

講 演

WOMEN IN THE LAW: Forty Years of Experience

MARIE NAKANISHI MILKS

In my remarks to you today, I would like to share with you a view of the participation and influence of women in the legal profession over a period of 40 years. It starts with my law school education to the present time. You will hear about the changes that have taken place for women and of my own education and experience.

I also will talk a little about my personal and family background and what being an American of Japanese ancestry means to me. During my talk I will be expressing opinions about ethnicity, race and gender differences.

And, finally, I would like to offer you some words of advice and thoughts for you to consider during your studies and as you plan for your own future – in a very different world, especially because of the impact of technology.

Let us begin. After I completed my studies at the University of Hawaii, concentrating on Asian Studies, I moved to Washington, D.C. I joined the staff of Patsy Takemoto Mink who served as a representative from Hawaii to

the United States Congress. Congresswoman Mink was the first Asian to be elected to the U.S. Congress.

In 1967, while working for her, I decided to go to law school. When I started at Georgetown University Law Center in the Evening Division, I was the only Asian student and one of very few women students. It is my belief that schools across the country were accepting more women law students because some male students were being drafted to serve during the Vietnam War. Nevertheless, we were a very small number of students.

During the 1960's, the percentage of women in law schools and in the legal profession was just about 5%. There was only one woman on the faculty at my law school and, in fact, when she attended Georgetown law school in the 1950's, she was the only female student. [In the 1950's, women constituted only 1 to 2% of the legal field]

After graduating from law school and returning to Hawaii, I became a lawyer with the Office of the Public Defender. At that time (1973), I was the only female Japanese American trial attorney in the State of Hawaii. Women lawyers were in the minority, less than 10%, but by the late 1970's, this percentage steadily increased to 15%, as more and more women were accepted to law schools.

In 1981, a year after I was appointed as a judge, I attended a Symposium of Women in the Judiciary in Racine, Wisconsin. Justice Sandra Day O'Connor of the United States Supreme Court was one of the featured participants. It was suggested that as more women entered law school, those women would

later enter the legal profession, and that thereafter more women would be eligible for judicial positions.

In fact, the general trend for the past 4 decades has demonstrated a time lag trend. A political science professor offered her observation that “the national proportion of women judges [in America] matched the national proportion of women lawyers on a time lag basis by about 10 years. Therefore, the women who constituted 1 to 2 percent of the legal profession in the 1950’s were the 1-2% of the judiciary in the 1960’s; the 4% figure of women in the legal field in the 1960’s was later reflected as 4% of the judges in the 1970’s.”

In the later 1970’s and early 1980’s the percentage of women in law schools increased to 15% and in the next decade, the percentage of women in the judiciary showed a similar percentage of women judges.

[A side note: One of the speakers commented that in many countries around the world, the number of women lawyers and judges were so high – Russia for example – that it was not an attractive field for men, as the wages were correspondingly lower. Interestingly, women complained as teachers that the pay was low, but now with more and more men becoming teachers, some believe that it has contributed to higher pay for women.]

By the late 1980’s and early 1990’s the percentage of women in law schools increased to 35%. And, by the late 1990’s and early 2000’s, the percentage of women judges in Hawaii was 33%, closely tracking the percentage of women law students a decade earlier.

By the later 1990's, women constituted 40-45% of the law school student body. Thus, if one were to anticipate the same tracking percentage at the present time, the numbers of women judges in Hawaii should be nearing 40%. That, however, is not the case and the numbers have held steady at 33%.

Based on the previously-mentioned time lag trend, academics were expecting that in the early 2000's women would comprise nearly 50% of the judiciary. Although the number of women in our Hawaii State Judiciary has not increased as predicted, the 33% mirrors the very same number of women lawyers, which is at the least, reassuring.

Currently, at the William S. Richardson School of Law (the University of Hawaii Law School), women comprise 50-60% of the law school population. By 2010, at least half of the judges should be women if the tracking trend were to hold true.

The population of women lawyers in Hawaii has been steady at 33%. What is interesting to note is the fact that with respect to the younger attorneys – those who have been members of our bar association for less than 5 years, more than half (51%) are women.

We have a State Bar Association which more recently has required all attorneys to be members. As of today, only two (2) women have served as president of the association in the history of the bar association. The women who have been elected had to be exceptionally outstanding because a large majority of the voters have historically been male attorneys. I have a guess

on why this is so. Simply put, it reflects the fact that there are not as many women who are able and available for that position.

Studies have shown that women lawyers usually work in the public sector. Those who have government jobs do not have the flexible hours provided by private practice. Since this leadership position requires travel, several meetings and social events to attend, it is not compatible with the schedule of the public sector attorney. Therefore, proportionally less women offer themselves as candidates than the male practitioners.

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My mentors in law school and when I practiced law were men. During the seven years that I was a trial attorney, all of the judges that I appeared before were men; there were no other Japanese American women lawyers in the criminal law field and less than a handful in the legal profession.

Curiously, the judges who were most helpful to me were two Japanese American judges: Masato Doi and Yoshimi Hayashi. It is my belief that they were very interested in helping me to succeed – in part of our common ancestry.

Very few of my clients were women and of the male clients, few were of Asian descent. From discussions with fellow attorneys in my office and others of Asian descent, we felt that growing up with parents who lectured to us about shaming the family name and preserving family honor played a major role in deterring Asians from engaging in criminal behavior.

I was appointed to the bench in 1980. In the early 80's, I began to notice more and more Asian men, especially Japanese Americans charged with crimes. The majority of cases were drug and alcohol related offenses.

Although I am not a sociologist, my opinion is that repressed emotions lead to the use of these substances to embolden the ability to be more outspoken. Stereotypically, in Hawaii, Asians have been described as quiet and efficient, not outspoken and expressive as the Caucasians. Even one of our Japanese-American Governors was described during his campaign as "Quiet and Effective".

During the 1970's and 1980's, there was frequent discussion at trial practice seminars about ethnic/racial and gender differences between male and female jurors. In fact, during the process of selecting jurors, we intentionally excluded certain jurors from serving, oftentimes after taking into consideration their gender and ethnicity.

For example, in sexual assault cases when the victim was a woman who may have acted somewhat inappropriately, we were taught to keep women on the jury because they would be more critical and judgmental about the woman and favor the male defendant. In some cases, we would exclude Japanese jurors who would more harshly judge a fellow Japanese person. This was not a far-reaching consideration. In the State of Michigan, students in high school were to be judged by their fellow students and learned that they were better off with adult judges than their own peers who were more disapproving of their bad behavior.

Notably, by the 1990's, court cases and decisions emphasized equality in the fact-finding process. Thus, the strategy of striking certain jurors because of gender or ethnicity/race is not permitted. The United States Supreme Court and the State Supreme Courts have held that the exclusion of a juror based on ethnicity/race or gender deprives that individual of the equal right to serve on a jury.

In Hawaii and many of the U.S. states, women did not have the opportunity to serve on a jury until the mid-1950's. For all the years that I tried cases as a criminal defense attorney, I never knew of a case where a woman served as the foreperson (chief juror). Starting in the 1980's, more and more women began to serve as the head juror. Out of curiosity, I congratulated a jury for selecting a woman and they said the men voted to make her the head juror so she could take notes. I was not very pleased with that remark. Sometimes cases resulted in what we refer to as "hung juries" – meaning the jury could not decide on the verdict. In many of those cases, the jurors were predictably divided by gender.

One very interesting discussion amongst those who study jury trends is the impact of technology upon the younger population, sometimes referred to as Generation Y. Because information comes quickly and from so many sources, jury experts have stated that this young generation of jurors, are very impulsive and indecisive. But, when they decide to agree with the plaintiff (for example, the injured person who sues), they have no problem with awarding very large amounts of money.

I understand that in 2009, Japan will be initiating a jury trial system

which would be composed of 3 professional judges and 6 lay individuals. It will be interesting to see whether the Japanese experience will be similar or not to the American/Hawaii experience.

In discussing this matter with some of my colleagues, we agreed that there will be issues of age, authority, and gender. How will the lay jurors relate with the professional judges who may be older, but most assuredly trained in the law. Since it appears that the judges would be instructing the law jurors on the law, will the jurors defer to the judges or will they feel free to speak up and disagree? Will the women jurors be intimidated by male jurors or the male judges? Do the younger people in Japan defer to their older authority figures?

One of the judges in Hawaii reminded us that Japanese people have a deep appreciation and sense of duty and, if made to understand the seriousness of their function as jurors, will take their assignment seriously and be duty-bound to speak up and share their position.

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Now – in the first decade of the 21st century – have women made progress in the legal profession? Some will say we have reached a plateau and others will say there has been a slight backward trend. Note that in our United States Supreme Court, the number of women justices has declined back to one. In our Hawaii Supreme Court, we have never had more than one out of five. At the general jurisdiction level [more serious crimes, more costly civil litigation and where jury trials are heard], the number of women judges has declined slightly.

My opinion is that many people feel that women have achieved equality and that no further effort is needed to encourage increased opportunities. In other words, many feel that the job is done. It is my belief that because of the appearance of more women judges, there has not been the same pressure to appoint an equal number of women as men. The perception that there are already more than enough women judges is reflected in television and movies. Today, almost all the presiding judges are women.

Within the next 5 years in Hawaii, there will be several openings in the State Judiciary. It will be most interesting to see whether the number of women in the Judiciary will be stable or increase as it should.

Personal observations of my education and career.

Before I say anything more, let me say that I am very grateful for the fact that I was born and raised a Japanese American – a blending of two cultures – with the great traditional values of Japan, and the energy and progressiveness of America. It afforded me what the poet Kahlil Gibran referred to as roots and wings.

My father was born and raised in Hiroshima, Japan and practiced tea ceremony and archery. He was very demanding of good manners and concentrated effort. My mother was born in Hawaii but raised in Iwakuni, Yamaguchi Prefecture, and she was very obedient and respectful to her parents – a trait that I was not especially good at, but which was a part of my core upbringing. Very important to both my parents was that I study hard and produce good school grades and that I not do anything to shame or disgrace the family. I often heard my parents admonish me and my siblings

to behave – “What would the neighbors say?” Or, “*hazukashii*”.

When we did good work we were praised. It was a very reassuring concept because it was not just praise, there was a warmth that came with it. I am a strong believer that one encourages a pattern of positive behavior with positive re-enforcement – “*homeru*” was practiced well by my parents. I think it produced good results with me.

While discipline sets forth the acceptable limits and conformity provides a sense of comfort, one can always be living a constricted life which I find very Japanese. [In America, we refer to it as living “in the box.”] Being raised in the American way - taking risks and believing that the individual has rights, privileges and opportunities - also shaped me.]

You should be very proud of your heritage. Your Japanese roots define your character and your ethical behavior. You should strive to maintain the good qualities that speak well of being Japanese. Merely because conforming behavior limits your potential, does not mean that you should choose to give up your unique strengths and qualities and embrace a totally different way of life. You should hold to your basic core and essence, but learn to apply yourself in creative ways. That way, you can have the best of many worlds, even if you could only choose one culture.

In America, we speak often of “role models” – the individuals who we look to for guidance and instruction. In my very early years, my role models were mostly women, as we did not have many male teachers. I look back and understand that my first male teacher was my father. He was a waiter

and worked in the evenings, so I spent a lot of time with him during the day: we went to the beach, we rode the bus and we also spent time at the art academy. He introduced me to art and culture and an ease to meeting new people.

So, it was that I was comfortable with older men who were my role models, once I graduated from high school. Most of the university professors were male and, as I mentioned previously, all but one of the law school faculty were male. My very first mentor in law was a woman. Representative Patsy Mink demonstrated to me that a Japanese American woman could be a lawyer. But other than Representative Mink, virtually every other mentor in my forty years in the law were men.

I was extremely fortunate that Judges Hayashi and Doi supported and nurtured me. Nevertheless, I honestly believe that my Japanese heritage allowed me to be compliant and respectful of their authority, thus commanding me to listen to what they had to say. Some of my fellow non-Japanese American women lawyers did not appreciate being told spoken to by the judges and did not have the same degree of "supervision" that I did. The essence of being younger to the older judges meant that I was to respect them and heed them. So, rather than resist them, I accepted my role as student and allowed them to be my mentors and teachers. Sometimes, the American way of being independent is counter-productive.

As I listened and was nurtured, I grew. My learning became knowledge and over time, I hope I have acquired the wisdom of years.

Today, I do not work full-time as a judge as I have retired. Nevertheless,

I am a mediator and arbitrator and still work alongside judges and attorneys. As an arbitrator, I am still called upon to decide disputes; as a mediator, I am called upon to help resolve disputes so that cases do not have to be litigated in court. It is a most satisfying career.

Let me say that mediation has a place in the justice system, along with trials by judges and juries. More and more lawyers are channeling their energy to resolving cases by compromise rather than having to win or prevail through the more costly, emotional and adversarial process of the judicial process. As a woman, I believe I am valuable to this mediation process, as I can be non-threatening and can allow a very humanistic approach to solving a problem, rather than the combative stance that litigation can create.

All of us in the legal field should feel very fortunate that we have the opportunity to help and counsel others and to bring harmony to people's lives. It is a wonderful career and I am so glad to have been a part of it for the past forty years.

MARIE NAKANISHI MILKS

EDUCATION

Georgetown University Law Center – J.D. 1972 (evening division)

Columbia University – 1965 summer session

University of Hawaii – B.A. in History, 1966 (Phi Beta Kappa)

PROFESSIONAL EXPERIENCE

Circuit Court Judge, March 1984 to March 2004

District Court Judge, July 1980 to March 1984

Acting State Public Defender, 1980; Deputy Public Defender, 1973-1980

Research Assistant, 1973 Hawaii State Legislature

Research Assistant, U.S. Department of Justice, 1972

PROFESSIONAL ACTIVITIES

Faculty, University Hawaii Law School, 1980-1996, spring 2005

Faculty, National Judicial College, 1985 to present; Member, NJC Faculty
Council 1988 to 1991, 1995 to 1999

Faculty, National Institute for Trial Advocacy, 1986 to present

Faculty, Trial Advocacy Workshop, Harvard Law School, 1988 to 1990

Bencher (charter member), Aloha Inn of Court, 1982 to present

Member, Governor's Committee on Crime, 1987 to 1996

Member, Board of Directors, HI Institute of Continuing Legal Education,
1988 to 1995

Member, American Judicature Society; Special Committee on Business
Courts

COMMUNITY ACTIVITIES

Lecturer, People's Law, 1989 to present

Judge, Hawaii Speech League, 1974 to present

Coach, American Youth Soccer Organization, 1980 to present

Player, Women's Island Soccer Association, 1980 to present

Board of Directors, Girl Scout Council of Hawaii, 1986 to 1998; President,
1998 to 2002

HONORS

Hawaii Women Lawyers, 2004 Outstanding Jurist Award; 1997 President's Award, 1993 Distinguished Service Award

Hawaii State Bar Association, 2000 'Ikens Award' (legal education)

University of Hawaii, Outstanding Alumnus Award 1989

State of Hawaii, Department of Education, Outstanding Public School Graduate, Superintendent's Conference, 1988

Department of Education, PRAISE Hall of Fame Inductee, 1986

Girl Scout Council of Hawaii, Outstanding Woman of Hawaii Honoree, 1985

PUBLICATIONS

Case Screening and Selected Case Processing in Prosecutor's Office, U.S. Dept. of Justice

Meeting Defenses and Objections and The Appellate Record, National College of District Attorneys