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Third Circuit: Gender, Race, and Ethnicity- Task Force on Equal Treatment in the Courts

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THIRD CIRCUIT: GENDER, RACE, AND ETHNICITY—TASK FORCE ON EQUAL TREATMENT IN THE COURTS

*The Honorable Dolores K. Sloviter**

The March 1993 vote of the Judicial Conference of the United States endorsing the provision of the proposed Violence Against Women Act that encouraged circuit judicial councils to conduct studies with respect to gender bias in their respective circuits[1] provided an official imprimatur of approval to such inquiries by the policy making body of the federal courts. Thereafter, the extent to which each federal circuit undertook to accept the invitation to proceed may have depended in large part on the zeal for the inquiry by the chief judge of the circuit or his or her delegated committee.

As I was the chief judge of the Third Circuit at that time, I bore the responsibility for the initiative in this circuit. The initial decision to be made was whether to proceed with an independent inquiry or await receipt of what promised to be, and ultimately was, the massive study in the Ninth Circuit, which was the first of the federal circuits to begin the study into gender bias.[2]

I sought the counsel of an ad hoc group of circuit and district court judges who had attended seminars devoted to the issue of gender task forces, and who, in course, recommended that we proceed with our own study that would be tailored to the specific operation, configuration, and concerns of the Third Circuit's courts. In the Spring of 1994, I went before our Judicial Coun-

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1. Title V of the proposed Violence Against Women Act of 1993, S. 11, 103d Cong. (1993), was endorsed at the March 1993 meeting of the Judicial Conference of the United States.

2. *See* THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, *reprinted in* 67 S. CAL. L. REV. 931 (1994).

cil with the proposal that we should go ahead with our own inquiry. There was a consensus that our circuit's population, bar, and caseload were too different from those of either the Ninth Circuit or the D.C. Circuit, which by then had also undertaken its study, to assume that the results found elsewhere would necessarily be applicable to us.

Once there was general agreement to proceed, the Judicial Council turned to the scope of the inquiry. The options were many. The Ninth Circuit study then in progress had been confined to gender issues, as had most of the state court studies. We recognized that the lack of prior studies into race and ethnic bias would present some challenges if our study included those areas, but the Council's authority to expand the inquiry from gender into other kinds of bias was unquestioned. As long as we were proceeding with a study, there was no opposition to extending it into the issue of race. There was some consideration given to including an inquiry into religious bias, but ultimately we chose to focus on gender, race, and ethnicity in the belief that a concentrated study of those issues would also reveal any other bias that was pervasive.

Thus, on June 29, 1994, the Judicial Council of the Third Circuit unanimously voted to establish a Task Force to "conduct[ ] a comprehensive examination of the treatment of all participants in the judicial process by judicial officers, their staffs, and court personnel in the Third Circuit to assure equality, regardless of gender, race or ethnicity."[3] Judge Anne E. Thompson of the District of New Jersey, who was thereafter to become the chief judge of the district court, was appointed as Task Force chair.

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3. The resolution stated in full:

> The Judicial Council hereby authorizes the formation of the Third Circuit Task Force on Equal Treatment in the Courts. The Task Force is charged with conducting a comprehensive examination of the treatment and conduct of all women and men, regardless of their race or ethnicity, in the courts of the Third Judicial Circuit. Based on its findings, the Task Force should make recommendations to the Judicial Council appropriate to correct any actual or perceived inequities.
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> The Judicial Council authorizes the Chief Judge to appoint a chair of the Task Force. Together, the Chief Judge and the Chair of the Task Force will appoint the Task Force members. The Chair of the Task Force is authorized to undertake all necessary and appropriate actions to further this endeavor.

As authorized by the Council resolution, Chief Judge Thompson and I selected a twenty-three person Task Force that was to act as the umbrella of the operation. We also decided, subject to agreement by the Task Force when assembled, to divide the inquiry into two commissions, one concentrating on gender and one focusing on race and ethnicity. Three judges and a practicing lawyer served as co-chairs.[4]

The Task Force and the Commissions included circuit, district, bankruptcy, and magistrate judges, practicing attorneys, law professors, government attorneys, public defenders, representatives of the court support staff, representatives of other related government departments, and a member of the general public. They were from all geographic areas of the circuit. There was some purposeful overlap between some members of the Task Force and the Commissions to assure continuity. In addition, a liaison judge was appointed from each district court[5] and one from the court of appeals to facilitate communication with the Task Force.

Thereafter, the two Commissions, under the leadership of their co-chairs, established a total of twelve committees, staffed with volunteers, to address particular areas of concern.[6] Many of the committees focused on the same issue, but under a different Commission; some were unique to that Commission, such as the Committee on Language Issues under the Race & Ethnicity Commission. More than one hundred persons actively participated in the work of the Task Force, the two Commissions, and the twelve committees. The Commissions met regularly and frequently with each other. They were to become the operating divisions of the study while the Task Force was the

4. District Judge Dickinson R. Debevoise and Magistrate Judge M. Faith Angell co-chaired the Commission on Gender. Circuit Judge Theodore A. McKee and Newark, New Jersey attorney Lawrence S. Lustberg co-chaired the Commission on Race & Ethnicity.

5. The Third Circuit has six district courts, five of which are Article III courts: the District of Delaware; the District of New Jersey; and the Eastern, Middle and Western Districts of Pennsylvania. The sixth court, the United States District Court for the Virgin Islands, is an Article I court.

6. The committees established by the Commission on Gender focused on Appointments by Judges, Court System Interaction, Court Employment, Criminal Justice Issues, and Bankruptcy Issues. The committees appointed by the Commission on Race and Ethnicity focused on Appointments by Judges, Court System Interaction, Court Employment, Jury Issues, Language Issues and Criminal Justice Issues.

policy body. Because there were overlapping members, each group was fully informed of the status and progress of the study.

Chief Judge Thompson's principal task at the outset was to select the Project Director, the only position for which funding was supplied by Washington. The position had been widely advertised. Chief Judge Thompson and the Third Circuit Executive reviewed 283 applications and interviewed fourteen candidates, ultimately recommending Betty-Ann Soiefer Izenman as the Project Director. Ms. Soiefer Izenman had previously been an Assistant United States Attorney and most recently had served as counsel for the Committee on Governmental Affairs of the United States Senate. She was to direct the entire project, internally and in its relationship with all others.

The Race & Ethnicity Commission enlisted the services of Dr. Donald N. Bersoff, Director of the Law and Psychology Program at Villanova University School of Law and Allegheny University of the Health Sciences, who holds both a Ph.D. in psychology from New York University and a law degree from Yale University. One of the early decisions was to collect both quantitative and qualitative data. Quantitative data is data that can be summarized and reported in terms of numbers, percentages and statistical significance. Qualitative information provides detail about individual human experiences. It was decided that the most efficient way to gather data from the large number of persons who interact with the courts of this circuit would be by three written surveys: one sent to all court employees, one to all judicial officers of the circuit, and one to a random sampling of attorneys who had filed pleadings in the courts of the circuit, augmented with a mailing to minority bar associations to increase responses from minority attorneys.

Framing the questions on the surveys proved to be one of the most sensitive duties for the Task Force and its constituent groups, and one of the most time consuming. Care had to be exercised that the questions clearly distinguished between observed phenomena and perceptions. The questions were reviewed at all stages by Dr. Bersoff, with the assistance of his graduate students. The proposed survey questions were submitted for comment to each of the Commissions and its committees, and revised with those comments in mind. Before the

questionnaires were distributed, they were submitted for peer review by two knowledgeable survey researchers to insure the methodological soundness of the survey.[7]

It was a comparatively easier task to gather objective data from court units, such as information about the race and gender of court staff and the employees involved in promotions, hiring, firing, disciplinary actions, and use of leave. Employment data also was collected from those units of the Department of Justice that work closely with the courts, such as the United States Attorneys Offices and the United States Marshals Offices.

The progress of the study and the plan of proceeding toward completion was presented at the 1995 Third Circuit Judicial Conference. At that time, there was a plenary session in the form of a town meeting on equal treatment issues moderated by Charles R. Nesson, Professor of Law at Harvard Law School, followed by ten break-out sessions covering discrete and diverse issues of race, ethnicity, and gender within the court system. The discussion was full and frank. Members of the Task Force, the Commissions and the committees had the opportunity to hear the concerns of lawyers and judges about the study itself, the methods proposed to be used, and the underlying subject matter.

In order to hear the views and experiences of persons who could not attend the Judicial Conference, the Task Force, the Commissions, and the committees gathered information through the use of eight public hearings.[8] Litigants, attorneys, law professors, and citizens appeared at the town meetings to speak about their experiences and their impressions of the federal courts and the manner in which they function. There were also focus group sessions in some areas.

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7. The reviewers were Professor Shari Seidman Diamond of the University of Illinois and Molly Treadway Johnson, the author of STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE (1995).

8. Public hearings, organized by members of the Task Force, were held in the principal population centers of the Third Circuit: Philadelphia, Pittsburgh, and Harrisburg (all in Pennsylvania); Newark and Camden (both in New Jersey); Wilmington, Delaware; and St. Croix and St. Thomas (both in the Virgin Islands).

Comments were sought from a variety of sources. The data collection was designed to ascertain whether the individual providing information personally experienced or observed any gender or racial bias by persons connected with the federal courts of the Third Circuit.

Valuable information about the treatment of bankruptcy debtors was obtained through a telephone survey conducted by a volunteer group of New Jersey bankruptcy attorneys who made over one thousand telephone calls to debtors of the New Jersey bankruptcy court. Information about treatment of jurors was obtained through a survey of jurors who sat on cases in the circuit over a six-week period. Approximately seventy-five percent of the 1021 jurors responded to the questionnaire. The information gathered provided a unique source of the sex and race of jurors.

Information from a different source, rarely consulted, was obtained through a questionnaire distributed to 300 defendants who had been prosecuted in the courts of the Third Circuit. Responses were received by thirty-nine percent of the questionnaires presumed to be delivered, many with comments.

Collection of the data proceeded for more than a year. When it was received, the data from the judges' survey was analyzed by Dr. Bersoff and his group, and the data from the employee and attorney surveys was analyzed by The Center for Forensic Economic Studies in Philadelphia. Following receipt and collation of all of the information from the different primary sources, and frequent reanalysis, each committee prepared its report and recommendations, which it submitted to its respective Commission.

The Commissions met to discuss the committee reports, and those reports were combined to constitute the Commissions' reports. They, in turn, were presented to the Task Force on April 8, 1997. The Task Force used those reports as the basis for its own report, which synthesized the results and observations from the Commissions' work, and adopted some of the recommendations.

A preliminary summary of findings was presented by the committees' chairs at the Third Circuit's 1997 Judicial Conference, supplemented by large easily viewable charts and graphs

to illustrate some of the data. The two-volume Report of the Third Circuit Task Force on Equal Treatment in the Courts was presented to the Judicial Council on September 17, 1997. It includes the Task Force Report itself and the recommendations, the reports of each of the committees, the survey forms, the charts and graphs showing the information collected and relevant commentary.[9]

The overriding finding was that "notwithstanding the identification of certain discrete problems that demand attention and the presence of differences in perception between whites, minorities, men and women, the overall record of the courts and administrative units of the Third Circuit is a positive one."[10]

Turning first to the statistical data concerning the judiciary and court personnel, the picture is one of overall progress made by women in increasing their number in the courts of the circuit. Bankruptcy and magistrate judges are selected by the Judicial Council and the district courts, respectively, and thus their numbers, to some extent, reflect current attitudes. Eight of twenty-one bankruptcy judges in the circuit, or 38%, are women, compared with a national average of 18% women, and 59% of all Third Circuit bankruptcy court law clerks are women. As of 1996, five of the last eleven magistrate judges chosen were women, raising the percentage of female magistrate judges to 21%. However, only one magistrate judge and no bankruptcy judge is a minority group member.

The statistics as to law clerks, often a subject of interest, showed that, according to the judges responding to the questionnaire, as of September 1997, 44% of all law clerks in the circuit were women and 15% of 1996 law clerks were minority group members, approximately proportionate with their population in law schools. The minority population in law schools that year was 19%.[11]

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9. *See* REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURTS, *reprinted in* 42 VILL. L. REV. 1355 (1997) [hereinafter REPORT OF THIRD CIRCUIT]. The Report is also available on-line at <ftp://ftp.cilp.org/pub/law/FedCt/Circuit/taskforce>.

10. *See id.* at 1381.

11. *See id.* at 1381-82.

Women constitute the majority of the workforce in the courts, although female court employees hold disproportionately fewer supervisory positions than males, and on the average have lower salaries than males. Similarly, minority court employees hold fewer supervisory positions and earn lower salaries than white employees.

The Task Force found that women and minority group members may be underrepresented in certain positions filled by court appointments. The Report noted that "[t]he percentage of women on the lists of certified arbitrators and mediators in the districts of the Third Circuit range from a low of 7.2% to a high of 22% in the Virgin Islands," and, "[i]n some districts, newer attorneys, a group which includes large numbers of women and minority attorneys, have encountered great difficulties gaining appointments as CJA [Criminal Justice Act] attorneys."[12]

The Task Force found very few minority group members among federal public defenders, assistant federal public defenders, clerks of court, or chief probation officers, except in the Virgin Islands. The Task Force also found that minority group members are called to serve on juries in relatively low numbers compared with the makeup of the eligible populations,[13] but that attempts were being made, particularly in New Jersey, to try to reach a larger cross-section of the community.[14]

The qualitative results were positive in all material respects. Lawyers, litigants, jurors, and judges overwhelmingly answered "never" to questions asking whether they had ever suffered from or witnessed discrimination in various forms or settings.

Court employees generally had no complaints regarding racial, ethnic, or gender issues, and the complaints that were raised were concentrated in a few offices. The large majority of court employees surveyed believed that they were treated equally, regardless of gender, race, or ethnicity. Specifically, "significant majorities of all employee groups believed that they were treated with respect, not subjected to adverse treatment by supervisors, and not assigned unequal workloads or required to

12. *Id.* at 1385.
13. *See id.*
14. *See id.* at 1384.

endure a hostile work environment based upon their race or ethnicity."[15]

According to information compiled "regarding 'court system interaction,' it was rare for judges to treat other judges, attorneys, court employees, witnesses, litigants or jurors adversely on the basis of gender or race," and "[v]ery few instances of sexual harassment were reported."[16] There were very few complaints that court employees, court security officers, or personnel of the United States Marshal's Services treated individuals in a demeaning or disparaging manner on the basis of gender, race, or ethnicity.[17]

Among sentenced criminal defendants, eighty percent believed they were treated the same as a person of a different race would have been treated, and eighty-one percent of sentenced criminal defendants who responded believed they were not treated adversely on the basis of gender. An analysis performed for the Task Force by staff of the United States Sentencing Commission showed that women receive less severe and more non-custodial sentences than men in several categories of offenses (violent crimes, larceny, and drugs). A study performed for the Committees on Justice Issues by Dr. Jane Siegel of Widener University "found that, even controlling for a number of appropriately considered personal characteristics and other legally relevant factors, male defendants are almost twice as likely to be detained without bail as female defendants."[18] Despite analyses performed by staff of the United States Sentencing Commission, the Task Force concluded that "further study . . . is necessary to determine whether race, in fact, influences sentencing in a statistical sense."[19]

Other findings were that the pilot program operating in the Eastern District of Pennsylvania to accept Chapter 7 bankrupt-

15. *Id.* at 1383.

16. *Id.* at 1383-84. All courts in the circuit have adopted Equal Employment Opportunity ("EEO") plans that comply with instructions from the Administrative Office of the Courts. The EEO plan of the court of appeals covers a broad range of issues, including sexual harassment.

17. *See id.* at 1384.

18. *Id.* at 1383.

19. *Id.* at 1382.

cy petitions *in forma pauperis* increases women's access to the bankruptcy courts.

Also of interest was that the criminal case assignment practice in the District of New Jersey may have a "negative, albeit unintended, impact on families."[20] Because cases are assigned on a district-wide basis, rather than on the basis of the place of the crime or return of the indictment, participants may have a commute of up to two and one-half hours longer than it would have been if the case had been assigned to a judge in the nearest courthouse. As a result, participants must be away from their families for a longer time.

The Race & Ethnicity Commission's Committee on Language Issues found that some minorities may be disadvantaged by the courts' inability to deal with those whose primary language is not English.[21] For example, interpreters have not always been available when needed. The Task Force found that there is a shortage of properly qualified interpreters and a lack of quality control programs to assure that interpreters are properly chosen and satisfactorily perform their critical function. Seventy-five percent of all Hispanic court employees who responded to the survey indicated that, at one time or another, they had been asked to translate by a court. Notably, the District of Delaware has "shown a sensitivity to non-English speaking persons" by posting bilingual signs in the courthouse.[22]

The Task Force made two general recommendations and a number of specific recommendations to address its findings. The first general recommendation was that the courts should recognize that perceptions of bias do exist, whether such perceptions are rooted in causes beyond the courts' control or stem from conduct within the courts, and that the courts should consider on an ongoing basis how best to address these perceptions.[23] The second general recommendation was that the Judicial Council should "adopt a mechanism to conduct a periodic review of the equality of treatment throughout the Third Cir-

20. *Id.* at 1384.
21. *See id.* at 1385-86.
22. *See id.* at 1384.
23. *See id.* at 1388-89.

cuit regardless of gender, race or ethnicity, including the status of implementation of the recommendations of this Report."[24]

On September 17, 1997, the Judicial Council "accepted the Report of the Third Circuit Task Force on Equal Treatment in the Courts as fulfilling the charge of the Task Force, accepted the findings of the Report and endorsed the thirty-eight recommendations of the Task Force."[25] The Council also voted "to encourage, oversee, and monitor the implementation of the Task Force's recommendations and periodically report to the Council."[26]

Pursuant to the Council's resolution, I established a five-judge Committee of the Council chaired by Chief Judge Thompson to monitor the implementation phase. All six district chief judges in the circuit and the chief judge of the court of appeals (or their designees) will act as liaisons between the oversight Committee and their own courts.

The Committee has already begun its work to publicize the Task Force's findings and recommendations, and to solicit suggestions for implementation. Job opportunities, including clerkships, are being widely publicized in a manner designed to reach minority law students.

The Third Circuit's study into the question whether those who have reason to interact with the courts of this circuit are treated equally regardless of gender, race, or ethnicity received the enthusiastic support of the great majority of the judges, employees, and lawyers. There were significantly more volunteers than we could put to work, and no one, in the two years of the study, who was asked to provide assistance declined to do so. Indeed, seventy-one percent of the judges in the circuit completed the questionnaire. Of course, there were some judges who were skeptical about the project, but they were not vocal in their objections, and thus we had none of the public disagreement reported elsewhere. Only one member of the Task Force wrote separately, and that was not as a dissent but as a

24. *Id.* at 1387.

25. Press Release, *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, Sept. 18, 1997.

26. *Id.*

separate statement commenting on the responses in one district and offering possible explanations.

The issue that proved most troublesome, both in drafting the survey questionnaires and in analyzing the information received, was the relevance of perceptions of bias, particularly when those perceptions did not correlate with the objective data collected. The Task Force Report did not ignore this issue, but faced it directly and devoted a considerable discussion to it.[27] As noted in the Report, "the validity of some of the perceptions could not be tested." However, "the existence of perceptions of differential treatment based on gender, race or ethnicity, even if no bias was shown, is information that would be of interest to the court in determining what, if any, remedial action to take."[28] The Report corroborates the oft-repeated statement that perceptions are reality for the courts' constituents.

The findings of the Task Force Report confirmed that men and women, whites and minorities view their experiences in the judicial system very differently. Minority court employees consistently reported experiencing more intrusive security procedures upon entering the courthouse than did white employees. The survey of court employees showed that of those employees who perceived disparate treatment, women were more likely than men to believe that gender plays a role in who is hired or encouraged to seek training. Female attorneys are more likely than male attorneys to see demeaning or disparaging conduct by judges to attorneys on the basis of gender. Race and ethnicity also appear to influence the way in which court employees and attorneys perceive their treatment or the treatment of others in the courts of the Third Circuit. Women of color see themselves as doubly disadvantaged within the court system.

Significantly, however, the perception of bias was not generally supported by the quantitative data received. It is of interest that perception of bias was also found in other circuit reports. Although some minimize the significance of this kind of perception, it is apparent that perception of bias, even unsupported by objective data, is an unmistakable fact that cannot be overlooked by any court system. The need to address percep-

27. *See* REPORT OF THIRD CIRCUIT, *supra* note 9, at 1375-88.
28. *Id.* at 1375.

tion, despite the fact that perceptions may be rooted in social factors beyond the courts' control, is evident.

The value of the Task Force was not limited to the information that was collected into the Report or the recommendations made. The process itself, the determination of which areas to study, which questions to pose, and which avenues to explore moved all those concerned closer to an appreciation of the need to assure all persons who come in contact with the court system that they are and will continue to be treated equally without regard to their gender, race, or ethnicity. Whether that will be accomplished will depend upon the continued commitment of the circuit leadership to implementation of the recommendations.