

REPORT OF THE
COMMISSION ON GENDER FAIRNESS

SUBMITTED TO
THE TENNESSEE SUPREME COURT
JANUARY 15, 1997

ACKNOWLEDGMENTS

The Commission on Gender Fairness acknowledges with gratitude the Justices of the Tennessee Supreme Court who established this Commission in 1994 for the purpose of ensuring equal treatment for all persons in the Tennessee Judicial System free from gender bias. We extend a special word of appreciation to Justice E. Riley Anderson, the Court's liaison to the Commission. We also express our deep gratitude to Penny White, who served during the early phases of the work of this Commission as its co-Chair and then served as liaison during her tenure as a Justice on the Tennessee Supreme Court.

We are deeply appreciative of the superb work provided by the Tennessee Bar Association Commission on Women and Minorities. It goes without saying that its fact-finding efforts, along with its numerous specific recommendations, provided invaluable assistance to this Commission. Special thanks go to Kathryn R. Edge, Prince C. Chambliss, Sheila Jordan Cunningham, and Janice M. Holder, who either chaired or co-chaired the Commission at one point during its four-year existence.

We also express sincere thanks to the Administrative Office of the Courts for its outstanding assistance to the Commission. A special acknowledgment is given to Mary Tom Plummer, who served as the Commission's liaison with the Administrative Office. We also offer a special word of thanks to Pam Chen, Administrative Assistant, acknowledging her outstanding organizational and planning skills.

OVERVIEW AND SUMMARY

The Commission on Gender Fairness, established by order of the Tennessee Supreme Court the latter part of 1994, has examined the Tennessee judicial system and, by this report, makes a number of recommendations to the Court to ensure equal treatment for all persons free from gender bias. Our findings and recommendations are detailed in the body of the report; this section provides a summary thereof.

1. Findings

The Commission finds that gender bias in Tennessee's legal system prevents the full participation of women therein. While many corrective measures have been taken by bar associations and courts to improve the condition of women in the justice system, evidence of gender bias persists. Additionally, some litigants perceive that gender bias against both males and females exists. While inequitable treatment based upon gender occurs in different forms, ranging from explicit to subtle, it is essential that steps be taken to ensure the broadest possible participation by women and minorities in the Tennessee legal profession.

2. Recommendations

A. Continuing Legal Education Programs

The Commission recommends that for judicial employees, attorneys and judges, training sessions and/or continuing legal education programs should be established to provide information concerning the existence and consequences of gender bias be disseminated, as well as ways in which gender fairness can be achieved.

B. Judicial Nomination, Selection and Evaluation Processes

The Commission endorses the Tennessee Judicial Performance and Evaluation Program and recommends that questions regarding potential gender bias continue to be a part of any evaluation questionnaire designed and used in that setting. While we recognize that it may take considerable time to fully implement and review the existing evaluation program, we recommend that eventually this program be extended to include evaluations of general sessions and juvenile court judges. Additionally we recommend that all evaluations be made available to the public. Finally, we endorse the use of the Judicial Selection Commission as a means of finding qualified persons to serve in the Tennessee judiciary regardless of gender of the applicant.

C. Review of Rules, Regulations, Procedures, etc. with Respect to Gender Neutrality

While various court rules have been converted to gender-neutral form, we recommend that all courts carefully examine existing court rules to ensure that they reflect gender-neutral usage. Similarly, we recommend that committees revising and updating jury instructions monitor the continued use of gender-neutral terminology. Likewise, we recommend that all executive orders, state statutes and regulations be written with an eye toward gender-neutral usage. Finally, we urge the Tennessee Supreme Court to encourage everyone within its purview -- judges, court employees and lawyers -- to employ gender-neutral language as one means of ensuring gender fairness in the justice system.

D. Data Collection

Given the need for demographic information, we recommend that various judicial conferences, agencies, law schools, bar associations and the Board of Professional Responsibility provide demographic information on membership and leadership, where applicable, to the Supreme Court on an annual basis. Additionally, we recommend to the Court that it undertake the collection of data on perceptions and attitudes of judges and non-judicial court personnel. Lastly, we urge that the Administrative Office of the

Courts collect, analyze and disseminate all data as it pertains to gender fairness in the Tennessee judicial system.

E. Guidelines for Attorney Appointments

We recommend that all judges develop guidelines to ensure that attorney appointments and all fee awards are based on gender-neutral considerations and that a record of such appointments, including fees awarded, be maintained and made available for inspection by the public.

F. Establishment of Speakers Bureau

We recommend the establishment of a speakers bureau to address and discuss issues related to gender fairness in the judicial system, and that this bureau be administered through the Administrative Office of the Courts.

G. Employment and Promotions Within the Judicial System

We recommend that the State of Tennessee implement the broadest possible recruitment efforts for all positions on a continuing basis, with special emphasis upon measures designed to increase the numbers of women in higher paid and higher status positions in the justice system. The Supreme Court should monitor, on an ongoing basis, implementation of policies designed to assure fair employment practices. Finally, we note that all judicial department offices, agencies and courts should be mindful of the need to maintain a working environment that will recognize and seek to accommodate the unique problems confronted by the single-parent employee.

H. Courtroom Conduct Handbook

We recommend the adoption of a courtroom conduct handbook modeled upon the existing guide prepared and approved by the Memphis Bar Association. Similarly, with respect to courtroom staff and personnel, we recommend an appropriate document to be used as a part of the training process.

I. Procedures for Receiving and Reviewing Complaints Regarding Gender Bias in the Courts

With respect to real or perceived bias by attorneys against others based upon gender, we recommend that the Tennessee Supreme Court carefully consider revising existing disciplinary rules to make it a disciplinary violation for an attorney to engage in gender based conduct. With respect to judges, law enforcement officers, employees of court clerks' offices, and juvenile court employees, we recommend that procedural mechanisms be put in place for receiving and reviewing complaints regarding gender bias. Specifically, we recommend that an insert be included in the Courtroom Conduct Handbook, described above,

whereby complaints pertaining to the behavior of any of those individuals can be brought to the attention of the appropriate authorities.

J. Oversight and Implementation of Recommendations

We recommend to the Supreme Court that it appoint a state-wide committee charged with planning, overseeing and monitoring implementation of this Commission's recommendations. That committee should include representatives from a number of groups and organizations and should also include representatives of the general public. Meaningful implementation and evaluation holds out considerable promise for the amelioration -- and ultimate elimination -- of gender bias in Tennessee's judicial system.

REPORT

I. Introduction

The Tennessee Supreme Court established the Commission on Gender Fairness (“the Commission”) by its order dated September 8, 1994, charging the members of the Commission to “examine the components of the Tennessee Judicial System and recommend revisions in rules, procedures, and administration to ensure equal treatment for all persons free from gender bias.” (Biographies of Commission members are attached as Exhibit A). Specifically, the Court recommended that the Commission “review and consider the findings of the Tennessee Bar Association Commission on the Status of Women and Minorities in the Profession (“the TBA Commission”) as it relates to gender fairness and propose methods to ensure that gender fairness is achieved” in eleven separately enumerated areas of administration.

Toward that end, the Commission deliberated the best use of the findings and report of the TBA Commission and determined that because extensive state-wide hearings and fact-findings had been undertaken by the TBA Commission with respect to issues concerning gender bias, the Commission would not hold public hearings but would, upon request, receive written or oral testimony from individuals or groups petitioning the Commission for an audience. The Commission did, in fact, receive such information, and it is discussed in Part II of this report.

WHAT IS “GENDER BIAS”?

The Commission sought to define what was meant by the broad term “gender bias” and adopted the fairly comprehensive working definition offered by Ms. Lynn Hecht Schafran in her article entitled Gender Bias in the Courts: An Emerging Focus for Judicial Reform, 21 ARIZONA STATE LAW JOURNAL 237, 238-239 (1989):

In the summer of 1988, a senior status federal district court judge in Pittsburgh made international headlines when he refused to address a female attorney as “Ms.” and threatened to hold her in contempt if she persisted in using her birth name rather than her married name. Many people -- judges, lawyers and lay persons alike -- assume that this is what gender bias in the courts is all about: offensive remarks to female lawyers from older male judges unaccustomed to dealing with women as professionals. Moreover, most assume that these incidents are infrequent, if not aberrational.

Unprofessional treatment that demeans women attorneys and undermines their credibility with jurors, clients and peers is a matter of serious concern and is by no means infrequent, but it is only a small part of the problem. More frequent and damaging are the myriad ways that gender bias taints decision making and the entire environment of the courts. In 1984, New York's Chief Judge established the New York Task Force on Women in the Courts to review "all aspects of the [court] system, both substantive and procedural" and determine whether there are "statutes, rules, practices or conduct that work unfairness or undue hardship on women in the courts." The Task Force concluded that "gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity."

Gender bias has three aspects: stereotyping the nature and roles of women and men, society's devaluation of women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives. Gender bias does not require deliberate intent. Among its consequences are the imposition on one sex of burdens not imposed on the other.

Gender bias is prevalent in virtually every aspect of the courts' decision making and administrative processes. Although gender can affect both sexes, women are overwhelmingly its victims. For every one case in which gender bias injures men, there are thousands of cases in which it injures women.

Ms. Schafran's working definition of gender bias should not be limited, however, to the court system. It is equally appropriate for other venues, including law firms, law schools, and bar associations. In any setting in which judges, attorneys, court officers, litigants, jurors, and the general public intersect with the judicial system, gender bias may adversely impact the administration of justice.

II. Summary of Findings Related to Gender Bias

A. Tennessee Bar Association Commission on Women and Minorities in the Profession

1. History of the Tennessee Bar Association Commission on Women and Minorities in the Profession

The TBA Commission was established in 1992. Its charge was “to develop a plan of action for the Tennessee bench and bar that will promote and ensure the broadest possible participation by women and minorities in the Tennessee legal profession.” The TBA Commission educated itself about the work of similar commissions in other states and gathered information about the status of women and minorities in Tennessee’s legal system. The TBA Commission held public hearings in Memphis, Nashville, and Knoxville, receiving anecdotal testimony from attorneys, judges, law students, court reporters, bar association leaders, litigants, members of the Tennessee General Assembly, and others with respect to racial and gender bias in the Tennessee legal system.

During the second phase of the work of the TBA Commission, a confidential, statistically valid survey of licensed Tennessee attorneys was conducted, the findings of which are detailed in the TBA Commission’s 1996 Report. The Report of the Commission on Gender Fairness incorporates by reference the 1996 Report of the TBA Commission, which also includes the TBA Commission’s interim report dated August, 1993 (Exhibit B). It should also be noted that this Commission endorses the numerous recommendations made by the TBA Commission (while they are included within the TBA Commission report, they are attached as Exhibit C).

2. Summary of Public Hearing Testimony

The TBA Commission’s public hearings were conducted to assess the current status of women and minorities in the legal profession in Tennessee and to educate the members of the Commission on the issues. Confidential testimony was also taken from witnesses who were reluctant to testify publicly for fear of jeopardizing their relationships in their jobs, within the bar and before the bench. In addition, a number of women related personal incidents of bias to various Commissioners but would not offer written or oral testimony.

A full report of the public hearing testimony relied upon by both the Commission

and the TBA Commission is detailed in the TBA Commission 1996 Report, but several themes from the testimony are highlighted here as they appeared in the TBA Commission's Report:

In the Courtroom

Treatment of Attorneys

Women attorneys appearing in court were frequently assumed by the judges to be clients or paraprofessionals and were addressed as such in front of their clients and juries.

Women attorneys were asked by some judges to produce their law licenses before being permitted to practice in certain courts, while male attorneys were not required to do so.

White male attorneys were appointed to handle more complex, lucrative estates in probate matters, while female and minority attorneys of equal competence were given smaller, less desirable estates.

One woman attorney was told by a Tennessee appellate court judge that he did not need to hear from her but that she could sit in the courtroom and “make it pretty.”

White male attorneys were awarded fees far in excess of those awarded to female or minority attorneys of comparable expertise on comparable cases.

One woman attorney was called into a male judge’s chambers on motion day, ostensibly to discuss a motion. The judge proposed that they have a sexual relationship. The attorney declined the judge’s proposal and as of the date of her testimony before the TBA Commission, she had lost every time she had appeared in the courtroom, although she has successfully appealed some of his rulings.

Some male judges refer to women attorneys appearing before them as “honey” and “sweetie” while court is in session.

Some male judges continue to permit male opposing counsel to make comments about the appearance of female attorneys. For example, one judge permitted a male attorney to comment to the jury, “I know Ms. X looks prettier than me, but don’t let her snappy suit and fancy high heels fool you.”

Women in the Judiciary

The TBA Commission Report indicates that the Tennessee bench does not yet represent a model of success in terms of the participation of women. As of mid-1995, of the 171 active members of the Tennessee Judicial Conference (composed of all of Tennessee’s appellate judges and justices and the judges of all general jurisdiction trial courts), 14 were women. The number of judges who are not white males is 22 or 13 percent.

Treatment of Litigants

In custody matters, women testified that women litigants are generally held to a higher standard than

men, with judges treating extramarital affairs as expected of men but as evidence of a character flaw in women.

In divorce matters, a wife who has a typical “mid-life crisis” (for example, moving out of the house and having an affair) frequently is judged much more severely than a husband who engages in similar behavior.

Judges often treat child support guidelines as “maximums” rather than “minimums.” (The complainants said that they felt that because women were most often in the “asking” position and men on the “paying” end, judges, mostly male, were biased in the awards.)

Women attempting to obtain orders of protection sometimes find judges unwilling to give their allegations serious attention.

In Law Firms

Women associates often are assigned work that their firms view as less desirable, while their male counterparts are assigned more complex, lucrative work.

Some firms assign litigation matters to male attorneys because they fear that juries will react adversely to a woman attorney, especially an “attractive” woman attorney.

Women being considered for partnership are frequently held to a higher standard than men of comparable experience.

Some firms resist hiring more than one or two women attorneys as litigators.

Exclusion of women associates and partners from opportunities to meet with and socialize with partners and clients was a frequent complaint.

Women attorneys report that law firms hold memberships in clubs that exclude women members and hold meetings among male associates, male partners and clients at these clubs, preventing women attorneys from this opportunity for client contact.

The Commission recognizes that the issues surrounding the treatment of women attorneys in law firms and law offices may fall outside the scope of the Commission’s charge. Nevertheless, because the private, government and corporate practice of law produces opportunities for women attorneys who may aspire to the bench and because women attorneys who appear before the courts of this state do so as an essential part of their practice setting, we believe it incumbent upon the Commission to address these concerns.

Research conducted in 1994 by Deborah Graham and Prentice Hall Law & Business and reported in Graham's book GETTING DOWN TO BUSINESS: MARKETING AND WOMEN LAWYERS (Glasser LegalWorks, 1996) confirms the TBA Commission's findings. Attached to this report is a summary of some of Graham's research (Exhibit D).

The Commission recommends that any ongoing effort by the Court to monitor the treatment of women in the Tennessee justice system include the study of indices of bias which may persist in private, corporate and government practice settings. While such a study is beyond the scope of this Commission's work, we acknowledge the essential nature of this inquiry to any comprehensive solution to the problems of gender inequity in the justice system.

In Law Schools

Of the faculty members at Tennessee's four law schools, only an insignificant number are women.

In Bar Associations

In urban areas, women are required to work longer and do more behind-the-scenes work than men in order to be considered for higher bar association offices, according to some reports.

Bar association CLE panels frequently feature only white males.

The leadership of urban bar associations has been overwhelmingly white male, despite consistent efforts by women to be elected or appointed to leadership positions.

Summary

The testimony received at the TBA Commission's public hearings in 1993 firmly established that gender bias in Tennessee's legal system prevents the full participation of women. The survey conducted by the TBA Commission subsequent to the public hearings further indicates a perception of bias on the part of some attorneys. While a majority of respondents consistently disagreed with statements such as "Judges appear to assign more credibility to the arguments of male attorneys," when these responses were broken down by gender of the respondents, disparities in the perception of judicial fairness emerged. 74.3% of male attorneys disagreed with the statement, "The outcome of cases or legal problems is affected by bias against female attorneys," while only 26.8% of female attorneys disagreed with the statement; 38.4% were neutral or had no opinion. These

findings suggest that subtle indicators of judicial bias may be more apparent to the members of some groups than to others.

The Tennessee Judicial Conference has an active Judicial Sensitivity Committee, including trial and appellate judges, which has encouraged and presented programs designed to help judges deal with issues of bias. The TBA Commission reports an increased participation by female panelists and speakers in general at the various judicial conferences. Nevertheless, the TBA Commission found that:

- (1) Only limited gender programs have been provided to some of the judges;
- (2) Those programs have not been provided on a systematic or regular basis;
- (3) There is no formalized manner in which such issues are integrated into regular programming;

and

- (4) There is no formalized manner in which diversity of panelists is encouraged or monitored.

Since the establishment of the TBA Commission, many steps have been taken by bar associations and the courts to improve the condition of women in the justice system, including the bold action by the Tennessee Supreme Court in establishing the Commission. While it is clear that some improvements have been made, evidence of gender bias persists, and the Commission offers this report with its recommendations to the Supreme Court consistent with its charges.

B. Additional Information Received by the Commission

As explained in Section I of this report, the Commission on Gender Fairness did not hold public hearings throughout the state. It did, however, receive written and oral testimony (and related documentation) from individuals and groups concerned about gender fairness issues in the Tennessee judicial system. This part of the report summarizes that information, identifies relatively recent developments related to that information and sets forth its observations and recommendations.

1. INFORMATION RECEIVED

The Commission received oral testimony from representatives of organizations including Dads Against Discrimination, the Children's Rights Council and the Society for the Preservation of Family Relationships.

Documents published by some of those organizations also were distributed to members of the Commission. In the same vein, letters were sent to the Commission from men pertaining to their personal experiences in domestic relations matters; one of those individuals is a member of the Tennessee Bar Association and addressed, in broader terms, his perception of gender bias in family law matters.

In essence, these organizations and/or individuals expressed the view that gender bias exists in the context of domestic relations disputes. Specifically, they asserted that men have been and continue to be discriminated against by reason of gender with respect to (1) the award of custody and (2) access to their children (visitation privileges). While some of the individuals expressed the opinion that certain judges were responsible for gender-based decisions regarding custody and visitation matters, others expressed the view that "the system" was unfair, in a pervasive sense, because mothers are viewed much more sympathetically in domestic relations disputes than are fathers.

The Commission also received oral and written testimony and related documents from women, some of whom are members of M.O.M. (Mothers Opposing Misjudgement). These individuals, all of whom reside in eastern Tennessee, addressed inequities in the context of child custody disputes. Specifically, they alleged that mothers had been and were being denied custody of their children because of judicial bias against them and that the bias was based upon gender, alone.¹ While their concerns went beyond gender fairness (for example, they addressed (1) undesirable aspects of the adversarial nature of divorce settlements, (2) excessive fees,

¹ Because a number of the witnesses described their own cases in specific detail and also because other cases were specifically identified, the Commission evaluated reported appellate court decisions pertaining to the matters addressed. Of the six rulings identified, three resulted in reversals of the trial judge's decision to award sole custody of the child or children to the father. Two appellate court decisions related to financial aspects of litigation, both of which resulted in reversals of trial court decisions that had been favorable to the father. By contrast, the sixth case involved an appeal brought by the father who was denied custody of the children, ordered to pay child support and obligated to abide by a specific visitation decree; the appellate court upheld the trial court's judgment in all respects.

including attorney's fees, associated with domestic relations litigation, and (3) the power of the single judge), one of their specific recommendations was the need to "educate court professionals about gender inequality." The Commission also received a letter from a woman expressing concern that elimination of the "tender years doctrine," discussed below, would be undesirable from a mother's perspective.

It is thus somewhat ironic that the Commission received testimony from both fathers' and mothers' groups and that the testimony is both consistent (i.e., claims of gender discrimination) and inconsistent (i.e., each group claiming to be a victim of such discrimination). And as a member of the Commission on Gender Fairness observed, it is possible that every complainant was expressing his or her dissatisfaction with either the judge or "the system" because he or she had been the losing party in contested litigation. Nonetheless, it is fair to say that a number of the individuals appearing before the Commission expressed in sincere and emotional terms the perception that gender bias exists in the Tennessee judicial system. That perception, whether or not based upon reality, cannot be ignored. Nor can these concerns be dismissed even if they are thought to represent only isolated instances before individual judges.

2. RELATED DEVELOPMENTS

It is interesting to note that a significant number of developments related to family law issues have taken place relatively recently and that some of these may pertain to gender bias concerns. Without attempting to rank-order these developments, they are as follows:

1. Effective May 15, 1996, Tennessee Code Annotated §36-6-101(a) was amended to provide for a presumption that joint custody is in the best interest of a minor child where agreed upon by the parents. Otherwise, neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established and it is recognized that the court has wide discretion to order a custody arrangement "that is in the best interest of the child."

2. The Tennessee Attorney General, on April 10, 1996, issued Opinion No. 96-068. Among other things, this opinion answers the question: "Would a presumption in favor of giving custody to one parent based upon gender without requiring the proper standard of proof violate constitutional or fundamental rights?" The Attorney General's response was clear and unequivocal. While observing that no Tennessee law currently imposes a gender-based presumption in favor of the mother's custody,² it was opined that "a statutory presumption in favor of giving one parent custody in a divorce or similar case based upon gender, which is applied without requiring the proper standard of proof or development of specific facts related to the child's best interest would be unconstitutional."

3. The House and Senate Judiciary Committees have agreed to the appointment of a joint study committee to review custody issues. See Tennessee Attorney's Memo, Volume 21, No. 16, April 15, 1996.

4. The Tennessee Bar Association's Family Code Commission, chaired by Mary Francis Lyle, is now reviewing (and possibly proposing revisions to) Tennessee's divorce statutes. According to The Tennessean (August 20, 1996, page 4B, column 3), members of Dads Against Discrimination and the Children's Rights Council appeared at a public hearing and presented testimony similar to that previously given to the Commission on Gender Fairness.

5. The June, 1996, report of the Commission on the Future of the Tennessee Judicial System ("Futures Commission") reported that "like the rest of society, and despite progress over the years, the judicial system suffers from biases of ... gender ... that should not influence the procedures and outcomes of the system, but which too often still do." (page 11)

² It was noted that the "tender years doctrine" does not require or authorize a presumption that either spouse is better qualified to care for a child of any age.

That Commission recommended that "in all domestic-relations disputes ... mediation should be required before litigants can obtain a trial date." (page 46) Additionally, the Futures Commission recommended that there be divisions of district courts devoted to family law and that that division could make great use of mediation: "Many of the issues that enter the court as contested matters should be resolved well short of the courtroom. Additional areas for direct involvement would be family matters that are closer to the adversarial court model, but that could benefit from involvement of other agencies. Child abuse and neglect, orders of protection, contested custody and child support are in this category." (page 51)

3. OBSERVATIONS AND RECOMMENDATIONS

As described in Section A, there is a perception that gender bias exists in the context of domestic relations disputes. And while it is interesting to note that both men and women have expressed the belief that they received unfair treatment because of their own gender, these anecdotal reports have also been corroborated, at least to some extent, by reported appellate court decisions. At a minimum, this data underscores the need for continuing education programs for attorneys and judges that focus upon gender bias issues.

While the Commission on Gender Fairness applauds the continuing efforts to focus upon ways in which family law matters can be resolved more justly and fairly, discussed in Section B, we recognize the delicate balance between parental interests and interests of children. With respect to the recommendation that the judicial system move toward a mediation model, endorsed by the Futures Commission, we acknowledge that mediation may produce desirable results through a less expensive and less hostile procedure. At the same time, however, we note that some commentators have urged caution in this context.³

³ See, for example, Penelope Eileen Bryan, Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation, 28 FAMILY LAW QUARTERLY 177 (Summer 1994) (concluding that "when a husband and wife possess vastly different negotiating power, mediation is likely to produce a lopsided agreement" and that "[a]s proclaimed neutrals, mediators cannot protect the at-risk spouse"); Karla Fischer, Neil Vidmar, and Rene Ellis, The

Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 SMU LAW REVIEW 2117 (1993) (concluding that "both the theory and practice of mediation pose serious problems for its use as a resolution device when a relationship involves a culture of battering"); and Laurie Woods, Mediation: A Backlash to Women's Progress on Family Law Issues, 19 CLEARINGHOUSE REVIEW 431 (Summer 1985) (arguing that the push toward mediation represents a regressive move toward privatization of family law issues).

III. SPECIFIC AREAS OF CONCENTRATION: FINDINGS AND RECOMMENDATIONS

In its order establishing the Commission on Gender Fairness, the Tennessee Supreme Court charged the Commission with the task of proposing methods to ensure that gender fairness is achieved in eleven separately enumerated areas of administration. This portion of the report (1) identifies each specific charge, (2) summarizes findings of fact, where appropriate, and (3) makes specific recommendations to the Court.

1. Review the courtroom treatment of litigants, witnesses, jurors, court reporters, bailiffs, clerks, and attorneys and propose methods to eliminate gender bias.

Reviewing the transcripts of public hearings and surveys of the Tennessee Bar Association Commission on Women and Minorities in the Profession, reports of the American Bar Association Commission on Women in the Profession, reports of other states and published articles reflecting independent research, this Commission finds that gender bias in the Tennessee courts does exist and that too many Tennesseans, women and men, experience discrimination or inequitable treatment in the judicial system simply because of their gender. While such treatment occurs in different forms, ranging from explicit to subtle, and in different settings, from law offices to courtrooms, it is essential that a plan of action be developed that will promote and ensure the broadest possible participation by women and minorities in the Tennessee legal profession.

The Commission's many findings and recommendations, set forth in detail throughout this report, are designed to ameliorate -- and ultimately eliminate -- the many forms of gender bias. In order to do so, there must be ongoing oversight to ensure full implementation of these recommendations. Accordingly, we strongly urge the Supreme Court of Tennessee to appoint a state-wide committee charged with planning, overseeing and monitoring implementation of the recommendations of this Commission. That committee should include representatives from groups such as the Tennessee Judicial Conference, Clerks of Court Conference, law schools, the Tennessee Bar Association, District Attorneys' General Conference, General Sessions Judges Conference, Tennessee Lawyers Association for Women, Public Defenders' Conference and the general public.

2. Develop and propose continuing legal education programs for all judicial employees and lawyers regarding gender fairness.

Tennessee Supreme Court Rule 21, Section 3.01, reads as follows:

Each attorney admitted to practice law in the State of Tennessee shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) actual hours of approved continuing legal education each calendar year, beginning January 1, 1987. In addition, beginning January 1, 1993, attorneys shall complete three (3) additional hours per year of approved continuing education in courses dealing with ethics and professionalism ("EP credits").

The Commission recommends that, beginning January 1, 1998, and in every even numbered year thereafter, the three (3) hours of ethics and professionalism shall contain a component concerning the existence and consequences of gender bias, as well as ways in which gender fairness can be achieved.

With respect to programs for judicial employees, we acknowledge the need for and recommend gender fairness training as a part of staff orientation. [See related discussion pertaining to Charge No. 10, which includes a suggested handout to be utilized as a part of the training process.]

3. Develop and propose orientation and continuing legal education programs for judges regarding gender fairness.

The Commission endorses the 1990 Model Code of Judicial Conduct, as modified and which now appears as Tennessee Supreme Court Rule 10. We recommend that the Tennessee Judicial Conference and the Tennessee General Sessions Judges Conference should plan and implement continuing legal education programs concerning the Code of Judicial Conduct and that, beginning January 1, 1998, and in every even numbered year thereafter, each program should contain a component concerning the existence and consequences of gender bias, as well as ways in which gender fairness can be achieved.

The Commission also recommends that the Tennessee Judicial Academy and the Tennessee General Sessions Judges Academy maintain a class on racial and gender fairness and that this class be a regular part of its curriculum for newly elected or appointed judges.

4. Review the judicial nomination, selection, and evaluation processes and propose methods by which these may be improved to effectuate gender fairness.

On June 14, 1995, the Tennessee Supreme Court adopted Rule 27, establishing the Tennessee Judicial Performance and Evaluation Program. The program is administered by a Judicial Performance Program Committee named by the Supreme Court and charged with the responsibility of designing the forms and format for evaluating trial judges and appellate judges "for the purpose of self-improvement." In addition, a report on all appellate judges seeking election or re-election is to be prepared by the Judicial Evaluation Commission for dissemination to the public. At this time, however, the Evaluation Program does not apply to judges of the General Sessions Court or the Juvenile Court.

The Commission endorses the use of the performance and evaluation process for all judges described above. It is expected that the extensive and detailed evaluation criteria set forth in Section 3 of Rule 27 will assure that all members of the judiciary, regardless of gender, are evaluated fairly and with regard only to those characteristics and qualifications that are relevant and important to the position. The Commission recognizes that questions regarding an individual's treatment of co-workers and parties who come before the court are a part of the Committee's evaluation format and recommends that questions regarding potential gender bias continue to be a part of any evaluation questionnaire designed and used by the Judicial Evaluation Commission.

The Commission on Gender Fairness recognizes that it will take considerable time for the Judicial Performance Program Committee and the Judicial Evaluation Commission to implement and review the evaluation program for appellate and trial judges. Nevertheless, it is our recommendation that the program eventually be extended to include evaluations of the General Sessions and Juvenile Court Judges of Tennessee. Furthermore, we recommend that the Tennessee Supreme Court consider making all evaluations available to the public in the future, including those relating to trial, general

sessions and juvenile court judges.

Tennessee Code § 17-4-101, et seq., establishes the Tennessee Judicial Selection Commission and states that "[i]t is the declared purpose and intent of the general assembly by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee, and to assist the electorate of Tennessee to elect the best qualified persons to the courts; to insulate the judges of the courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the courts by eliminating the necessity of political activities by appellate justices and judges; and to make the courts 'nonpolitical.'" The Judicial Selection Commission is composed of fifteen members nominated by "associations composed of lawyers who regularly practice in the trial and appellate courts and who, respectively, represent the prosecution and defense functions in criminal proceedings and the plaintiff and defense functions in civil proceedings, and who, therefore, from experience and observation are familiar with the best qualifications and characteristics of judges." At this time, the membership of the Commission consists of seven women and eight men.

The Commission on Gender Fairness endorses the use of the Judicial Selection Commission as a means of finding qualified individuals to serve in the Tennessee judiciary regardless of gender of the applicant. It is noted that the by-laws of the Judicial Selection Commission are written in gender-neutral language, clearly envisioning and encouraging the application of qualified members of both genders for judicial positions. The Commission on Gender Fairness also endorses the current composition of the Judicial Selection Commission and recommends that those associations which provide nominations for the Commission be encouraged to maintain a similar gender balance in the future. It is believed that such diversity on the Judicial Selection Commission will assist in attracting qualified members of both genders to the application process.

5. Review existing court rules, jury instructions, regulations, statutes, practices, and procedures and propose revisions that produce gender fairness and employ gender-neutral terminology.

The Commission notes that the phrase "produce gender fairness" might be read as establishing a substantive, as opposed to a linguistic, norm. However, the Commission has decided that it should limit its fact-finding and recommendations to linguistic norms. It would be impracticable, given the duration of the Commission, to embark upon a study of the substantive gender fairness resulting from application of the various laws enumerated in a Supreme Court order (except as noted in other portions of this report). Therefore, the Commission has limited its mission to examining the use of gender-neutral terminology.

I. Findings of Fact

A. Court rules

The Commission found that the following court rules already appear in gender-neutral form in published sources:

1. Rules of the Tennessee Supreme Court;
2. Rules of Practice and Procedure of the Tennessee Court of the Judiciary;
3. Tennessee Rules of Appellate Procedure;
4. Tennessee Rules of Civil Procedure;
5. Tennessee Rules of Criminal Procedure;
6. Tennessee Rules of Juvenile Procedure; and
7. Tennessee Rules of Evidence.

The Commission acknowledges the efforts of Marshall Davidson, a member of the Commission, and Professor Neil Cohen, of the University of Tennessee College of Law, for having been instrumental in revising these various rules and converting them to a satisfactory gender-neutral form. Indeed, Professor Cohen was

recognized for his efforts at the 1994 Knoxville Bar Association dinner in honor of the Supreme Court.

The Commission found that the following Court rules have not been revised to reflect gender-neutral terminology:

1. Rules of the Tennessee Court of Appeals;
2. Rules of the Tennessee Court of Criminal Appeals; and
3. Some local court rules.

B. Jury Instructions

The Commission found that revision of both the Civil and Criminal Tennessee Pattern Jury Instructions is currently underway. The Commission has been informed by members of the respective revision committees, Judge Janice Holder and Judge Charles Lee, that the proposed revisions will incorporate gender-neutral language.

C. Regulations

The Commission found that the various administrative agencies of Tennessee vary in the degree to which their regulations reflect gender-neutral language. A non-exhaustive survey of the Rules and Regulations of the State of Tennessee revealed that the regulations of some agencies, such as the Tennessee Board of Funeral Directors and Embalmers, use gender-specific language (Chapter 0660-1-.02, attached as Exhibit E). Regulations promulgated by other agencies, such as the Department of Human Services, use gender-neutral pronouns (Chapter 1240-4-1-.09(2), attached as Exhibit F). Another variation is exemplified by regulations of the Tennessee State Board of Accountancy, which employ a blanket provision on gender neutrality (Chapter 0020-1-.01(1)(h), attached as Exhibit G).

D. Statutes

The Commission found that the Legislative Drafting Manual edited by Ellen C. Tewes and published by the Office of Legal Services of the Tennessee General Assembly advocates the use of gender-neutral language in legislation (Exhibit H). Also, the Commission has been assured by James Clodfelter, Chair of the Tennessee Code Commission, that his office exercises oversight to ensure that enacted laws reflect gender-neutral terminology (letter from Commission member Mae Owenby to James Clodfelter, attached as Exhibit I).

E. Practices and Procedures

The Commission has not found any practices and procedures in addition to those enumerated above that are affected by the use of gender-specific language. Parenthetically, we note that the Court Conduct Handbook (discussed in connection with Charge No. 10, below) will sufficiently address appropriate use of gender-neutral language in all practices and procedures of the courts.

II. Recommendations

A. Court Rules

The Commission recommends that the Tennessee Supreme Court encourage the Tennessee Court of Appeals, the Tennessee Court of Criminal Appeals, and the local trial courts to revise existing court rules to reflect gender-neutral usage. In the exercise of its supervisory power, the Supreme Court should direct these courts to use gender-neutral language in all newly-promulgated rules. The Supreme Court also should take steps to ensure that gender-neutral terminology is employed in all its proposed revisions to existing rules.

B. Jury Instructions

The Commission recommends that the Tennessee Supreme Court commend the two revision committees for their efforts in revising Pattern Jury Instructions to ensure gender-neutral usage and to monitor further Pattern Jury Instruction revisions to ensure the continued use of gender-neutral terminology.

C. Regulations

The Commission recommends that the Tennessee Supreme Court communicate to Governor Don Sundquist the need to issue an Executive Order requiring that all newly-promulgated regulations reflect gender-neutral usage.

D. Statutes

The Commission recommends that the Tennessee Supreme Court express its support of the efforts of the Tennessee General Assembly's Office of Legal Services and the Tennessee Code Commission to ensure gender-neutral usage in all Tennessee statutes (unless, in specific instances, gender specificity is appropriate).

E. Practices and Procedures

The Commission recommends that the Tennessee Supreme Court continue to set an example of awareness and concern about the use of gender-neutral language. The Supreme Court should encourage everyone within its purview -- judges, court employees, lawyers-- to use gender-neutral language as one means of ensuring gender fairness in the Tennessee justice system.

6. Develop a method of data collection to track and evaluate the participation of women in all aspects of the judicial system.

The Commission has concluded that not only data collection, but also data analysis and dissemination, can play an important role in evaluating and improving the status of women in Tennessee's justice system. However, although much relevant data has been and is currently being collected by various agencies and groups, there is no central repository for this data and, therefore, no easy way for the Court or the public to gain access to it. The Commission believes that the Court's leadership role in the justice system can be enhanced if the Court can serve as a central repository of important gender-related information and if the Court publicizes that information and uses it in carrying out its supervisory role.

Although the word "develop" in Charge 6 seemed to contemplate the origination of a data collection process, the Commission initially focused its efforts on identifying existing sources of data about the participation of women in the Tennessee judicial system. By educating itself about the data already being collected, the Commission felt, we could avoid duplication of effort and help ensure the efficient allocation of resources for new data collection efforts. After identifying existing data, the Commission turned its attention to the need for additional data and the logistics of collecting, maintaining, and disseminating the new data, as well as data from existing sources. Throughout its work, the Commission kept in mind the broad language of its charge, "all aspects of the justice system." We considered data collection, not just in terms of lawyers, judges, and other court personnel, but also in terms of law students, law teachers, organized bar and citizens' groups, litigants, jurors, witnesses, and even members of the general public who have ephemeral contact with the justice system, for example, by making an informational inquiry at the court clerk's desk. The Commission decided to omit from its focus law enforcement officers and non-judicial elected and appointed officials on both the state and local levels. While some women attorneys may be elected or appointed to these positions of authority, the Supreme Court does not have jurisdiction over these positions; thus, they would not fall within the purview of the "justice system" in our charge. For example, the Commission does not recommend collecting data on the make-up of the Governor's Cabinet; while

there may be women in the cabinet, they would be part of the executive rather than the judicial branch. An exception would be district attorneys and similar positions since these positions must be filled by attorneys.

An important source of information and guidance for the Commission was a book published by the Federal Judicial Center, Studying the Role of Gender in the Federal Courts: A Research Guide 1995 (hereinafter the Research Guide). A copy of this book has been delivered to the Administrative Office of the Supreme Court. According to this source, “[b]y early 1994, more than forty states, the District of Columbia, Puerto Rico, and several federal circuits had created task forces on gender issues in the courts.” From the outlines of gender task force reports contained in this volume, it appears that data collection has been an important part of these groups’ efforts. The book includes suggestions about various means of data collection, including public hearings, focus groups, analysis of existing records or databases, mail questionnaires, interviews, and observational studies.

Another important source of information has been the 1996 Report of the Tennessee Bar Association Commission on Women and Minorities in the Profession (hereinafter “the 1996 Report”), as well as information furnished by individual members of that Commission. As part of its work, the TBA Commission undertook both public hearings and a survey of licensed attorneys, discussed fully in Part II of this Report.

- I. Finding of Facts
 - A. Types of Existing Data
 - 1. Demographic

Judges and Lawyers

The primary source of information about the gender composition of the judiciary in Tennessee is the Judicial Conference, whose membership “consists of all general jurisdiction trial judges of the Circuit, Chancery, Criminal, and Probate Courts of Tennessee and judges and justices of the three appellate courts” (1996 Report at 33). The general sessions judges have their own conferences. The juvenile judges have the Tennessee Council of Juvenile and Family Court judges and many general sessions judges also have juvenile jurisdiction and are members of both the General Sessions Judges Conference and the Tennessee Council of

Juvenile and Family County judges. Some of the municipal court judges who are elected for eight (8) year terms and have general sessions court jurisdiction are also members of the Tennessee General Sessions Judges Conference. Some municipal judges do not have any type of membership as they do not possess general sessions jurisdiction. Other than the Judicial Conference, the General Sessions Judges Conference and the Tennessee Council of Juvenile and Family Court judges, there is no other central source of data about the gender composition of the judiciary in Tennessee.

With respect to lawyers, the TBA Commission discovered that the Board of Professional Responsibility had stopped collecting data on the race and gender of new licensees many years ago. However, at the urging of the TBA Commission, the Board agreed to once again begin collecting the data. According to the 1996 Report at pp. 12-13, "Beginning in May 1996, data on race and gender will be available from the computer systems shared by the Board of Professional Responsibility, the Commission on Continuing Legal Education and the TBA." The Board's license renewal forms for 1995 contained a section for voluntary disclosure of race and gender information, but unfortunately, this new section was not prominently displayed on the form. (See Exhibit 10 to 1996 Report.) The TBA Commission concluded that "this lack of prominence will probably result in an unnecessarily diminished response rate." (1996 Report at 13). The Commission has been informed that the gender data will be available from the Board of Professional Responsibility.

The Commission has also identified the following potential sources of demographic information on judges and lawyers:

- (1) U.S. Bureau of the Census, Occupation and Labor Force
- (2) U.S. Bureau of Labor Statistics
- (3) Tennessee Department of Labor
- (4) Tennessee Department of Employment Security
- (5) Tennessee Occupational Information Coordinating Committee
- (6) American Bar Association Commission on Women in the Profession
- (7) National Bar Association, Law Professors Division
- (8) The National Association for Court Management
- (9) The National Judicial College
- (10) The Women Judges' Fund for Justice

- (11) Other states
- (12) National Center for State Courts

Other Court Personnel

Information on the gender of other court personnel, such as court clerks, deputy clerks, secretaries, bailiffs, and court reports is available only from widely scattered sources. The two most centralized sources for this data would appear to be the Administrative Office of the Supreme Court and the state personnel department. Other sources might be the professional organizations of the various groups.

Law Students and Law Teachers

Data on the gender composition of the faculty, administration, and student body of the three ABA-accredited Tennessee law schools is available in an annual publication, A Review of Legal Education in the United States, published by the American Bar Association Section of Legal Education and Admissions to the Bar. The 1996 Report at pp. 13-23 contains information for 1993 collected directly from all four Tennessee law schools, including the Nashville School of Law, about faculty and student demographics, as well as a breakdown of courses taught by male vs. female faculty and a comparison by gender of student participation and leadership in student organizations.

The National Association for Law Placement in Washington, D.C. maintains information on the initial jobs of graduates from the three ABA-accredited Tennessee law schools. This information includes a gender breakdown by type of job (large firm, small firm, government, business, etc.) and by annual salary. This information is not regularly published, and is available only upon request from NALP. The 1996 Report at pp. 21-23 includes the 1994 information from NALP, as well as 1992 employment information gathered directly from the University of Memphis and the University of Tennessee.

Organized Bar and Citizens' Groups

The TBA Commission undertook a survey of all bar associations in Tennessee; the results of the survey, response to which was disappointingly low, are reported at pp. 4-5 of the 1996 Report. There is no readily available data on the gender composition of bar associations or organized citizen groups that are active in the judicial system.

Litigants, Jurors, Witnesses, and Public

The Commission found that there are no centralized records of the gender composition of these groups.

Data on the gender of litigants, jurors, and witnesses would probably be available in raw form from court records currently being maintained; however, the Commission is unaware of any data on the gender composition of members of the general public whose contact with the justice system does not ripen into the status of litigant, juror, or witness.

2. Behavior, Perceptions, and Attitudes

Judges and Lawyers

The Commission is unaware of any data on judges' behavior, perceptions, or attitudes relating to gender. With respect to lawyers, the public hearings held by the TBA Commission elicited testimony from attorneys. The public hearing testimony is summarized in the TBA Commission's Interim Report, which is reprinted as Exhibit 1 of the 1996 Report. The TBA Commission also undertook a random survey of licensed Tennessee attorneys in an attempt to measure both demographics and behavior, perceptions, and attitudes. Again, the response to the survey was disappointing, with only 374 of 1800 attorneys responding. The results of the survey are reported at pp. 8-13 of the 1996 Report and discussed further in Part II of this report.

Other Court Personnel

Law Students and Law Teachers

Organized Bar and Citizens' Groups

Litigants, Jurors, Witnesses, and Public

The Commission is aware of no data concerning the gender behavior, perceptions, and attitudes of these groups other than public hearings conducted by the TBA Commission. The public hearing testimony is summarized in the TBA Commission's Interim Report, which is reprinted as Exhibit 1 of the 1996 Report.

B. Need for Additional Data

1. Demographic

Judges and Lawyers

The Commission believes that the membership information collected by the Judicial Conference and the General Assembly Judges Conference and the demographic information being collected by the Board of Professional Responsibility, though not comprehensive, should be more than adequate for the Supreme Court's purposes.

Other Court Personnel

The Commission believes that adequate data on the gender composition of the lay work force in the court system probably exists and that it is important for the Supreme Court to have this data. This data is undoubtedly collected or could easily be compiled, formally or informally, at the local level by the various county and municipal court officials who employ laypersons. However, this data is currently inaccessible to the Supreme Court as a practical matter because there is no centralized mechanism for collecting and maintaining it.

Law Students and Law Teachers

The Commission believes that the demographic information that is available in the ABA publication, A Review of Legal Education in the United States, is adequate for the three ABA-accredited law schools in Tennessee. However, demographic data should be collected from the Nashville School of Law because it offers the only night law school in the state and attracts a large number of re-entry students, a large percentage of whom may be female.

Organized Bar and Citizens' Groups

The Commission believes that bar associations stand on a different footing from citizens' groups for the purpose of data collection. The TBA Commission identified participation in bar associations as a significant correlative of power and influence within the justice system of this state. Therefore, the Supreme Court should have data on the gender composition of the members and leaders of bar associations in our state, including both geographic and "specialty" bar associations (such as the Tennessee Lawyers Associations for Women, the Tennessee Trial Lawyers Association, etc.). In contrast, citizens' groups involved in the justice system, such as Mothers Against Drunk Driving, are less well organized and do not implicate the Supreme Court's role in supervising the justice system to the extent that bar association membership does. Therefore, the Commission believes that collection of data on the membership of such groups is unnecessary.

Litigants, Jurors, Witnesses, and Public

The Commission believes that demographic information on these groups is not as important as information about the behavior, perceptions, and attitudes of these groups. In light of recent developments in the substantive law ensuring gender equality in jury selection and the long-standing abrogation of any gender disabilities in terms of ability to sue or to testify, the Commission does not believe that the gender composition of these groups would yield significant information useful to the Court. Therefore, the Commission recommends that demographic data should not be collected on these groups.

2. Behavior, Perceptions, and Attitudes

Judges and Lawyers

The Commission believes that the TBA Commission's public hearings and its survey of licensed attorneys has yielded adequate information about lawyers' behavior, perceptions, and attitudes regarding gender in the justice system. However, the situation is different with respect to judges. To our knowledge, no information exists with respect to the gender-related behavior, perceptions, and attitudes of judges. The Commission finds that this is a significant omission. The TBA Commission's public hearings and survey revealed that other participants in the judicial system believe that judges' behavior is sometimes motivated by gender considerations. In addition, the Commission has heard presentations from two groups -- one composed of non-custodial fathers and one consisting of non-custodial mothers -- who suggest that their often-negative encounters with the legal system result from judges' attitudes and beliefs about gender, discussed in detail in

Part II of this Report. Without adequate information about the gender-related behavior, perceptions, and attitudes of judges, the Supreme Court would find it difficult to provide leadership or guidance to the judiciary in eliminating gender bias in our system. Therefore, the Commission believes that additional data on the gender-related behavior, perceptions, and attitudes of judges is necessary.

Other Court Personnel

The Commission believes that additional data on the gender-related behavior, perceptions, and attitudes of court personnel is needed, largely for the same reasons such information is needed for judges. Many members of the public who never encounter a judge do encounter nonjudicial court personnel. For these citizens, court personnel represent the justice system. If the behavior of these individuals reflects gender bias, the public will perceive our system as gender-biased. Also, from the Supreme Court's standpoint as employer, information is needed about nonjudicial personnel's perception of gender-related aspects of their employment. Thus, the Commission recommends that additional data be collected on the gender-related behavior, perceptions, and attitudes of court personnel.

Law Students and Law Teachers

The Commission does not believe that additional data should be collected on the gender-related behavior, perceptions, and attitudes of law students, law teachers or administrators. Although the legal education system in this state is a major component of the justice system, since it provides training for many of our attorneys and judges, our state's law schools are not within the direct purview of the Supreme Court. The only direct influence exercised over legal education by the Supreme Court is its regulation of the bar examination in terms of the subjects to be tested and the prerequisites to admission. If the Supreme Court were ever to consider a gender-related prerequisite for admission to the bar (i.e., one hour of instruction on the ethical constraints on gender-biased behavior), then the Court should consider collecting data to support the institution of such a requirement. Until then, however, the Commission believes that the quality of the existing demographic data (which, for instance, continues to reflect inadequate employment of females on the tenured faculties of the three ABA-accredited law schools) and the gender fairness ensured by other forces within the legal education system (i.e., policies of the individual universities, ABA accreditation standards and efforts by the law schools themselves to ensure gender fairness) makes additional data collection about this group unnecessary.

Organized Bar and Citizens' Groups

With respect to bar associations, the Commission believes that demographic data alone should be sufficient for the Supreme Court's purposes, especially if that data includes information on the gender make-up of bar association leadership. Again, primarily because the Supreme Court does not play a role in supervising or regulating bar associations, additional data on behavior, perceptions, and attitudes relating to gender does not appear necessary.

With respect to the gender-related behavior, perceptions, and attitudes of organized citizens' groups, however, the Commission feels differently. While the Commission believes that demographic data for these groups would not be useful, it believes, conversely, that information about the groups' gender-related perceptions would be valuable. As noted in the section on litigants, witnesses, jurors, and citizens below, it will be difficult to efficiently obtain data on the behavior, perceptions, and attitudes of these types of laypersons involved in the justice system. Because citizens' groups such as Mothers Against Drunk Driving are organized, it would be easier to collect data from them. As noted earlier, the Commission has already heard from several affiliated non-custodial fathers' groups about their perceptions of gender bias in our court system. The Commission believes that additional data collection from organized groups is needed to enable the Supreme Court to evaluate the existence of gender bias in our system and to suggest means of alleviating it.

Litigants, Jurors, Witnesses, and Public

These groups are the most numerous in our justice system and yet the most evanescent in terms of data collection. Because they encounter the justice system only sporadically and are not supervised, regulated, or monitored by any agency, they escape both demographic and attitudinal quantification. However, the Commission believes that the Supreme Court should obtain additional information about the gender-related behavior, perceptions, and attitudes of this group in order to assess the impact of the justice system on these groups and these groups' impact on the justice system. As noted above, the Commission believes that organized citizens' groups may provide an important source of data on public attitudes and perceptions; we realize, however, that the special-interest nature of such groups would have to be considered in evaluating the data collected from them.

The Commission believes that information on the gender-related behavior of these groups is not necessary for the Supreme Court's purposes. A large body of legal-sociological literature exists about the

gender-related behavior of jurors; the gender-related behavior of witnesses, litigants, and the public would likewise seem to be a matter more for sociologists than for the Court. Because the Court has no role in supervising these groups and because they are not representatives of the judicial system, their behavior does not implicate gender fairness within the system.

C. Means of Collecting Additional Data

1. General Background

The Research Guide at p. 26 lists the following methods of data collection for studying gender fairness:

- public hearings
- focus groups
- analysis of existing records of databases
- mail questionnaires (surveys)
- interviews
- observational studies

Any form of data collection requires resources in the form of people; most also require money. In considering and recommending the sorts of data collection that should be undertaken, the Commission is aware of the current realities in terms of both human and monetary resources available to the Supreme Court. However, the Commission has also attempted to provide the Supreme Court with a range of possible alternatives so that the Court can choose the one most compatible with its resources. In the handbook, Operating a Task Force on gender Bias in the Courts: A Manual for Action, published by The Foundation for Women Judges, Lynn Hecht Schafran and Norma Juliet Wikler recommend a variety of data collection methods: “Findings from each method add to the cumulative body of information gathered and help construct a general picture of how gender bias operates in the state’s courts. The most convincing case is made when the data produced by different methods corroborate each other.” (p.39). Fortunately, because information generated by the TBA Commission is a part of this Report, we can save time and money by building up on rather than repeating their efforts.

In general the most expensive form of data collection is the mailed questionnaire. However, the survey is a good vehicle for gathering both demographic data and information about behavior, perceptions, and attitudes. As the TBA Commission discovered, a statistically valid survey requires an appropriate survey instrument, a random sampling of recipients, duplication and mailing of the instrument, collection and analysis

of the data (by a third party if the survey is to be confidential), and reporting of the data. Although the Research Guide contemplates that the Commission itself could undertake a statistically valid survey, Schafran and Wikler note that “the services of qualified, paid consultants will probably be necessary during all phases, from questionnaire construction through the analysis of the results.” (Operating a Task Force at 36). Working with a paid consultant, Elliott Ozment of Legal Management Resources, the TBA Commission spent \$8000 to generate the 374 responses to its survey of licensed attorneys, or approximately \$21.40 per response. (Of course, the paid consultant was not responsible for the low response rate. But the TBA experience does demonstrate that a survey can be a bit of a gamble.) It should also be noted that the TBA Commission explored the possibility of working with the University of Tennessee’s Social Science Research Institute, but largely because of contract conditions imposed by the University (such as the provision that all survey results would be owned by the University and not by the TBA), ultimately decided not to hire them. And there may be other educational or not-for-profit groups who could provide low- or no-cost consulting services for a survey.

The next most expensive form of data collection is generally agreed to be observational studies, depending on how the studies are staffed. “Participant observations,” in which an “outside observer enters and is actively involved in the activities of a particular setting (e.g., an office) by observing, listening, [and] asking questions” requires a highly trained observer and is therefore quite expensive. (Research Guide at 77). By contrast, “nonparticipant observation” is conducted by outsiders who do not interact with those being observed and can be conducted by trained laypersons; it is, concomitantly, much cheaper than participant observation. Still, the problem remains of recruiting, training, and supervising the observers, as well as collecting and analyzing the observers’ data. This method of data collection is preeminent for measuring behavior, but is obviously not as useful for gathering information about participants’ observations, attitudes, and demographics. As noted by the Research Guide, many state court task forces have used this method of data collection, and a sample form for observers to use in recording their data is included at pp. 169-172. The Commission has also been informed that various groups in Tennessee, such as the ACLU and Mothers Against Drunk Driving, have done court-watching projects, but the Commission has been unable to verify this or to access any data that might have been generated. We have also actively explored the idea of having law students conduct observational data. Fran Ansley, Professor of Law at the University of Tennessee, considered having students in her fall 1996 Discrimination class choose an observational study of a courtroom as their class project. However, Professor

Ansley believes that even a nonparticipant observational study would have to receive Human Subjects Research pre-clearance from the University, obviously adding to the complexity of undertaking this project. Another possibility considered by the Commission is an IOLTA grant for an observational study. The Court should consider that, instead of actually commissioning an observational study solely for its own use, the Court could play a role in publicizing the usefulness of such studies and encouraging those who undertake such studies to share their results with the Court.

Next in descending order of expense comes public hearings, a form of data collection that the Commission explicitly rejected because of the TBA's earlier efforts.

Focus groups and interviews are less expensive than public hearings but also yield results that are less generalizable than those obtained through statistically valid surveys. They are, however, very useful for measuring perceptions and attitudes. A "focus group" is "a group interview in which the interviewer, referred to as a moderator, uses a topical interview guide or protocol to lead a group of about six to ten people in a one- or two-hour discussion on a limited number of topics. Focus groups have been used by gender task forces to interview judges, court employees, lawyers from various practice areas, prisoners, litigants, and members of bar groups." (Research Guide at 33). Schafran and Wikler report use of a focus group to obtain the views of rural laypersons who might have been unable to attend the New York Gender Bias Task Force's public hearings, which were held in urban areas; they also note that the meetings were organized by the Cornell University Cooperative Extension Service. Although both focus groups and interviews are intensive in terms of human resources, they might be appropriate for obtaining data from groups not reached by the TBA Commission's public hearings and survey. In essence, the presentations received by the Commission from non-custodial fathers and non-custodial mothers were a sort of focus group.

The least expensive form of data collection is analysis of existing records or databases, particularly where the information has already been collected and reported in terms of gender. The Commission anticipates that this will be the primary source of data for the Supreme Court for two reasons: (1) there is already a substantial amount of relevant data being collected by various groups and agencies; and (2) the expense involved in using this data would involve only the expense of analyzing and disseminating; the Court would not have to bear the cost of collection. The justice system also generates many records that are not collected or reported in terms of gender. For example, every filed court case involves at least two litigants having gender

(the exception, of course, are cases involving non-human entities). These records would be most useful for yielding demographic data rather than data on behavior, perceptions, and attitudes. Review and analysis of this sort of raw data would be a very expensive proposition, although little expertise would be required to compile purely demographic data from such records. The Commission contacted two organizations that might be able to undertake analysis of raw data: the Municipal Technical Advisory Service (MTAS) and the County Technical Advisory Service (CTAS). CTAS in fact conducted a survey of caseloads in the General Sessions Courts about ten years ago. Although the primary clients of both organizations are cities and counties, respectively, the officials contacted by the Commission indicated that both organizations would entertain a request by the Supreme Court to conduct raw data review and analysis. As with observational studies, the collection and analysis of raw data could be undertaken by law students or community groups.

2. Appropriate Data Collection Techniques

Judges and Lawyers

The Commission finds that the following data collection methods would be most useful for measuring the gender-related perceptions and attitudes of judges: surveys, focus groups, and interviews. The most useful methods for collecting information on judges' gender-related behavior would be observational studies of courtrooms, and surveys and focus groups directed to other categories of participants in the justice system, such as lawyers and litigants. The specialized questionnaire discussed in the section on litigants, jurors, witnesses, and the public below would also be an effective means of obtaining information on judicial behavior.

Other Court Personnel

The Commission finds that the following data collection methods would be most useful for examining the behavior, perceptions, and attitudes of court personnel in interactions with the public: observational studies. Also, as noted below in the section on litigants, witnesses, jurors, and the general public, we believe a specialized questionnaire would be useful in collecting this sort of data.

With respect to the court personnel's gender-related perceptions and attitudes within their employment environment, the Commission finds that the following data collection methods would be most useful: surveys, focus groups, and interviews.

Organized Bar and Citizens' Groups

The Commission finds that the focus groups would be the most useful and cost-effective means of

collecting data from citizens' groups on their perceptions and attitudes. Although a survey could also be used to collect this data, it would be much more expensive.

Litigants, Jurors, Witnesses, and Public

As recommended in the last section of this report, those having contact with the court system will be apprised of mechanisms by and through which they can make complaints about gender bias. The Commission envisions that reports made by those individuals pursuant to the procedures outlined in that section will be available to the Supreme Court.

D. Use of Data Collected

In the Commission's view, in light of all the existing data that is currently collected but remains relatively inaccessible, the question of how the Supreme Court will use the data is just as important as how the data will be collected. We see the Supreme Court as having a unique role in serving as a repository and source of data relating to gender in the justice system, and the Court also has unique opportunities to publicize that information. Therefore, the Commission recommends the creation of a half- or full-time position in the Administrative Office of the Courts devoted solely to requesting reports of existing data from the collecting agencies, investigating various methods and resources for the collection of new data, supervising and monitoring the collection of new data, analyzing the data reported or collected, and disseminating the information to interested groups and the public at large.

II. Recommendations

The Commission recommends that the Supreme Court:

A. Reporting of Existing Data

1. Request that the Judicial Conference and the General Sessions Judges Conference make available to it demographic information on their membership and leadership on an annual basis;
2. Request that the Board of Professional Responsibility make available to it on an annual basis the demographic information on licensed attorneys now being collected;
3. Request all agencies having demographic information about the employment of nonjudicial personnel in the justice system to make that information available to the Court on an annual basis;

4. To the extent the information provided by these agencies is not comprehensive, request all professional organizations composed of nonjudicial personnel in the justice system to make their demographic membership information available to the Court on an annual basis;

5. Obtain each annual edition of A Review of Legal Education in the United States, published by the ABA's Section on Legal Education and Admission to the Bar, which will contain demographic information on the faculty, administration and student bodies of the University of Memphis, University of Tennessee and Vanderbilt University Law Schools.

6. Request from the Nashville School of Law demographic information on its faculty, administration, and study body, on an annual basis;

7. Request from the National Association of Law Placement in Washington D.C. information on the initial job placement of graduates from Tennessee law schools, on an annual basis;

8. Request from each bar association in the state, including specialty bar associations, demographic information on their membership and leadership on an annual basis;

B. Collection of New Data

9. Undertake the collection of data on the gender-related perceptions and attitudes of judges, using an appropriate data collection method directed to judges;

10. Undertake the collection of data on the gender-related behavior of judges, using an appropriate data collection method directed to lawyers, nonjudicial court personnel, litigants, jurors, witnesses, and the public;

11. Undertake the collection of data and the gender-related behavior, perceptions, and attitudes of nonjudicial court personnel, with respect to both their interaction with others in the justice system and their

employment status, using an appropriate data collection method directed to the court personnel and to lawyers, litigants, jurors, witnesses, and the public;

12. Undertake the collection of data on the gender-related perceptions and attitudes of organized citizens' groups and the public in general, using an appropriate data collection method directed to those groups;

13. Order the development of a form for complaints of gender bias within the justice system and mandate that the collecting agency forward anonymous data to the Court;

C. Use of Data

14. Establish in the Administrative Office of the Court a full- or part-time position responsible for all duties relating to data collection, analysis, and dissemination, and specifically for implementing the recommendations of this Commission;

15. Provide appropriate public access to all collected and analyzed data;

16. Using collected and analyzed data, compile an annual report on the status of gender fairness in the justice system of Tennessee, making comparisons from year to year in order to gauge our progress in achieving the goal of gender equity;

17. Disseminate this report to all courts, bar associations, law schools, and interested citizens' groups in the state, and make it available by request to any person; and

18. Include in the annual State of the Judiciary address a summary of that year's report on gender fairness.

7. Develop guidelines to ensure that attorney appointments and fee awards are based on gender-neutral considerations.

In a myriad of cases, a judge must appoint an attorney for representation of an individual or to protect the interests of a child, an incompetent person or unknown heirs, or to serve as administrator ad litem, receiver, special master or special commissioner. Tennessee Supreme Court Rule 13, entitled Appointment and Compensation of Counsel for Indigent Defendants, reads, in part:

"The Court shall, in selecting and appointing such counsel, either designate the Public Defender Service, if such service is available, or a private attorney selected from a panel of attorneys approved by the Court. The party shall not have the right to select the appointed counsel from the Public Defender Service, from the panel of attorneys, or otherwise."

Similarly, Tennessee Supreme Court Rule 15(1), entitled Reimbursement of Costs in Mental Health Proceedings, provides in part:

"The Court shall in selecting and appointing counsel either designate counsel from any legal aid or legal services operating in that county or a private attorney selected by the Court. The party shall not have the right to select appointed counsel."

The Commission recommends that all judges develop guidelines to ensure that attorney appointments and all fee awards are based on gender-neutral considerations. Nonetheless, the appointing judge also should retain a certain measure of discretion. For example, we would not recommend, nor would it benefit justice, for there to be a recommendation that all lawyers be on a list and appointments fall on a rotating basis. Each attorney in the respective jurisdiction, therefore, should have some input as to whether the attorney desires to be placed on the list for criminal

appointments, civil appointments, or both.

Appointment and fee award guidelines should include the following provisions.

1. All appointments shall be made without consideration of gender.⁴

2. The judge shall maintain a panel of attorneys for appointment in civil and criminal cases and the affected attorneys shall have information from the judge's office of the process through which the attorney may be named to the panel in civil matters and/or criminal matters. The judge shall follow procedures to ensure that the same attorney or attorneys not be appointed continuously or on a more frequent basis than others. These procedures also shall include in civil matters that the attorney for the complainant does not recommend appointments, but that the appointment be made independently by the judge.

3. The judge shall maintain a record of attorney appointments showing case name and number, type of case, date of appointment, date of final disposition and the fee awarded to the appointed attorney, and the record shall be available for inspection by the public. Fee awards should be based upon an hourly fee and should be awarded upon review by the judge of an affidavit of time and expenses, with the hour divided into tenths.

⁴ The Commission also recommends that this include race, age, national origin, religion and disability; however, the Commission is charged only as to issues related to gender bias.

8. Establish a speaker's bureau to address and discuss gender fairness.

The Commission recommends that a speaker's bureau be established and maintained to address and discuss issues related to gender fairness in the Tennessee judicial system. Through the Administrative Office of the Courts, a course should be established whereby individuals who would serve as members of the speaker's bureau would be acquainted with issues related to gender bias and gender fairness. The Bureau could be broken down for each grand division of the state in order that members of the bureau could teach and speak throughout their respective grand divisions. The expense of travel and overnight stay (if any) should be the expense of the sponsoring organization. Some members of this Commission are willing to serve as members of the speaker's bureau.

9. Review the issue of gender bias as it relates to employment and promotions within the judicial system.

The Tennessee Department of Personnel has issued a number of reports related to employment and promotions within the judicial system. These reports, attached as exhibits, are as follows:

- 1) Affirmative Action Report, 1993-94 (pages 3-10, only) (Exhibit J)
- 2) Composition of the Work Force by Salary Range, Judicial 1994-95 (Exhibit K)
- 3) Analysis of Executive and Non-Executive Branch Agencies' Work Force (Exhibit L)

The above-mentioned reports do not include any information with regard to sheriffs' departments across the state and clerks of court personnel because these are county-funded offices and employees. That is, the reports relate only to state-funded court employees who are paid through the Administrative Office of the Courts. A list of the categories of state-funded employees by salary range is attached (Exhibit M).

The various offices of District Attorneys General employ 294 attorneys, of whom 64 (21.7%) are female. With respect to Public Defenders' offices, 45 of the 153 attorneys (29.4%) are female. Of the attorneys employed by the Office of Attorney General and Reporter, approximately 48% are female.

On November 28, 1995, then Chief Justice E. Riley Anderson notified each judicial department employee by letter of the Tennessee Supreme Court's commitment to uphold the Tennessee Department of Personnel rules in compliance with the EEOC and Affirmative Action. Included with that letter was a copy of the Tennessee Department of Personnel, Chapter 1120-7, Equal Employment and Affirmative Action Policy (Exhibit N).

In June, 1991, the Tennessee Supreme Court solicited the assistance of the National Center for State Courts to conduct a study of the Office of the Executive Secretary (name later changed to the Administrative Office of the Courts). The study was conducted for the purpose of analyzing the effectiveness of management and its efficiencies in regards to court automation. Under the supervision of the current Director of the Administrative Office of the Courts, a conscientious effort has been made to develop educational programs that sensitize court personnel to gender-related issues. The Education Division of the Administrative Office of the Courts now presents these educational seminars to a vast number of judicial system personnel, including many of the county-funded employees (i.e., clerks of court and their support staff).

Charles E. Ferrell, Director of the Administrative Office of the Courts, received a letter on February 5, 1996, from the Comptroller of the Treasury of Tennessee, Department of Audit, stating that: "No policies have been developed to ensure that the Court System is complying with EEOC regulations. An EEOC officer should be appointed." That letter was forwarded to the Supreme Court and as of September, 1996, no action has not yet been taken with respect to the appointment of an EEOC officer.

The Administrative Office of the Courts is currently staffed by a total of 54 employees, of which only 10 are males. Of the 15 staff members with jobs classified as upper management, 8 are female. At the present time, the Administrative Office of the Courts does not employ a personnel officer to oversee and implement an affirmative action plan. One of the recommendations, appearing in the last section of this report, is that a personnel officer be employed as soon as possible. Without attempting to suggest the full scope of that individual's responsibilities and duties, it should be noted that the American Bar Association recommends the hiring of a personnel officer and that that individual's duties, according to Standards Relating To Court Organization, are as follows:

- 1) Creation of new or modified job classifications which are dictated by the addition of functions or changes in job responsibilities for positions in the offices covered;
- 2) Reclassification requests from employees who feel that their current job title does

not match their assigned duties;

- 3) Periodic gathering of salary data to keep the pay plan current and allow for justifiable salary increases as dictated by labor market forces; and
- 4) Involvement in recruiting, screening and testing, including the preparation of job vacancy announcements.

It should also be noted that at the present time the Administrative Office of the Courts does not have complete and accurate job descriptions. It is essential that these be prepared in order that salary equity can be insured.

Phyllis Severance, Assistant Commissioner of Personnel, submitted a report to the Commission concerning the composition of the work force by salary range, dated December 31, 1995. Of the 529 judicial branch employees (trial and appellate judges, law clerks, secretaries, child support referees, appellate court clerks, state-funded court employees, and Administrative Office of the Courts staff) 59.4 percent are female employees and 70.7 percent of those employees earn an annual salary of between \$ 16,000 and \$32,900. It should be noted that most females are employed as secretaries and that the minimum annual salary for a secretary is \$16,764 and it reaches a maximum rate of \$26,520. Appellate secretaries earn slightly more. The remaining 40.6 percent are male employees, of whom 68.8 percent earn \$70,000 or more per year. Most of these male employees are trial court judges and the current annual salary as established by the legislature for trial court judges, irrespective of gender, is \$95,496. It should be noted that a gender bias study regarding equity pay in the court system is difficult to conduct because of the fact that over 30 percent (approximately 180) of these employees are elected or appointed to job positions with set salaries. Salaries for most of the remaining employees within the judicial branch (160 secretaries, 56 court reporters, and 38 law clerks) are on a salary schedule as set by the Tennessee Supreme Court. This schedule allows for no compensation differences based upon gender.

The Department of Employment Security reported, based upon the 1990 census, that there

were a total of 9,653 attorneys and judges in Tennessee, 2,027 of whom were females (approximately 21 percent). By contrast, the 1980 census reported that there were 7,211 attorneys/judges in Tennessee, of whom 857 were females (approximately 12 percent). According to the Tennessee Board of Professional Responsibility, there are now 13,247 active attorneys in Tennessee; at present, this total is not broken down either by race or gender. It should be noted, however, that applicants now have the option of providing this information.

As of May 16, 1996, there were 150 general sessions court judges, of whom 7 were female (5 percent); 143 trial court judges, of whom 13 were female (9 percent); 21 intermediate appellate court judges, of whom 1 was female (5 percent); 5 Supreme Court judges, of whom 1 was female (20 percent); and 5 senior judges, of whom all are male. Thus, the Tennessee Judicial Conference (which excludes General Sessions Court judges) has 174 judges, of whom 15 are women (8.62 percent). By adding General Sessions Court judges to these numbers, there are 324 judges, of whom 22 are female (6.79 percent).

The Commission has reviewed the Tennessee Department of Personnel policies and procedures related to attendance and leave (June 1, 1996). While we find the policies to be reasonable and appropriate, it is noted that some of the policies fail to give adequate emphasis to the special needs of single-parent working mothers and fathers. To the extent that the working environment facilitates the full integration of workers without consideration of gender, we believe that two modifications are called for, as noted below.

In light of the above information, the Commission makes the following recommendation:

- 1) The Administrative Office of the Courts should employ a personnel officer to oversee and implement an affirmative action plan in accordance with the affirmative action report, discussed earlier (Exhibit J). This appointment should occur as quickly as possible.
- 2) The State should implement the broadest possible recruitment efforts for all positions on a continuing basis, with specific emphasis upon measures designed to increase

the numbers of women in higher-paid and higher-status positions.

3) Job descriptions for all judicial system employees are needed as soon as possible.

This will enable supervisors to determine whether gender-based salary differentials exist.

4) The Supreme Court should monitor, on an ongoing basis, implementation of policies designed to assure fair employment practices, equitable compensation schemes, and equal access to training and promotion opportunities for all court employees.

5) All judicial department offices, agencies, courts, etc., should be mindful of the need to maintain a working environment that will recognize the unique problems confronted by the single-parent employee. One way in which the needs of that employee can be more appropriately addressed is to study ways in which adequate day-care services can be provided to those individuals. Additionally, with respect to the Department of Personnel policies and procedures related to attendance and leave, we recommend the following:

A. Present policies (Chapter 1) recognize the need for irregular work schedules for some employees. Nonetheless, they appear to be related only to the nature of the employee's particular work. We recommend that irregular work schedules, including the use of flex-time, be made available in cases of single-parent working mothers or fathers, depending upon the special needs in each specific case.

B. Present policies (Chapter 21) recognize the authority of the agency or officially designated supervisor or manager to permit the rescheduling of an employee's work week. Again, we recommend that supervisors be especially sensitive to the rescheduling needs, on a case-by-case basis, of the single-parent employee.

10. Develop a court conduct handbook with guidelines for attaining gender fairness, preventing sexual harassment, and establishing gender-neutral language in the courts.

After reviewing courtroom conduct handbooks utilized in other jurisdictions, the Commission concludes that the Memphis Bar Association's "Guidelines for Bias-Free Conduct" sufficiently addresses the issue of gender fairness insofar as attorneys and judges are concerned. We have been assured by the Memphis Bar Association that their guidelines could be utilized on a state-wide basis, should the Tennessee Supreme Court agree. Therefore, we recommend the adoption of the Memphis Bar Association's "Guidelines for Bias-Free Conduct" (Exhibit O).

With regard to courtroom staff and personnel, in Charge 2, above, we acknowledge the need for and recommend gender fairness training as a part of staff orientation. A suggested handout to be utilized as a part of that training process is attached (Exhibit P).

11. Develop a procedure for receiving and reviewing complaints regarding gender bias in the courts.

The Commission believes that a number of individuals within the court system may be perceived by others as having acted in ways giving rise to real or perceived bias against others based upon gender. This section of the Report is divided into two parts, the first of which deals with gender bias on the part of attorneys and the second of which pertains to gender bias exhibited by others.

A. Complaints regarding attorneys:

The Commission believes that any procedure which will be utilized to attack gender bias on the part of attorneys must be supported by a disciplinary rule. Accordingly, we recommend that the Tennessee Supreme Court carefully consider revising DR 1-102 to effectuate this change. Having made this very general recommendation to the Tennessee Supreme Court, however, the Commission is uneasy about recommending specific language to accomplish this goal because of a number of competing considerations.

First, some individual Commission members question the need for a revised rule; that is, existing disciplinary rules provide an adequate basis for disciplining attorneys who exhibit gender bias in the courts. Second, several members of the Commission have noted serious First Amendment concerns related to any rule that might impinge upon an attorney's exercise of speech. Parenthetically, it should be noted, as well, that the Commission on Racial and Ethnic Fairness makes a similar recommendation to the Supreme Court but notes that it "does not intend to regulate words or conduct that are subject to federal or state employment discrimination laws ... [nor does it intend] to prohibit speech otherwise protected by the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution."

It is this Commission's understanding that approximately fifteen states now have provisions making it a disciplinary violation for an attorney to engage in conduct and/or utter words reflecting discrimination. We also call the Court's attention to a recent article (Andrew E. Taslitz and Sharon Styles-Anderson, Still Officers of the Court: Why the First Amendment is no Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession, 9 GEORGETOWN JOURNAL OF LEGAL

ETHICS 781 (1996)) in which the authors urge that careful attention should be given to such cases as R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (finding content-based regulations constitutionally infirm) and Gentile v. State Bar of Nevada, 501 U.S. 1076 (1991) (upholding restrictions upon an attorney's speech).

At one point, the Commission considered recommending to the Tennessee Supreme Court that DR 1-102 be amended by adding the following provision:

“Intentionally or knowingly utter statements or engage in conduct, in the course of representing a client, that reflects bias or prejudice based upon race, sex, religion, or national origin, except where such factors are at issue in or otherwise relevant to the representation, when such statements or conduct would constitute a substantial likelihood of material prejudice to any person likely to be affected by such words or conduct.”

We also considered recommending the following commentary to accompany that amendment:

“This rule is intended to make discriminatory statements and conduct unethical when engaged in by lawyers in their professional capacity, under such circumstances that such statements or conduct could constitute a substantial likelihood of material prejudice to any person likely to be affected thereby. It would, for example, cover activities in the courthouse such as a lawyer's treatment of court support staff as well as conduct more directly related to litigation, activities related to litigation, activities related to practice outside the courthouse whether or not related to litigation such as treatment of other attorneys and their staff, bar association and similar activities and activities in the lawyer's office and firm. Except to the extent that such conduct is closely related to the foregoing, purely private activities are not intended to be covered by this amendment.”

At this point, however, the Commission is not prepared to recommend that specific language. Rather, we urge the Court to consider the suggested amendment, above, along with provisions, as follows:

- 1) Michigan Rule of Professional Conduct 6.5:

“A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of that person’s race, gender, religion, national origin or other protected personal characteristics. To the extent possible, a lawyer shall require subordinate lawyers and non-lawyer assistants to provide the same courteous and respectful treatment.”

2) New Jersey Disciplinary Rule requires that a lawyer:

“shall not engage, in a professional capacity, in conduct involving discrimination ... because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socio-economic status or handicap where the conduct is intended or likely to cause harm.”

3) Standard proposed by the authors of the Georgetown Journal of Legal Ethics article:

“It is unprofessional conduct for a lawyer to (1) commit, in the course of representing a client, any verbal or physical discriminatory act, on account of race, ethnicity, or gender, if intended to intimidate litigants, jurors, witnesses, court personnel, opposing counsel or other lawyers, or to gain a tactical advantage; or (2) engage, 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.”

4) American Bar Association, Criminal Justice Section, proposed amendment to Rule 8.4 of the Model Rules of Professional Conduct:

“It is professional misconduct for a lawyer to engage, in the course of representing a client, in a pattern of verbal or physical acts which discriminate on the basis of race, ethnicity or gender, and which are

intended to abuse or harass litigants, jurors, witnesses, court personnel, opposing counsel, or other lawyers.”

Finally, it may be helpful to members of the Court to identify several issues, each of which must be carefully evaluated in the context of a proposed rule. They are as follows:

- 1) The prohibited act should be very precisely defined. Should it be limited to attorney’s conduct, or should it encompass words or, most broadly, anything that exhibits discrimination?
- 2) Carefully define the protected categories. Should it be limited to discrimination based upon race, gender, religion, and national origin? Or should the list be a more expansive one?
- 3) Definition of persons against whom the discriminatory attitudes or conduct is exhibited. Should it include litigants, jurors, witnesses, court personnel, opposing counsel, other attorneys, and clients?
- 4) Should there be a “mens rea” requirement? Should it be limited to intentional acts or conduct exhibiting reckless indifference?
- 5) Evaluate carefully the scope of the regulation. Should it apply to in-court conduct, only? Should it encompass law-related activities? Should it be a disciplinary offense only in the context of “representation of one’s client?”
- 6) Should there be any exceptions? Should “legitimate advocacy” be exempt? Should comments and/or conduct in the context of jury selection be exempt?

B. Complaints regarding others:

The Commission believes that other persons who are participants in the judicial process may also engage in or be perceived as having exhibited bias based upon gender. These include judges, law enforcement officers, employees of court clerks’ offices and juvenile court employees. Complaints regarding gender bias on the part of any of these persons require specific procedural mechanisms for receiving and reviewing complaints. Because a uniform complaint procedure is inappropriate, the

Commission recommends that an insert be included in the Court Conduct Handbook (recommended in Section 10 of this Report) which would list the outlets available for complaints regarding gender bias. The insert should, at a minimum, include the following:

THE COURT OF THE JUDICIARY: The Court of the Judiciary receives complaints filed by the public and lawyers against judges. Complaints must be in writing, either typed or hand-written legibly, dated and signed before a Notary Public, and mailed to:

Disciplinary Counsel
Court of the Judiciary
600 Nashville City Center
511 Union Street
Nashville, TN 37243-0607

The Court of the Judiciary has an informational brochure available by calling 615/741-2687. Complaint forms are also available from the Administrative Office of the Courts by calling this number.

BOARD OF PROFESSIONAL RESPONSIBILITY: The Board of Professional Responsibility receives complaints filed by the public against lawyers. You may telephone the Board at 615/361-7500 or file a written complaint addressed to:

Mr. Lance Bracy
Chief Disciplinary Counsel
Board of Professional Responsibility
1101 Kermit Drive, Suite 730
Nashville, TN 37217-5111

Complaints against law enforcement officers should be filed with the chief law enforcement officer in your county, either the Sheriff or Chief of Police. Sheriffs in Tennessee are elected by the voters. In some jurisdictions police chiefs are appointed by the local government.

Complaints against employees of court clerks' offices should be filed with the chief Clerk in whose office the offending person is employed. If you have a complaint against the chief Clerk, you should file the complaint with the

Presiding Judge of that Court. You can find out who the presiding judge is by contacting the Administrative Office of the Courts, 615/741-2687. Some court clerks in Tennessee are elected by the voters.

Complaints against juvenile court employees must be filed with the Council of Juvenile & Family Court Judges, Gateway Plaza, First Floor, 710 James Robertson Parkway, Nashville, TN 37243-0810. 615/741-3980.

EXHIBIT A

COMMISSION MEMBERS

Co-Chairs

Kathryn Reed Edge

Katie Edge is a partner with Miller & Martin, Nashville, Tennessee, and is the former Deputy Commissioner of the Tennessee Department of Financial Institutions. She currently serves as Treasurer of the Tennessee Bar Association and as a member of the TBA's Executive Committee and Board of Governors. She is the past President of the Tennessee Lawyers' Association for Women and the Marion Griffin Chapter of the Lawyers' Association for Women. She co-chaired the initial TBA Commission on Women and Minorities and remains a member of its Implementation Group. Edge is a graduate of George Peabody College of Vanderbilt University and holds a J.D. from the Nashville School of Law, where she is a member of the faculty in banking law.

Donald J. Hall

Donald J. Hall, Professor of Law at Vanderbilt University School of Law, received his B.S. degree from Florida State University in 1965 and his J.D. (with honors) from the University of Florida in 1968. He was managing editor of the University of Florida Law Review and graduated Order of the Coif. After private practice in Florida, he joined the Vanderbilt faculty, where he teaches criminal law and criminal procedure. In addition to active involvement in the American Bar Association, he has served as Reporter, Pattern Jury Instructions for Criminal Cases, Tennessee Judicial Conference (1983-1990), member of the Tennessee Sentencing Commission (1986-1995) and member of the Board of Directors of the Metropolitan Nashville Public Education Foundation since 1987. In 1994, he received a Vanderbilt Chair of Teaching Excellence

Members

Lillian G. Bean

Lillian Bean is Circuit Court Clerk for Knox County, Tennessee. Bean served as Deputy Clerk to the Knox County Circuit Court Clerk for four years, then as Executive Secretary at Oak Ridge National Laboratory for fourteen years before being appointed, then elected, as Circuit, Sessions and Juvenile Court Clerk in 1980. She is a Certified Public Administrator from the 1989 class of the University of Tennessee Institute for Public Service, Center for Government Training. She is a member of the State Court Clerks Association of Tennessee, the County Officials Association of Tennessee, as well as numerous other organizations.

Prince C. Chambliss, Jr.

Prince Chambliss is a partner in the Memphis firm of Armstrong, Allen, Prewitt, Gentry, Johnston & Holmes. Chambliss is a graduate of Harvard Law School, and after his graduation he clerked for Chief Judge Sam C. Pointer, Jr., of the United States District Court for the Northern District of Alabama. He is Vice-President of the Tennessee Board of Law Examiners. After having served as Vice-President of the Memphis Bar Association, he was recently installed as President of the Association.

Carol Chumney

Carol Chumney is now beginning her fourth term in the Tennessee General Assembly, having most recently served as House Majority Whip. By profession an attorney, she earned her B.A. magna cum laude in History with honors and Economics from the University of Memphis. She is a graduate of the University of Memphis School of Law where she served as Editor-in-Chief of the University of Memphis Law Review. After graduating from law school, she clerked for Judge Harry Wellford for the Sixth Circuit Court of Appeals. She is a trial attorney in private practice with the Memphis law firm of Glankler Brown and has served as President of the Memphis Federal Bar Association. In her capacity as a State Representative, she has sponsored reform legislation in many areas, including the law requiring sexual harassment policies and workshops for all three branches of state government. In 1996, she was the recipient of the "Outstanding Legislator of the Year" Award from the Tennessee Task Force Against Domestic Violence.

Judy M. Cornett

An Associate Professor at the University of Tennessee College of Law, Judy Cornett received her B.A. and J.D. degrees from the University of Tennessee. There, she was a member of the Order of the Coif and Editor-in-Chief of the Tennessee Law Review. She clerked for Judge Edward A. Tamm of the United States Court of Appeals for the District of Columbia Circuit. She received her M.A. in English from the University of Virginia, where she is now a doctoral candidate. She is a member of the East Tennessee Lawyers' Association for Women and served as a member of the Tennessee Bar Association Commission on Women and Minorities in the Profession. Professor Cornett teaches law and literature, legal writing, civil procedure and legal profession.

Sheila Jordan Cunningham

Sheila Jordan Cunningham is a partner in the law firm of Baker, Donelson, Bearman & Caldwell in Memphis, and focuses her practice on state and local taxation. She received her B.A. and J.D. degrees, with honors, from the University of Memphis, where she was a member of the University of Memphis Law Review. She currently is on the Board of Trustees of the Paul J. Hartman State and Local Tax Forum, is a member of the Board of Governors of the Tennessee Bar Association, a member of the Board of Directors of the Memphis Bar Association, and a member of the Tax Section of the American Bar Association. She is a judge on the Tennessee Court of the Judiciary, a Fellow

of the Tennessee Bar Association, and has served as President of the Association for Women Attorneys and of Tennessee Lawyers' Association for Women.

Marshall Davidson

Marshall Davidson, a staff attorney with the Tennessee Supreme Court, graduated with honors from the University of Tennessee College of Law where he was a member of the Tennessee Law Review. After graduating from law school, Mr. Davidson clerked for Judge Houston Goddard, presiding judge of the Tennessee Court of Appeals. He later clerked for then Chief Justice Frank Drowota of the Tennessee Supreme Court. Before joining the Tennessee Supreme Court as a staff attorney, Mr. Davidson was in private practice. He has served as a captain in the Judge Advocate General's Corps of the United States Army. Currently, he teaches torts at the Nashville School of Law and is a adjunct instructor at Middle Tennessee State University.

Holly O. Davison

Holly Davison is a Food Management teacher at Science Hill High School. She received her B.S. from East Tennessee State University, a M.A. in vocational education, and has taken additional post-graduate hours. She is the former mayor of the City of Watauga and now serves as Equity Grant Director/Writer for the Johnson City public schools. In addition to membership in a number of educational honor organizations, she was President of Tennessee Women in Government (1984-85) and received the Tennessee Education Association Susan B. Anthony Award for Contributions to Women's Issues in 1990.

Karen P. Dennis

Karen Dennis is the Executive Director of the Memphis Area Legal Services, a non-profit corporation chartered to provide legal assistance to low income and elderly residents of several west Tennessee counties. She is also the Director of the Legal Method Program at the University of Memphis Law School. A 1973 graduate of the State University of New York at Buffalo with a B.A. degree in History, she is a 1978 graduate of the University of Tennessee School of Law. She has served as a member of the Tennessee Supreme Court's Commission on Permanency Planning, is a member of the Memphis Bar Association, the Association of Women Attorneys, and the National Legal Aid and Defenders Association.

Terri E. Elrod

Terri Elrod is an Official Court Reporter in Tennessee (criminal court, only) having served previously as a court reporter in Alabama and Florida. She received an Associate Degree from Gadsden State Junior College with an emphasis on court reporting, and is currently certified as a Registered Professional Reporter with the National Court Reporters Association. She served as Vice-President of the Tennessee Official Court Reporters Association and now serves as its President.

Tom E. Gray

Tom Gray is a Chancellor of the Eighteenth Judicial District, State of Tennessee. After receiving his law degree from the Nashville Y.M.C.A. Night Law School, he was elected judge of the General Sessions Court for Sumner County in 1982. In 1986 and again in 1990, he was elected Chancellor. He now serves as Chair of the Bench Bar Relations Committee of the Tennessee Judicial Conference and his Vice-Chair of the Education Committee. He is an adjunct faculty member at Volunteer State Community College and prior to joining Vol State, he was with Martin College in Pulaski, Tennessee, where he served as its President. He chairs the Sumner County Public Records Commission and is Secretary to the Administrative Board, First United Methodist Church in Gallatin.

F. Evans Harvill

Evans Harvill, of Clarksville, Tennessee, is a partner in the Daniel, Harvill, Batson & Nolan. He received his B.S. degree from Austin Peay State University and his J.D. degree from Vanderbilt University School of Law. He is a past President of the Tennessee Bar Association, was a member of the Supreme Court Board of Professional Responsibility, and was a member of the ABA Standing Committee on Ethics and Professional Responsibility. He is now a member of the Tennessee Board of Regents (having served as Vice-Chair 1992-93) and is Civilian Aide to the Secretary of the Army.

C. Creed McGinley

Creed McGinley is a Circuit Court Judge, Twenty-fourth Judicial District, in Savannah, Tennessee. After receiving a B.S. from the University of Tennessee in 1973 and a J.D. from Memphis State University Law School in 1976, he was in private practice until 1982 and then served as Assistant District Attorney General from 1982 to 1988. He has served as Circuit Court Judge since 1988, hearing both civil and criminal cases of unlimited jurisdiction. He served on the Court Executive Team of the Commission on the Future of the Tennessee Judicial System. He currently serves on the Education Committee and ADR Committee of the Tennessee Judicial Conference.

Diana F. Monroe

Diana Monroe is Clay County General Sessions Judge, Juvenile Judge for Clay County and Judge of the City of Celina, Tennessee. She received her B.S. and M.A. degrees from Tennessee Technological University and a J.D. degree from the Nashville School of Law. She has served as a math teacher for sixteen years at Celina High School, and was honored by Clay County as its "1994 Teacher of the Year." She is a member of the Tennessee General Sessions Judges Conference and the Juvenile Judges Conference.

Randall E. Nichols

Randy Nichols has been serving as Knox County's District Attorney General since 1992. Prior to his appointment, he served as Judge of the Criminal Court for Knox County and was an Assistant District Attorney as well as having practiced in the field of criminal defense before he assumed the bench. He received both his undergraduate and law degrees from the University of Tennessee. He has served on the Tennessee Sentencing Commission, is on the Advisory Committee on the Rules of Criminal Procedure and is a Board member of the Metro Drug Commission.

Mae S. Owenby

Mae Owenby, who has served in the Tennessee House of Representatives, received her B.A. degree from Lincoln Memorial University (cum laude) and her M.A. degree from the University of Tennessee. She has served as teacher, principal and guidance counselor for Blount County schools for twenty-six years, and in 1986 was elected Superintendent of Blount County schools. A former member of the Board of Directors for the National Association of State School Supervisors, she is currently a member of the Tennessee State Democratic Executive Committee, the Blount County Democratic Women's Club, Great Smoky Mountains Historical Society and the Blount County Historical Society.

Donna L. Pierce

Donna Pierce is General Counsel at the University of the South. Prior to accepting this position in 1993, she was a partner in the Chattanooga law firm of Chambliss & Bahner. She is the past President of the Chattanooga Bar Association and the Southeast Tennessee Lawyers' Association for Women and has served on the Board of Directors of the Tennessee Lawyers' Association for Women and Southeast Tennessee Legal Services. She is now a Board member of the Tennessee Justice Center and a member of the Tennessee Supreme Court Commission on CLE and Specialization. She received her undergraduate and law degrees, with honors, from the University of South Carolina.

Mary Tom Plummer

Mary Tom Plummer is the Director of Education in the Administrative Office of the Courts. She received her B.A. degree in Education from the University of Kentucky, and previously served as an educational planner with the Administrative Office of the Courts. Her current responsibilities include planning and implementation of continuing legal education seminars for judges and other court personnel, orientation programs for new judges, and faculty development workshops to help judges perfect their teaching skills. She serves on various committees within the judicial conferences and other professional organizations.

Leon Ruben

Judge Leon Ruben currently serves as Presiding Judge of the General Sessions Courts for Davidson County, Tennessee. Prior to his joining the bench in 1981, he served on the Metropolitan Nashville Council for six years. He has served as President of the Tennessee General Sessions Judges

Conference and is currently serving as its Secretary/Treasurer. He holds a B.A. degree from Vanderbilt University, a J.D. from the Nashville School of Law, and has been active in the American Judges Association, where he now serves on the Gender Fairness Committee.

Paula R. Voss

Paula Voss has been serving as an Assistant Public Defender in Knox County since 1992, specializing in appellate practice. Previously, she was a judicial law clerk for the Tennessee Court of Criminal Appeals and was a staff attorney at the Knoxville Legal Aid Society from 1980 until 1989. She also served as Director of the Volunteer Legal Assistance Program, the pro bono unit serving several East Tennessee counties. She received her B.A. degree from Miami University (Ohio) and her J.D. degree from the University of Tennessee.

Penny J. White

[She served either as Commission Co-Chair or Supreme Court Liaison during the majority of time the Commission was in existence.]

Penny White is a former Tennessee trial and appellate judge. She graduated from East Tennessee State University, the University of Tennessee College of Law, and Georgetown University College of Law. At the University of Tennessee, she served as Editor-in-Chief, Executive Editor and Research Editor of the Tennessee Law Review. At Georgetown, she was a Prettyman Fellow. While a member of the Tennessee Judiciary, she served on the Commission on Legal Education and Specialization, Alternative Dispute Resolution Commission, and on the Judicial Conference Executive Committee. She chaired the Judicial Evaluation and Education Committees. She has received the ETSU Outstanding Alumni Award, the University of Tennessee College of Law Public Service Award and the Y.W.C.A. Tribute to Women Award. She teaches at the University of Tennessee College of Law, the National Judicial College, and for various state and federal judicial and legal education programs.

Justice E. Riley Anderson (Liaison to the Tennessee Supreme Court)

Riley Anderson is a Justice on the Tennessee Supreme Court, and served as its Chief Justice 1994-1996. Prior to his selection, he was a judge on the Tennessee Court of Appeals, Eastern Section, having been appointed to that court in 1987 and then elected in 1988. Prior to that time, he was in practice in Oak Ridge from 1958 until 1987. He received both his B.S. and J.D. degrees from the University of Tennessee and is a 1988 graduate of the New York University Seminar Series for Appellate Judges. He was a founding member and first President of the Hamilton Burnett American Inn of Court in Knoxville and has served as President of ABOTA and the Tennessee Defense Lawyers Association.

Exhibit B

Refer to TBA Commission's 1996 Report and Interim Report of 1993

EXHIBIT C

TBA COMMISSION RECOMMENDATIONS

1. Bar Associations Task Force: Recommendations:

The TBA should continue to emphasize to its members and leaders the importance of participation in local bar associations by all attorneys. Local bar associations should also be encouraged to develop specific programs designed to facilitate participation by their female and minority members. Local bar associations should also be encouraged to reach out to any female or minority practitioners in their areas who are not members. As long as the TBA itself encourages participation by all of its members, the local bar associations will be similarly encouraged to be inclusive. [page 6]

2. Legal Profession Task Force: Recommendations:

More effort is needed in this area. The TBA should actively encourage all legal employers in the state to interview and accept candidates for employment solely upon their merit -- not their race or gender. Additionally, the TBA should emphasize to its members the importance of mentoring programs, both within law firms and for all new lawyers in the community. [page 8]

3. Survey Task Force: Recommendations:

The Commission recommends that the results of the survey be disseminated to the media, to all local bar associations, and to all state-wide specialty bar associations. The Commission also recommends that the TBA urge the Board of Professional Responsibility to continue gathering and maintaining information on the race and gender of Tennessee attorneys to request even more types of demographic data (as requested by Chair Holder) on the annual registration form, and to revise the annual registration form so as to make the request much more prominent. [page 13]

4. Law Schools Task Force: Recommendations:

The Commission recommends that all Tennessee law schools continue to place a high priority on recruiting qualified students from groups traditionally underrepresented in the legal profession. The Commission also recommends that law schools devote more resources to academic and co-curricular programs designed to meet the needs of female, minority and non-traditional students. The Commission also encourages law schools to make every effort to recruit and hire administrators and faculty from traditionally underrepresented groups. [page 23]

5. Courts Task Force: Recommendations:

In order to keep the attention of the bench and bar of Tennessee, as well as all of those who participate in Tennessee's judicial selection process, the Commission recommends that the Tennessee Bar Association designate an entity within the TBA:

(1) To annually survey and publish a detailed analysis, including analysis by selection process, of the number of women and minority judges in Tennessee and the number of women and minority lawyers who participate in judicial selection processes, in a form most helpful to analyzing whether judicial selection in Tennessee is appropriately inclusive; and

(2) To continue consideration of whether any further changes in Tennessee's judicial selection process are appropriate, and whether other efforts are needed on the part of the bench and bar of Tennessee, to increase the participation of women and minorities in the

judicial selection process. [pages 26 and 27]

6. Judicial Education Task Force: Recommendations:

Based on the Task Force's review of Tennessee and national materials, the Commission recommends:

that the TBA encourage the Tennessee Supreme Court to adopt a rule that all judges and court support employees receive formal training on a regular basis to address issues of bias on the basis of gender or minority status with the goal of ensuring fair and equal delivery of services and reaching bias-free decisions.

that the TBA encourage the Tennessee Supreme Court and the Administrative Office of the Courts to include diversity training as part of each general jurisdiction course and/or training provided to new judges and encourage those entities to develop curricula that infuse issues of bias based on gender or minority status into all other substantive law courses.

that the TBA adopt, and request the Tennessee Supreme Court to also adopt, a formal policy of encouraging gender and minority diversity among panelists presenting CLE and other training programs for judges, court personnel, and lawyers.

that the TBA encourage the General Sessions Judges Conference and the Tennessee Court Clerks Association to establish and support comparable committees to the Judicial Sensitivity Committee of the Tennessee Judicial Conference. [pages 31 and 32]

7. Judicial Conference Leadership: Recommendations:

The TBA should recommend that the Governor of Tennessee and the judicial nominating committees continue nominating and appointing qualified females and minorities to judgeships. Also, current female and minority judges should encourage other qualified females and minorities to consider becoming judges. The TBA and local bar associations should provide practical information to lawyers on how to put themselves forward as candidates for both elected and appointed judgeships. [pages 35 and 36]

8. Judicial Sensitivity and Harassment Task Force: Recommendations:

The Tennessee Supreme Court policy should be revised to clearly state to whom the policy applies. In light of state and federal laws that require employers to provide workplaces free from harassment, the policy should apply to, as well as protect, judges and employees of the state judicial system. Employees should be protected from harassment by judges, co-workers *and individuals who have business with the courts*. In addition, individuals having business with the courts should be protected from harassment by judges or anyone employed within the judicial system.

The policy should provide for alternatives in reporting. The current Tennessee policy is not entirely clear as to whether it protects individuals who have a complaint against someone other than a judge. However, even if the policy is currently intended to protect only employees, lawyers and litigants against harassment by judges, there are not currently adequate alternatives for reporting.

The policy should provide some information as to what discipline may result. The present policy simply states that a harassing judge will be dealt with and a non-employee harasser will be removed. How a harassing judge will be dealt with is not adequately addressed and may constitute a problem with the policy. The seeming secretiveness with regard to treatment of judges may result in increased hostility or litigiousness on the part of the individual who feels that he or she has been harassed.

There should be uniform procedures (i.e., a form developed) for the reporting of sexual harassment. It would be wise to provide forms to set a standard for investigating harassment. Such procedures would help to assure that all parties are dealt with in the same fashion, may help avoid claims of inadequate investigation, and may assist in the defense of allegations of sexual harassment.

In addition, the policy should be assessed annually in terms of administrative success. An analysis of the number of claims filed, the outcome of the various claims, and the satisfaction level of the individuals using the reporting system should be reviewed annually. Finally, the policy will certainly need to be modified to reflect the changing judicial interpretations of Title VII. [pages 41 and 42]

9. Implementation Task Force: Recommendations:

[After noting that the Implementation Task Force is anticipated to survive the Tennessee Bar Association Commission and also after noting the assumption that the Commission's recommendations ultimately are approved by the Board of Governors, this Task Force], the Task Force proposes that its duties include the following:

1. monitor representation of traditionally underrepresented groups in the judiciary, to the extent that information on minority status is available;
2. disseminate the 1996 Report of the TBA Commission on Women & Minorities in the Profession to the Tennessee Supreme Court Commissions on Racial/Ethnic Fairness and Gender Fairness; members of the Judicial Conference and General Sessions Judges Conference; all local bar associations, including women's and minority bar associations; and the Governor's Office;
3. make presentations on the 1996 Report to the Tennessee Judicial Conference and the General Sessions Judges Conference;
4. meet with leaders of the judiciary, bar associations, law firms, and law schools, to discuss the findings and recommendations of the 1996 Report;
5. create an action plan to initiate concrete changes in response to the 1996 Report's recommendations regarding the judiciary, bar associations, law firms, and law schools;
6. develop a speakers' bureau from within the Commission by geographic areas from which to draw speakers for legal groups and other community groups;
7. develop a plan to deal effectively with the media, if necessary, upon publication of the 1996 Report. [pages 42 and 43]

Less desirable work assignments	48%	
Steering to/from particular work	47%	
Compensation		40%
Performance reviews/promotions	36%	
Sexual harassment		22%
Hostile work environment	10%	

Other indices of gender bias were: “exclusion from firm management and decision-making,” “perception of females as being inferior,” “inappropriate or sexist comments/jokes,” “archaic dress codes,” “negative attitudes toward women lawyers being mothers or taking time off to have children,” “subjection of women to standards that are not applied to men,” and “very subtle attitudes.”

Forty percent of the women respondents said that there was discrimination against women lawyers by clients of the firm, while 30% said “no” to that question. Of the 196 respondents who said that firm clients were biased against women lawyers, 77.5% of those said they had been subjected to such discrimination. This type of discrimination has been manifested by a resistance to using women lawyers; resistance to women playing a lead role in client matters, and actual sexual harassment. Fifty-six percent of the respondents said that their firms did nothing special to ensure that women lawyers are involved in participating in business development opportunities.

When law firms and corporations acknowledge that they are in the business to make money, one wonders why more is not done to encourage the woman lawyer “rainmaker.” “The persistence of gender blindness ... is ... a by-product of the difficulty involved in recognizing gender bias and portraying gender-related problems persuasively,” writes Ms. Graham. Men are often not taught to recognize gender bias in its subtle applications and are frequently astounded that women report that they have experienced bias in the firm or organization. Perhaps law firms should not wait until gender bias smacks them in the face to face up to its insidious nature.

Exhibit E

Refer to Tennessee Board of Funeral Directors and Embalmers (use of gender-specific language)

Exhibit F
Regulations of the Department of Human Services (use of gender-neutral pronouns)

Exhibit G

Refer to Regulations of the Tennessee State Board of Accountancy (employing a blanket provision on gender neutrality)

Exhibit H

Refer to Legislative Drafting Manual, edited by Ellen C. Tewes and published by the Office of Legal Services of the Tennessee General Assembly (advocating the use of gender-neutral language in legislation)

EXHIBIT J

AFFIRMATIVE ACTION REPORT, 1993-1994

EXHIBIT K

COMPOSITION OF WORK FORCE BY SALARY RANGE,
JUDICIAL, 1994-95

Exhibit L
Refer to Analysis of Executive Branch Agencies' Workforce

EXHIBIT M

STATE-FUNDED EMPLOYEES BY SALARY RANGE

Exhibit N

Refer to Letter expressing Supreme Court's commitment to uphold Department of Personnel rules in compliance with the EEOC and Affirmative Action; Chapter 1120-7 attached.

EXHIBIT O

GUIDELINES FOR BIAS-FREE CONDUCT

EXHIBIT P

THE ROLE OF COURTROOM EMPLOYEES IN ELIMINATING GENDER BIAS

Stereotypes have no place in the treatment of people, or the handling of cases in court. Court employees are often the only members of the court system with whom the public interacts. By conveying respect to all as you provide them with assistance, you play an important role in eliminating bias in the administration of justice.

REMEMBER:

-- The claims of women litigants are as legitimate as any other claims heard in court and must be treated accordingly. It is wrong to prejudge women as more troublesome, irrational, or emotional, or to regard cases that are "typically" brought by women (e.g. child support) as less important than other cases.

-- All court personnel must take special care to treat victims of domestic violence and sexual assault with respect and sensitivity, given the trauma that they have already experienced. Victims of domestic violence and sexual assault, particularly, should not be subjected to greater scrutiny because of the nature of the act(s) perpetrated against them. Their testimony is no less credible because the alleged acts are sexual or occurred in a domestic context.

-- Good attorneys, male or female, are zealous advocates. Recognize and respond to women lawyers to the same extent and in the same manner as you would recognize and respond to male lawyers.

-- Everyone entering the court must be given equal treatment regardless of gender, race, age, national origin, religion, disability or ability to speak English.

-- As court employees, you provide valuable service to everyone using the court. By taking the lead in ensuring respectful and fair treatment for all, you will ensure that you receive the respect and courtesy you deserve.