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Procter Hug Jr.

Marilyn L. Huff

John C. Coughenour

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NINTH CIRCUIT: THE GENDER BIAS TASK FORCE

The Honorable Procter Hug, Jr.
The Honorable Marilyn L. Huff
*The Honorable John C. Coughenour**

I. INTRODUCTION

In 1990, the federal courts of the Ninth Circuit began to examine the effects of gender on the business of the courts. The pioneering *Final Report of the Ninth Circuit Gender Bias Task Force*¹ was issued in July 1993 and the Ninth Circuit has worked to implement the task force's recommendations for several years. To assist others setting forth on a similar journey, this article summarizes the circuit's experience in undertaking a study of this magnitude and duration.

In August 1990, the Ninth Circuit Judicial Conference endorsed a resolution calling for a study of gender bias in the federal courts of the Ninth Circuit.² The resolution had been introduced by the Lawyer Representatives Coordinating Committee, a group of attorneys selected by the district court judges to represent the federal bar and to attend and participate in the annual circuit judicial conference. The resolution called for a special study committee to "conduct a comprehensive review of gender bias issues, including, but not limited to, courtroom

* Chief Circuit Judge Hug is the chief judge of the United States Court of Appeals for the Ninth Circuit; Chief District Judge Huff of the Southern District of California chairs the Ninth Circuit Standing Committee on Gender, Race, Religious and Ethnic Fairness; and Chief District Judge Coughenour of the Western District of Washington chaired the Ninth Circuit Gender Bias Task Force. Our thanks to Mark Mendenhall, Esq., Assistant Circuit Executive for the Ninth Circuit, for his assistance in the preparation of this article.

1. This report is reprinted in 67 S. CAL. L. REV. 731 (1994).

2. See *Resolution No. 9: Create an Advisory Committee on Gender Bias in the Courts*, reprinted in M. Mendenhall, 1990 *Ninth Circuit Judicial Conference Report*, 132 F.R.D. 83, 115 (1990).

interaction, judicial branch employment practices and other issues of court administration, gender bias within the judiciary, selection of court-appointed counsel, and jury instructions.”

To carry out the mandate, then-Chief Circuit Judge J. Clifford Wallace appointed eight judges and lawyers from across the circuit and a social scientist to serve on the Ninth Circuit Gender Bias Task Force.³ The task force was asked to conduct a study of gender bias in the Ninth Circuit, report its findings to the circuit conference, and make recommendations to respond to the problems identified.

II. PROCESS AND FINDINGS⁴

The task force met numerous times to determine the scope of its work. For assistance, the task force established advisory committees and local working groups of volunteer lawyers, professionals, academics, and students recruited from throughout the circuit and across the country. As the first researchers to specifically address the issue of gender bias in the *federal* courts, the task force pioneered an approach that looked at the *effects of gender* instead of defining and identifying bias per se. The task force sought answers to five specific questions:

- (1) What roles do women and men play in the Ninth Circuit?
- (2) What role, if any, does gender play in appointments made by the judiciary?
- (3) Does gender affect professional interactions, either in the courtroom, or in the more informal settings of chambers conferences and lawyer negotiations?

3. The members of the task force were The Honorable John C. Coughenour, United States District Court for the Western District of Washington, chair; The Honorable Procter Hug, Jr., United States Court of Appeals for the Ninth Circuit; The Honorable Marilyn H. Patel, United States District Court for the Northern District of California; attorneys Terry W. Bird of Los Angeles, California; M. Margaret McKeown of Seattle, Washington; Henry Shields, Jr., of Los Angeles, California; Judith Resnik of the University of Southern California Law Center; and Deborah R. Hensler, Ph.D., of the RAND Corporation and the University of Southern California Law Center.

4. The contents of this section have been adapted and drawn from *Executive Summary, THE EFFECTS OF GENDER IN THE FEDERAL COURTS, THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE* (July 1993), with special thanks to Professor Judith Resnik.

(4) How do members of the judiciary and the bar view the relationship between their work and their family life?

(5) What role, if any, does gender play in legal decision-making in specific areas of law of particular concern to the Ninth Circuit?

The task force relied on a wide variety of methods to collect information to respond to these questions. Public records provided information about the demographic characteristics of the judiciary and the composition of court committees. A special judges survey completed by more than eighty percent of the judges provided information on judicial experiences and attitudes regarding court appointments, courtroom interactions, work-life policies, and criminal sentencing. The largest scientifically-designed survey of attorneys in the circuit received more than 3500 responses reflecting the views and experiences of those who practice before Ninth Circuit courts. Focus group interviews with nineteen groups of attorneys across the circuit supplemented the responses from the written attorney survey. Special office self-studies were conducted in two U.S. Attorneys Offices and seven Federal Public Defender Offices. Five advisory committees researched the substance of criminal law, federal benefits, immigration, employment, and federal Indian law in connection with the mission of the task force. Finally, in the interim period between the issuance of the preliminary report and the final report, questionnaires were mailed to each of the fifteen districts in the circuit to determine what educational and other efforts had been undertaken to address issues raised by the task force's preliminary report.

After more than two years of research, the task force made several findings and conclusions.⁵ With regard to the role of gender, the task force concluded "gender counts" and can have an effect on litigants, witnesses, lawyers, employees, and judges. Although, as of 1991, the Ninth Circuit was "generally ahead of the nation" as to gender representation on the bench, the task force found that, outside the judiciary, women were underrepresented in federal practice. Twelve percent of the

5. This article only briefly summarizes the task force's findings and conclusions. For a complete discussion, see *THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE* (July 1993), reprinted in 67 S. CAL. L. REV. 731 (1994).

Ninth Circuit judicial appointments were held by women, and women constituted sixteen percent of the federal bar. Regarding promotions and appointments, the task force found that, within the Ninth Circuit, "in the aggregate, women are proportionately represented in fee-bearing and decision-making positions," but are "virtually unrepresented in key positions in some districts."

The task force also found that, in general, both men and women lawyers believe they are treated fairly by federal judges within the Ninth Circuit. However, data collected from the circuit-wide attorney survey indicated that approximately sixty percent of female practitioners within the circuit had been subject to "unwanted sexual advances or other forms of sexual harassment by colleagues, opposing counsel, clients, judges or other court personnel." Further, the task force found that surveys consistently indicated that men and women "have significantly different views of the definition and prevalence of gender bias."

To address problems identified by the task force and to ensure both men and women are treated with equal dignity throughout the circuit, the task force set forth several recommendations:

(1) Ongoing Education. Among other efforts, educational programs on the effects of gender should be instituted as a regular and routine part of conferences for lawyers, judges, and court personnel.

(2) District-By-District Implementation. The districts should review the selection and appointment procedures and should consider forming a standing committee or creating the office of ombudsperson on fairness in the courts.

(3) Discipline and Sanctions. Disciplinary rules for judges, court staff, and lawyers should prohibit gender-biased behavior and sexual harassment and should include procedures for bringing complaints and maintaining data.

(4) Circuit Level Recommendation. The Ninth Circuit should create a standing committee on fairness in the courts.

(5) National Agenda. The Judicial Conference of the United States should create a national standing committee on fairness

in the courts and should charter a national commission to study the relationship between federal law and gender fairness.

(6) Effects on Litigants. The districts and the circuit should generate annual reports examining the effects of gender on litigants.

(7) Broadening the Inquiry. The task force suggested the Ninth Circuit commission other task forces to address discrimination predicated on all invidious classifications, including ethnicity, race, religion, sexual orientation, handicap, and age.

III. IMPLEMENTATION⁶

The judges and lawyers in the Ninth Circuit have been broadly supportive of the work of the Ninth Circuit Gender Bias Task Force from its inception. As previously noted, they overwhelmingly approved the task force's creation through passage of a 1990 resolution at the circuit conference. At the 1992 circuit conference, after the release of the task force's preliminary report, the judges and lawyers reaffirmed overwhelmingly their support for continuing and completing the work of the task force by passage of another resolution.⁷ That broad base of support continued in 1993 when the Ninth Circuit Judicial Conference strongly adopted yet another resolution, this time endorsing the findings of the Ninth Circuit Gender Bias Task Force and urging the bench and the bar of the Ninth Circuit to assist in implementing the task force's recommendations.⁸

Shortly after the 1993 circuit conference had endorsed the findings and recommendations of the task force, the Judicial Council of the Ninth Circuit similarly endorsed the *Final Report*, thanked the task force for its work, and discharged its members from further duties.⁹ Subsequently, the judicial coun-

6. Material for this section has been prepared with the assistance of Charles Loughran, Esq., Assistant Circuit Executive, staff to the Gender Fairness Committee.

7. See *Resolution No. 2, Eliminating Gender Bias in the Ninth Circuit*, 9TH CIRCUIT NEWS (Fall 1992).

8. See *Resolution No. 2, Assure Gender Fairness: Full Implementation of the Ninth Circuit Gender Bias Task Force's Recommendations*, 9TH CIRCUIT NEWS (Fall 1993).

9. See "Minutes," Ninth Circuit Judicial Council, Nov. 19, 1993.

cil fulfilled the task force's fourth recommendation by creating a circuit-level Gender Fairness Committee.¹⁰ The committee was charged with the circuit-wide responsibility for implementing the recommendations in the *Final Report* and other related matters. Since late 1994, the Gender Fairness Committee has been the focal point for a variety of activities and initiatives designed to further the work of the Ninth Circuit Gender Bias Task Force.

In the area of ongoing education, each of the fifteen districts in the circuit incorporated some form of educational program and dialogue on gender bias issues into their annual district conference program between 1992 and 1994. Judges in the district courts as well as members of the bar actively participate in these conferences, both as presenters and as attendees. Since 1994, a number of districts have revisited and repeated these educational programs, and most have included the issues of racial, religious and ethnic fairness in the discussions.

In 1994, the Federal Judicial Center developed a special half-day traveling seminar on sexual harassment issues for judges. The program was especially timely for the Ninth Circuit, and four districts availed themselves of the opportunity to participate in the sessions which were conducted in the individual districts. In the spring of 1996, the Ninth Circuit, in cooperation with the Administrative Office of the United States Courts, sponsored two programs on the subject of equal employment opportunity. The programs included gender specific issues and sexual harassment and were presented to more than eighty court unit executives and personnel specialists from every district in the circuit.

The Federal Judicial Center developed a half-day training program on sexual harassment awareness for court executives, managers, supervisors, and support staff. Beginning in May 1996, specially-trained court personnel, including a member of

10. See "Minutes," Ninth Circuit Judicial Council, Aug. 15, 1994. The initial members of the committee were The Honorable Marilyn L. Huff, United States District Court for the Southern District of California, chair; The Honorable Edward Leavy, United States Court of Appeals for the Ninth Circuit; Clerk of Court Jack L. Wagner, United States District Court for the Eastern District of California; and attorney Andrea Miller of Sacramento, California.

the Circuit Executive's Office staff, presented the program to court units in the Ninth Circuit. More than 1200 supervisors and staff support employees in all fifteen districts participated in the program as it traveled throughout the circuit.

In October 1996, the Gender Fairness Committee published *A Resource Guide on Gender Fairness Topics*. This is a sixty-three-page annotated bibliography of audio-visual training materials, books, articles, manuals discussing how to promote gender fairness in the courtroom, and reports. The materials relate to gender fairness, employment discrimination, and sexual harassment in the courts and in comparable employment settings. The *Guide* was widely distributed to judges and court unit executives as part of the ongoing educational efforts within the circuit.

Recently, in January 1998, the Ninth Circuit and the Federal Judicial Center conducted an educational seminar for judges within the Ninth Circuit. This seminar included discussions on gender fairness issues. For example, the seminar addressed guidelines for judicial officers to avoid the appearance of bias and sensitive evidentiary issues which may be presented during a sexual harassment trial.

In the area of district-by-district implementation, almost every district in the circuit has appointed a "gender fairness coordinator" who is either a judge or court unit executive. The coordinators are charged with leading district activities involving gender fairness. More than half the districts have established a standing or special committee on gender fairness in the courts which includes representatives from multiple court units.

For example, in the Southern District of California, an Equal Justice Committee was created to study and make recommendations regarding the fair administration of justice without gender, racial, or ethnic bias. Among its many activities, the Equal Justice Committee: provided notice to attorneys and bar associations about law-related positions with the court in an effort to promote diversity; sought input from interested bar associations as to practices and procedures to eliminate bias in the court system; adopted a general order as part of the district's Code of Conduct to promote fairness and eliminate bias in the court system; and, in coordination with a significant number of

bar associations, continues to hold numerous workshops and educational seminars which address gender fairness.

Considerable work has been undertaken by the Gender Fairness Committee in the area related to discipline and sanctions. In 1994, the committee began the process of revising the circuit's Model EEO Plan to include specific reference to sexual harassment and other gender-specific issues. Several drafts of the revised plan were widely circulated for comment. In August 1995, the Judicial Council of the Ninth Circuit approved a new Model EEO Plan, and by March 1997, all courts in the circuit had adopted the Model Plan or had submitted variations that were approved by the council.

The Ninth Circuit Gender Bias Task Force recommended that the federal judiciary's Codes of Conduct or Canons of Ethics be revised to prohibit gender-biased behavior and sexual harassment. These recommendations were forwarded to the Judicial Conference of the United States and its Committee on Codes of Conduct for consideration.

The fourth recommendation, to create a committee on fairness in the courts, has been implemented through the establishment of the Gender Fairness Committee described above.

The task force's recommendation for a national agenda has been forwarded to the appropriate national bodies for their consideration and implementation.

In the area of the effects on litigants, the Gender Fairness Committee developed the above-mentioned *Resource Guide on Gender Fairness Topics* which was widely distributed to all the courts in the Ninth Circuit and included many materials addressing the effects of gender on litigants. Various seminars have also been held throughout the circuit which have addressed the elimination of bias in the administration of justice.

The final recommendation, to broaden the inquiry, was taken up by the Ninth Circuit in 1993 when the judges and lawyers at the circuit conference endorsed overwhelmingly a resolution calling for the creation of a task force on the effects of ethnicity, race and religion on the administration of justice in the Ninth Circuit.¹¹ That task force has completed its work and

11. See Resolution No. 1, *Establish a Task Force on the Effects of Ethnicity, Race,*

issued its final report in August 1997.¹² The Gender Fairness Committee, recently expanded and renamed the Standing Committee on Gender, Race, Religious and Ethnic Fairness, is in the process of implementing the task force's recommendations.

IV. CONCLUSION

The Ninth Circuit continues to lead and innovate in the critical area of studying and developing procedures to eliminate discrimination in all aspects of the administration of justice. The circuit can be justifiably proud of its pioneering ground-work in the fields of gender, ethnic, racial and religious fairness.

Very significantly, the judges and lawyers of the circuit have participated willingly in these ongoing self-examinations. Each time the circuit has called for a popular vote on undertaking a major study, continuing the work of the study, or accepting the study's results, the judges and lawyers resoundingly have endorsed the proposition. As time has progressed, a growing number of Ninth Circuit community members have contributed to the implementation efforts.

The goal of the self-examination and monitoring process is to ensure that citizens perpetually receive the equal treatment they have a right to expect and demand. In this manner, the Ninth Circuit can continue to play a leadership role in assuring that court procedures embody the fairness principles which lie at the heart of our judicial system.

and Religion on the Administration of Justice in the Ninth Circuit, 9TH CIRCUIT NEWS (Fall 1993).

12. See FINAL REPORT OF THE NINTH CIRCUIT TASK FORCE ON RACIAL, RELIGIOUS & ETHNIC FAIRNESS (Aug. 1997), available online at <<http://www.ce9.uscourts.gov>>.

