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## Synopsis of the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts

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# Perspective

## Synopsis of the Report of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts

Jay C. Carlisle\*

The recent Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts ("Taskforce")<sup>1</sup> observes "some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and lawyers." "Biased conduct toward lawyers based on gender or race or ethnicity, has occurred to a greater degree."<sup>2</sup> The Report concludes that such conduct is unacceptable and admonishes all participants in the Second Circuit courts to guard against it.<sup>3</sup> The purpose of this Perspective is to review several sections of the Report.<sup>4</sup> The Perspective is written from an informative, not an analytical, standpoint and is intended to summarize the status of key issues raised by the Task Force.

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1. See Preliminary Draft Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, June 7, 1997 [hereinafter "Task Force Report"] (on file in the Pace University School of Law, Law Review Office).

2. *Id.* at 42.

3. *Id.* at 43.

4. See *id.* at Chapter Four entitled The Baruch Report: Survey Results of Observations and Opinions of Judges, Lawyers, Law Clerks, and Courtroom Deputies and Chapter Nine, entitled Complaints.

## I. Introduction

In the fall of 1993 the Second Circuit Judicial Council<sup>5</sup> voted unanimously to create a Task Force on Gender, Racial and Ethnic Fairness composed of seven Judicial officers and three attorneys.<sup>6</sup> The Judicial Council's action was prompted by a 1992 resolution by the Judicial conference of the United States which warned that bias, in all of its forms, presented a danger to the effective administration of justice in federal courts.<sup>7</sup> Similarly, in early 1994 Congress passed the Violence Against Women Act and specifically asked federal courts to study "the nature and extend of gender bias."<sup>8</sup>

The Task Force recognized the difficulties of asking Second Circuit judges to evaluate themselves and asked members of the bar and legal academics to complete an independent investigation and to submit their report to the Task Force.<sup>9</sup> By July of 1994 approximately sixty volunteers from throughout the Second Circuit had been selected and spent 1995 and 1996 studying specific areas. The Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, was submitted on

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5. At the time of the vote, the Judicial Council for the U.S. Court of Appeals for the Second Circuit consisted of Chief Circuit Judge Newman; Circuit Judges Kearse, Cardamone, Winter, Miner, Altimari, and Mahoney; Schif District Judges Griesa, McAvoy, Platt, Cabranes, Telesca, and Parker.

6. The members of the Task Force were the Honorable Sharon E. Grubin (Co-Chair), the Honorable John M. Walker, Jr. (Co-Chair), the Honorable John T. Curtin, the Honorable Sterling Johnson, Jr., the Honorable Constance Baker Motley, the Honorable Sonia Sotomayor, the Honorable Lawrence W. Pierce, Ellen Mercer Fallon, Esq., Fern Schair, Esq. and Sue Ann Shay, S.D.N., Esq. Judge Pierce retired prior to issuance of the Report and is not listed as a member of the Task Force.

7. See Task Force Report, *supra*, at note 1, at 1.

8. 42 U.S.C. § 14001.

9. The volunteer group is referred to as the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts. Sheila L. Birnbaum, Esq. was named as the Executive Director. John H. Doyle, Esq. and Bettina B. Plevan, Esq. were named as co-chairs of the Gender Committee. Professor Diane L. Zimmerman of the New York University School of Law was named as Reporter for the Gender Committee. William J. Snipes, Esq. and Hector Willems Rodriguez, Esq. were named as co-chairs of the Racial and Ethnic Committee. Professor Beryl Jones of Brooklyn Law School was named as Report to the Racial and Ethnic Committee. Special Assistants for both committees were Ms. Sharon Arnoldi, Ms. Paula Gerard and Ms. Amy D. Hundert. Professor Carroll Seron of Baruch College of the City University of New York served as the committees' Social Science Advisor.

June 5, 1997, and is referred to as Exhibit "A" of the Task Force Report. Also, a survey was undertaken by experts from Baruch College of the City University of New York ("the Baruch Report")<sup>10</sup> and written questionnaires were sent to all judicial officers, law clerks, courtroom deputy clerks, and all other court employees in the circuit. Finally a telephone survey of lawyers, with a written follow-up to non-respondents, was conducted by Louis Harris and Associates and this data was then presented to focus groups around the circuit.<sup>11</sup> The Baruch Report was submitted in June of 1997 and is referred to as Exhibit "B" of the Task Force Report. Exhibit "C" to the Report was prepared by the Employment Economics Division of Price Waterhouse LLP on November 21, 1996 and is entitled "Statistical Analysis for the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts."<sup>12</sup>

The Task Force's Report was released, with Exhibits "A,, "B" and "C," to the public during the summer of 1998. This essay will highlight sections four and nine of the Task Force Report with particular reference to the Baruch Report.

## II. Section IV of the Task Force Report

The objective of the Task Force study was "to examine whether, how, and when gender, race, or ethnicity affect the quality or nature of individual experience in the circuit's federal courts, both as to those who are involved in the litigation process and those who are court employees."<sup>13</sup> Earlier studies by the Ninth Circuit Gender Bias Task Force<sup>14</sup> and the Task Force

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10. This report, entitled "A Report of the Perceptions and Experiences of Lawyers, Judges and Court Employees Concerning Gender, Racial and Ethnic Fairness In the Federal Courts of the Second Circuit of the United States" [hereinafter "The Baruch Report"] was completed in June of 1997 and is on file in the offices of the Pace University School of Law, Law Review.

11. *See id.*

12. *Id.*

13. Task Force Report, *supra* note 1, at 5.

14. *See* The Preliminary Report of the Ninth Circuit Gender Bias Task Force (1992). The Ninth Circuit study demonstrated a "complex" picture about the ways in which gender affects professional interactions between judges and attorneys. The authors of that report argued that gender adds an extra dimension that is often discomfoting and sometimes destructive to female counsel. They summarized their findings as follows: "Taken together, these data suggest that women and men in the Ninth Circuit perceive the same world differently or inhabit differ-

on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts for the District of Columbia had reported systematic and persistent differences in the perceptions of men and women and white and minority judges.<sup>15</sup> A New York State Task Force on Women in the Courts found "gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences."<sup>16</sup> Thus, the Second Circuit Task Force commissioned an elaborate survey by the School of Public Affairs at Baruch College. The primary investigative technique of the Baruch Report was the distribution of detailed questionnaires to judges, lawyers and those court employees in a position to observe courtroom conduct.

The response rate for these groups were as follows: (1) Seventy three percent of the judges responded. (2) Seventy three percent of courtroom deputy and law clerks responded. (3) Seventy percent of assistant United States attorneys and public defenders responded and (4) a significant number of attorneys who had filed appearances or participated in Second Circuit courts in 1995 responded.<sup>17</sup>

#### A. *Overview of the Findings*

White male judges and white male attorneys consistently responded that gender and race/ethnicity do not matter.<sup>18</sup> They "tend to believe that the federal courts of the Second Circuit are color and gender blind toward those who practice in it."<sup>19</sup> However, some female judges and most female attorneys reported observing a court where gender frequently compromised the fairness of proceedings in the Second Circuit.<sup>20</sup> The findings

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ent worlds, one characterized by feelings of exclusion and the other by feelings of acceptance." The Preliminary Report of the Ninth Circuit Gender Bias Task Force (1992:6).

15. See Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts (District of Columbia, 1992).

16. Report of the New York Task Force on Women in the Courts, 15 FORD. Urban L. J. 1 (1986-87) (This 198 page report contains 463 footnotes and is the most comprehensive report on gender bias produced anywhere.) See Annual Report of The New York State Judicial Committee on Women in the Courts (November 1997) (copy on file with the Pace Law Review).

17. Task Force Report, *supra* note 1, at 25-26.

18. See The Baruch Report, *supra* note 10 at 25-26.

19. *Id.* at 26.

20. See *id.* at 25.

with regard to both female and minority attorneys were as follows:

white and minority female attorneys and minority male attorneys report that members of their own group are more disadvantaged than other groups. White female attorneys, for instance, observe that they are more disadvantaged than minority male and minority female attorneys in private practice. Similarly, minority male and minority female attorneys report that they are more disadvantaged than white female attorneys.<sup>21</sup>

These responses and other statistical data convinced the Task Force that “Notwithstanding some risk of survey error, we are satisfied that the Baruch Report provides a reliable basis for drawing the conclusions we have reached.”<sup>22</sup> These conclusions are as follows:

1. *Biased Conduct Directed at Parties and Witnesses*

The biased treatment of parties and witnesses comprised instances where a witness was (1) ignored, interrupted or not listened to; (2) helped or coached in a patronizing way; (3) subjected to a sexually oriented remark; or (4) subjected to derogatory remarks related to gender, race, or ethnicity (including parodying an accent). Overall few judges and court employees reported biased conduct by lawyers based on gender or race or ethnicity directed at parties or witnesses, but 26.9 percent of female judges observed parties or witnesses ignored, interrupted, or not listened to by lawyers, which the judges attributed to racial or ethnic bias.<sup>23</sup>

Few white male lawyers reported any bias against parties and witnesses. Female and minority lawyers reported biased conduct toward parties and witnesses by other lawyers to a greater degree. The Task Force stresses:

Apart from the reported occurrences of biased conduct, the most significant aspect of the data on treatment of parties and witnesses is the difference between the extent to which such conduct is reported by white males as compared to females and minority males, and by whites as compared to minorities.<sup>24</sup>

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21. *Id.* at 28-34.

22. The Task Force Report, *supra* note 1, at 27.

23. *See id.* at 28-29.

24. *Id.* at 31.

## 2. *Biased Conduct Directed Against Lawyers*

The Baruch Report presented data as to what lawyers reported they themselves have experienced and what judges, court employees (law clerks and courtroom deputy clerks), and other lawyers reported they have observed.<sup>25</sup> Few white male attorneys reported experiencing bias. About one half of the female attorneys reported they had experienced conduct based on race or ethnicity.<sup>26</sup>

However, a substantial percentage of all attorneys observed biased conduct based on gender and race. Fifty four percent of white male attorneys, seventy seven percent of white female attorneys, seventy nine percent of minority male attorneys and eighty percent of minority female attorneys reported observing biased treatment of other attorneys based on gender.<sup>27</sup> Almost fifty percent of white female attorneys and minority male lawyers reported observing a female attorney mistaken for a non-attorney.<sup>28</sup> Over thirty percent of white female attorneys and minority male and female attorneys reported observing attorneys helped or coached in a patronizing way, which they attributed to gender bias.<sup>29</sup> Less than eight percent of white attorneys reported these types of gender bias.<sup>30</sup>

Almost forty one percent of white male attorneys, fifty nine percent of white female attorneys, seventy eight percent of minority male attorneys and eighty five percent of minority female attorneys reported observing biased treatment of other attorneys based on race or ethnicity.<sup>31</sup> Twelve percent of white male attorneys, twenty one percent of white female attorneys, thirty nine percent of minority male and female attorneys reported observing that attorneys had been subjected to derogatory racial or ethnic remarks.<sup>32</sup> Thirteen percent of white male attorneys, twenty two percent of white female attorneys, forty five percent of minority male attorneys and eighteen percent of minority fe-

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25. *See id.* at 32.

26. *See id.* at 33.

27. *See* The Task Force Report, *supra* note 1, at 34, n. 25.

28. *See id.* at 34, n. 25.

29. *See id.*

30. *See id.*

31. *See id.* at 35, note 26.

32. *See* The Task Force Report, *supra* note 1, at 34, n. 25.

male attorneys reported that they have observed an imitation or parody of manner of speech of an attorney, which they attributed to racial or ethnic bias.<sup>33</sup> Finally, one percent of white male attorneys, four percent of white female attorneys, forty three percent of minority male attorneys and twenty eight percent of minority female attorneys reported that they had observed attorneys helped or coached in a patronizing way, which they attributed to racial or ethnic bias.<sup>34</sup>

The Task Force states that, "a significant percentage of lawyers reported observing biased conduct based on gender, race or ethnicity directed at other lawyers by judges and court employees, as well as by lawyers."<sup>35</sup> Ten percent of white male attorneys, thirty six percent of white female attorneys, thirty one percent of minority male attorneys and forty seven percent of minority female attorneys reported observing biased treatment of other attorneys based on gender by judges.<sup>36</sup> At least twenty percent of all attorneys, with the exception of white male counsel, reported observing biased treatment of other attorneys based on gender by court employees.<sup>37</sup> Seven percent of white male attorneys, thirteen percent of white female attorneys, forty percent of minority male attorneys and forty one percent of minority female attorneys reported observing biased treatment of other attorneys based on race or ethnicity by judges. Similarly a significant number of all attorneys, with the exception of white male counsel, reported observing biased treatment of other attorneys based on race or ethnicity by court employees.<sup>38</sup> Finally, forty seven percent of white male attorneys, sixty six percent of white female attorneys, sixty one percent of minority male attorneys and seventy seven percent of minority female attorneys reported observing biased treatment of attorneys based on gender by other attorneys.<sup>39</sup> Twenty seven percent of white male attorneys, forty eight percent of white female attorneys, fifty four percent of minority male attorneys and sixty percent of minority female attorneys reported

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33. *See id.*

34. *See id.* at 35, n. 28-30.

35. *Id.*

36. *See id.*

37. *See* The Task Force Report, *supra* note 1, at 36.

38. *See id.* at 36.

39. *See id.*



observing biased treatment of attorneys based on race or ethnicity by other attorneys.<sup>40</sup>

## B. *Opinions and Beliefs About Biased Treatment of Attorneys*

### 1. *The Judges Perspective*

Most judges reported that all attorneys are treated very fairly. However, the percentage reporting this view dropped “somewhat” when the judges were asked to report whether female and minority attorneys were treated very fairly.<sup>41</sup> A significant number of female judges reported gender and racial bias.<sup>42</sup> The Task Force noted that “few judges believe that lawyers are ever disadvantaged based on their race or sex in court proceedings specifically, but the percentages expressing this view increased somewhat when the judges were asked about female and minority lawyers.”<sup>43</sup>

### 2. *Conclusions and Recommendations*

The Second Circuit Task Force reached the following conclusions based on the data discussed in chapter four of their Report. First, some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and attorneys. Second, biased conduct toward attorneys based on gender or race or ethnicity, has occurred to a greater degree. Third, it is significant that far more women than men, particularly white men, report observing biased conduct based on gender, and that far more minorities than whites report observing biased conduct based on race or ethnicity.

The Task Force recommended that copies of its report and the appended reports, surveys and statistical data be distributed to all judges and court persona. The Task Force urged them to become familiar with the Report and exhibits and to take steps to minimize the type of bias reported.

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40. *See id.* at 37.

41. *Id.* at 38.

42. *See* The Task Force Report, *supra* note 1, at 39.

43. *Id.*

### C. Chapter IX of the Task Force Report: Complaints

#### 1. Against Judges

The Task Force points out that many respondents who have experienced or observed biased treatment by judges, attorneys, and court employees in the Second Circuit have not registered a formal complaint with the courts.<sup>44</sup> The Task Force's Report alerts the bar to the Judicial Councils Reform and Judicial Conduct and Disability Act<sup>45</sup> which establishes a formal complaint mechanism which can be used to report misconduct by Article III, bankruptcy and magistrate judges. The Report notes that a complainant can file a verified complaint with the clerk of the Court of Appeals or can register a complaint with the Chief Judge.<sup>46</sup> These complaints are subject to initial screening and then forwarded to a special investigative committee composed of the Chief Judge along with Court of Appeals and District judges appointed in equal numbers by the Chief Judge. The Judicial Council can sanction the accused judge in a number of ways short of removal from office. Petitions to appeal from the Judicial Council's decision can be made to the United States Judicial Conference.<sup>47</sup>

The Task Force makes three recommendations to encourage reporting of incidents of race, ethnicity and gender bias on the part of judges:

First, the courts should consider whether the initial screening process, currently administered solely by the Chief Judge, might be expanded to include review by a committee of lawyers. This might enhance public confidence in the complaint process. Second, whoever performs the initial screening process should be careful not to overlook genuine complaints of gender or race biased conduct which (because of inartful drafting by a complainant not trained in the law) may appear to argue only the merits of the complainant's case. . . Third, to encourage those who may be deterred from registering complaints of misconduct because they

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44. See *id.* at 43.

45. See The Task Force Report, *supra* note 1, at 106 ("Between 1991 and 1995, 371 misconduct complaints were filed against judicial officers, and only 22 raised allegations of race or gender bias. All bias complaints, like all complaints generally, were dismissed as relating to the merits of the case, frivolous, or unsupported. In fact, 98.6 percent of all complaints filed are dismissed." *Id.* at 106, n. 105.

46. See 28 U.S.C. § 372(c).

47. See The Task Force Report, *supra* note 1, at 107.

fear reprisal, the courts should set out clearly the circuit's rules on the alternative mechanism for triggering the complaint with the chief judge who conducts a preliminary investigation to determine whether there is sufficient independent evidence of misconduct to trigger the Section 372 proceedings.<sup>48</sup>

## 2. *Against Lawyers*

The Task Force Report points out that most courts in the circuit have some procedure to register complaints regarding misconduct of attorneys. Several courts have established grievance committees comprised of lawyers and judges to investigate attorney misconduct claims. Also, referral to state disciplinary committees is an option in every district. Nonetheless, the Task Force Reports that, "even where they exist, the district court grievance committees rarely receive reports of misconduct by lawyers". The Task Force recommends that each court formalize and publicize its policy for registering and investigating complaints of attorney misconduct.

## 3. *Against Court Employees*

The Task Force states, "No court in this circuit has a formal procedure to receive complaints about discriminatory conduct by court employees." Instead court employees must seek informal assistance by writing to the clerk of the court in the district or to the supervisor of the employee or agency for whom he or she works. This procedure has resulted in very few complaints.

## D. *Suggested Procedure*

The Task Force recognizes that "any unwillingness of aggrieved persons to report biased conduct creates problems for a court." The Task Force then recommends that the courts in the Second Circuit establish a uniform, formal mechanism to consider complaints about court employees. Finally, the Task Force recommends that each court in the circuit adopt a rule noting the circuit's disapproval of any conduct which is gender or racially biased. Also, the Task Force recommends that each court in the circuit declare its intent to take corrective action where appropriate. The Report recommends the following rule:

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48. *Id.*

It shall constitute misconduct for a lawyer to:

1. commit, during the representation of a client in the Second Circuit, any verbal or physical discriminatory act, on account of race, ethnicity, or gender if intended to improperly intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers or to gain a tactical advantage; or
2. to engage, in the course of representing a client in a matter in the Second Circuit, in any continuing course of verbal or physical discriminatory conduct, on account of race, ethnicity, or gender, in dealings with litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, if such conduct constitutes harassment.

### III. Conclusion

The Task Force recognizes that "Bias can be conscious or, in the more likely case, unconscious." The Task Force states,

The foregoing definition is followed by a pertinent quote from the English educator Sir Walter Moberly: "the most pernicious kind of bias consists in falsely supposing yourself to have none". This observation is the crux of the Task Force's four year research carried out by a cross-section of distinguished members of the Second Circuit's bench and bar. The detailed results of statistical data and focus group research speak for themselves. Few, if any, white male judges and attorneys believe there is any gender, racial or ethnicity bias in the circuit. At least twenty five percent of female judges and much higher percentages of female attorneys report incidents of gender and racial bias. Even higher percentages of minority attorneys report incidents of gender and racial bias.

The Task Force notes that as of 1990 there are 26,575 female attorneys in the circuit and that 25,078 are white. Also, the Task Force notes that as of 1990 there are 76,283 male attorneys in the circuit and 72,507 are white. Thus, as of 1990, there are at least 8,000 minority (hispanic, black, indigenous, asian/pacific islander) attorneys in the circuit and at least 27.3 percent of all attorneys in the circuit are women. These census figures will have dramatically increased by the year 2000. Consequently it is fair to suggest that at least 35 percent of all attorneys in the circuit have perceptions and experiences with

respect to gender and racial bias which are very different from white male attorneys. The question, not answered by the Task Force Report, is what actions, if any, can be pursued to address these differences.