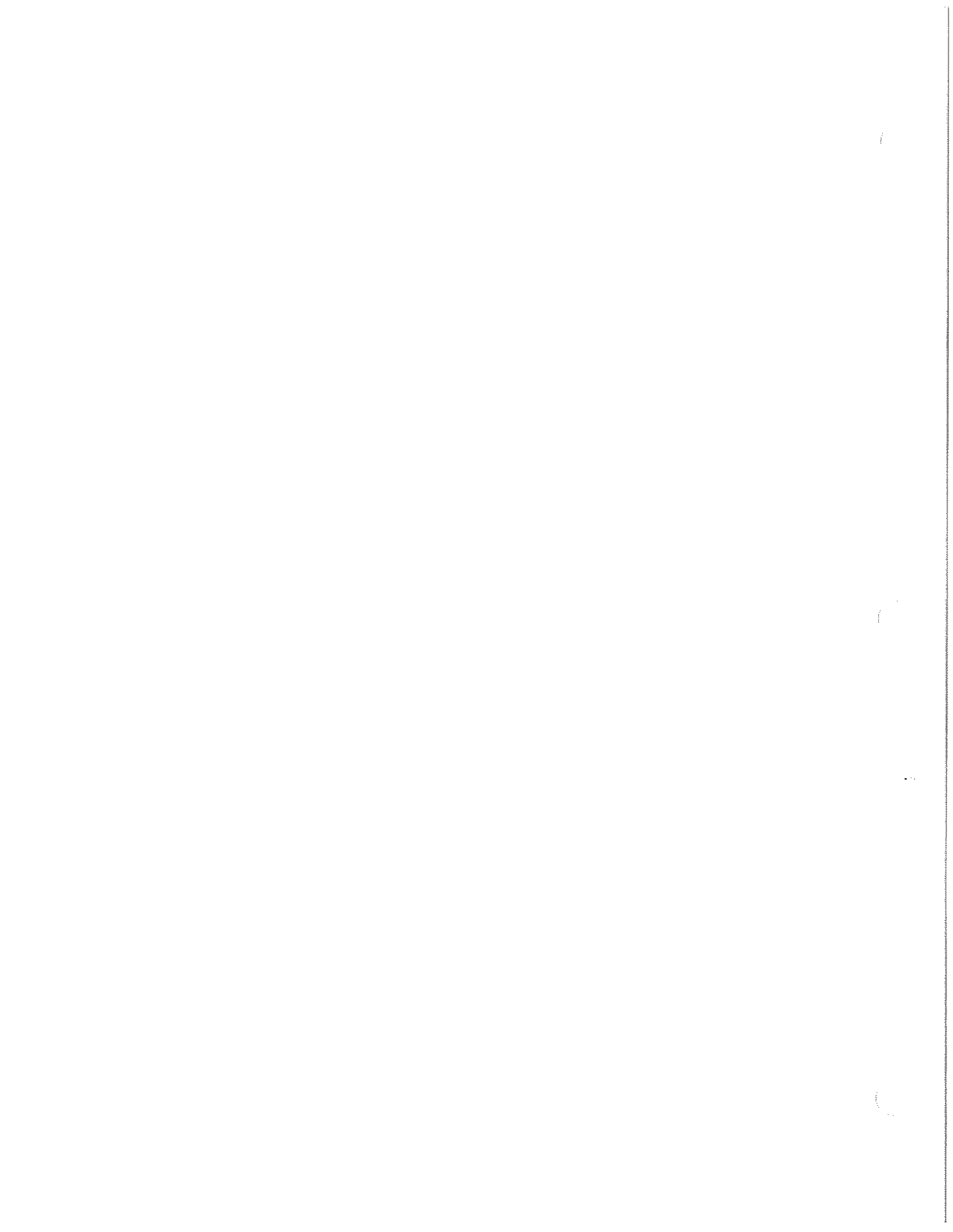
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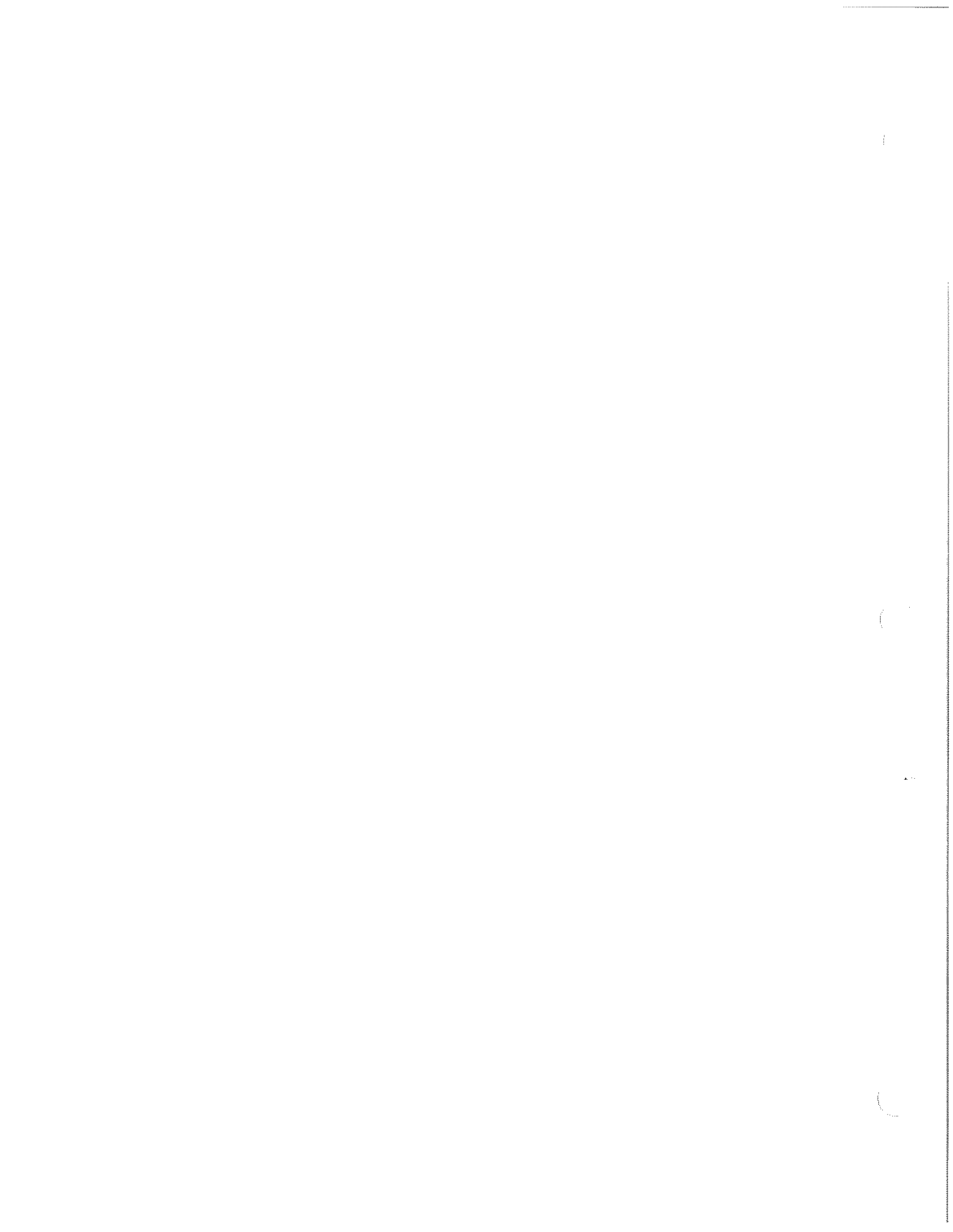


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Life Fellow
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Legislation Committee, 1992-1995
Arbitration Committee, 1995
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Family Law Mediation Training Seminar, (1995) Course Director, presented at South Texas College of Law, sponsored by Center for Legal Responsibility.

Matrimonial Arbitration in Texas: New Applications of Old Concepts, (1995) presented to American Bar Association, Arbitration Training Seminar, Four Seasons Hotel, Houston, Texas.

In the Trenches & Still Kickin!, (1995) presented at Solo Practice Seminar, South Texas College of Law, Houston, Texas.

Matrimonial Arbitration in Texas, (1995) presented to American Academy Of Matrimonial Lawyers at the Matrimonial Arbitration Institute, Westin Galleria, Houston, Texas.

The Arbitrator's Malpractice Liability and Tips on Avoiding Malpractice, (1995) presented to American Academy Of Matrimonial Lawyers at the Matrimonial Arbitration Institute, Westin Galleria, Houston, Texas.

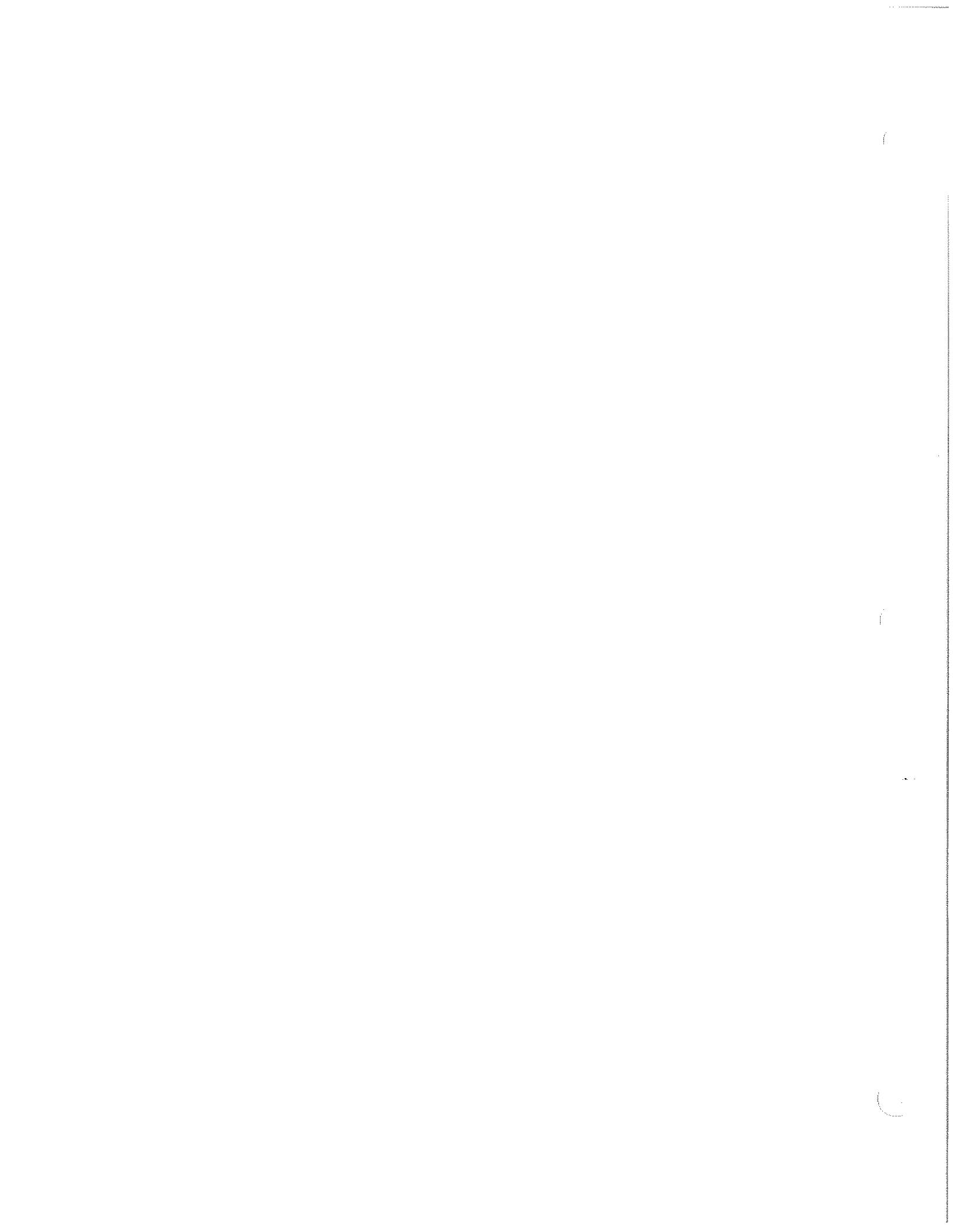
Biography of Curtis M. Loveless

Curtis M. Loveless practices law in Denton, Texas, with his own firm. Mr. Loveless received his B.B.A. from the University of North Texas and his J.D., from, the University of Texas. He has practiced law in the Denton area since 1969, becoming board certified in family law by the Texas Board of Legal Specialization in 1975.

Mr. Loveless has been a member of the American Academy of Matrimonial Lawyers since 1987 and is current by serving as Texas Chapter President.

Mr. Loveless has served on the Family Law Council, the governing organization for the Family Law Section of the State Bar of Texas for 9 years and is currently an advisory member of the counsel. Mr. Loveless has served as course director of the Second Annual Advanced Family Law Drafting Course and as Co-director of the Texas Academy of Family Law Specialists Course in Las Vegas, Nevada in 1988. Since 1985, Mr. Loveless has spoken at numerous Marriage Dissolution Seminars and Advanced Family Law Courses.

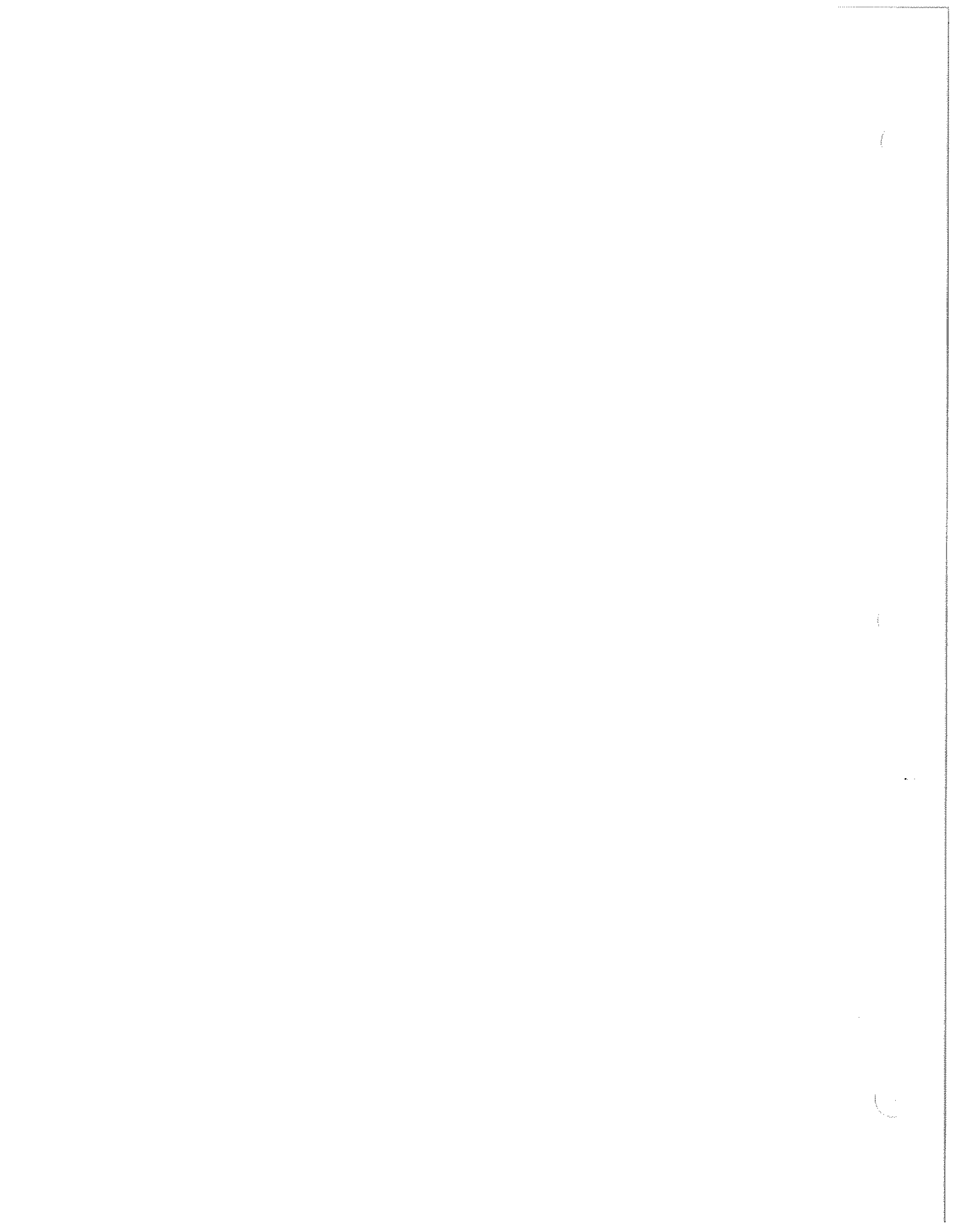
Mr. Loveless has also served as an officer and director of the Texas Academy of Family Law Specialist. Mr. Loveless has also twice served on the Texas Supreme Court Child Support Guidelines Committee and on Manual Revisions of the Texas Family Law Practice Manual Committee, Texas.



Gender Bias In Our Practice and Our Courts, Fact or Fiction? JJ-i

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GENDER BIAS IN OUR PRACTICE AND OUR COURTS

FACT OR FICTION?

I. INTRODUCTION

Henry Kissinger, former Secretary of State, was quoted as saying that "the battle of the sexes will never be won as long as each sex keeps fraternizing with the enemy." This article takes a look at that fraternization and how both the legal system and the legal profession are coping with it.

II. GENDER BIAS AND TEXAS FAMILY LAW

A. Community Property Principals: Can We Blame It All On The Conquistadors?

Texas' community property system is a remnant of the Spanish colonial presence in Texas and Mexico. Old hispanic property principals were remarkably progressive for their time in that they recognized certain property rights for married women. Specifically, under hispanic marital property law, the property brought into a marriage by a woman remained her separate property. More importantly, a married woman retained the right of control over her separate property.

While the right of control over separate property and other old hispanic marital property rights are now taken for granted, it is important to remember that women had almost no property rights whatsoever under most

European legal systems until the twentieth century. For example, early nineteenth-century Anglo-American law recognized a married woman's property rights only to the extent that she possessed real estate at the time of marriage. And, after marriage, all right to control separate property real estate, as well as the right to control all other marital property, was in the hands of the husband. As to personalty, Anglo-American law simply did not recognize any separate property rights for married women.

In 1840, the Congress of the Republic of Texas enacted a system of marital property law that was primarily derived from these hispanic community property principles. Following Texas' entry into the Union in 1845, the Texas Constitution included a provision that recognized the hispanic principals of separate and community property. Texas' approach was, however, more conservative than the hispanic approach because there were no provisions for control of property, separate or community, by the wife during marriage. Also, since divorce was not recognized under old Spanish law, there were no provisions for division of property upon divorce.

In the years following statehood and up until the early years of the twentieth century few changes were made to Texas marital property law. The resistance to reform and greater recognition of property rights for married women was due, at least in part, to the locally

generated myth of the "great liberality" toward married women in Texas' community property system. Joseph W. McKnight, Texas Community Property Law: Conservative Attitudes, Reluctant Change, 56 L. & Contemporary Prob. 71, 82 (1993). As noted earlier, the hispanic principals retained in Texas were progressive for the mid-nineteenth century; however, these same principals were considered inadequate and conservative by the late nineteenth century. Most states' marital property laws liberalized considerably during the last part of the nineteenth century.

Texas did not begin to follow the liberal trend until the early twentieth century when the women's suffrage movement ushered in a new period of change for Texas marital property law. In 1911, the legislature enacted a statute permitting a married woman to petition for judicial removal of the disabilities of coverture for business purposes and to acquire full contractual power in that context. 1911 Tex. Gen. Laws 92, §§ 1-4. Although the statute still required the husband's consent, it represented a considerable advance in married women's property rights. McKnight, supra at 82.

In 1913, the husband's sole control of the community estate was broken when the legislature gave wives control of their earnings and the profits from their separate estates. Prior to this legislation, the husband was the manager of all the community

estate as well as the wife's separate property, subject only to the requirement that the wife join in any conveyance of the homestead or her separate property. Id. at 82 n. 75. The 1913 act also was significant because, for the first time, it protected property subject to the wife's control from her husband's creditors.

Although the legislative changes of 1913 represented a significant step forward for married women, the scope of the reform was somewhat limited. A married woman's contractual power was still restricted and this represented a great impediment to her exercise of her newfound property rights. This impediment remained until the 1960's despite the significant changes in social attitudes and demands for reform that were brought about by the great depression and World War II.

The final demise of statutorily based gender discrimination in marital property law took place in the 1960's. In 1963, the legislature responded to a reformist drive for a constitutional amendment to eliminate all gender based discrimination by enacting legislation that removed nearly all gender based restrictions on the property rights of married women. 1963 Tex. Gen. Laws 1189 § 6. Two years later, in 1965, the grounds for divorce were made gender-neutral. 1965 Tex. Gen. Laws 1634 § 1. Finally, the legislature passed the gender neutral Matrimonial Property Act of 1967. 1967 Tex. Gen. Laws

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735. This act, which became effective on January 1, 1968 and was the first of its kind in the United States, signified the end of statutorily based gender discrimination in Texas' marital property law.

Although most other statutory forms of gender based discrimination were legislatively abolished by the end of the 19-60's, the total elimination and future prohibition of statutory gender discrimination was assured in 1972 with the adoption of the Texas Equal Rights Amendment. Tex. Const. of 1972, art. I. § 3a. Of course, while the legislature and the constitution eliminated gender based discrimination in Texas family courts, neither was able to eliminate past, present or future gender based discrimination practiced by the individuals, both men and women, who practice and administer law in Texas.

B. SAPCR

Before Title 2 of the Family Code was enacted in 1973, suits affecting the parent child relationship were guided solely by caselaw. As far as custody of children is concerned, the gender neutral best interest of the child standard (currently found in Family Code § 153.002) has been the controlling principle for most of the twentieth century. See Brown v. Brown, 500 S.W.2d 210, 217 (Tex.Civ.App.--Texarkana 1973, no writ). The underlying principles and considerations in interpreting a child's best interest varied significantly, however, from the

factors now relied upon under Title 2.

Prior to Title 2, Texas courts followed a "well recognized rule of law" to the effect that, other things being equal as between the parents of a child, it is presumed that primary custody by the mother is in the child's best interest unless she is found to be unfit. Crawford v. Crawford, 256 S.W.2d 875, 879 (Tex.Civ.App.--Amarillo 1952, no writ); Liska v. Hall, 357 S.W.2d 601 (Tex.Civ.App.--Dallas 1962, no writ). This rule of law was known as the tender years presumption. The tender years presumption did not, however, have the effect of a legal presumption; rather, it was viewed more as a "preference." Erwin v. Erwin, 505 S.W.2d 370, 372 (Tex.Civ.App.--Houston [14th Dist.] 1974, no writ); Lynch v. Wyatt, 191 S.W.2d 499 (Tex.Civ.App.--Texarkana 1945, no writ). This distinction was important because it ensured that a court's decision to award custody to the father where the mother was not an unfit parent was not automatically considered reversible error by Texas appellate courts. This provided trial courts with broader discretion when deciding custody issues.

Official judicial recognition of the tender years preference came to an end when the gender neutral best interest of the child standard was codified in the original Title 2 of the Family Code. See Adams v. Adams, 519 S.W.2d 502, 503 (Tex.Civ.App.--El Paso 1975, no

writ). Simply put, Title 2 put an end to any official reliance upon gender as a factor, determinative or otherwise, in custody disputes. See also Texas Equal Rights Amendment, Tex. Const. of 1972, art. I. § 3a. But, as with most other aspects of American and Texas jurisprudence, the statutory prohibition on gender based custody decisions was incapable of eliminating the unofficial bias caused by years of social conditioning and judicial acceptance. As any experienced family law practitioner or judge can attest, such unofficial and unstated (usually) bias is still present in many Texas courts today, especially in rural communities.

III. PROPERTY DIVISION UPON DIVORCE

Despite the gender-neutrality of the Texas Family Code, gender bias still often plays a significant role in the division of community property upon divorce. Texas courts can divide the community estate any way they see fit, so long as the decision is "fair." Unfortunately, a division upon divorce that appears "fair" to the judge may actually serve as a de facto sentence to poverty for a party who has not consistently worked outside the home throughout the marriage. Texas' prohibition on dividing separate property and, until recently, long-standing prohibition on alimony, often insures that the stay-at-home partner will not be sufficiently compensated for investment of human capital into the home front and the subordination of

their earning ability to the promotion of the other spouse's earning ability. Even the legislature's decision to allow alimony will not significantly alter this situation because the alimony statute provides relief under very limited and egregious circumstances.

According to the Final Report of the Gender Bias Task Force of Texas, the negative financial consequences of property division upon divorce are disproportionately placed on women. Final Report, Gender Bias Task Force of Texas (Feb. 1994), at 45-50. Simply stated, even an disproportionate division of property in favor of the economically dependent spouse oftentimes will not adequately compensate for the differences in earning power between the spouses.

Moreover, the economically dependent spouse often cannot adequately protect or pursue his/her legal and financial rights because temporary spousal support and interim attorney's fees awards are not sufficient or non-existent. Specifically, the economically dependent spouse may be forced to enter into an unfair settlement agreement or may not have the resources to adequately present his/her facts to the court. This subject is analyzed in more detail in Section VI, infra.

IV. CONSERVATORSHIP

A. Possession and Access

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Although Texas and nearly every other jurisdiction in this country have abolished the "tender years" presumption in favor of the "best interest" test, an implied "tender years" presumption refuses to die in many courts in this state. The "tender years" presumption essentially presumes that it is in a young child's best interest for the mother to retain primary custody unless the mother is shown to be unfit. See *supra* § IIB.

Over the past few decades, Legislatures and courts slowly began to realize that that belief was based more on stereotypes and bias than on scientific fact. As a result, the courts are now supposed to apply the gender neutral "best interest" test. But no matter how explicit the law is, fathers are often thought to be the "underdog" in custody cases because many segments of society still perceive that infants and small children should be with their mothers.

This "underdog" status for fathers is bolstered by the fact that most sitting judges grew up at a time when mothers stayed home with their children. Despite protestations to the contrary, most judges cannot totally disassociate themselves from a lifetime of traditional social conditioning. The contradiction in this mindset is that, currently, the overwhelming majority of the children before judges have two working parents or one working parent and a parent who will be forced to enter the full

time job market immediately after the divorce is final.

Fathers are not alone, however, in facing bias during custody proceedings. The biased belief that fathers lack the innate parenting ability of mothers is directly related to the presumption that infants and small children belong with their mothers. Unfortunately, this belief often has the side-effect of holding mothers to a higher standard than men in custody disputes. For example, since fathers have traditionally played a more marginal role in parenting, a father who is involved with his children is often regarded as "super dad" even if the mother has always been the primary caretaker. The differing standards for the dating habits and relationships of the mother and father provide another example of the bias women face in custody cases. If a mother dates or has a boyfriend, this is often used against her or is perceived as a "bad" fact. On the other hand, a new girlfriend for the father is often seen as a plus because the new girlfriend is a stabilizing influence and can help care for the children.

B. Gender Bias in the Expert

Ideally, the mental health expert in a custody case should focus solely upon the best interest of the child. Gender bias should play no role in the expert's findings. If gender bias does affect the expert's opinion, there is a grave risk

that the aggrieved party's rights will be substantially prejudiced. The reason is simple. Courts normally presume that lay witnesses are biased to some extent. In fact, these biases are often brought out during testimony. However, with an expert witness, courts tend to assume that the expert's opinion is scientific and unbiased. Even if the expert is hired by a party, the court may only recognize a bias based on that fact instead of the more insidious bias, namely gender bias.

Mental health experts face the same type of bias inducing factors as lay witnesses. They may have been unconsciously socialized into believing that women are inherently more capable to raise children than men. Alternatively, the expert may have been a party to, and lost, a disputed custody fight. In this situation, it may be impossible for the expert to avoid confusing his or her personal issues with those in the case at hand.

While there is no way to guarantee that an expert is unbiased or his or her bias will be noted by the court, it is vital for the practitioner to take the steps necessary to discover any bias that might exist. Aside from discovering whether the expert has been involved in a divorce or custody dispute, it may also be useful to know the extent of the expert's personal history with his or her own mother and father. Regardless of how the bias came about, it is

the attorney's job to recognize its existence and bring it to the courts attention.

C. Child Support

In theory, the Texas Family Code has eliminated gender based bias from the establishment and collection of child support by removing, for the most part, judicial discretion in this area of the law. Under the current code, child support is supposed to be established by specific guidelines regardless of sex. As to failure to pay child support, Texas court's have little discretion when a contempt motion is brought.

Unfortunately, according to the Gender Bias Task Force of Texas, a parent's gender still has a significant impact upon the establishment and collection of child support. Final Report, Gender Bias Task Force of Texas (Feb. 1994), at 58-64. The Task Force found that many litigants and attorney's feel that custodial fathers receive disproportionately lower child support amounts than custodial mothers. Id. The Task Force also found a perception that, when warranted, noncustodial fathers' requests for decreases in child support are granted less frequently than warranted requests made by non-custodial mothers. Id.

The complaint heard most frequently regarding bias against women in this area centered around enforcement of child support awards. According to the Task Force, many women face significant difficulties in

enforcing child support awards. Id. These difficulties range from the financial obstacles faced by women in pursuing child support violation claims to the perception that many judges are too lenient or too reluctant to exercise their contempt powers.

Why are these problems attributed to women? The answer is relatively simple and obvious. Although these problems are certainly faced by parents of both genders, women are still awarded primary custody more often than men. This means that more men than women are obligated to pay child support. Therefore, all other things being equal, the number of men who fail to pay their child support should be proportionately larger than the number of women who fail to pay.

Current economic realities are also partly to blame for the gender bias in enforcing child support awards. The average income for a woman remains below that of a man. It necessarily follows that the average single mother faces significant financial obstacles in pursuing enforcement of a child support award.

V. DOMESTIC VIOLENCE

Domestic violence is a sad constant in the family law arena. According to the Texas Department of Human Services, 639-,712 Texas women were physically or sexually abused by their male intimate partners in 1992. See Final Report, Gender Bias Task Force of Texas (Feb. 1994), at

66. In many situations, violence is present long before the courts get involved. But, domestic violence often begins or increases during divorce proceedings because the psychological bases for such destructive behavior, such as anger, disappointment, depression, etc., are found in nearly every divorce. As reflected in the statistic cited above, the vast majority of the time, the target of domestic violence is the woman. Sadly, children are also subject to domestic violence with nearly as much frequency as women.

Where the spouse is the sole victim of the domestic violence, the only legal solution is a protective order. Unfortunately, according to the Gender Bias Task Force Final Report, the Texas justice system does not sufficiently protect women from violence. This is primarily due to the fact that protective orders are often difficult to obtain and are not strictly enforced. See id.

Moreover, female victims of domestic violence often face financial difficulties in protecting themselves. This is especially true with women who do not work outside the home and have limited access to money. On an immediate level, many women have insufficient resources to leave their home, which is where most domestic violence takes place. The alternative, obtaining an injunction restraining the husband from entering the home, usually re-

quires extensive funds for legal expenses.

Additionally, female victims of domestic violence face prejudice even after they bring the legal system into the fray. Courts, prosecutors, law-enforcement personnel, and others often treat domestic violence less seriously than other crimes. A woman's motive and credibility is almost always questioned and battered women are sometimes blamed for causing the abuse or suffering through it.

Men also face problems with domestic violence. A male who is the victim of domestic violence must either hide that fact or brace himself for the scorn and ridicule of a society that still views women as the weaker sex and a male who is physically abused by a woman as something less than a man. Also, a male who is the victim of domestic violence but defended himself may be viewed as the aggressor simply because he is male.

VI. COURT ACCESS

In family law situations, especially those involving children, one party usually faces greater financial obstacles in gaining access to the court system than the other party. Typically, the disadvantaged party is a woman. The obstacles to the courtroom are generally caused by a lack of sufficient funds to retain appropriate legal counsel and/or pursue an effective and comprehensive legal strategy.

Why is the financially disadvantaged party normally a woman? Because it is still accepted in our society that the mother should stay at home with the children or, at the very least, allow her parenting responsibilities to take precedence over her work outside the home. In essence, mothers in this situation invest their time and efforts into an activity that is certainly meaningful, but does not produce significant financial rewards.

In the divorce context, Texas has attempted to address this problem through Family Code § 3.58(c)(4), which provides for the payment of interim attorney's fees and expenses by one spouse for the benefit of the other spouse. Tex. Fam. Code Ann. § 3.58(c)(4) (Vernon 1995). To obtain an award of interim attorney's fees and expenses, a spouse must show: (1) a need, and; (2) a source. Unfortunately, the protection afforded by the interim fees provision does not always work in practice. While it is often very easy to prove a client's need, establishing a source is usually much more difficult. For example, in a divorce situation where the wife is a mother who is not employed outside the home and the community estate consists of little more than equity in a homestead and a large mortgage, a source is difficult to find. The husband in this situation usually has the ability to retain counsel because his income provides him with a consistent liquid source of funds. This is true even if the wife is awarded

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interim spousal support and child support. Many attorneys would be more willing to represent the husband because their chances of getting paid over the long term are much greater since the husband will still have a reliable income source once the divorce is finalized. On the other hand, the wife will have to enter the work force with no assurance that she will achieve financial security. In this situation, few attorneys would be willing to represent the wife because they would expose themselves to the financial risk that they would never be paid.

Reluctant judges also add to the financial obstacles for the financially disadvantaged spouse. According to the Gender Bias Task Force survey, two-thirds of male attorney respondents and three-quarter of female attorney respondents indicated that judges rarely or never award sufficient interim attorneys' fees to allow the economically dependent spouse to pursue litigation effectively. Final Report, Gender Bias Task Force of Texas (Feb. 1994), at 49.

Geography presents another potential obstacle to court access for the financially disadvantaged spouse in a divorce action. It is a well known fact among family law litigators that courts in certain counties are traditionally more hesitant to award interim fees.

Wives are not the only parties, however, who face financial obstacles to the courts.

Society has evolved enough that there are now a significant number of families with stay-at-home fathers and primary income earning mothers. There are also many marriages where both spouses work outside the home but the wife earns and has access to a significantly greater amount of money than the husband. In both these situations, the husband's legal rights may be prejudiced by his lack of access to funds. But, unlike a woman in these situations, the husband faces more than just the problem of proving a "need" and a "source" to obtain interim fees. Typically, he must also overcome the antiquated prejudice and misplaced shame associated with a man who must be supported by a woman. It is not uncommon for a husband in this situation to decide not to seek interim fees simply because of the stigma attached to such support.

VII. ATTORNEYS

Gender bias can be found in all segments of society, so it should come as no surprise that gender bias exists among and between attorneys. Gender bias in the legal workplace takes many forms. Statistics show that female attorneys still face, to some extent, a "glass ceiling" when it comes to attaining partnership status. Whether this stems from the continued existence of the "old boy network" or from a more unconscious bias is the subject of much debate, but the fact remains that a disproportionately small percentage of women are offered partnership. Women also

face gender bias in more mundane ways, such as offensive or demeaning comments in everyday conversation or in a contested hearing at the courthouse. For an in-depth analysis of gender bias in interpersonal relationships, both social and professional, see Richard Orsinger, Gender Issues in the Everyday Practice of Family Law, 18th Annual Marriage Dissolution Institute (1995), at § P.

VIII. JUDGES

Gender bias in the courtroom can take many forms, ranging from demeaning speech and attitudes toward female attorneys and litigants to judgments based upon improper gender bias and stereotypes. It is unrealistic to expect judges, most of whom in Texas are middle aged males (Dallas County being the exception), to put aside a lifetime of social conditioning. The best approach is to recognize this fact and deal with it by educating individual judges about the existence and pervasiveness of gender bias. Only after this is done is it possible to actively avoid gender bias in the courtroom.

As to gender bias in rendering a decision, it is important for the attorney to bring every underlying detail to the judge's attention. For example, some judge's have forgotten how difficult it is for a single mother to make ends meet. It is hard to expect a fifty-five year old male judge to understand the economic realities that face a newly divorced mother who has

not worked outside the home in twenty-five years. From the male perspective, it is equally difficult for most judges to understand the problems faced by a recently unemployed older husband who, because of his age, is unable to find job with a salary commensurate with his experience and abilities. It is the attorney's job to re-educate their judge.

IX. JURIES

There is, perhaps, no more important phase of a jury trial than voir dire. Voir dire enables the litigator to eliminate members from the panel whom he/she perceives will not be sympathetic to her client. There are two traditional methods for eliminating a potential juror. First, a juror may be stricken for cause, which means that the attorney has a statutory ground for that potential juror's disqualification. The number of strikes for cause are unlimited. Jurors who cannot be stricken for cause may still be eliminated through the exercise of a preemptory strike. The number of preemptory strikes are limited to six in a district court and three in a county court. TEX. R. CIV. P. 233.

At the heart of the preemptory challenge is the perception that the composition of a jury affects the jury's verdict. In evaluating the composition of a jury, lawyers recognize that jurors will rarely admit to their biases and prejudices. Trial attorneys have traditionally mitigated this problem by

relying on preemptory strikes to form juries that are to their liking. Peremptory strikes guarantee a party a measure of control over the unspoken bias of a particular juror either against the party or in favor of their opponent.

Recently, the United States Supreme Court severely limited the lawyer's control over the make-up of the jury panel by limiting his/her use of the peremptory challenge. In J.E.B. v. Alabama, 114 S.Ct. 1419 (1994), the Court prohibited discriminatory preemptory strikes based on gender. Id. at 1421. The Supreme Court's ruling in J.E.B. is only the latest in the series of decisions that have severely limited the litigator's ability to choose a jury. Trial lawyers are now prohibited from basing jury strikes on the basis of the jury panelist's race, gender, and possibly religion.

Despite the holding in J.-E.B., it is probably time for men and women attorneys to stop pretending there is a difference between men and women, especially when dealing with juries. The evidence for innate sexual differences is mounting rather than disappearing on the scientific front. Where it was once believed that the differences were sociological, studies are revealing biological based difference. For example, there is some evidence that the bundle of nerves that allows the right half of the brain to communicate with the left is larger in women than in men. (Texas Bar Journal - get cite). If this proves to

be true, it would allow greater cross-talk between the right and left side of the brain in women and perhaps explain what is commonly called "women's intuition" because it would allow greater ability to read emotional cues. Whether biological or learned, it is a great resource that is not used often enough by women in the courtroom.

A. Batson and Its Progeny

Formerly, preemptory challenges could be used to eliminate jurors for any reason whatsoever and neither party was required to explain or justify their use of the preemptory strike. This broad ability changed with Batson v. Kentucky, 476 U.S. 79 (1986). The basic holding in Batson is that there is a violation of equal protection of the law under the 14th Amendment if the state uses its preemptory challenges to systematically remove blacks from a jury solely because of their race or on the assumption that blacks as a group will be unable to impartially consider the state's case against a black defendant.

Subsequent Supreme Court cases shifted the focus and broadened the reach of Batson. Under the current Supreme Court case law, the Batson principals now apply to both civil and criminal cases, and may be claimed by jurors and parties/defendants without regard to the claimant's race. See Georgia v. McCollum, 112 S. Ct. 2348 (1992); Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991); Powers v.

Ohio, 499 U.S. 400 (1991). And, under the holding in J.E.B., the Batson principles now prohibit peremptory challenges based solely upon gender.

In J.E.B., the state of Alabama sued in civil court to establish paternity and obtain child support for a minor. The state's attorney used nine of its ten preemptory strikes on male venire members. In prohibiting gender-based preemptory strikes, the Supreme Court held:

We have recognized that whether the trial is criminal or civil, potential jurors as well as litigants have an equal protection right to jury selection procedures that are free from state sponsored group stereotypes rooted in, and reflective of, historical prejudice. . . . We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

Id. at 1421.

B. Criticisms of J.E.B v. Alabama

Few people can find fault with the reasoning in Batson. Batson, in essence, prohibited prosecutors from systematically removing black people from a jury when the criminal defendant is also black. It is believed by most that Batson was neces-

sary to vindicate black defendants' right to a fair jury selection process. But the Supreme Court has subsequently twisted and extended the sound principles of Batson to such an extent that the reasoning in recent cases runs counter to common sense.

In McCullum, the Court turned its attention to the constitutional rights of the prospective juror instead of the constitutional rights of the defendant or party. McCullum, 112 S.Ct. at 2353. This reasoning represents a completely different approach than the sound reasoning found in Batson, and is arguably unsound. As Justice Thomas noted, the post-Batson line of decisions has "exalted the right of citizens to sit on juries over the right of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." J.E.B. followed the same reasoning as McCullum and represents a further step toward valuing jurors rights over that of a defendant or party.

Another concern with J.E.B. and, to some extent, its antecedents is the burden that the continually expanding rules regarding jury selection place on the litigants and the courts. As Justice Scalia noted in his Edmonson dissent, courts are almost certainly going to be forced to expend enormous amounts of time litigating the gender-neutrality of peremptory challenges. Edmonson, 500 U.S. at 645 (J. Scalia dissenting).

Whereas race based Batson challenges are limited in number because there are limited opportunities for race based peremptory strikes and they are relatively easy to identify, gender based challenges will almost certainly arise more often because the population is roughly divided equally between male and female. Moreover, prohibiting gender based challenges may only serve to complicate an already "Byzantine system of justice that devotes more and more of its energy to sideshows and less and less on the merits of the case." Id. Perhaps Justice Scalia should be credited with predicting the O.J. Simpson media and legal "event".

Arguably, the most significant flaw behind J.E.B.'s reasoning rests in its blatant disregard for common sense. The majority opinion states that lawyers have no rational basis for using sex-based peremptory strikes because ". . . gender plays no identifiable role in jurors' attitudes. . . ." J.E.B., 114 S.Ct. at 1420. This statement simply flies in the face of common knowledge. For better or worse, an individual's personality, biases, and prejudices are shaped in large part by their gender. While an individual's gender does not provide a rational basis for speculation as to how that person will vote on a case in every situation, there are certain situations where gender may play a significant role in a juror's vote. This is especially true in family law. As Justice O'Connor noted in her concurrence, "one

need not be a sexist to share the intuition that . . . a person's gender and resulting life experience will be relevant to his or her view" of some cases, such as those involving ". . . child custody, or spousal or child abuse." Id. at 1431 (J. O'Connor concurring). Unfortunately, by pretending that gender is not a factor in an individual's biases or prejudices, the Court has stretched the logic of Batson beyond recognition, and thereby done a disservice to one of the Court's more noble and note-worthy opinions.

C. Ramifications of Batson and Its Progeny

While the Supreme Court certainly chose the high-road in its decision in J.E.B. (or at least the politically correct road), such moral satisfaction does little to assuage the anxiety of family law litigators and trial lawyers in general. Trial lawyers are traditionally a superstitious, intuitive, and instinctive group. In choosing a jury, most trial lawyer's tend to play hunches. In practice, these hunches are often based on race, religion, and/or gender.

Gender based peremptory strikes that are based on hunches or stereotypes are extremely common in family law litigation. Family law cases, by definition, generally involve a petitioner of one gender and a respondent of another gender. Even Justice O'Connor, in her J.E.B. concurrence, noted that the Court's decision is not without its cost. In its endeavors to pro-

fect the prospective juror from gender discrimination, the Court denies a party from utilizing the "intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case." J.E.B. v. Alabama, 114 S.Ct. 1419 (1994).

Common sense tells us that in no other field will gender and resulting life experience be more relevant than in family law cases. For example, with all other things being equal, the thought of an all female jury in a custody battle would create despair in even the hardiest trial lawyer if he or she represents the father. Similarly, in the case of religion, very few attorneys who represent a working mother in a custody battle would welcome a jury that consists primarily of fundamentalist Christians who, because of their religion and traditional mind-set, might harbor a strong belief that a mother's place is in the home. Although the above examples are extreme and based on stereotypes, they are meant to instruct rather than to offend. They serve as an example of the type of situations where a family law litigator would almost certainly desire to exercise preemptory strikes for reasons that are no longer constitutionally valid or politically correct.

As a practical matter, Batson and its progeny simply require the trial lawyer to work that much harder during voir dire. In reality, race, gender, and religion often result in a

bias or prejudice that can provide the basis for a valid preemptory strike or a strike for cause. The key is to expose that bias or prejudice, thereby providing a valid and articulable basis for the preemptory strike. For example, counsel for the father in a custody case will typically be suspicious of any female venire member. That does not necessarily mean that he will automatically want to strike all female venire members; rather, he will spend extra time on female venire members to determine whether their gender and resulting life experience have caused an impermissible bias.

In this respect, the Texas Family Code has preserved, to some extent, the family law litigator's ability to strike a potential juror, whether male or female, in a custody case. Section 14.01(c) of the Texas Family Code states that the Court must consider the qualifications of the respective parents without regard to the sex of the parent. Tex.Fam.Code Ann. Section 14.01(c) (Vernon 1994). If the lawyer can establish that the potential juror is biased because they possess the traditional maternal preference, then the biased juror can be validly struck from the panel. The attorney should consider asking the jury panel questions such as:

If all you knew about this lawsuit was that Mr. Jones and Mrs. Jones both want custody of their two year old daughter, how many of

you would award custody to Mrs. Jones?

How many of you folks think a dad should not have custody of infant children?

How many of you folks think that Mr. Jones is going to have to prove Mrs. Jones is unfit as a mother before you could award him custody?

These questions or similar other questions will help detect pro-mom venire members.

Conversely, there are ways to detect pro-dad jurors. For example, consider asking the jury panel questions such as:

If all you knew about this lawsuit was that Mr. Jones and Mrs. Jones both want custody of their two year old daughter, how many of you would award custody to Mr. Jones?

How many of you believe that, everything else being equal, our legal system is geared toward awarding a mother custody?

When seeking to detect pro-dad jurors, it is also helpful to look at the prospective jurors involvement in organizations such as Fathers for Equal Rights, or their past involvement with the family courts.

The situation becomes much more difficult if there is no statutory support for striking an unwanted venire member. To

lodge a peremptory strike that is valid under Batson and its progeny, the lawyer must be able to state an articulable reason for wanting to strike the juror other than one that is based on race, religion, or gender. For obvious reasons, this will require more questioning than was required in the past. If the lawyer looks long enough, she or he is almost certain to stumble upon a permissible, articulable reason for striking a potential juror. The articulable reason may be based on tangible things such as what the juror reads, what television shows he or she watches, where the juror lives, or the juror's past involvement with the legal system. This approach requires exhaustive and often repetitive questioning.

An articulable reason can also be based on an intangible such as body language. Even a potential juror with the slightest bias will evidence some significant body language. Body language can provide the lawyer with an especially effective articulable reason for a peremptory strike because it is an extremely subjective area. What amounts to significant body language to one observer is often a mere itch to another. Moreover, most trial lawyers will attest to the fact that voir dire is a long, boring and repetitive process. It is simply impossible for the judge and opposing counsel to keep their eyes on the perspective jurors at all times. This leaves the door wide open for the attorney to base a peremptory strike on even the most subtle body language. Because

this area is so subjective, a lawyer who bases a strike upon body language should carefully note the body language and the area of questioning at the time.

Society's continually evolving perception of the appropriate roles for men and women is another factor that potentially mitigates the impact of J.E.B.. While the legal profession is slow to accept new ideas, the new reality of gender roles and perception in our society has nullified many of the old stereotypes. Jury experts are now leaning toward a belief that traditional stereotypes are no longer a distinct indicator of a potential juror's vote. The last thirty years of unprecedented social changes in our society have effectively produced individuals with more complex and disparate personalities. For example, it is now entirely possible that a jury pool will contain individuals who were raised by a stay-at-home father and a working mother. Everything else being equal, counsel for the father in a custody case would probably prefer to have a juror with this life experience on the panel regardless of the juror's gender. In short, appearances are more deceiving now than ever. What counts is real life experiences, which can only be discovered through extensive, thorough, and probing voir dire questioning.

X. THE LAW OFFICE

While the courtroom is a public forum where judges and juries often must at least appear to be "politically correct", behind closed doors in the law office may be a different matter.

The following is a poignant example of that:

IMPRESSIONS FROM AN OFFICE

By: Natasha Josefowitz

The family picture is on HIS desk.

Ah, a solid, responsible family man,

The family picture is on HER desk.

Umm, her family will come before her career.

HIS desk is cluttered.

He's obviously a hard worker and a busy man.

HER desk is cluttered.

She's obviously a disorganized scatterbrain.

HE is talking with his co-workers.

HE must be discussing the latest deal.

SHE is talking with her co-workers.

SHE must be gossiping.

HE's not at his desk.

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He must be at a meeting.

SHE's not at her desk.

She must be in the ladies' room.

SHE's not in the office.

She must be out shopping.

HE's having lunch with the boss.

He's on his way up.

SHE's having lunch with the boss.

They must be having an affair.

The boss criticized HIM.

He'll improve his performance.

The boss criticize HER.

She'll be very upset.

HE got an unfair deal.

Did he get angry?

SHE got an unfair deal.

Did she cry?

HE's getting married.

He'll get more settled.

SHE's getting married.

She'll get pregnant and leave.

HE's having a baby.

He'll need a raise.

SHE's having a baby.

She'll cost the company money in maternity benefits.

HE's going on a business trip.

It's good for his career.

SHE's going on a business trip.

What does her husband say?

HE's leaving for a better job.

He knows how to recognize a good opportunity.

SHE's leaving for a better job.

Women are not dependable.

The reaction of the men in my office to this piece was that it was true. The women's reaction was that that is how men perceive women - but that it is not an accurate perception - but rather gender bias at work.

There have been several studies done in recent years by such groups as the Department of Labor, U.S. General Accounting Office, the Feminist Majority Foundation and others that have been labeled "Glass Ceiling" studies. The Department of Labor defines the term "glass ceiling" to mean artificial barriers based on attitudinal or organizational bias that prevent

quality minorities and women from advancing into mid- and senior-level management positions. Labor Department Report on the Glass Ceiling Initiative, Daily Lab. Rep. (BNA) No. 154, at D-1 (Aug. 9, 1991).

One controversial study conducted by the Feminist Majority Foundation concluded that women will eventually reach the top of America's corporate ladder. The Feminist Majority Foundation, Empowering Women Series No. 1, Empowering Women in Business, at 1-2 (1991). Of course, the study also concluded that "it will be 475 years, or the year 2466, before women reach equality with men in the executive suite." Id.

Statistics show that a definite glass ceiling is in place in the law office as well. It is not just anecdotal. One in five lawyers in the United States is a woman (one in four in Texas) and yet the ABA's Young Lawyer Division prepared a report in 1990 which found that 81% of all women attorneys are associates in law firms, compared with 54% of men. Women Lawyers: A Status Report, Bar-rister Magazine, at 31 (Fall 1991). Although 45% of male attorneys are partners in firms, only 18% of female attorneys have achieved that level. Id. These numbers have been traditionally rationalized by arguing that women have only been in the profession a short while and that time alone will equalize the numbers. Diane F. Norwood & Arlette Molina, Sex Discrimination in the Profession: 1990

Survey Results Reported, 55 Tex. B.J. 50, 50 (Jan. 1992). This rationalization ignores the fact that women have been in the profession in substantial numbers for at least 10 years, and most attorneys make partners within that time frame. Id. Despite the opportunity for equality created by the increasing number of experienced women attorneys, the percentages are still far from equal.

The glass ceiling is not, however, the only problem faced by women attorneys. The Young Lawyers Division study also found that incidents of sexual harassment are alarmingly high in the profession. Every female junior associate who responded to the survey said she had experienced or witnessed an incident of sexual harassment in her career. Although most female attorneys will tell you that sexual harassment is becoming more subtle, some blatant sexual harassment does still exist.

One female attorney reported that one of her firm's partners recently made the following remark about her at a breakfast meeting of approximately 15 attorneys: "We offered our landlord several 'fringe benefits' in order to get a break on our new lease. One thing we offered was a night with Heidi. But, he said, 'No thanks, I've already had her.'" Id. at 51.

Sexual harassment in general is a type of sexual discrimination prohibited by state and federal laws. It includes a

wide range of unwelcome and offensive conduct. Specifically, there are two types of sexual harassment;

1. Quid pro quo harassment; and
2. Hostile work environment harassment.

Katrina Grider, et al, Sexual Harassment: The Reasonable Woman Standard in Hostile Environment Litigation, 55 Tex. B.J. 52, 52 (Jan. 1992).

Quid pro quo harassment occurs when employment decisions (such as hiring, firing, promotions, awards, bonuses, transfers, or disciplinary action) result from submission to or rejection of unwelcome sexual conduct. For example, in order to get a promotion, the employee must give in to sexual advances.

Hostile work environment harassment occurs when the activity in question creates a hostile or offensive environment for members of one sex - whether such activity is carried out by a supervisor or by a co-worker. This is the type that Anita Hill complained of. She apparently, according to her story, found references to "Long Dong Silver" offensive, which created an offensive work environment for her.

So, does this mean every time a pass is made by a co-worker or even a supervisor, that it is sexual harassment of the first type? Or every time a dirty joke is told, it is sexual

harassment of the second type? Neither one of these options seems realistic. Instead, we are going to have to find a balancing test. Women cannot scream "sexual harassment" with every dirty joke. However, they should not have to put up with what happen to Heidi - as described earlier. The courts are struggling with these issues now and will eventually find where to draw the line. What the courts cannot change or protect are the more subtle "sexisms" as were portrayed in the piece "Impressions From an Office."

XI. CONCLUSION

There have been many strides in the legal profession toward the elimination of gender bias for the litigant and the female attorney; but elimination of prejudices comes slowly. Further change will only come with education and awareness. The subtle (and not so subtle) ways that sexism is practiced is often taken for granted because of ignorance. We can eliminate gender bias in the practice of law and other professions only when we objectively identify some of those areas where discrimination may still exist.

