



New Jersey Courts

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# BENCH GUIDE FOR ADDRESSING GENDER BIAS IN THE COURTS

NJ SUPREME COURT COMMITTEE ON WOMEN IN THE COURTS

## Scenario One

You are presiding over a domestic violence hearing involving two women. One of the alleged predicate acts of the domestic violence is the defendant's harassment of the plaintiff by telephoning the plaintiff's boss and identifying herself as plaintiff's lesbian lover. Plaintiff alleged the purpose of the telephone call was to embarrass the plaintiff and subject her to the disapproval of her conservative boss and coworkers. During cross examination, defense counsel repeatedly asks the plaintiff why she is embarrassed to admit the truth about *"the lifestyle you have chosen."* When the plaintiff's attorney objects, defense counsel responds, *"If she chooses to lead a lesbian lifestyle, she needs to deal with the consequences. They want to be recognized under the law, but want to choose whether to 'come out' or not."*

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## Responses Suggested by New Jersey Trial Judges

1. Since the comments made by the attorney are gratuitous and mean-spirited, I would move immediately to stop that conduct on the record. The attorney's comments have no probative value regarding the events that gave rise to the domestic violence charges and, if anything, tend to corroborate his client's purpose to harass the plaintiff through a third party. I would make a comment to the effect that cases are decided upon evidence presented in court and nothing else, and tell counsel to move on with his cross-examination.
2. I would cut off counsel with a statement such as "Counsel, the PDVA does not concern itself with the sexual orientation or "lifestyle" of the parties. The information you are seeking is not relevant to any issue before the court. The question I have to resolve is whether your client used personal information about the plaintiff, acquired as a result of a dating relationship, to harass her by revealing the information to a third party. As for your response to counsel's objection, I am not aware of any case or statute conditioning one's civil rights on whether one is 'out.' Objection sustained. Move on."
3. There is no reason for defense counsel to continuously ask questions about plaintiff's lifestyle. Such questions constitute acts of bias. Accordingly, I would have warned defense counsel to discontinue asking those questions. Defense counsel's response to plaintiff's counsel's objection is gratuitous, unprofessional and offensive. Given the egregious nature of the statement, I would advise counsel that such an attack is not acceptable in the courtroom and violates the RPC's admonition against conduct motivated by bias. If the conduct persists, I would consider referring the attorney to the County Committee on Professionalism or to the District Ethics Committee if there was a prior history of bias.

## REFERENCE FOR SCENARIO ONE

### Rules of Professional Conduct (RPC) 8.3 (a) Reporting Professional Misconduct

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

### RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

(g) engage in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

### Code of Judicial Conduct, Rule 3.5 Demeanor

A Judge should be patient, dignified, and courteous to litigants jurors, witnesses, lawyers, and others with whom the Judge deals in an official capacity, and should not permit lawyers, court officials, and others subject to the Judge's direction and control to display impatience or discourtesy or to detract from the dignity of the Court.

### Code of Judicial Conduct, Rule 3.6 (B) Bias and Prejudice

A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice on the bases specified in Rule 3.6(A), against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when the listed bases are issues in or relevant to the proceeding.

### Code of Judicial Conduct, Rule 3.6 (C) Bias and Prejudice

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6(A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so. This section does not preclude reference to the listed bases when they are issues in or relevant to the proceeding.

### Principles of Professionalism

The principles are promulgated by the NJ Commission on Professionalism in the Law. See also the Professionalism Counseling Program administered by county bar associations, and Court Directive #1-97.

## Scenario Two

You are presiding over a criminal matter in which the female public defender is wearing a hijab, the traditional head covering worn by many Muslim women. The defendant asks repeatedly for a new attorney. Finally, you ask him to state his objection to the attorney. He announces that he is fine with the “*Muslim lady*” but he doesn’t want the jury thinking that he, too, is Muslim. “*I got enough enemies as it is,*” he says.

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## Responses Suggested by New Jersey Trial Judges

1. I assume this conversation would occur outside the presence of a jury. I would deny defendant’s request. There is no reason for the defendant to inject this issue under these circumstances. It is clearly too prejudicial. The defendant has offered no good reason for requesting a new attorney since he stated he was otherwise “fine” with her.
2. I would tell the litigant his comments are offensive to his attorney as to both her gender and her faith. I would then advise him his right is to have a competent attorney assigned to him. He does not have the right to a counsel of his choice. I would then deny his request for the reasons stated.
3. Explain on the record to the defendant in the presence of the defendant’s attorney that the Court may not engage in the discriminatory behavior against his lawyer or anyone else. Offer to address his concerns in *voir dire*. A potential question is: Will anyone favor or disfavor a party in this matter based upon the attire of anyone in the courtroom? If anyone has a question for the Court about attire, they may ask it at side bar. Explain at sidebar the juror may not permit his or her verdict to be influenced by attire. If the juror does not credibly accept this duty, then the juror should be excused for cause.

### REFERENCE FOR SCENARIO TWO

See **RPC 8.4 (g)** from scenario one.

**United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006); Wheat v. United States, 486 U.S. 153, 159 (1988):** “[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”

### Administrative Directive #4-07 - Jury Selection – Revised Procedures and Questions

Another issue addressed by the Scenario is the potential prejudicial impact on the defense case when defense counsel wears a hijab. The Response in the Bench Guide suggests that the solution lies in asking the right questions of jurors during voir dire: “The standard voir dire questions approved by the Court . . . are intended to provide for a full and complete voir dire of prospective jurors so that reasons for any appropriate challenges for cause can be discovered and so that counsel is provided with information that may be relevant to their lawful exercise of peremptory challenges.

## Scenario Three

You are presiding over a busy courtroom when a baby held by a woman in the back starts to cry. The officer tells her that she must leave the baby with someone because there cannot be commotion in the courtroom. She replies that she cannot leave her newborn with anyone because she is breastfeeding. All eyes turn to you as the baby’s cries grow louder.

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## Responses Suggested by New Jersey Trial Judges

1. Preparation is the key to this scenario. Every courtroom will occasionally have a litigant, spectator, friend of a litigant, witness, interested party, etc. who will bring a baby that may cry. All of these persons have a right to be in the courtroom. For a litigant, witness, and other interested party who may have to participate, her presence may be critical. I have found that offering the mother a place where she can feed and care for her baby is important to her, with the understanding that when the particular matter that she is interested in is reached, court personnel will advise her so that she can return to the courtroom. If the baby cries subsequently, breaks can be taken consistent with the court’s schedule and the necessity of the mother’s participation. Therefore, planning, with your staff will make these issues manageable.
2. At the call of the list, if I notice that there are infants in the courtroom, I make an announcement that it is important for the court to hear the proceedings, therefore, if a baby starts crying, the court would appreciate if the mother would leave the courtroom until the child is calm. I also state that the sheriff’s officer will assist the mother in finding a quiet place. When the mother’s matter is ready to be heard the sheriff’s officer will advise the mother so she can return to the courtroom.
3. I would calmly inquire as to whether the mother would like to step outside to calm the child and/or to feed the child\* and then advise her that I will take her case as soon as she is ready. If the mother was unable to calm the baby, then I would permit her to come back in the afternoon if that were feasible or reschedule the matter for another day. I would ask the mother whether there is a better time of day for the matter to be heard or whether there is a possibility to make arrangements with family members to either watch the child or to accompany the mother to court to assist.

In closed proceedings (CIC cases) when I have toddlers who are being disruptive, I advise the litigants to relax and permit the children to walk around the courtroom if that helps. The hearing is often stressful enough for the litigants and I do not want them to be further stressed because they are trying to quiet their child. I check with my court clerk and, so long as the testimony and/or representations can still be properly recorded on Court Smart, I try to work through the disruptions. Also, when I have a busy calendar, I always take cases with children first so they don’t have to sit in the hallway or in the court room waiting.

\* By law, every courthouse must have a lactation room available for use by the public as well as court personnel.

### REFERENCE FOR SCENARIO THREE

**NJ Civil Rights Act:** “Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.”

**Supreme Court Policy on Access and Fairness:** “The millions of litigants who come to the courts each year for a just resolution of their cases must believe they are being treated fairly, with or without counsel. They must have full access to the courts, regardless of income, language barriers, disability, cultural diversity, or educational level.”

**NJ Courts Vision Statement:** We will be a court system, characterized by excellence, that strives to attain justice for the individual and society through the rule of law. We will . . . [p]rovide equal access to a fair and effective system of justice for all without excess cost, inconvenience, or delay, with sensitivity to an increasingly diverse society.

**NJ Constitution Article I Rights and Privileges:** “A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered....”

## Scenario Four

You are seated in chambers when you hear angry voices at your door. You look up to see a familiar white male attorney entering chambers, followed by a black female attorney who looks upset. The black female attorney says, “*Judge, the sheriff’s officer tried to stop me from coming into your chambers because he wouldn’t believe I was an attorney. He let this attorney strut right in here. I am appalled at the way this court has treated me!*”

### Responses Suggested by New Jersey Trial Judges

1. If faced with this scenario, I would first try to calm the offended attorney down by welcoming her, introducing myself and asking her to sit down. Next, I would ask opposing counsel if he would mind if I spoke privately with the offended attorney solely with regard to the incident that occurred with the sheriff’s officer. I would offer her the opportunity to explain to me her version of the events leading up to the alleged offense. I would apologize to her on behalf of my staff and assure her that I would speak to the officer about her allegations. I would then ask if she felt comfortable proceeding with her client today. If not, I would offer a short adjournment. If so, then I would bring the other attorney in, thank him for his courtesy and continue with the conference. After the attorneys left, I would call the sheriff’s officer in and discuss the event with him to glean his side of the story. I would then speak with my supervising judge about how to proceed before taking any course of action.

2. I would immediately apologize to the female attorney for the conduct of the sheriff’s officer in the presence of the white male attorney. I would further explain that the conduct exhibited by the sheriff’s officer does not, in this case, reflect the mindset of the Court. I would state that all attorneys are to be treated equally in my courtroom. All attorneys are to be treated with the dignity and respect they deserve.

I would inquire into the basis for the sheriff’s officer’s conduct. If appropriate, I would admonish the sheriff’s officer that attorneys who appear in court must be treated equally and with dignity, respect and professionalism. Deviations from the standard will not be tolerated. The conduct of the officer will reflect on the judge and must be impartial and unbiased. The sheriff’s officer’s uncertainty about whether the black female was an attorney is no basis for his conduct. There are too many ways to determine if a person is an attorney. In other words, belief is not necessary when you can verify, politely.

3. I would explain that I will speak to the sheriff’s officer about the allegation of the discriminatory conduct. I would notify the assignment judge, presiding judge, or trial court administrator (TCA) about the incident. I would rely on one of them to notify the sheriff’s office command structure. I would explain to the attorney my plans to address the incident and offer the attorney the opportunity to file a complaint with the ombudsman and the sheriff. I would ask to be notified of the outcome of this matter. I would explain to the attorney that while these steps are being taken, the sheriff’s officer is not employed by the Judiciary.

#### REFERENCE FOR SCENARIO FOUR

See **Code of Conduct Rule 3.5** from scenario one.

#### **Judicial Code of Conduct Rule 1.1 Independence, Integrity and Impartiality of the Judiciary**

A judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved. This Code shall be construed and applied to further these objectives.

#### **Judicial Code of Conduct Rule 3.4 Decorum**

A judge shall maintain order and decorum in judicial proceedings.

#### **Judicial Code of Conduct Rule 3.7 Ensuring the Right to Be Heard**

A judge shall accord to every person who is legally interested in a proceeding, or to that person’s lawyer, the right to be heard according to law or court rule.

## Scenario Five

You are listening to arguments regarding a restraining order in a domestic violence matter. The husband tells you how hurt he is that his wife would try to manipulate the circumstances of their pending divorce to keep him away from his house and his kids. The wife rolls her eyes every time the husband speaks. Then the husband turns to you and says, “*Now I know why you look so familiar. I saw you at the Rutgers game yesterday! My buddies and I go to every game. What do you think of the new coach? He can’t possibly be worth all that money!*”

### Responses Suggested by New Jersey Trial Judges

1. I would address the parties and indicate that the focus of the hearing is the matter before me and the parties should refrain from addressing the court in any manner that is not directly related to the hearing at hand. I would also place on the record, so that the record is clear, that I do not know the husband nor have I ever met him at a Rutgers game or anyplace else for that matter and that I have ruled based on the evidence presented to me during the hearing. I would advise the parties that if I had a prior or current relationship with either one of them outside the court I would not handle the action but would have it transferred to another judge. If during the hearing I felt the wife’s actions of eye-rolling was being done intentionally in an effort to communicate with me I would immediately address it and advise her to stop doing it. I would then recess court and leave the bench.

2. I would politely indicate for the record that I have no relationship with the individual and that I do not recall him from any event I have attended (which are many in my resident county). However, I would advise the husband that discussions regarding anything other than the matter before me would be inappropriate. I would advise him to speak with his attorney for a further explanation of the issues.

3. I would advise that the remarks were inappropriate. I would confirm for the record and the parties that I did not know the parties before today’s appearance; and that common interests in sports, literature, film or any other topic do not, did not and would not influence the decision of the Court. I would also inform the parties of a judge’s obligation to recuse him or herself if that were not so. As to the eye rolling of the wife, I would remind both parties that they have an obligation to behave in a respectful manner while they are in court. Trying to address a party rather than the court, staring down a party, making faces of disbelief and eye rolling all constitute grossly inappropriate conduct which will not be tolerated by the Court.

#### REFERENCE FOR SCENARIO FIVE

See **Code of Conduct Rule 1.1** from scenario four.

See **Code of Conduct Rule 3.4** from scenario four.

See **Code of Conduct Rule 3.5** from scenario one.

#### **Judicial Code of Conduct Rule 2.1 Promoting Confidence in the Judiciary**

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

#### **Judicial Code of Conduct Rule 2.2 External Influences on Judicial Conduct**

Judges shall decide cases according to the law and facts. Judges shall not permit family, social, political, financial or other relationships or interests to influence their judicial conduct or judgment.

#### **Rule 3.17 (B) (1) Disqualification**

Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:

Personal bias, prejudice or knowledge. Judges shall disqualify themselves if they have a personal bias or prejudice toward a party or a party’s lawyer or have personal knowledge of disputed evidentiary facts involved in the proceeding.

The material in this Bench Guide has been provided by the Supreme Court Committee on Women in the Courts to assist judges in addressing potential bias, particularly toward women, that may arise in a courtroom. The committee, established in 1990, monitors the nature and extent of systemic gender bias in the court system and makes recommendations to the Supreme Court on the subject of gender bias to help ensure fair treatment of women.

Some scenarios of problematic gender and race conduct were gathered from actual examples observed by attorneys and judges that have come to the Committee's attention in the past several years.

Various responses to each scenario are provided by New Jersey State judges and are intended to provoke thoughtful inquiry for judges while off the bench. The responses are suggestions and not the only appropriate responses. They can serve as an educational tool to assist judges in preparing while off the bench or to respond to difficult situations that should be addressed promptly by judges in order to maintain trust and confidence in the courts as a bias-free forum for the resolution of disputes.

The Committee on Women in the Courts comprises judges, attorneys and court personnel who are appointed to renewable two-year terms. It includes representatives from several bar associations, private firms, state agencies, Legal Services of New Jersey, Rutgers Law School and Seton Hall University Law School.

*The material in this bench guide has been provided by the Supreme Court Committee on Women in the Courts for training purposes and shall in no way be considered an official position of either the committee or the New Jersey Judiciary. The material in this booklet is not to be copied except with the written permission of the committee and is intended for use by judges only. The committee does not investigate individual cases of bias.*

*If you have questions about the work of the committee, call 609-815-2910.*

*Approved by the New Jersey Supreme Court*

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