

IMPLEMENTING FAIRNESS

THE REPORT OF THE
COMMITTEE TO IMPLEMENT
THE RECOMMENDATIONS OF THE
RACIAL AND ETHNIC FAIRNESS COMMISSION
AND THE GENDER FAIRNESS COMMISSION

Presented to the Tennessee Supreme Court
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FOREWORD

History

This Report follows and builds upon a nearly decade-long effort to study the issue of racial, ethnic, and gender fairness in the justice system of Tennessee. The Tennessee Bar Association Commission on Women and Minorities in the Profession was established in 1992. This Commission held public hearings across the state at which many participants in the legal system testified regarding their experiences with racial, ethnic, and gender fairness; the Commission also conducted a confidential, statistically valid survey of licensed Tennessee attorneys. The Commission's efforts culminated in two reports: the Interim Report issued in August 1993 that set forth the results of the public hearings, and the 1996 Report that set forth the Commission's recommendations and the results of the survey.

By Order entered September 12, 1994, the Tennessee Supreme Court appointed two commissions to study the issue of racial, ethnic, and gender fairness in the Tennessee justice system: the Commission on Racial and Ethnic Fairness, and the Commission on Gender Fairness. These two commissions engaged in factfinding and issued final reports, the Gender Fairness Commission in January 1997, and the Racial and Ethnic Fairness Commission in February 1997. The final reports of both Commissions are available online at http://www.tsc.state.tn.us/geninfo/Info_opt.htm. Both Commissions made numerous recommendations for enhancing fairness in Tennessee's legal system. Both Commissions recommended the appointment of a body to follow through with the Commissions' recommendations.

By Order entered September 3, 1998, the Tennessee Supreme Court created the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and the Gender Fairness Commission (the "Implementation Committee"). The Committee was charged generally with "planning, overseeing and monitoring the implementation of the recommendations of the Commissions." More specifically, the Committee was ordered to

review the reports of the Commissions and develop a plan for implementing each recommendation. The plan should specify the body responsible for such implementation and offer guidance to the Court, the Tennessee General Assembly, bar associations, law firms, law schools, government agencies and instrumentalities with regard to effective means of implementing the Commissions' recommendations, as appropriate.

The Committee was also charged with "establish[ing] means for monitoring the progress made by the various implementing bodies."

Committee Processes

Pursuant to this charge, the Implementation Committee took as its starting point the recommendations made by the Racial and Ethnic Fairness Commission and the Gender Fairness Commission. The Committee undertook factfinding in order to explore the degree to which these recommendations are already being addressed and to determine the best way to ensure that the recommendations are fully implemented.

Initially, the Committee divided into five subcommittees: Education and Training; Court Environment; Court Policy and Procedure; Judicial Nomination, Selection, and Evaluation; and Data Collection. (A table of subcommittee membership is found at the end of this report.) The recommendations of the two Commissions were then grouped into related categories and assigned to one of the subcommittees; each subcommittee then undertook factfinding regarding its assigned recommendations. (A table of the recommendations of the two Commissions, identifying the responsible Implementation Committee subcommittee, is found at the end of this report.) In addition to drawing upon the expertise of individual members, the Committee heard presentations from a number of interested parties. First, Jarrett Hallcox, from the University of Tennessee Center for Government Training, provided us with information about existing training requirements and opportunities for county officials, including court clerks. Second, Janice Rodriguez and Martin O. Deschenes from the Tennessee Foreign Language Institute and Karen Williams of the Administrative Office of the Courts informed us about the recent federal grant to develop an interpreters program for the Tennessee court system. They also provided us with materials regarding interpretation of court proceedings for non-English speakers., including a proposed benchbook. Third, the Committee heard a presentation by Fred Ramos, Esq., of Nashville regarding interpretation issues for Hispanic litigants. Finally, two University of Tennessee law students, Mary Taylor Gallagher and Kate Pittenger, presented a draft disciplinary rule prohibiting bias on the part of attorneys in the course of representing their

clients. Their presentation included background material on the status of anti-bias rules in other states and the First Amendment implications of anti-bias rules.



Structure of Report

This Report recommends actions by the Tennessee Supreme Court, the General Assembly, administrative agencies, bar associations, private law firms and other legal employers, and the state's law schools. The Report is organized as follows:

- (1) Highlights of the Committee's recommendations;
- (2) Reports of the five subcommittees;
- (3) Conclusion;
- (4) Table of recommendations of the two Commissions, along with a table of Implementation Committee subcommittee membership; and
- (5) Attachments, preceded by a Table of Attachments.

This Report represents countless hours of work on the part of Committee members. This Report underscores the commitment of the Tennessee Supreme Court to ensuring fair treatment -- and the perception of fair treatment -- for all persons who encounter the justice system in our state. This Report is presented to the Tennessee Supreme Court in the hope that it will find a wider audience and that it will promote discussion among the citizens of this state about ways of improving our justice system.

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Keith, former deputy director; Toyia Mundy, former administrative assistant; Libby Sykes, deputy director; Jean Stone, assistant director; and Marjorie Beard, administrative assistant.



HIGHLIGHTS OF THE RECOMMENDATIONS OF THE IMPLEMENTATION COMMITTEE

Anti-Bias Rule

The Implementation Committee recommends that the Supreme Court promulgate an amendment to the Code of Professional Responsibility—or the Rules of Professional Conduct, as appropriate—prohibiting attorneys from manifesting prejudice based on race, gender, and other characteristics, in the course of representing a client. This amendment will bring the code of conduct for lawyers into line with the code of conduct for judges, and will ensure that laypersons encountering the judicial system will be treated fairly. It will also ensure that laypersons have access to the disciplinary enforcement process.

Interpretation for Non-English Speakers

The Committee recommends that the Supreme Court act to ensure that all non-English speakers within the justice system have timely access to accurate, affordable interpretation. During its factfinding the Committee learned that there is an urgent need for improved interpretation services throughout our state, due to the ever-growing number of non-English speakers in our state. This need is particularly acute in the criminal justice system, where the constitutional rights of non-English speakers may be adversely impacted by the lack of timely, affordable, accurate interpretation.

The Committee recommends that the Supreme Court support the ongoing efforts of the Tennessee Foreign Language Institute, in cooperation with the Administrative Office of the Courts, to implement a Certified Court Interpreters Service. The Committee also

recommends adoption of the Benchbook promulgated by the TFLI for use in all Tennessee courts.

Female and Minority Judges

The Committee recommends that steps be taken to increase the presence of women and racial and ethnic minorities on the state's appellate, trial, General Sessions, juvenile, and specialized courts and in the ranks of administrative law judges. Although the Judicial Nomination and Selection Commission reflects the state's racial and gender diversity, this diversity has not yet been achieved on the state's courts. There is a need for more qualified female and minority candidates to seek judicial office, and there is a need for female and minority judges in counties with a low population of minorities. To address this concern, the Committee proposes a number of steps, including establishment of a loan or scholarship program for women and minority law students who agree to prepare themselves to become judicial candidates in counties with low minority population.

Data Collection

The Committee recommends the funding of an additional full-time position within the Administrative Office of the Courts for the purpose of collecting, analyzing, and disseminating data regarding racial, ethnic, and gender demographics. During its factfinding, the Committee learned that there are a large number of entities already collecting data relevant to racial, ethnic, and gender fairness, but that there is no centralized repository for that data. Therefore, it is difficult to gain a complete picture of our state's justice system in

terms of racial, ethnic, and gender categories, and in turn, it will be difficult to monitor the improvements resulting from adoption of any recommendations of this Committee.

Guidelines and Notices

The Committee recommends that the Tennessee Supreme Court mandate adoption of the Guidelines for Civility and Professional Conduct for Judges and the Guidelines for Civility and Professional Conduct for Attorneys; that the Court mandate adoption of a document modeled on the Memphis Bar Association Guidelines for Bias-Free Conduct, to be distributed state-wide; and that the Court mandate adoption of two forms to be posted in every courthouse in Tennessee regarding the availability of a complaint procedure for incidents of bias or prejudice.

Replacement of Geier Scholarship Monies

During its factfinding the Committee found that scholarship monies provided pursuant to the Geier consent decree are instrumental in increasing the number of African-American students in our state's law schools. However, the Committee also learned that the decree may, in the near future, be vacated. It is therefore crucial, the Committee believes, that the General Assembly study ways to replace the Geier money in the form of law school scholarships for African-American students.

Appointment of Attorneys

The Committee recommends that the Tennessee Supreme Court mandate use of a system by the trial courts of this state to ensure that fee-generating and other court appointments are made in a racially and ethnically neutral and gender-neutral manner.

Standing Committee on Bias and Discrimination

The Supreme Court should appoint a standing committee on bias and discrimination that would monitor the implementation of this Committee's recommendations and would work closely with the Administrative Office of the Courts on gathering data related to bias and discrimination in the justice system.



INTRODUCTION TO SUBCOMMITTEE REPORTS

The several recommendations of the Tennessee Supreme Court's Commission on Racial and Ethnic Fairness and the Tennessee Supreme Court's Commission on Gender Fairness are highlighted below in bold, followed by the response of the subcommittee.



REPORT OF THE COURT POLICY AND PROCEDURE SUBCOMMITTEE

I. Racial and Ethnic Fairness Recommendation

Local court systems should designate an ombudsman to assist public participants in the judicial system.

Implementation Committee Recommendation:

Most believe that there is a need for such a position and that it should be a paid position working within the clerk's office. Possibly legislation and funding on a state level would be the most universal and appropriate way to make uniform such a position. Although many clerks, even under threat of practicing law without a license, try to provide the services needed, it seems unlikely that local courts will fund any additional positions. If established as a position, the ombudsperson could recruit volunteers from the community to assist those using the court systems.

The subcommittee decided to do a survey of judges and others for input on all recommendations. While the survey was certainly less than scientific, it was helpful. (The survey instrument is appended as Attachment 1.)

Several judges and other participants made comments. Some felt that the present clerks, not victim-witness coordinators, should fill the role of ombudsperson. (A compilation of survey responses is appended as Attachment 2.) Possibly legislation and funding on a state level would be the most universal and appropriate way to make uniform such a position.

Training of both the ombudsperson and the volunteers would be essential to their effectiveness.

In conjunction with this effort to make the courts more user-friendly, other tools could be developed. Some suggestions are orientation videos, brochures, Internet web sites, sample forms, and person-to-group presentations. Such group presentations should be done at convenient times. (See also the Report of the Court Environment Subcommittee at section II.)

State law should be clarified to say that a helpful clerk is not practicing law without a license. While some court clerks might feel more comfortable with the current restrictions on giving advice to litigants or potential litigants, the Committee's sense is that most court

clerks would appreciate having more leeway to assist litigants or potential litigants in routine matters. Court clerks should be able to provide simple forms and give verbal instructions on matters within the scope of their courts' jurisdictions. Court clerks should be trained in providing forms and verbal assistance, and should make it clear to those assisted that the court clerk is not an attorney and cannot provide legal advice.

In May 1999 the National Conference on Public Trust and Confidence in the Justice System developed a "report card" on the nations' courts. The subsequent press release and executive summary (which is appended as Attachment 3) are excellent materials about public perception of the judicial system.. The full report is also online at <<http://www.ncsc.dni.us/PTC/NAP/ptc2.htm>>. The Tennessee Supreme Court has appointed a Committee on Building Public Trust and Confidence in the Judicial System in this state; that Committee's work is now underway. The Implementation Committee recommends that the Public Trust and Confidence Committee consider the idea of an ombudsperson as a way of improving public trust and confidence in the courts.

II. Racial and Ethnic Fairness Recommendation

The Legislature should enact legislation to provide for sanctions against insurance companies that discriminate on the basis of race or ethnicity in the evaluation and settlement of personal injury and workers' compensation claims.

Implementation Committee Recommendation:

Certainly the Commissioner of Commerce and the Legislature should be ever vigilant to detect and eliminate any unfairness in settlement of claims. (See also Report of the Data Collection Subcommittee at section III.) The General Assembly should consider legislation prohibiting insurance companies from discriminating on the basis of race, ethnicity, or gender in offering or making workers' compensation settlements and should grant the approving court jurisdiction to set aside any settlement upon a finding of such bias.

The survey results did not indicate this as a problem, or at least did not see this as a problem that the courts could correct. Courts may now impose "bad faith penalties" and court costs, including attorney fees, for certain types of unfair treatment of claimants whose cases are presented to courts. This should be expanded to include unfair treatment based on race, ethnicity, or gender.

A judicial education seminar should be focused on the issue of bias in settlements. If courts believe from any evidence that the insurance companies have discriminated on the basis of race, ethnicity, or gender, then they should be able to set aside settlements or declare

them void for the purpose of additions. Legislation would be helpful to the courts in order to assure jurisdiction of such cases.

Workers' compensation settlements must be approved by a judge. This fact will allow a judge who is trained to detect bias to ask proper questions regarding settlements. Judges should be trained to detect bias in settlements. Judges would be assisted by statewide data from which systematic practices might be inferred. The Department of Labor may already be collecting and compiling such data; if so, that data should be reported to the Administrative Office of the Courts and disseminated to trial judges statewide. If not, the Supreme Court should consider requiring collection of data on this issue. (See also Report of the Data Collection Subcommittee at section III.)

III. Racial and Ethnic Fairness Recommendations

Courts should ensure that jury source lists represent the racial and ethnic make-up of the areas they serve. If standard list sources, such as driver's licenses, property tax [rolls], and voting lists do not adequately represent minority demographics, courts should consider lists from other sources, such as school enrollment, public housing residents, and utility customers.

Courts should review jury service and its policies and adjust those policies that may be barriers to minority participation, such as the length of service, jurors' ability to serve on call at home, the level of reimbursement, and assistance with child care.

Implementation Committee Recommendation:

This Committee's recommendations are directed primarily at local custom and practice, since jury selection practices that violate the state or federal constitution, state statutes, or court rules will more likely be addressed in appeals of individual cases. The Administrative Office of the Courts should have some way to review jury service in each county as to racial, ethnic, and gender fairness. The Data Collection Subcommittee has developed a form for recording this information. It is appended as Attachment 4.

Recently, in May 1999, the Tennessee Bar Association presented its report from the Commission for Jury Reform. This sixty-five-page report is excellent and thorough. The Implementation Committee recommends further study of the ideas expressed in this report to the Tennessee Supreme Court and to the Legislature. Some areas are controversial and may need to be rectified.

The Implementation Committee recognizes that the process of jury selection is governed by the U.S. and Tennessee Constitutions and by statutes, court rules, and local customs and practices.

Public housing residents and parents of school children should be included in the list of those called for jury service. Exemptions from service should be eliminated to the extent possible.

Presently citizens over 65 may elect to be exempted from jury service. Presently, this exemption is being used to screen out all citizens over 65 from jury source lists. This exemption should not exclude all citizens over 65 from the jury list but only those who elect not to serve. Elder citizens who are willing to serve should be encouraged by the system to serve. By reducing the time each juror must serve more groups would be better able and willing to serve.

Very close scrutiny must be given at trial and on appeal to jury challenges that seem to be racially or ethnically motivated or gender-based. The number of peremptory challenges possibly needs to be decreased in order to diminish the possibility that such challenges can be used on the basis of racial, ethnic, or gender bias.

IV. Racial and Ethnic Fairness Recommendation

Courts, district attorneys, and public defenders should assure that all defendants receive the same quality of treatment and representation.

Implementation Committee Recommendation:

All Public Defenders' offices must be fully staffed with well-trained and committed criminal defense attorneys. There must also be adequate funding for appointed attorneys in cases where the Public Defender does not or cannot serve. Consideration should also be given to proper payment of attorneys in Juvenile Court. Presently, children accused of status offenses are not represented by the Public Defender or may not be represented by any attorney.

There is no doubt under United States and Tennessee law that all defendants are entitled to an adequate and competent legal defense. This is a matter of constant concern and only ongoing efforts by the Tennessee Supreme Court and the Legislature will assure proper defense for those unable to afford a legal defense.

Issues regarding indigent defense in criminal and juvenile matters are of ongoing concern and must be addressed each year by the Tennessee Supreme Court and the

Legislature. Currently, these issues are addressed in the "Petition of the Indigent Defense Commission for the Adoption of a Revised Supreme Court Rule 13," docket no. M2000-00372-SC-RL-RL, presently pending before the Court and appended as Attachment 5. This Committee recommends that this Petition be given serious consideration by the Supreme Court.

This also is a matter of ongoing concern that must be addressed each year by the Tennessee Supreme Court and the Legislature.

One of the problems that needs to be addressed is the lack of attorneys available to provide representation, particularly in Juvenile Courts in rural areas. This lack of representation creates problems in the area of statutory "valid court orders." Status offenders should not be institutionalized for contempt of these invalid, non-qualifying orders of juvenile courts.

Overall, District Attorneys seem to have more staff than Public Defenders, although major efforts have been made in the last few years to correct this imbalance. Many District Attorneys contract to collect child support for IV-D cases. In this area there is often insufficient staff to do all the work required for collection of child support. Sometimes the bottleneck is court docket time. In both cases every effort should be made to properly fund collection of support by reallocating resources in the District Attorney's office or by adding staff in the Juvenile Court office where needed.

Many times needless warrants are issued for defendants that are ultimately dismissed for lack of proof either before trial or at trial. District Attorney offices need to set up screening before the issuance of needless warrants. This would keep many people out of the system.

An October 3, 1999 article from The Tennessean by Dwight Lewis is appended as Attachment 6. Many of the minorities described in this article are placed in detention or jail without proper representation.

Effective representation of accused persons requires that counsel be provided at the earliest possible time. Unless the indigent accused is provided prompt legal counsel, discrimination occurs between the poor defendant and the defendant of financial means. Counsel should be provided to all indigent defendants as soon as possible after custody begins, at the initial judicial appearance or when formal charges are filed, whichever occurs first. Appropriate authorities should immediately notify the public defender's office whenever the person in custody requests counsel or is without counsel.

V. Racial and Ethnic Fairness Recommendation

The Legislature and the Tennessee Supreme Court should expand efforts to make legal representation available to low and moderate income people.

Implementation Committee Recommendation:

In recent surveys, it is clear that 80% of the population eligible for legal assistance through the civil legal services agencies do not receive it due to lack of staff to provide assistance. We recommend a number of steps to make the justice system, particularly the civil justice system, more accessible to the public.

Legal Aid is underfunded in Tennessee. With recent cutbacks in the funding allocated to the Legal Services Corporation, many of the local legal aid agencies have been forced to lay off or not replace attorneys. In recent surveys, it is clear that 80% of the population eligible for legal assistance through the civil legal services agencies do not receive it due to lack of staff to provide assistance. Each of the legal services agencies either sponsors an in-house pro bono program or partners with a bar association pro bono program. However, only about 2500 of the more than 13,000 attorneys in Tennessee, or 20%, participate in a formal pro bono program, and the participation rate is lower in rural areas where there are few attorneys.

Fortunately, the Tennessee Bar Association has created an Access to Justice Committee, currently headed by Mr. Harold Pinkley, that is working on the issue of civil legal services delivery. This Committee is concentrating on issues involving pro bono recruitment, training, and retention and has created a subcommittee to investigate Pro Se litigation. The Pro Se subcommittee is headed by Judge Marietta Shipley. Several judges and attorneys have volunteered to join this subcommittee and they are in the process of developing a plan for addressing the explosion of pro se filings and internet sites that provide information to the public. (A detailed "Pro Se Handbook" from the United States District Court for the District of Idaho is appended as Attachment 7.)

Judge Shipley was one of the team members who attended the Conference on Pro Se Issues sponsored by the State Justice Institute on November 18-21, 1999. As a result of this conference, Tennessee developed an action plan for *pro se* litigation. The State Justice Institute provides funding for implementation of the state action plan, and the Administrative Office of the Courts should apply for one of these grants. Guidelines for the grant applications are available online at <<http://www.statejustice.org>>.

As to the civil legal services programs, they are currently in the process of developing a statewide civil legal services plan. This plan will address decreases in funding in two ways: first, by adjusting the way in which legal services are delivered to the indigent, and second, by maximizing their resources. The eight project directors and their staff have created a 75-page statewide plan that they are disseminating to attorneys and judges in

Tennessee for comments, recommendations, and implementation. One of the key areas of development is the area of Pro Bono representation. The state plan requests assistance from the judiciary in recruiting and training attorneys, the creation of special panels to handle a rural/urban partnership, and local rules and procedural initiatives that would reduce the perceived unfair treatment of women and minorities in courtrooms.

The following recommendations are a compilation of ideas generated by various commissions, committees, and surveys. This list is by no means comprehensive and while it may appear very general, we hope to address negative perceptions on the part of minority and women who appear before the court system as litigants, counsel, witnesses, and jurors.

The Court should create uniform court forms that are reproducible by individuals and are easy to use; should publish simplified rules of procedure that are available to all persons; and should provide information about legal rights and responsibilities that is understandable and easily accessible to members of the public. These resources should be available both in hard copies and on-line. The Court should also provide less formal settings for resolution of minor disputes and family disputes. Most litigants who have little money to hire an attorney are women and minorities--it is this segment of the population who are unable due to their lack of funds to access the justice system and who are most likely to proceed pro se. They need to be able to transact routine legal matters in a manner that is simple and easy and does not require a lawyer.

Also, small claims courts without attorneys should be developed and sessions provided at night and on Saturdays. Clerks should be able to supply and assist litigants with preparation of small claim court documents. A special committee should be formed to study all details of a small claims court. (See Attachment 8, Michael Bailey, *Small Claims Courts Arrive in Full Force in Virginia*, from The Legal Reformer (Summer 1999)).

Judges and court personnel need training in dealing with *pro se* litigants. The American Judicature Society has addressed this issue in a book, Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers, that could be distributed with the training.

The Court should encourage attorneys to handle pro bono work through organized pro bono projects. Almost every attorney does pro bono work, not all of it intentionally. If an additional 2500 attorneys would participate in pro bono programs, that would increase the attorneys available to the indigent population to an additional 15 full-time equivalent attorneys across the state.

The Court should strongly consider amending Sup. Ct. R. 8 to require mandatory pro bono hours for all licensed Tennessee attorneys. Short of requiring pro bono service, the Court can encourage the judiciary to actively assist pro bono programs by recruiting

attorneys, participating in CLE programs sponsored by pro bono programs, attending award day ceremonies for pro bono attorneys, and creating court rules that would give preference to scheduling cases handled by pro bono and legal services staff.

The Court should work with the legislature to identify statutes that prevent the clerks' offices from assisting litigants due to fears of practicing law without a license. The Court should encourage the creation of clear, understandable rules for all clerks about what help is appropriate and what is not. The Court should also encourage bar associations and legal services agencies to hold community days or create hotlines and community education brochures that would explain to the community how the system operates and what these agencies can and cannot do.

Alternative Dispute Resolution should be more fully required in certain areas of the law. Care should be taken, however, to assure that increased use of ADR does not merely result in the relocation of bias into an arena less regulated by rules of procedure and evidence and less subject to judicial scrutiny. Much scholarship has focused on the ways in which ADR processes can disadvantage the less powerful litigant, especially women in domestic relations litigation. Critics of ADR suggest that it may, in effect, privatize discrimination and bias. *See, e.g.,* Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058-67 (1996).

The message we would encourage the Court to send to the indigent, mainly women and minorities, is one that says they are valued members of our community, not just people whose legal problems should be ignored or treated as less important than others'. Sending the message that the judiciary, the bar associations, the Clerks, and the legal services agencies are working together to create a more accessible, user-friendly system and to reduce barriers to the system and to legal counsel would ameliorate the perception of unfair or discriminatory treatment held by women and minorities and would encourage a more positive perception of the judicial system by the community.

VI. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court should ensure appropriate interpreters are available pursuant to applicable law.

Implementation Committee Recommendation:

The Committee finds that the problem of interpretation for non-English speakers, especially in the juvenile and criminal justice systems, is an urgent one that requires strong action by the legislative, executive, and judicial branches.

The issue of interpretation for non-English speakers in the Tennessee court system is becoming increasingly urgent as the state's population of non-English speakers grows. Although the greatest population of non-English speakers has traditionally been Hispanic, the population of other ethnicities, including Asians and natives of Middle Eastern countries, is growing rapidly. The Committee has learned that non-English speakers are fearful of taking advantage of the civil justice system, often failing to file meritorious civil suits. The Committee has also learned that non-English-speaking criminal defendants are sometimes treated differently from English-speaking defendants solely because of their inability to speak English or to provide a neutral, trustworthy interpreter.

Pursuant to a federal grant, Ms. Janice Rodriguez of the Tennessee Foreign Language Institute and Ms. Karen Williams of the Administrative Office of the Courts have developed "Court Interpretation Guidelines" (appended as Attachment 9) consisting of a Code of Professional Responsibility for Interpreters in Tennessee Courts, Guidelines for the Judiciary in the Administration of Interpreter Services, and a Judge's Benchbook. This Committee recommends that the Supreme Court adopt these Guidelines and mandate their use in all Tennessee courts. The Committee also recommends that the Tennessee Foreign Language Institute draft a proposed court rule or legislation mandating timely, accurate, and affordable interpretation services for all non-English speakers in the juvenile and criminal justice systems. The Court should promulgate such a rule as soon as practicable. A survey of court rules adopted by other jurisdictions has been made by the Tennessee Foreign Language Institute and is attached as Attachment 10.

In addition, clerks of civil, criminal, and juvenile courts should have available brochures with simple instructions in Spanish and in other languages as the need increases. The Foreign Language Institute should help in developing the brochures.

Courts and court clerks should be encouraged to train and/or hire personnel that are proficient in Spanish and in other foreign languages as local needs arise. Many police departments are presently taking such steps to deal with this problem.

A Consortium for State Court Interpreter Certification, staffed by the National Center for State Courts, has been established (*see* Attachment 11). Tennessee has joined this Consortium.

Interpreter certification is a complicated and important issue. The Tennessee Foreign Language Institute has taken major steps to start a certification program in Tennessee. Every possible effort should be made to improve the number and quality of interpreters, and this Committee recommends that the Supreme Court support the effort to establish a certified interpreters program.

VII. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court and the Legislature should review all aspects of the system of assessing and providing bail bonds; should set forth specific guidelines regarding surety requirements; and should consider a public pre-trial service system free from bias as an appropriate alternative or addition to the current bail bonding practices.

Implementation Committee Recommendation:

In order to fully address this recommendation, a separate committee would need to do a separate study of present statewide practices affecting pre-trial release. Because inequities in pre-trial release inevitably result from linking liberty to money, this Committee recommends that the Committee on Building Public Trust and Confidence in the Judicial System make it a priority to study Tennessee's current pre-trial release programs and practices and to recommend reforms in pre-trial release. Some method of data collection needs to be set up to determine how defendants are presently being released. Hopefully the Administrative Office of the Courts could develop a form that deals with release that each court would be required to submit on a monthly basis. (See the Report of the Data Collection Subcommittee at section II.).

The first proposed Rules of Criminal Procedure in 1976 attempted to address this issue but the final enacted Rules omitted this proposed rule. It appears that our present state law contemplates the least onerous method of release for all defendants. Unfortunately many counties are not following the pre-trial release statutes. Legislation should be written which includes a "public pre-trial service system." Courts that continually fail to follow current state law need to be so advised.

Some jails in Tennessee are presently under Federal Court orders to limit the jail population. Courts in these jurisdictions have set up pre-trial release programs. All counties in Tennessee should make efforts to be certain release is fair.

Another problem area is untrained non-attorney Judicial Commissioners. Many warrants throughout the state are issued by these commissioners. A statewide educational program needs to be established to train these commissioners in criminal law and pre-trial release law. Also, the state law for appointment should be made uniform from county to county. This Committee recommends the passage of legislation requiring all judicial commissioners to be licensed attorneys.

While at this time we cannot recommend abolishing the "professional" bail bond system in Tennessee, this ought to be the ultimate goal of any pre-trial release reform.

Further General Observations

A monograph from the Bureau of Justice Assistance, Trial Court Performance Standards and Measurement System Implementation Manual (NCJ No. 161567 (July 1997), 248 pages) and available online at <<http://www.ncjrs.org/txtfiles/161567.txt>> could be of help to any entity seeking to implement this Committee's recommendations and also to the Committee on Building Public Trust and Confidence in the Judicial System.



REPORT OF THE COURT ENVIRONMENT SUBCOMMITTEE

I. Racial and Ethnic Fairness Recommendation

That the Tennessee Supreme Court amend the Tennessee Rules of Professional Responsibility to prohibit, inter alia, bias or discrimination by lawyers.

Bias and discrimination have no place in the courts and in the performance of legal services. The concept of one system of justice for all persons does not contemplate, nor should the profession and the Court permit, prejudice or discrimination by lawyers.

This recommendation does not intend to regulate words or conduct that are protected by federal or state laws and remedies, and does not intend to prohibit speech otherwise protected by the First Amendment to the United States Constitution in Article I, Section 19 of the Tennessee Constitution.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

The Tennessee Supreme Court should amend Tenn. Sup. Ct. R. 8 to adopt a disciplinary rule that clearly prohibits discrimination or bias by lawyers. The suggested language for the amended rule, in Model Rule form, is as follows:

Proposed Rule 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
-

- (b) **commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) **engage in conduct that is prejudicial to the administration of justice. This rule is violated by, among other things, a lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, a bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. This prohibition does not preclude legitimate advocacy where the characteristic is relevant to the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.**
- (e) **state or imply an ability to influence improperly a government agency or official; or**
- (f) **knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.**

Alternatively, in Model Code form, the suggested language for the amended rule is as follows:

DR 1-102. Misconduct

- (A) **A lawyer shall not:**
 - (1) **Violate a Disciplinary Rule.**
 - (2) **Circumvent a Disciplinary Rule through actions of another.**
 - (3) **Engage in illegal conduct involving moral turpitude.**
 - (4) **Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.**
 - (5) **Engage in conduct that is prejudicial to the administration of justice. This rule is violated by, among other things, a lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, a bias or prejudice based upon race, sex, religion, national origin,**
-

disability, age, sexual orientation, or socioeconomic status. This prohibition does not preclude legitimate advocacy where the characteristic is relevant to the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.**
- (7) Willfully refuse to comply with a court order entered in a case in which the lawyer is a party.**

Appended as Attachment 12 is a copy of the written document reviewed by the Committee in conjunction with this recommendation: Mary Taylor Gallagher and Kate Pittenger, "Planning and Drafting Project Completed in Conjunction with the Tennessee Supreme Court Gender, Racial and Ethnic Fairness Committee: Proposed Disciplinary Rule 8.4 and Planning Document" (Fall 1999).

II. Racial and Ethnic Fairness Recommendation

Judges should issue clear and concise directives to eliminate discriminatory practices within the court environment.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

The Tennessee Supreme Court should adopt guidelines for civil and professional conduct for participants in the court system throughout the state, one of which clearly prohibits any type of racial, ethnic, or gender bias. Such guidelines should be prominently displayed in courtrooms, and disseminated by the courts to participants. The Committee has drafted guidelines for both judges and attorneys, "Guidelines for Civility and Professional Conduct for Judges" and "Guidelines for Civility and Professional Conduct for Attorneys," which are appended as Attachments 13 and 14. Also appended as Attachments 15, 16, and

17 are two notices and an accompanying form: “Justice Served Here,” “Justice Is Blind, but Humans Have Faults,” and “Judicial Unfairness or Misconduct Form.” These notices should be posted in all courtrooms, clerks’ offices, judges’ chambers, and hallways in all Tennessee courthouses. The form should be readily available at a central location in each courthouse. These notices and form should be available in at least a Spanish translation and in other language translations as needed in the locality.

The Tennessee Supreme Court should adopt a model multipurpose informational brochure for dissemination through the courts or clerks’ offices that includes a prohibition against bias or discrimination. An example of such a brochure is the “Weakley County General Sessions Court” brochure appended as Attachment 18. It is recommended that the multipurpose brochures be published or made available in different language translations.

The Tennessee Supreme Court should authorize production of a model multipurpose video presentation(s) on the court system which would include discussion of the prohibition against bias or discrimination. This video should be shown to those participating, either as parties or as potential jurors, in the court system throughout the state, prior to the proceedings. Such multipurpose video could be produced in conjunction with the Committee on Building Public Trust and Confidence in the Judicial System.

The guidelines, notices, forms, brochure, and video recommended above can be promulgated by virtue of the Court’s rulemaking power.

The Tennessee Supreme Court should recommend adoption of language in all Tennessee pattern jury instructions prohibiting bias or discrimination by the jury in the consideration or rendering of its verdict.

The Tennessee Supreme Court, through the Administrative Office of the Courts, should continue to encourage and promote seminars or judicial conference presentations that include ethics programs focused on elimination of discrimination or bias in the court system. (See also Report of the Education and Training Subcommittee at section VII.)

The Tennessee Supreme Court should establish a standing committee to address issues of discrimination or bias in the court system, comprised of, among others, a representative each from the Judicial Conference, the General Sessions Court Conference, the Juvenile Court Judges, the District Attorneys Conference, the Public Defenders Conference, Tennessee Lawyers’ Association for Women, the Tennessee Bar Association, groups for police and law enforcement including the Sheriffs’ Conference Association, and Fraternal Order of Police, victims’ rights coordinators, Court Clerks’ Conference, and trial lawyers. This committee would be responsible for monitoring the implementation of any of the recommendations of the Implementation Committee that are ultimately adopted, and it would work closely with the data collection entity recommended to be established in the

Administrative Office of the Courts. (See also Report of the Data Collection Subcommittee at section I.)

III. Racial and Ethnic Fairness Recommendation

Courts should ensure that in civil or criminal fee-generating cases, attorneys are appointed on a non-discriminatory basis.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

The Tennessee Supreme Court should establish a fair and equitable procedure for appointing attorneys in fee-generating cases throughout the state by requiring judges to maintain a list of attorneys for fee-generating cases on a rotating and non-discriminatory basis.

The Tennessee Supreme Court could recommend that state judges amend local rules in a manner to ensure that participation in compiling lists of attorneys for fee-generating matters occurs in a non-discriminatory and rotating manner and that the process is administered by the court clerks, subject to judicial discretion based upon the complexity of the particular matter and the experience of the attorney. Alternatively, the Tennessee Supreme Court could recommend adoption of a standing order by local or state courts that mandates appointment of attorneys in fee-generating cases on a rotating and non-discriminatory basis.

The Tennessee Supreme Court should promulgate a rule requiring that a record of all appointments in fee-generating cases be maintained by each judge and that the race, ethnicity, and gender of each appointed attorney be recorded. These records should be designated public records, and the data should be reported to the Administrative Office of the Courts on an annual basis. (See also Report of the Data Collection Subcommittee at section I.)

IV. Racial and Ethnic Fairness Recommendation

All participants in the court environment should be addressed by appropriate formal titles.

Implementation Committee Recommendation:

Judges, court personnel, and attorneys should receive training in proper forms of address; this issue might be included in the one-hour biennial ethics requirement for attorneys recommended in the Report of the Education and Training Subcommittee at section VII.

The Committee notes that the Guidelines for Bias-Free Conduct promulgated by the Memphis Bar Association (appended as Attachment 19) address this concern. (See also Report of the Education and Training Subcommittee at section V.)

The Committee encourages the judiciary and attorneys participating in the court process to continue to address all participants in a dignified and respectful manner. Judges, court personnel, and attorneys should never distinguish between men and women or among people of different races or ethnicities by using differing forms of address. For example, men should not be addressed as “Mr.” while women are addressed by their first names. Neither should terms of endearment (such as “honey”) be used when addressing any participant in the court system. The Committee believes that violations are often unintentional and well-meaning; however, violations can undermine public trust and confidence in the court system and result in perceptions of bias.

V. Racial and Ethnic Fairness Recommendation

State and local bar associations, in conjunction with judges and clerks, should develop court monitoring programs to ensure court environments free from racial or ethnic bias.

Implementation Committee Recommendation:

The Tennessee Supreme Court should recommend that state judges develop a uniform program to monitor court environments throughout the state, and require that the results of such monitoring program be shared as appropriate with state and local bar associations. Alternatively, state and local bar associations could take the lead in developing such a monitoring program. Such a court environment monitoring program could be based upon court watch programs run by voluntary organizations such as Mothers Against Drunk Driving, or they might utilize the resources of trained observers such as sociologists, social psychologists, or cultural anthropologists. A trained observer program might be developed

in conjunction with the state's colleges and universities. (See also Report of the Data Collection Subcommittee at section I.)

VI. Racial and Ethnic Fairness Recommendation

Judges should encourage sheriffs, clerks, and other court personnel who hire court assistants to appoint minority personnel.

Gender Fairness Recommendation

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 on-going 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.

Implementation Committee Recommendation:

Efforts must be made at a much earlier level to educate and encourage individuals to seek appointments or to run for elected offices, such as judge and court clerk, within the justice system.

Judges are encouraged to continue to set examples of conduct by hiring minority personnel for their own staff needs.

Judges should educate and encourage others, including sheriffs, clerks, and other court personnel who hire court assistants to appoint minority personnel. It is believed that education of other participants in the court system could result in its improvement.

Judges are urged to individually encourage appointment or hiring of minority personnel by sheriffs, clerks, or other court personnel who hire court assistants, recognizing that ethical canons or codes of judicial conduct may prohibit their acting in a manner that might be perceived as attempting to exercise influence over those separate offices.

Since 1988, progress has been made in hiring women for positions within the Tennessee judicial system. It should be recognized that a review of the available statistics demonstrates that in many instances qualified candidates simply do not apply. Collaborative efforts by local bar associations, educational systems, and the court system may lead to

greater numbers of applications. (See also Report of the Education and Training Subcommittee at section IV, and Report of the Judicial Nomination, Selection, and Evaluation Subcommittee at section I.)

VII. Racial and Ethnic Fairness Recommendation

The Administrative Office of the Courts should recruit and hire minority court reporters for use in state-funded cases.

Implementation Committee Recommendation:

The Tennessee Supreme Court should encourage efforts of the Administrative Office of the Courts in recruiting and hiring minority court reporters for use in state-funded cases. In order to develop a pool of minority court reporters, the Administrative Office of the Courts could solicit information from state-wide and local organizations of court reporters.

VIII. Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

The Tennessee Supreme Court should continue to encourage and monitor the efforts to convert local and court rules to a gender-neutral form.

The Tennessee Supreme Court should continue to encourage and monitor the efforts to convert jury instructions and verdict forms to gender-neutral form. An example of a verdict form that uses gender-specific form, though not gender-specific language, is appended as Attachment 20.

The Tennessee Supreme Court should ensure that all court rules it promulgates are expressed in gender-neutral language.

The Committee urges the General Assembly to utilize gender-neutral language in statutes and the executive branch to use gender-neutral language in rules, regulations, and executive orders.

V. Additional Recommendations:

During the course of this subcommittee's work, several areas of concern were identified which did not fit within the direct mandate of its assignment.

The court system needs to address the growing need for translators in the courts due to the increase in diverse ethnic populations throughout all regions of the state. The subcommittee suggests that this concern may be the subject of several current studies, including the ongoing federal grant being administered by the Tennessee Foreign Language Institute and Ms. Rebecca Montgomery of the Administrative Office of the Courts, and there exists a need to coordinate efforts and funding to ensure that a consistent and effective program is instituted statewide. (See also Report of the Court Policy and Procedure Subcommittee at section VI.)

The subcommittee recognizes the existence of perceived inequities in the system of justice relating to insurance settlements and the insurance claims process preceding settlements that are ultimately court-approved. The subcommittee suggests that there should be efforts made to ensure that bias and discrimination play no part in the manner in which claims are handled or resolved. The subcommittee suggests that the Tennessee Supreme Court could authorize or recommend that the Administrative Office of the Courts seek a method to investigate the practice of insurance settlements to insure that there is no racial or ethnic or gender bias in the manner in which those claims are handled or settled. It is suggested by the subcommittee that data gathered by the court clerks' offices could be incorporated into the annual reports that are currently required for statistical analysis. (See also Report of the Data Collection Subcommittee at section III and Report of the Court Policy and Procedure Subcommittee at section II.)

REPORT OF THE EDUCATION AND TRAINING SUBCOMMITTEE

I. Racial and Ethnic Fairness Recommendations

Law schools should continue their affirmative efforts to recruit, admit, and graduate more minority law students.

Law schools, together with the bar associations and state education officials, should increase their efforts to disseminate information about careers in the law to encourage minority high school and college students to consider careers in the legal profession.

Law schools should offer greater financial assistance to minority applicants and law students.

Law schools should act as community resources with outreach to communities across the state to help eradicate existing forms of discrimination and bias and to improve opportunities for all persons to achieve personal and professional goals, regardless of race or ethnicity.

Law schools should continue or initiate mentor programs to support the academic success and professional development of minority law students.

Law schools should develop activities to improve the knowledge and responsiveness of students, lawyers, and judges to issues of race and ethnicity in the workplace.

Law schools should continue efforts to increase employment opportunities for minority students and graduates, ensuring that minorities have access to the same employment opportunities as other law students and graduates.

Implementation Committee Recommendation:

The state's law schools should continue their affirmative efforts to enroll and graduate minority students. The Tennessee Supreme Court can monitor the schools' success in these efforts by requesting that each school submit, on an annual basis, information about the enrollment, attrition, and graduation of its students. The state's three ABA-accredited law schools are already required to report this information to the ABA annually, and these schools could simply copy the information to the Court. The state's one non-ABA-accredited law school could use the ABA form to report information directly to the Court.

The ABA form is appended as Attachment 21. In addition to the ABA-requested information, the Court could request from each law school information on student recruitment efforts, financial aid, and retention. The court could use the occasion of this annual request for information to remind the schools of its ongoing interest in these matters.

The schools should utilize a variety of means to address minority enrollment issues: campus recruiting visits to historically black colleges and universities, sponsoring minority pre-law days, advertising in selected minority publications, use of financial aid, hosting individual visits from prospective students, and utilizing enrolled minority students in the personalized recruitment of prospective students. The attrition rate for minority law students should be carefully monitored, and academic support and mentoring programs should be established when attrition rates indicate that they are needed.

The law schools should disseminate information about careers in the law to encourage minority high school and college students to consider careers in the legal profession. This can be done through appearances at pre-law clubs in colleges and universities, and through programs such as the Tennessee Pre-Law Fellowship Program.

Efforts should be made to increase employment opportunities for minority students and graduates, and to insure that minorities have access to the same employment opportunities as other law students and graduates. Toward this end, the schools should make sure that non-discrimination policies are in place and enforced that make available placement services, counseling, job leads, and on-campus interviews equally to all students. The schools should require that employers abide by established non-discrimination policies as a condition for participating in the posting of job listings and in interviews conducted on campus. The law schools should participate in minority job fairs (such as the Southeastern Minority Job Fair and the Nashville Bar Minority Opportunities Program) that provide further opportunities for minority students. Bar associations in major hiring areas of the state should be encouraged to host such minority job fairs.

II. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court and the Legislature should promote appropriate methods to increase financial assistance to minority law students by such programs as scholarships, loans, and tuition forgiveness.

Implementation Committee Recommendation:

We note that three of the four state's law schools are currently providing substantial financial assistance to minority law students. The bulk of this assistance at the two public law schools is available pursuant to the consent decree entered in the case of Geier v.

Alexander , 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 F.2d 799 (6th Cir. 1986). Recently, however, there have been indications that the Geier decree might be vacated. If the Geier consent decree is dissolved, the legislature should provide funding to replace the Geier scholarship funds for minority students. In addition, the schools should be encouraged to preserve the funds already in place and to increase them when feasible. The Tennessee Bar Foundation should also explore the possibility of targeting some IOLTA funding each year for scholarship assistance for minority students enrolled in the state's law schools.

III. Racial and Ethnic Fairness Recommendation

Law schools should increase the diversity of their teaching faculty—both full-time and part-time—by continuing their efforts to attract and retain high quality minority professors.

Implementation Committee Recommendation:

The law schools should increase the diversity of their teaching faculty, both full-time and part-time, by continuing their efforts to attract and retain high quality minority and female professors. Similar efforts should be made in the hiring and promotion of minority and female administrators. The charts appended as Attachment 22 show that the state's law schools have made uneven progress toward achieving greater representation of women and minorities on their faculties. As with the composition of the student body, the Court should monitor the composition of the law schools' faculties and administrations. The Court could ask for an annual report on the composition of full-time and part-time faculty and senior administrators, by gender and race, at the same time that it requests information on students at the state's schools.

IV. Racial and Ethnic Fairness Recommendations

Local and state bar associations and the courts should develop educational programs to provide training for primary and secondary school students and the public through community forums.

Judges should educate public audiences about the legal system and the adversarial process to help avoid confusion and misunderstandings about the judicial process that may be misinterpreted as bias.

Implementation Committee Recommendation:

The Supreme Court's S.C.A.L.E.S. program provides high school and junior high students an excellent opportunity to see how the Court conducts its business. We would encourage the Court to continue this program, and other courts to conduct similar programs, as the Western Section Court of Criminal Appeals did recently in Dyer County. This program will be most effective in reaching the commissions' goals when minority and female attorneys play prominent roles in the courtroom, and in the composition of the attorneys who meet with the students before and after the courtroom appearance. The Community Court program in Memphis, in which General Sessions judges hold court in various neighborhoods, serves as a model of a public education initiative that should be replicated across the state. Bar associations and judges should be encouraged to develop "street law" programs for high school students.

The legislature recently passed legislation allowing juvenile courts to implement "teen courts." Tennessee Teen Court Program of 2000, ch. 792, 2000 Tenn. Pub. Acts ____ (to be codified at Tenn. Code Ann. §§ 37-1-701 et seq.). The Committee encourages those participating in the teen court system to be sensitive to issues of racial, ethnic, and gender fairness.

V. Racial and Ethnic Fairness Recommendation

Local bar associations, in conjunction with legal and judicial organizations, should develop handbooks to provide judges, attorneys, and court personnel with information that will improve their interaction and communication with persons of diverse racial and ethnic backgrounds in courtroom and judicial settings.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

We recommend the adoption of a handbook addressing concerns of racial, ethnic, and gender bias, modeled upon the Memphis Bar Association Guidelines for Bias-Free Conduct (appended as Attachment 19), that could be used on a state-wide basis. The Tennessee Supreme Court could provide funding for the production and distribution of these handbooks to local bar associations. A Spanish-language version of the handbook could also be produced. The University of Tennessee Center for Government Training, which has an

established track record of producing such publications, is one organization that could act as publisher for this handbook.

VI. Racial and Ethnic Fairness Recommendation

Judicial Conferences, the Court Clerks Conference, the bar associations, and other associations that offer continuing legal education programs should encourage the selection of educational faculty from diverse racial and ethnic backgrounds.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

We recommend that the Administrative Office of the Courts establish a speakers bureau on gender, racial, and ethnic fairness. The compilation and periodic distribution of a list of speakers who are able and willing to speak on these issues would encourage bar associations and others to sponsor such programs, and facilitate their planning. The speakers bureau could also maintain a listing of potential faculty from diverse racial and ethnic backgrounds that would be available for continuing legal education programs. Bar associations and other organizations would be notified of the availability of this resource, which could be used in their efforts to diversify their programming.

VII. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court should require that continuing legal education include, within its ethics and professionalism requirements, racial and ethnic diversity training.

Gender Fairness Recommendation

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

Implementation Committee Recommendation:

The state's continuing legal education program for attorneys should mandate that training in gender, racial, and ethnic issues be included. We recommend that the Tennessee Supreme Court require that issues of racial, ethnic, and gender diversity be a continuing education requirement for all attorneys. We recommend a requirement of one hour of CLE on racial, ethnic, and gender diversity every other year, either as a part of the existing ethics requirement or as a new requirement.

VIII. Racial and Ethnic Fairness Recommendation

The legislature should require state and local law enforcement officials to invest time and resources in diversity training for officers and support staff.

Implementation Committee Recommendation:

Training in gender, racial, and ethnic diversity issues should be required for all law enforcement officers, including bailiffs. The Peace Officers Standards and Training Commission should establish this training as part of the human relations curriculum for law enforcement officers. To maintain their certification these officers must receive 40 hours per year of in-service training. We recommend that at least four hours per year of this in-service training deal with gender, racial, and ethnic diversity issues. The support staff is not required to have POST certification and/or yearly in-service, but they should receive yearly educational programming such as that available from the University of Tennessee Center for Government Training.

IX. Racial and Ethnic Fairness Recommendation

Judges should exercise authority and receive funding to require sensitivity training for all court personnel.

Gender Fairness Recommendation

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

Implementation Committee Recommendation:

The administrative director of the courts prepares for the Supreme Court's approval an annual judicial education plan that provides for the orientation and continuing training and education of all elected or appointed judges of trial and appellate courts of record of the state.

This plan should include elements of gender and racial and ethnic fairness training each year.

The District Attorneys and Public Defenders Conferences sponsor their own continuing legal education programs. We recommend that at least one hour every other year of the ethics component of these programs address gender, racial, and ethnic fairness issues.

The University of Tennessee Center for Government Training provides educational programming, including certification, for state and local employees. Courses such as “Diversity in the Workplace” and “Sexual Harrassment” are already a part of their curriculum, and they have a curriculum specifically designed for clerks of court. We recommend that the certification process for clerks of court require completion of a segment that covers gender, racial, and ethnic diversity issues. We also recommend an examination of the possibility of requiring that all deputy clerks and court reporters receive training in gender, racial, and ethnic diversity matters within six months of their appointment. Diversity should also be an important ingredient in the selection and training of members of the Foster Care Review Board.

X. Racial and Ethnic Fairness Recommendations

Law firms, corporations, government agencies, and other law-related offices should develop in-house mentor programs to support the professional development of minority lawyers.

Law offices should implement programs to assure equality in the nature, scope, and importance of tasks assigned to all attorneys regardless of race or ethnicity.

Implementation Committee Recommendation:

While law firms, corporations, and government agencies are not directly supervised by the Supreme Court, we encourage the Court to consider ways in which it could communicate its interest in mentoring programs for minority lawyers and in the fair assignment of tasks regardless of race or ethnicity to such offices. Ways in which the Court might convey its interest include the following: addressing law firm fairness issues in public addresses and CLE presentations, conducting a one-time or an annual survey of law firm mentoring practices, and promoting its interest in fairness during informal contacts with legal employers.

REPORT OF THE JUDICIAL NOMINATION, SELECTION, AND EVALUATION SUBCOMMITTEE

I. Racial and Ethnic Fairness Recommendation

Judicial appointing authorities should establish as a priority the increase of minorities in judicial and quasi-judicial appointments.

Implementation Committee Recommendation:

The key actors in the appointment process – the Judicial Selection Commission and the Governor – should promote both racial and gender diversity. A diverse judiciary leads to better decisionmaking and to increased public confidence in the courts. *See Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts.*, 39 BOSTON COLLEGE L. REV. 95 (1997). A review of the racial and gender composition of the State’s appellate bench convinces this Committee that representation of both minorities and women needs to be increased. A chart showing the current racial and gender makeup of the appellate courts is appended as Attachment 23. Given Tennessee’s method of selection and retention of appellate judges, this Committee finds that the appointment process is crucial to any effort to diversify the bench. *See John Gibeaut, Bench Battle*, ABA JOURNAL, May 2000, at 42.

However, the goal of diversity requires that the pool of applicants for appellate judgeships be diverse. As shown by the chart attached as Attachment 24, there is a need for greater diversity in the pool of applicants, as well as in the slate of nominees presented by the Judicial Selection Commission. Increasing the diversity of applicants for judgeships requires that minorities and women be educated about the judicial role, gain experience in positions that prepare them for the judicial role, and be promoted as candidates for judicial office. The following recommendations address each of these requirements.

This Committee urges the Governor to appoint women and minorities to vacant and newly created judicial positions.

This Committee encourages the Judiciary to continue its practice of hiring minorities and women as law clerks - both as rotating and career clerks. The ABA has recently undertaken initiatives to increase judicial clerking opportunities for minorities and women. *See James Podgers, “New Diversity Initiatives,” ABA JOURNAL*, April 2000, at 97.

The hiring of career law clerks has reduced the number of positions available to top-ranked law school graduates, particularly minorities and women. Because it believes that experience as a judicial law clerk may encourage women and minorities to seek judicial office, the Committee urges all Tennessee judges having law clerks to consider hiring rotating clerks exclusively. The Commission encourages those judges who have career law clerks to maintain their second staff position as a rotating one.

This Committee encourages the judiciary to continue to seek law clerk candidates in consultation with the four law schools in Tennessee.

In order to increase the number of minorities and women among law clerks, the Committee urges judges to broaden the selection pool by considering not only grades or class rank but also a variety of scholastic achievements and other factors, such as extracurricular activities and public service.

The Supreme Court should encourage the judiciary to maintain court staffs that reflect the state's "diverse mixture with respect to race, including the dominant ethnic minority population, and gender." The Supreme Court should promulgate a rule, and should require all local courts to promulgate a local rule, against discrimination in court procedures and in hiring.

The Committee encourages the Tennessee Bar Association, the minority bar associations, the Lawyers Association for Women, and local women's bar associations to identify candidates for judicial appointments before vacancies occur and to prepare these candidates for the selection process.

Many judicial districts have small numbers of minority and female attorneys. Therefore, there are few minority and female candidates available to seek judicial appointment or election. The Tennessee Supreme Court should promote, and the General Assembly should fund, a law school scholarship or loan program for minorities and women from the designated counties who will agree to practice law in their home counties or in counties with low percentages of minority residents for ten years and who shall consider seeking a judgeship from that judicial district.

The Supreme Court should continue to award CLE credit for courses that provide information and guidance to minority and women attorneys regarding the judicial nomination, selection, and evaluation process. An example of such a CLE program is the "Path to the Robe" session presented during the University of Tennessee Law Women 25th Anniversary Celebration on March 27-29, 1998. Panelists on this program were former Tennessee Supreme Court Justice Penny J. White, Sullivan County Circuit Court Judge Phyllis Miller, and Knox County Chancellor John F. Weaver. Moderator was former Knox County General Sessions Court Judge Gail Jarvis. Programs such as these, particularly if

presented in settings likely to reach female and minority lawyers, can play an important part in making judicial office an attainable goal. The Committee encourages bar associations and CLE providers to present more programs like this.

The Committee also encourages the state's law schools to prepare law students, especially women and minorities, for judicial office through curricular and co-curricular offerings, and encourages the law schools' Career Services offices to present judicial office as an attainable career goal and to provide information on how to prepare for judicial office. In particular, the Committee urges the states' law schools to encourage minorities and women to apply for judicial clerkships and to provide the information and guidance necessary to assist them in doing so through strong judicial clerkship advising programs.

The Committee urges the Secretary of State to appoint more minorities and women as administrative law judges.

II. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court and the Presiding Judges of Judicial Districts should designate minority judges to fill temporary vacancies, including those in jurisdictions that have little or no minority representation in the bench or bar.

Implementation Committee Recommendation:

The Tennessee Bar Association as well as local bar associations, minority bar associations, and women's bar associations should forward, every 6 months, to the Tennessee Supreme Court and the Presiding Judges of Judicial Districts a list of minority and women candidates available to fill temporary vacancies.

The Tennessee Bar Association as well as local bar associations, minority bar associations, and women's bar associations should forward, every 6 months, to the Tennessee Secretary of State a list of minorities and women available to fill vacancies.

III. Racial and Ethnic Fairness Recommendation

The Legislature should review the composition of the Judicial Selection Commission to ensure compliance with statutory requirements of diversity.

Implementation Committee Recommendation:

The Legislature should review the composition of the Judicial Selection Commission biennially.

The Committee endorses the statute that establishes the judicial selection process. While the current composition of the commission does closely approximate the state's "diverse mixture with respect to race, including the dominant ethnic minority population, and gender," the Commission encourages the Speakers of the Tennessee House and Senate to appoint at least 7 women to the commission to reflect gender population statewide. The Speakers are encouraged to appoint more than 3 minorities to the Commission.

IV. Racial and Ethnic Fairness Recommendation

Judicial candidates should be screened and disqualified upon evidence of racial and ethnic bias prior to appointment.

Implementation Committee Recommendation:

The Committee believes that gender bias should also be disqualifying. The Committee endorses the process by which judicial candidates are currently screened. The application form, the interview process, and the composition of the Selection Commission itself are designed to root out evidence of racial, ethnic, and gender bias.

V. Racial and Ethnic Fairness Recommendation

The judicial evaluation process should include screening for bias when evaluating sitting judges and evaluators should reflect the proportionate population of minorities.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

The judicial evaluation process solicits evaluations from other judges, court staff, and those attorneys who practice before the court. The Committee recommends that the pool of evaluators be broadened to include parties whose cases have been heard by the judge being evaluated. All evaluators should represent the racial, ethnic, and gender diversity of the geographic area from which the judge hears cases.

The evaluation process also includes an hour-long interview with the Commission on Judicial Performance, which today consists of 3 minority males, 4 white females, 4 white males, and 1 minority female. By statute the Commission must represent the diversity of the state's population. The Commission urges the Speakers of the House and Senate and the Judicial Council to assure that future appointments reflect that diversity.

The Supreme Court should mandate diversity training for all judges including private act and juvenile judges and child support referees.

Additional Recommendation:

The Court of the Judiciary should keep and report annually to the Administrative Office of the Courts statistics on complaints against judges brought on issues of racial, ethnic, and gender bias. (See also Report of the Data Collection Subcommittee at section I.) These statistics should be statutorily required to be published in the AOC annual report.

REPORT OF THE DATA COLLECTION SUBCOMMITTEE

I. Racial and Ethnic Fairness Recommendation

That the Tennessee Supreme Court create, and the Tennessee General Assembly fund, an entity: (a) to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee; (b) to follow through on the recommendations made by this Commission; (c) to identify other appropriate measures that should be taken to eliminate discrimination or bias in the practice of law and in systems of criminal and civil justice; and (d) to report periodically to the Tennessee Supreme Court, the Legislature, and the Governor on the accomplishment of appropriate goals and recommendations.

Gender Fairness Recommendation

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.

Implementation Committee Recommendation:

Frequently, if a locality has data on the judiciary or public perceptions of the courts, the locality does not routinely report that information to any state office. Consequently, statewide information is, at best, impressionistic and, at worst, incomplete. This report envisions that in the near future the Tennessee Supreme Court will develop a formal system for collecting statewide data and a process for analyzing that information.

The Implementation Committee concurs with the Gender Fairness Commission's recommendation that the task of data collection be assigned to the Administrative Office of the Courts. One should keep in mind, however, that the AOC was designed "to assist in improving the administration of justice in the state." Tennessee Code Annotated Section 16-3-801. Further, more than data collection is contemplated; both recommendations apparently envisioned that the entity would, among other things, both study the information collected and promulgate guidelines.

To the extent that creating a separate entity is presently impracticable, then there must be a meaningful increase in the staff and resources of any existing agency, such as the AOC, that is asked to perform data collection. If this approach is adopted, the Court should follow the model established in other jurisdictions by continuing the appointment of a committee that studies the data collected by the agency, and makes recommendations in light of those findings. For instance, Hawai'i has a Committee on Equality and Access to the Courts and its mission is to deal with issues of fairness and to increase access for parties appearing on their own behalf, the economically disadvantaged, and the immigrant community. *See THE HAWAI'I STATE SUPREME COURT COMMITTEE ON EQUALITY AND ACCESS TO THE COURTS AND THE HAWAI'I STATE JUDICIARY OFFICE ON EQUALITY AND ACCESS TO THE COURTS, ANNUAL REPORT (June 1999).*

Likewise, a report written by those involved in similar efforts in New Jersey, which is the leader in the anti-bias task force movement, recommends the creation of a standing committee on issues of bias. Any proposed standing committee was envisioned as continuing the effort to implement the task force recommendations; working with the court administrative office to develop judicial and legal education programs on bias issues; developing a statistical data base for monitoring bias; reviewing appellate decisions for instances of bias; participating in programs for professional and lay audiences on issues of bias; serving as a media resource; and processing complaints regarding judicial and lawyers' bias, through formal and informal mechanisms. *See NORMA JULIET WIKLER AND LYNN HECHT SCHAFRAN, LEARNING FROM THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS: EVALUATION, RECOMMENDATIONS, IMPLICATIONS FOR OTHER STATES 76 (1989).* (See also Report of the Court Environment Subcommittee at section II.)

More generally, studying the impact of race, ethnicity, and gender on the administration of justice is an awesome task. Any entity charged with such responsibilities is apt to benefit from the efforts of the ABA Commission on Opportunities for Minorities in the Profession, the ABA Council on Racial and Ethnic Justice, and the National Center for State Courts. In fact, the ABA Commission on Opportunities for Minorities in the Profession has called for information about the status of minority and women lawyers to prevent the re-institution of exclusionary practices in the profession. This information should assist in detailing changes in the profession as they unfold, allow for meaningful assessment of policies, and allow for changes, if necessary. That Commission also noted the dearth of national information regarding the distribution of minority lawyers, minority representation in legal departments, in state or local government offices, or on law faculties. *See AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, MILESTO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 19 (1998).* The same generally can be said regarding data for both minority and women lawyers in Tennessee. It is anticipated that data collection performed by the appropriate entity would become routine, and that a report of the data would occur at least annually. To facilitate the

collection and reporting of data there needs to be a standardized framework for and centralized reporting of data collection.

Similarly, to take full advantage of studying the impact of race, ethnicity, and gender on the Tennessee judicial system, there should be continual self-assessment of the judicial system, the data collected, and the methodology of data collection. For instance, the data collection entity should periodically consider issues such as whether the categories and classifications presently surveyed or studied are sufficient, and consider whether there are other substantive areas where study or data are needed.

The Report of the Commission on Gender Fairness and the Report of the Commission on Racial and Ethnic Fairness contained anecdotal and impressionistic stories of gender, racial, and ethnic bias. Data collection was deemed important to either confirm or deny the extent of gender, racial, and ethnic bias. The Implementation Committee recommends that the Administrative Office of the Courts undertake a systematic program of data collection from court users. A form for collecting this data, "Survey of Court Users," is appended as Attachment 25.

Collecting data is not enough, however. The data itself might suggest trends and other areas of exploration. Personnel must be available who have appropriate training in social science research. Determining the appropriate questions to ask and the proper assessment of the collected data calls for persons who have advanced social scientific research training. The kind of social scientific research expertise needed to assess and monitor gender, racial, and ethnic bias is usually not found on court administrative staffs. Such expertise should be sought. In the absence of in-house expertise, a consultant relationship with qualified academics should be established.

Analysis of data only goes so far, however. The statistics can either detail or forecast trends, while stories recount particular -- sometimes singular -- experiences. One way to supplement the effectiveness of both types of data is by using professionally trained observers or monitors. In fact, social science expertise would be invaluable in making use of this form of data collection. *See generally* MOLLY TREADWAY JOHNSON, *STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE* 77-81 (Federal Judicial Center 1993); LYNN HECHT SCHAFFRAN AND NORMA JULIET WIKLER, *OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION* 37 (1986).

Anyone knowledgeable about the court system and its general operation should be an acceptable candidate to serve as an observer or monitor. These observers are a way to take a "picture" of the judiciary; they report on what is actually happening in the places where human contact occurs, such as in the courtroom and the clerk's office. Nonverbal communication and otherwise sensitive information are sometimes better conveyed through observational studies than other data collection methods. Each site selected should be

observed a number of times and at different times of the day to validate the observation process.

As the Report of the Commission on Gender Fairness noted, pages 61-63, there are two basic types of observers or monitors: participant observers and nonparticipant observers. The participant observer watches a particular setting, listens, and asks questions of the participants. The participant observer is typically in place for a significant period of time, which allows the participant observer to probe the minds of the participants in their work setting and to see the participants' interactions and how they react to each other and other stimuli. The participant observer thus is able to measure both the nature and extent of possible biases. In contrast, the nonparticipant observer only watches the proceedings and records what has occurred, such as the level of attention paid to each participant, the forms of dress employed, and extraneous comments that have racial, ethnic, or gender overtones. Nonparticipant observation will generally secure less qualitative, but more quantitative information.

While the validity of observational studies can be undermined by inadequate training or the biases of the observers, professional training should reduce, if not eliminate, any such biases. Training and supervision, including reliability checks of the observer's methodology, will likely reduce discrepancies among the observers. Background readings, detailed instructions of what to look for, and perhaps an instructional videotape should be sufficient to familiarize observers with their assigned task and how to perform it. Furthermore, providing observers with a form to use in recording behaviors will standardize the process. This is another instance in which persons with social science training could play an important role in devising and implementing observational studies.

II. Racial and Ethnic Fairness Recommendation

The Administrative Office of the Courts should collect and distribute data on the impact of current bail bonding policies on racial and ethnic minorities.

Implementation Committee Recommendation:

The most appropriate way to consistently collect the pertinent information may be through a survey document, which could be completed each time a request for bail is considered. The AOC should disseminate survey documents, and periodically collect and analyze the information contained therein. The survey documents should include information on the charges filed against a defendant, the defendant's approximate income status, and the defendant's race, ethnicity, and gender. Other pertinent factors could include whether bail was applied for, the outcome of the bail decision, and sufficient identifying information about the court (including the judge, the individual prosecutor, and the defense

attorney's and prosecutor's office). Collectively, this data should allow for a better assessment of the granting or denial of requests for bail by persons of color and could lead to an assessment of what role, if any, the race, ethnicity, gender or any other factor plays in bail bonding decisions. Appropriate recommendations should follow when sufficient data is collected and trends are documented.

Like the Racial and Ethnic Fairness Commission, the Commission on the Future of the Tennessee Judicial System criticized the bail system. Presently, the decision on whether bail is granted is committed to the judicial commissioner or general sessions judges and thus tends to vary from court to court. The Commission on the Future of the Tennessee Judicial System perceived that a defendant's financial ability, rather than the appropriate factors of whether the defendant presented a threat to the public or was a flight risk, dictated whether the defendant would be released on a bond. *See COMMISSION ON THE FUTURE OF THE TENNESSEE JUDICIAL SYSTEM, TO SERVE ALL PEOPLE 35-36 (1998)*. Furthermore, the Implementation Committee learned that non-English-speaking criminal defendants may be denied bail, or the setting of bail may be delayed, due solely to the unavailability of timely, accurate, affordable interpretation services. (See also Report of the Court Policy and Procedure Subcommittee at section VI.)

Recently, the General Assembly has considered and modified the law on the bail bonds process. Such amendments were primarily directed at bond companies and would have required the companies to collect at least 10 percent of the total bond amount from a criminal suspect. Arguments were raised that the bill would discriminate against the poor. *See Tom Humphrey, Bail Bond Installment Bill Fails, KNOXVILLE NEWS-SENTINEL, May 14, 1999, at A4*. A general re-evaluation and reform of the state's bail bond system may be needed. (See also Report of the Court Policy and Procedure Subcommittee at section VII.) Recommendations regarding such an effort are beyond the charge of this Committee. However, the recommended data collection regarding bail bonds would substantially assist in determining the need for reform.

III. Racial and Ethnic Fairness Recommendation

The Administrative Office of the Courts should compile and distribute data on civil cases to evaluate the influence and impact of race and ethnicity issues on outcomes, settlements, and damage awards.

The Tennessee Department of Commerce and Insurance should require insurance companies to report the amount of personal injury settlements and the race and ethnicity of the parties.

Implementation Committee Recommendation:

These recommendations attempt to address the concern that the disposition of civil cases, including personal injury settlements, are influenced by the race or ethnicity of the parties.

Appropriate legislative or administrative action may be necessary before the Tennessee Department of Commerce and Insurance (or any successor agency⁴) can require that insurance companies disclose the race, ethnicity, and gender of the parties to a settlement. Such legislative or administrative action should be sensitive to confidentiality restrictions that may be included within a settlement agreement. That sensitivity to confidentiality should not, however, extend to prohibiting disclosure of the race, ethnicity, and gender of the claimants or the amount of the settlement. That is, it would seem to serve little useful purpose -- and be contrary to the efforts of both this Committee and the prior Commissions -- for a settlement agreement to prohibit the disclosure of the race, ethnicity, and gender of the claimants or the amount of the settlement.

Another problem with any simple equation between settlement amounts and racial or ethnic bias is that personal injury and insurance law allow differences in settlement amounts due to the "value" of the injury, which often is a function of socio-economic factors and not necessarily race, ethnicity, or gender. *See generally* Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 794-98 (1996) (posing unanswered questions regarding the judiciary, litigants, attorneys, and juries on the confluence of race and tort law); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994) (examining gender and race bias in the calculation of damages, especially assessment of loss of future earnings capacity). Therefore, more complete data may be obtained if the Department of Insurance and Commerce (or any successor agency) also secures information related to the socio-economic status of claimants too.

Collecting data on all civil cases would require a great deal of effort and coordination among all civil courts throughout the state and the data collection entity within the Administrative Office of the Courts. Some effort has been made in this area in workers' compensation cases. Presently, an employee who suffers an employment-related injury and who is not satisfied with the benefits received from an employer can file a claim. To conclude a case, a SD-1 Workers' Compensation Statistical Data form (appended as Attachment 26) has to be filled out by the employer and filed with the clerk of the court in which the case is pending contemporaneously with a final court order. *See* Tenn. Code Ann. § 50-6-244(b). Then before the tenth day of each month, the court clerk must forward all SD-1 forms filed during the preceding month to the administrator of the Division of

⁴By statute, the Department of Insurance and Commerce expires on June 30, 2002. See Tennessee Code Annotated Section 4-29-223(a)(6).

Workers' Compensation. *See id.* § 50-6-244(c). Even when workers' compensation claims are resolved by the Department, the statistical data form must be completed for the settlement to become final. *See id.* § 50-6-244(d). The SD-1 form does not inquire into the claimant's race, ethnicity, or gender. A modification of the form -- to ask the claimant's race, ethnicity, and gender -- would begin to accomplish the purpose of providing more detailed information on the settlement of workers' compensation claims. Copies of the modified SD-1 form should be forwarded to the data collection entity for assessment of whether there is racial, ethnic, or gender bias in the settlement of workers' compensation cases.

A similar data collection process could be implemented for tort and insurance cases. Namely, as a condition for settlement, the court could require the disclosure of the parties' race, ethnicity, and gender and the amount of the settlement. Collection of this information could be mandated by court rule; legislation probably would not be necessary. Such information could be part of the judgment that is entered in every case, whether the case is tried or settled. Copies of this information should be forwarded to the data collection entity for assessment of whether there is a discrepancy in the settlement of tort and insurance cases, due to racial, ethnic, or gender bias.

IV. Racial and Ethnic Fairness Recommendation

The Tennessee Supreme Court should prepare reports showing minority representation among court personnel by judicial districts, and make such reports available to appointing authorities.

Implementation Committee Recommendation:

Data on minority representation among court personnel might be best acquired by a survey document. The Administrative Office of the Court should disseminate these survey sheets, and periodically collect and analyze the information contained therein.

The apparent purpose behind this recommendation is to document the need for and facilitate the selection and appointment of court personnel reflecting more gender, racial, and ethnic differences. It is anticipated that the AOC could play a role in fulfilling this recommendation. Presently, the AOC does collect information on state court judges. During the preparation of this report the subcommittee became aware that recently a person was appointed to the AOC to collect and consolidate data on state court judges.

Before that appointment, the subcommittee gathered some data on the racial, ethnic, and gender composition of the state judicial system. Our efforts were hampered in several ways. One question was how to define the "judicial system," or posed differently, which judges and courts should be included. This matter was resolved by using a list of addresses

of judges and court clerks provided by the AOC. We sent out a letter to each of the listed judges and court clerks. Relatedly, we considered which positions should be included in the survey. It turned out, however, that the list included some municipal court judges, which was beyond the self-defined scope of our inquiry. In requesting information from the court clerks, the subcommittee defined the appropriate non-judicial employees as: “including court clerks, deputy clerks, secretaries, bailiffs, court reporters and other like positions that contribute to the smooth operation of the courts.” Due to the apparently small number of replies to the letters for information, we are not confident that the results present an accurate picture of the racial, ethnic, and gender composition of the state judicial system. The information garnered indicated that the clerks’ offices largely employed white women, that judges and bailiffs typically were white men, and that, on occasion, African Americans were employed, mostly as bailiffs.

V. Racial and Ethnic Fairness Recommendation

The Tennessee Department of Correction should compile and distribute data on the access minorities have to, and their success in, offender programs that offer educational, vocational, and drug rehabilitation treatments.

Implementation Committee Recommendation:

This recommendation responds to the perception identified in the Report of the Racial and Ethnic Fairness Commission that African American defendants are apt to receive harsher sentences, including incarceration, than non-African American defendants. Judges traditionally have wide discretion in the sentences that they may impose. That discretion is improperly used when because of a defendant’s race, ethnicity, or gender the judge imposes a harsher sentence than the sentence s/he would impose upon a defendant of a different race, ethnicity, or gender with a similar background, who committed a similar crime. Presently, the AOC collects data on certain criminal cases. Due to how it is collected and recorded it is not always readily interpretable by the public.

The data alluded to in the recommendation and sought from the Department of Correction should cover a reasonable number of years. It should include defendants of all races and ethnicities and both genders. From this larger database one could try to ascertain whether minorities and women have equal access to programs that offer educational, vocational, and drug rehabilitation programs as men and as members of other racial and ethnic groups. It is believed that the Department of Correction presently does document the race, ethnicity, and gender of defendants. Both the Department of Correction and the data collection entity could analyze the information. This data should allow for a better assessment of whether minorities have the same opportunity to participate in the available programs. Appropriate recommendations should follow after the data is reviewed.

VI. Racial and Ethnic Fairness Recommendations

The Tennessee Commission on Children and Youth should compile and distribute data on the outcomes of juvenile court proceedings by race and ethnicity and recommend appropriate corrective actions if such data shows bias.

The Tennessee Commission on Children and Youth should compile and distribute data regarding the extent to which minority children are eligible for educational, vocational, and drug rehabilitation programs and the outcome of such programs for minority participants.

Implementation Committee Recommendation:

Some statistics are already being compiled and distributed by the Tennessee Council of Juvenile and Family Court Judges. These statistics should be reported to the data collection entity. To the extent these statistics do not address the Commissions' concerns, the Court should recommend that the Commission on Children and Youth and the Department of Correction compile the listed data and report it to the data collection entity. Though any data reported cannot show bias, analysis of the information might lead one to infer that some bias exists. It is important to keep in mind that the sentencing decision is a discretionary one, and there might be other non-racial, non-ethnic, or non-gender-based reasons for an apparent disparity. Alternatively, it may be that certain juveniles, though eligible for such programs, either are not offered an opportunity to participate in the programs, or when they are offered, choose not to participate in them. Rather than speculating on the outcomes of these juvenile proceedings, the collected data, when properly analyzed, could indicate the actual practices.

However, even the impression that the sternest sentence is imposed on the most delinquent offender may not be fully accurate. Recent research does support the notion that the race or ethnicity of a juvenile affects the outcome of cases. In George Bridges and Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIOLOGICAL REV. 554 (1998), the authors studied juvenile offenders and their probation officers' written accounts in three counties in Washington state. They found that probation officers consistently portrayed African American youths differently from white youths in their written court reports; the African Americans' delinquency was more often attributed to negative attitudinal and personality traits. These attributions about the juveniles played a role in whether the offender was thought likely to engage in future criminal activities, and were a way by which race and ethnicity indirectly influenced sentencing determinations.

It is important to bear in mind that both the juvenile and his or her family members' impression of the Tennessee judicial system will be heavily shaped by how the juvenile is treated. These impressions can be lifelong and can lead to a corrosive opinion of the utility of the state judicial system.

Corrective action should include more training of probation officers and others who process juvenile cases so that efforts can be made to identify and perhaps separate out cultural impressions from the actual causes that have resulted in the juvenile's appearing in court.

Conclusion:

A comprehensive and systematic data collection process should begin immediately. The state judiciary presently lacks a person or a place that collects demographic information on the courts or data on public perceptions of the judiciary. Besides collecting this information, a formal systemic process of data analysis should be implemented.



CONCLUSION

Members of the legal profession often take pride that some important societal changes were initiated by them in their roles as lawyers and judges. Neither those accomplishments, nor the pride they generate, should blind us to the many recent stories of widespread public dissatisfaction with the legal system. We believe that the Supreme Court recognized the need for remedial action by establishing the predecessor Commissions and this Committee.

The recommendations in this Report are but the latest in an ongoing effort by the state judiciary and the bar to bring about justice for all who come into contact with the state court system. The recommendations themselves are modest. We are under no illusion that, even if they were all immediately implemented, they would resolve completely the identified issues.

Some of our recommendations address areas of the legal profession that are outside the direct control and supervision of the state judiciary, such as the law schools, bar associations, and legal employers. We believe it is important that the Court continue to monitor the activities of the legal profession in these arenas because they are generally not otherwise directly accountable to any authority.

Our recommendations are relatively simple and financially inexpensive to implement. However, in terms of time, effort, reflection, and self-examination, our recommendations may require more. Old lessons may need to be relearned, while some habits and practices will have to be discarded. New lessons will have to be taught and learned. However, we

should not fear the future. We should, instead, fear what will happen if we are no longer willing to continue to strive toward equal treatment under the law for all persons. It is not an exaggeration to note that public confidence in the court system is essential to public respect for court judgments. We must restore public confidence.

In accordance with the order establishing this Committee, we limited ourselves to addressing issues of racial, ethnic, and gender fairness. We know that issues of wealth and social class permeate the treatment of individuals within our judicial system, and their perceptions of that system. We cannot continue to ignore the impact that wealth inequality has on the delivery of justice and on perceptions of fairness.

Finally, this Report should not be viewed as the last step toward a more equal state court system. Additional effort has to be expended, regardless of the metaphor chosen—there is still much work to be done; there are yet many miles to go; there are still promises to keep; the dream of equality has been too long deferred.

TABLE OF RECOMMENDATIONS OF THE RACIAL AND ETHNIC FAIRNESS COMMISSION AND THE GENDER FAIRNESS COMMISSION

This table permits a reader who has located a particular recommendation in the report of either predecessor Commission to locate the Implementation Committee's comments on that recommendation in the appropriate subcommittee report. The recommendations of the predecessor Commissions are listed in the order in which they appear in their respective Commission reports.

<u>Racial and Ethnic Fairness Commission</u>	<u>Responsible Subcommittee</u>
<u>Recommendations</u>	

General Recommendations

1. That the Tennessee Supreme Court create, and the Tennessee General Assembly fund, an entity: (a) to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee; (b) to follow through on the recommendations made by this Commission; (c) to identify other appropriate measures that should be taken to eliminate discrimination or bias in the practice of law and in systems of criminal and civil justice; and (d) to report periodically to the Tennessee Supreme Court, the Legislature, and the Governor on the accomplishment of appropriate goals and recommendations.

Data Collection

2. That the Tennessee Supreme Court amend the Tennessee Rules of Professional Responsibility to prohibit, inter alia, bias or discrimination by lawyers. . . .

Bias and discrimination have no place in the courts and in the performance of legal services. The concept of one system of justice for all persons does not contemplate, nor should the profession in the Court permit, prejudice or discrimination by lawyers.

This recommendation does not intend to regulate words or conduct that are protected by federal or state laws and remedies, and does not intend to prohibit speech otherwise protected by the First Amendment to the United States Constitution in Article I, Section 19 of the Tennessee Constitution.

Court Environment

Education and Training

1. Law schools should continue their affirmative efforts to recruit, admit, and graduate more minority law students. **Education and Training**

2. Law schools, together with the bar associations and state education officials, should increase their efforts to disseminate information about careers in the law to encourage minority high school and college students to consider careers in the legal profession. **Education and Training**

3. Law schools should offer greater financial assistance to minority applicants and law students. **Education and Training**

4. The Tennessee Supreme Court and the Legislature should promote appropriate methods to increase financial assistance to minority law students by such programs as scholarships, loans, and tuition forgiveness. **Education and Training**

5. Law schools should increase the diversity of their teaching faculty—both full-time and part-time—by continuing their efforts to attract and retain high quality minority professors. **Education and Training**

6. Law schools should act as community resources with outreach to communities across the state to help eradicate existing forms of discrimination and bias and to improve opportunities for all persons to achieve personal and professional goals, regardless of race or ethnicity. **Education and Training**

7. Law schools should continue or initiate mentor programs to support the academic success and professional development of minority law students. **Education and Training**

8. Law firms, corporations, government agencies, and other law-related offices should develop in-house mentor programs to support the professional development of minority lawyers. **Education and Training**

9. Law offices should implement programs to assure equality in the nature, scope, and importance of tasks assigned to all attorneys regardless of race or ethnicity. **Education and Training**

10. Law schools should develop activities to improve the knowledge and responsiveness of students, lawyers, and judges to issues of race and ethnicity in the workplace. **Education and Training**

11. Law schools should continue efforts to increase employment opportunities for minority students and graduates, ensuring that minorities have access to the same employment opportunities as other law students and graduates.

Education and Training

12. Local and state bar associations and the courts should develop educational programs to provide training for primary and secondary school students and the public through community forums.

Education and Training

13. Judges should educate public audiences about the legal system and the adversarial process to help avoid confusion and misunderstandings about the judicial process that may be misinterpreted as bias.

Education and Training

14. Judges should exercise authority and receive funding to require sensitivity training for all court personnel.

Education and Training

15. Local bar associations, in conjunction with legal and judicial organizations, should develop handbooks to provide judges, attorneys, and court personnel with information that will improve their interaction and communication with persons of diverse racial and ethnic backgrounds in courtroom and judicial settings.

Education and Training

16. The legislature should require state and local law enforcement officials to invest time and resources in diversity training for officers and support staff.

Education and Training

17. The Tennessee Supreme Court should require that continuing legal education include, within its ethics and professionalism requirements, racial and ethnic diversity training.

Education and Training

18. Judicial Conferences, the Court Clerks Conference, the bar associations, and other associations that offer continuing legal education programs should encourage the selection of educational faculty from diverse racial and ethnic backgrounds.

Education and Training

Court Environment

1. Judges should issue clear and concise directives to eliminate discriminatory practices within the court environment.

Court Environment

2. Courts should ensure that in civil or criminal fee-generating cases, attorneys are appointed on a non-discriminatory basis.

Court Environment

3. All participants in the court environment should be addressed by appropriate formal titles. **Court Environment**

4. State and local bar associations, in conjunction with judges and clerks, should develop court monitoring programs to ensure court environments free from racial or ethnic bias. **Court Environment**

5. The Tennessee Supreme Court should prepare reports showing minority representation among court personnel by judicial districts, and make such reports available to appointing authorities. **Data Collection**

6. Judicial appointing authorities should establish as a priority the increase of minorities in judicial and quasi-judicial appointments. **Judicial Nomination, Selection & Evaluation**

7. The Tennessee Supreme Court and the Presiding Judges of Judicial Districts should designate minority judges to fill temporary vacancies, including those in jurisdictions that have little or no minority representation in the bench or bar. **Judicial Nomination, Selection & Evaluation**

8. The Legislature should review the composition of the Judicial Selection Commission to ensure compliance with statutory requirements of diversity. **Judicial Nomination, Selection & Evaluation**

9. Judicial candidates should be screened and disqualified upon evidence of racial and ethnic bias prior to appointment. **Judicial Nomination, Selection & Evaluation**

10. The judicial evaluation process should include screening for bias when evaluating sitting judges and evaluators should reflect the proportionate population of minorities. **Judicial Nomination, Selection & Evaluation**

11. The Tennessee Supreme Court and the Legislature should review all aspects of the system of assessing and providing bail bonds; should set forth specific guidelines regarding surety requirements; and should consider a public pre-trial service system free from bias as an appropriate alternative or addition to the current bail bonding practices. **Court Policy and Procedure**

12. Judges should encourage sheriffs, clerks, and other court personnel who hire court assistants to appoint minority personnel. **Court Environment**

13. The Administrative Office of the Courts should recruit and hire minority court reporters for use in state-funded cases. **Court Environment**

Court Policy and Procedure

1. Local court systems should designate an ombudsman to assist public participants in the judicial system. **Court Policy and Procedure**

2. The Administrative Office of the Courts should collect and distribute data on the impact of current bail bonding policies on racial and ethnic minorities. **Data Collection**

3. The Administrative Office of the Courts should compile and distribute data on civil cases to evaluate the influence and impact of race and ethnicity issues on outcomes, settlements, and damage awards. **Data Collection**

4. The Tennessee Department of Commerce and Insurance should require insurance companies to report the amount of personal injury settlements and the race and ethnicity of the parties. **Data Collection**

5. The Legislature should enact legislation to provide for sanctions against insurance companies that discriminate on the basis of race or ethnicity in the evaluation and settlement of personal injury and workers' compensation claims. **Court Policy and Procedure**

6. The Tennessee Department of Correction should compile and distribute data on the access minorities have to, and their success in, offender programs that offer educational, vocational, and drug rehabilitation treatments. **Data Collection**

7. Courts should ensure that jury source lists represent the racial and ethnic make-up of the areas they serve. If standard list sources, such as driver's licenses, property tax [rolls], and voting lists do not adequately represent minority demographics, courts should consider lists from other sources, such as school enrollment, public housing residents, and utility customers. **Court Policy and Procedure**

8. Courts should review jury service and its policies and adjust those policies that may be barriers to minority participation, such as the length of service, jurors' ability to serve on call at home, the level of reimbursement, and assistance with child care. **Court Policy and Procedure**

9. Courts, district attorneys, and public defenders should assure that all defendants receive the same quality of treatment and representation. **Court Policy and Procedure**

10. The Tennessee Commission on Children and Youth should compile and distribute data on the outcomes of juvenile court proceedings by race and ethnicity and recommend appropriate corrective actions if such data shows bias. **Data Collection**

11. The Tennessee Commission on Children and Youth should compile and distribute data regarding the extent to which minority children are eligible for educational, vocational, and drug rehabilitation programs and the outcome of such programs for minority participants. **Data Collection**

12. The Legislature and the Tennessee Supreme Court should expand efforts to make legal representation available to low and moderate income people. **Court Policy and Procedure**

13. The Tennessee Supreme Court should ensure appropriate interpreters are available pursuant to applicable law. **Court Policy and Procedure**

Gender Fairness Commission
Recommendations

Responsible Subcommittee

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, as well as ways in which gender fairness can be achieved. **Education and Training**

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. **Judicial Nomination, Selection & Evaluation**

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.

Court Environment

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.

Data Collection

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.

Court Policy and Procedure

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.

Education and Training

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 on-going 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.

Court Environment

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.

Education and Training

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.

Court Environment

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.

See Court Environment

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