

The E-Word:

Emotions, Women, And the Law

By Marie Jonas



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Most female attorneys have dealt with this issue in one context or another: use of the “E” word. *Emotional.*

My most memorable experience with the loaded adjective came in the context of an exchange of heated discovery meet and confer letters (everyone’s favorite) in my sixth year of practice. I had explained—straightforwardly—to opposing counsel that his lack of

understanding of electronic discovery and repeated production of potentially privileged materials could create malpractice risk. In reply, he attacked, not the content or merits of my argument, but rather my condition: the language in my letter was “indicative of some emotional involvement” that I had with the case, which made “moving forward difficult.”

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Emotional involvement. There it was, the most gendered of slights disguised beneath the neutral mantle of cognitive typology.

The criticism is especially difficult to address, both because of the ostensibly gender-neutral language and because of the self-fulfilling nature of any response. What is there to get upset about? It is not a “lady” insult—just an attack on an attorney behaving too zealously. And protest too strongly—“but I am *not* emotional!”—and haven’t you just proven the point?

Slightings like this you ignore and move on. You respond by winning, good practice dictates, which we did.

I again heard the phrase recently, this time, directed at opposing counsel. “I think that she has gotten too emotionally involved in this,” male co-counsel (not at my firm) shared. I had interacted with the opposing attorney as well. Upset? Sure. Who isn’t after hours in a conference room. But emotionally involved? I didn’t register that—at least not to excess. Despite not being at the receiving end, hearing the phrase stung (how emotional of me!) and made me sensitive to my gender and outsider-status in a field, civil litigation, still largely dominated by men.

So what to do here: where you are a witness, not a target, and yet speaking out risks that you will be labelled with the same brush as your “emotional” counterpart on the other side?

Bias towards women in the law: there is no dearth of coverage on this topic. (See, e.g., Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. Times (Aug. 8, 2017); Bazelon, *What It Takes to Be a Trial Lawyer If You’re Not a Man*, The Atlantic (Sept. 2018); Weiss, *Showing Anger Can Backfire for Female Lawyers*, *Studies Say*, ABA J. (Aug. 6, 2018).) Stereotypes of women’s excessive emotionality are alive and well. We know all

too well that women’s speech is often read as shrill or nagging, when, were the same behavior espoused by a man, it would be characterized as strident or assertive.

You cannot decouple this manifestation of bias from the act of speaking at which it is directed. Speech is vital to our role as attorneys, and is essential to the power that we hold in this capacity. Branding a woman’s language as “emotional” is a diminution of her words. Our collective shaming of women’s voices has deep historical roots. As classicist Mary Beard wrote in her recent manifesto *Women & Power*, the earliest examples of women’s presence on the public floor in Western culture were met with the depiction of these women as usurpers of a man’s role. One woman who had the gall to defend herself in the courts was described as having “a man’s nature behind the appearance of woman.” We have been conditioned to disregard women’s public voices as inconsistent with the female condition; and to hear women’s voices consistent with the ingrained stereotypes we are taught about women’s roles.

An additional bias, less frequently addressed, is also implicit in this vein of critique. In the legal profession, we treat as inherently negative tapping into the emotional, rather than the rational, side of our brains. We have internalized a distaste and dismissiveness towards the “emotional.” But empathic understanding of our clients as individuals, hearing and connecting to their personal and emotional needs along with their financial and business concerns, makes us better lawyers, not worse. As should be self-evident, caring for people is a powerful motivator for positive action, yet ironically in our field it is shunned. “Emotional” involvement, when balanced with rational and objective analysis of the circumstances

facing your client, should be lauded, not diminished. An ability to channel our empathy, our feelings, what is sometimes characterized as a more feminine than masculine trait should be respected as powerful, not rejected as weakness.

Women bear the burden of memorizing the coping mechanisms and tricks meant to address the systemic biases we face. As Ms. Beard writes, however, “the big issues ... are not solved by tips on how to exploit the status quo.” So to women lawyers as women—most of whom have practiced longer, and endured far more, than I have—I offer no advice.

Nor can we attorneys simply wait longer: Progress is too slow, women continue to be driven out of the profession disproportionately due to the failure of our culture and profession to make room for them.

So what can we—as lawyers—do?

Teach ourselves to respect women’s voices. When you hear women speak, think consciously about your reaction to their words. Imagine scenario shifts where the same language is presented by men. Be mindful of subliminal reactions to “feminine” traits, such as higher-pitched voices.

Train ourselves to fight our biases. Too often, we tune out during our elimination of bias CLEs. We need to actively engage ourselves and our colleagues on these issues through meaningful trainings and thoughtful discussions.

Don’t be a bystander. If you hear offending language or stereotypes play out, counter that narrative. Maybe it is a simple “I don’t think I agree with that characterization.” At the same time, make a point of recognizing the contributions of your colleagues, female and male, thereby amplifying the voices that may otherwise be overlooked.

Watch our words. This is not about being

the Thought Police, it is about being thoughtful about the words we put out into the world. Labels such as “emotional” often come to our minds as an instinctual reaction, sometimes reflecting biases we might not be aware of. Rather than acting on instinct, reflect on what (and whether) you say something, and consider the power behind those words.

Reconceptualize what power looks like in our profession. Quintessentially “powerful” roles in our profession (judges, Supreme Court advocates) have long been dominated by men. But what if, as Ms. Beard suggests, we decouple power from “public prestige.” Instead, let us focus our view of power on the “ability to be effective, to make a difference in the world, and the right to be taken seriously.” Use this as an entrée to reforming what power means. Taking a person seriously—thereby recognizing her or his power—is a small but vital act that we each are capable of accomplishing.

We must not thrust onto women the continued obligation of “just doing everything men do, but better, for less pay.” This is advice, save the last part, that nearly all women attorneys have received at some point. Instead, we must collectively, as professionals, devote ourselves to doing better to combat the root of these problems. Perhaps the points I lay out above provide a starting point for doing the hard work of changing our collective way of thinking. And by *our*, I mean we attorneys. This is not work for women to accomplish alone anymore.

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