REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

November 21, 1997

Chapter Nine

Complaints

The aim of any court's grievance procedures should be to provide necessary avenues of redress for persons who suffer untoward treatment of any kind, including biased treatment on the basis of gender, race, or ethnicity, by judges, lawyers, and court employees. Reporting instances of bias is an essential step to identifying and then eradicating biased conduct in the courts of this circuit. The Committees' research, however, suggests that many respondents who have experienced or observed biased treatment by judges, lawyers, and court employees in the Second Circuit have not registered a formal complaint with the courts.[110] Concerned that underreporting of grievances might forestall necessary corrective procedures, the Task Force examined the current complaint procedures available to persons aggrieved by the misconduct of judges, lawyers, and court employees.

A. Complaints about Judges

In 1980, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act,[111] pursuant to which all federal circuit courts have established a formal complaint mechanism (the "Section 372 complaint mechanism") which can be used to report misconduct by Article III, bankruptcy, and magistrate judges. In the Second Circuit, the

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[110]Between 1991 and 1995, 250 misconduct complaints were filed against judicial officers. In five of these complaints, corrective action was deemed necessary. Twenty-two complaints raised allegations of race or gender bias. All of the bias complaints, like most complaints generally, were dismissed on the grounds that the complaint related to the merits of the case, was frivolous, or was unsupported. Historically, 98.6% of all complaints filed are dismissed.

[111]28 U.S.C. § 372(c).

Section 372 complaint mechanism is administered by the Judicial Council and is triggered by one of two methods. First, a complainant can file a verified complaint with the clerk of the Court of Appeals. The complaint is then forwarded to the judge complained of and to the Chief Judge of the Court of Appeals, who screens the complaints and dismisses those that (i) are frivolous, (ii) are outside the scope of Section 372, (iii) relate to the merits of the case, or (iv) have been subject to corrective action by the judge against whom the complaint is registered. Alternatively, a complainant can bring information to the Chief Judge, who can then inquire of others who may have been present at the time of the alleged misconduct and determine whether their testimony is sufficient independent evidence to proceed with the Chief Judge's initiation of the Section 372 process without the testimony of the complainant. If the independent evidence is insufficient, the complainant retains the option of submitting a verified complaint.

Those complaints that survive this initial screening process are forwarded to a special investigative committee composed of the Chief Judge along with Court of Appeals and district judges appointed in equal numbers by the Chief Judge. The investigative committee, after conducting its investigation, files a report of its findings and recommendations with the Judicial Council. The Judicial Council can sanction the accused judge in a number of ways short of removal from office. Petitions to appeal from the Judicial Council's decision can be made to the United States Judicial Conference.

Despite the confidentiality of this complaint procedure,[112] many focus group and

[112]The information made public about a complaint is a summary statement that someone has made a complaint about a judge, including the nature of the allegations, and, if

public-hearing participants and survey respondents do not file complaints when they observe or experience bias based on gender, race, or ethnicity. Respondents gave a variety of reasons for not reporting misconduct, including the respondent's own belief that a particular incident of biased conduct was simply too trivial to report and the respondent's concern that filing a complaint would have adverse repercussions for the complainant or would be futile. Other respondents were simply not aware that a complaint procedure existed.

To encourage the reporting of incidents of race, ethnicity, and gender bias on the part of judges, the Task Force makes the following recommendations.[113] First, the courts should consider whether the initial screening process, currently administered solely by the Chief Judge, might be expanded to include review by a committee of lawyers. This might enhance public confidence in the complaint process.

Second, whoever performs the initial screening process should be careful not to overlook genuine complaints of gender, racially, or ethnically biased conduct which (because of inartful drafting by a complainant not trained in the law) may appear to argue only the merits of the complainant's case. Though no instances of genuine bias complaints being overlooked have been identified, the possibility that this might occur should be kept in mind. Third, to encourage those who may be deterred from registering complaints of misconduct because they fear reprisal, the courts should make generally known the alternative

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dismissed, a statement as to why the complaint was dismissed. Neither the complainant nor the judge is identified.

[113]Of course, any attempt to revise the circuit's complaint mechanism must come within the Section 372 framework and the limits imposed by Article II of the U.S. Constitution, which provides that Article III judges can be removed from office only for treason, bribery, or other high crimes and misdemeanors.

mechanism for triggering the Section 372 process which, as noted, allows a complainant to register a complaint with the Chief Judge, who then conducts a preliminary investigation to determine whether there is sufficient independent evidence of misconduct to trigger the Section 372 proceedings.

Finally, the Committee Report notes that the Southern District of New York has a mechanism by which 3 judges meet periodically with representatives of bar associations to discuss a variety of issues including court administration and the conduct of individual judges. Because this would help identify perceived problems, the Task Force encourages other courts in the circuit to explore the possibility of adopting a similar program.

B. Complaints about Lawyers

Most courts in the circuit have some procedure to register complaints regarding the misconduct of lawyers. Several courts have set up grievance committees comprised of lawyers and judges to address attorney misconduct claims: District of Connecticut -- 11 lawyers (including 5 women and no minorities); Southern District of New York -- 6 judges (including 3 women and 2 minorities); Eastern District of New York -- 4 judges (including no women or minorities); Court of Appeals -- 7 members (including 2 women and no minorities). Additionally, referral to state committees on lawyer grievances is an option in every district. In the District of Vermont and the Northern and Western Districts of New York, however, such referrals are the only option since those districts have no independent procedures for registering complaints about lawyer misconduct.

However, even where they exist, the district court grievance committees rarely receive reports of misconduct by lawyers. Some possible reasons for this are that (1) many

the treatment of litigants in employment discrimination cases.

7. Courts should note the concern on the part of some that employment discrimination cases are disfavored by judges and take care that litigants in those cases are treated fairly. Judges should avoid remarks or visible reactions that might create the impression of bias.

E. The Jurors

Based on the data from Chapter Eight, the Task Force reaches the following conclusions:

a. The representativeness of jury pools on the basis of gender, race, and ethnicity is a matter that warrants constant vigilance and monitoring.

b. In some courts, the representation of women and minorities in jury pools is somewhat below what would be expected.

c. A number of jurors who served believe, whether rightly or wrongly, that their gender and, to a lesser extent, their race or ethnicity affected their selection to be jurors.

d. The nature and scope of jury voir dire can alter the perception that jury selection is based in part on gender, racial, or ethnic stereotyping.

e. Jurors are not being treated inappropriately based on gender, race, or ethnicity.

Recommendations:

1. Each court should be vigilant and closely monitor the representativeness of its jury pool (with a view to the prevention and early elimination of problems).

2. Courts in which representation of groups based on gender, race, or ethnicity is deficient should determine the cause or causes and take appropriate remedial action. Consideration should be given to additional methods to broaden the pool of jurors including adding those who hold a driver's license.

3. Courts should consider whether to alter voir dire practices to reduce the degree of stereotyping in jury selection based on gender, race, or ethnicity, but further study is required before any particular change can be recommended.

F. Complaints

Based on the data from Chapter Nine, the Task Force reaches the following

conclusions:

a. Many persons do not file complaints against judges notwithstanding the existence of a possible basis for such a complaint either because they believe the incident too trivial, fear adverse repercussions from filing a complaint, consider it futile, or are unaware of the complaint procedure.

b. In addition to state grievance mechanisms, complaints regarding lawyer misconduct may be made to grievance committees of the circuit's courts, except in the Northern and Western Districts of New York and the District of Vermont.

c. The authority and procedures of grievance committees, in the districts that have them, are varied. There is little general knowledge by the public and the bar as to the existence of these grievance committees and how they function.

d. Complaints about the conduct of court employees from co-workers based on gender, race, or ethnicity may be made in each court through existing EEO procedures, which will likely be revised in light of the approval of a Model Employment Dispute Resolution Plan in March 1997 by the Judicial Conference of the United States.

e. No procedures exist to enable members of the public to complain formally of biased conduct committed by court employees.

f. The adoption by each court of a local rule prohibiting biased-related conduct and specifying remedial action would decrease the frequency of biased conduct and send a message of disapproval to those who would engage in it.

Recommendations:

1. Courts should consider whether to use a lawyer committee to screen complaints against judges by eliminating those that are frivolous and to help ensure that meritorious complaints are not withheld out of fear of repercussions.

2. Courts should make the public and the bar aware of existing mechanisms for triggering the Section 372 process for complaints of judicial misconduct.

3. Courts should consider adopting the Southern District of New York's practice of having judges meet periodically with bar association representatives.

4. Courts should review existing mechanisms for complaints of attorney misconduct to determine whether they are adequate.

5. Courts should formalize and make the public and bar aware of policies and

procedures for registering and investigating complaints of lawyer misconduct.

6. In carrying out the request of the Judicial Conference that they adopt and implement an Employment Dispute Resolution Plan pursuant to the Model Plan, courts should bear in mind the need to accommodate complaints of biased conduct based on gender, race, and ethnicity.

7. Each court should adopt procedures for processing complaints by the public of biased treatment by court employees based on gender, race, or ethnicity and publicize them.

8. Each court should adopt a local rule setting forth unacceptable biased conduct and its intent to take corrective action where appropriate.