

## **GENDER BIAS WITHIN THE COURT ENVIRONMENT**

### **TREATMENT OF WOMEN JUDGES, ATTORNEYS, LITIGANTS, WITNESSES AND JURORS**

**Gender Recommendation VII-1: The Michigan Supreme Court should issue an Administrative Order that behavior exhibiting gender bias in the court environment is not acceptable and that judges must set an example by not engaging in or permitting such behavior in chambers, courtroom or administrative areas.**

#### **Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which was not expressed with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, while similar behaviors were devalued in female professionals. These behaviors included aggression, assertiveness and other departures from the "feminine" ideal.

#### **Research Methodology in 1997:**

Review Supreme Court Administrative Orders and Michigan Court Rules

#### **Status of the implementation of the recommendation in 1997:**

The Michigan Supreme Court issued AO-1990-3, which endorses many of the recommendations of the 1989 Task Force Reports and directs Michigan courts to commit to the elimination of bias of all types in the judicial system. It does not specifically prohibit inappropriate gender or racial/ethnic comments or actions.

The Michigan Rules of Professional Conduct were amended on 10-1-93 to add Rule 6.5, which requires adjudicative officers and lawyers to treat all persons involved in the legal process with courtesy and respect, and take particular care to avoid discourtesy based on a person's race, ethnicity, gender, or other protected personal characteristic and to require those who are supervised by the lawyer to do the same. This leaves some significant interpretation for those involved in an individual situation. The 1989 Task Force Report is much clearer. It makes the clear and logical conclusion that gender and racial/ethnic comments or actions are inappropriate and therefore offensive, and should be specifically prohibited.

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The Michigan Judicial Institute has included the issue of gender bias in numerous training programs for judges and court personnel.

#### **Recommended Action:**

This recommendation has been partially implemented. The State Bar of Michigan Task Force recommends implementation of the recommendation as written.

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### TREATMENT OF WOMEN JUDGES, ATTORNEYS, LITIGANTS, WITNESSES AND JURORS

**Gender Recommendation VII-2: The Michigan Supreme Court should require the Michigan Judicial Institute ("MJI") to provide education in the following areas:**

- a. awareness training for judges on the definition, recognition and impact of sexist behavior; and
- b. the importance of language.

#### **Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors included such things as aggression, assertiveness and other departures from the "feminine" ideal.

#### **Research Methodology in 1997:**

Review Supreme Court orders

Review of activities of the Michigan Judicial Institute

#### **Status of the implementation of the recommendation in 1997:**

The Michigan Judicial Institute has developed a substantial number of diversity training programs and program components. They have developed policies that require that specific material identified in the 1989 recommendations be included in all judicial and court training programs. They evaluate the success of these programs, the number of attendees and the demographics of the classes in order to determine whether they are fully complying with the letter and spirit of the 1989 Reports. As a result the Michigan Judicial Institute has developed a listing of training programs responding to specific recommendations has substantially implemented its responsibilities under the 1989 Reports.

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#### **Recommended Action:**

This recommendation has been substantially implemented. Continued implementation of the recommendation is required. In addition, the State Bar of Michigan Task Force recommends:

- The Michigan Judicial Institute should increase the utilization of their training programs by collecting data to assess the number of judges who have attended and by requiring judges to attend these programs.

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#### **Gender Recommendation VII-3: All court administrators should:**

- a. direct that all forms, manuals, bench books, and correspondence employ gender-neutral language;
- b. establish a policy prohibiting gender-biased conduct by all judges and court personnel;
- c. conduct regular training for court employees on the issue of gender bias and its relation to the proper function of the court as a service provider; and
- d. when undertaking improvements to court facilities, take into account the special needs of parents by providing for child care areas and facilities.

#### **Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors include aggression, assertiveness and other departures from the "feminine" ideal.

Michigan courts did not have uniform policies and standardized procedures relating to personnel and employment matters.

#### **Research Methodology in 1997:**

Discussions with the State Court Administrators Office

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

All State Court Administrative Office materials are gender neutral. The State Court Administrative Office has published a Guide to Bias-Free Courts and developed a poster on Access to Justice. In addition, the State Court Administrative Office has developed model personnel policies and has provided them to trial courts.

Reasons given by individual courts for not adopting a written policy were diverse and ranged from "We don't do that" to "No Complaints" to, rather cryptically, "Courts are unwilling." Many cited a lack of resources and a need for a statewide policy to be developed by the State Court Administrative Office. Others felt the Code of Judicial Conduct sufficed to fill this need. Others responded that a formal policy statement is a hindrance and that internal/informal procedures are the better way to handle problems related to gender bias.

On balance, the status of implementation of this recommendation in 1997 is mixed. There is apparently significant misunderstanding of the importance of formal, written and publicized policies prohibiting gender bias by all participants in the justice system. Even if the State Court Administrative Office developed a uniform, statewide policy statement, an educational process would be required to explain the need for it, as well as the importance of enforcement.

Questionnaire responses reported implementation of training regarding gender bias ranged from a high of sixty percent (60%) to a low of fifteen percent (15%). Of the reporting counties, which have implemented this recommendation, many cited the Michigan Judicial Institute as the source of training. The most frequent scheduling was semi-annually. Some use county programs, staff meetings and in-house seminars. Very few use outside providers. The barriers to providing training most frequently cited are lack of resources (money, space) and time. Some cited small staff numbers making training difficult to schedule. Others indicated no need for training because there are no gender-bias problems. Again, implementation of the recommendation regarding training is somewhat mixed. Many of respondents seem not to recognize the need for or benefit from training, but many more indicated that limited resources simply prevent pursuing such a program of staff training.

Implementation of the recommendation to make facilities responsive to the needs of parents and children is very low, ranging from a high of thirty percent (30%) to a low of ten percent (10%). Many courts indicated that they have no facilities suitable for the use of young children. Others have made very minimal gains in this area such as providing a box of toys. Only one court indicated that it has a special room for children.

The primary barriers to implementation are predictable: lack of space, money, staff. Other barriers listed are a fear of liability, the fact that the counties own the buildings and a belief that this is not properly a court function. At least one court indicated no need for such facilities.

Implementation of the facilities recommendation in 1997 is almost non-existent. One respondent indicated that little new building and building improvement is taking place across our court system. Many county/court facilities are overcrowded with the justice-system participants; courtroom, judges & staff, clerks' offices, prosecutors, friend of the court, probation, law enforcement. Often courts have little or no control over their space needs and resources are

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limited. While the need for child and parent-friendly space can hardly be denied, the competition for space and resources with other elements of the system is fierce.

#### **Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- The Michigan Judicial Institute should continue/increase its efforts to include these issues in their training programs for chief judges and court administrators.
- The State Court Administrative Office should continue its efforts to develop recommended personnel models, standards and guidelines and require local courts to adopt these models, standards and guidelines.
- All courts should adopt a written policy prohibiting gender-biased conduct and this policy should be communicated to all new and existing staff.
- The recommendation regarding facilities for childcare should be implemented. The issue of funding is obviously critical to implementing this recommendation.

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**Gender Recommendation VII-4:** Jury instructions should be continually monitored to ensure gender neutrality. Some jury instructions should be amended to include specific examples of the types of bias jurors must guard against and the ways in which such bias might influence their decision-making.

**Summary of condition prompting 1989 recommendation:**

The recommendation was made because the 1989 Task Force received complaints of sexist language in printed court materials and reports of sexist or biased comments made by jurors.

**Research Methodology in 1997:**

The State Bar Task Force conducted a word search of the Michigan Jury Instructions and Court Rules to locate instances of the use of the words he, him his, she, her and hers, to ascertain whether their usage was free of gender-language bias.

**Status of the implementation of the recommendation in 1997:**

Although there has been substantial efforts to accomplish gender-language neutrality, a 1997 review of revised *Michigan Criminal Jury Instructions* revealed problem areas in CJI2d Chapters 6-14 and 17-20. See table, attached.

The revised *Michigan Standard Jury Instructions - Civil* reveal no problem areas in the instructions. Some of the language in the comment sections, however, is not gender neutral.

Although it was not recommended, the State Bar of Michigan Task Force also reviewed the Michigan Court Rules and found them to be free of gender-language bias.

**Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- The *Michigan Criminal Jury Instructions* identified above should be revised to ensure that they are free of gender-language bias.
- There should be continued monitoring of all printed court materials to ensure ongoing compliance with the recommendations of the State Bar of Michigan Task Force.



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### **TABLE OF *MICHIGAN CRIMINAL JURY INSTRUCTIONS* WITH PROBLEM AREAS REGARDING GENDER-NEUTRAL LANGUAGE:**

- Chapter 6 - State of Mind: CJI2d 6.1, 6.3, 6.4 and 6.6.
- Chapter 7 - Defenses: CJI2d 7.6, 7.18, 7.20 and 7.22.
- Chapter 8 - Aiding & Abetting: CJI2d 8.5 and 8.7.
- Chapter 9 - Attempt: CJI2d 9.3 and 9.4.
- Chapter 10 - Conspiracy and Solicitation: CJI2d 10.4, 10.5 and 10.7.
- Chapter 11 - Carrying Concealed Weapon: CJI 2d 11.1, 11.7, 11.8, 11.11, 11.14, 11.17, 11.18, 11.21, 11.22 and 11.27.
- Chapter 12 - Narcotics: CJI 2d 12.4.
- Chapter 13 - Police & Prisons: CJI 2d: 13.1-10, 13.13 and 13.14.
- Chapter 14 - Perjury: CJI2d: 14.1 and 14.2.
- Chapter 16 - Homicide: CJI2d: 16.3, 16.9, 16.12, 16.13, 16.17-19, 16.21, 16.23, 16.26.
- Chapter 17 - Assault: CJI2d 17.3-5, 17.7, 17.9, 17.14.
- Chapter 18 - Robbery: CJI2d 18.1-4.
- Chapter 19 - Kidnapping: CJI2d 19.2-5 and 19.7.
- Chapter 20 - Sex Crimes: CJI2d 20.35 and 20.36.

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**Gender Recommendation VII-5: The State Court Administrative Office should be empowered to investigate allegations of gender bias on the part of court personnel.**

#### **Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors include aggression, assertiveness and other departures from the "feminine" ideal.

The 1989 Task Force found that some mediation panel members were insensitive to the existence and impact of gender bias in their decision-making and their treatment of women attorneys and litigants.

Additionally, mediation panels did not include a representative number of female participants.

In comparison to their male counterparts, women attorneys did not receive an equitable share of the available appointments in all jurisdictions, or of the assignments to more serious criminal cases and cases which were high profile or economically lucrative.

#### **Research Methodology in 1997:**

Discussions with State Court Administrative Office personnel

#### **Status of the implementation of the recommendation in 1997:**

MCR 8.113 allows the State Court Administrative Office to conduct investigations and gather data on a number of complaints.

#### **Recommended Action:**

This recommendation has been fully implemented. In addition, the State Bar of Michigan Task Force recommends:

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- Since the State Court Administrative Office has the ability to investigate and review the activities of Michigan courts, the State Court Administrative Office should insure that the Supreme Court is aware of problems.
- Further, the State Court Administrative Office should develop a procedure that responds to complaints in a formal manner and investigates with written documentation, determinations of fact and resolution.
- The State Court Administrative Office should develop and the Supreme Court should adopt performance standards and guidelines for judges regarding gender bias issues in courts.

**APPOINTMENT OF WOMEN TO FEE-GENERATING POSITIONS**

**Gender Recommendation VII-6: Records of appointments to fee-generating positions by type of position, gender of appointee and fee generated should be maintained and monitored.**

**Summary of condition prompting 1989 recommendation:**

The 1989 Task Force found that in comparison to their male counterparts, women attorneys did not receive an equitable share of the available appointments in all jurisdictions, or of the assignments to more serious criminal cases and cases which were high profile or economically lucrative.

**Research Methodology in 1997:**

Discussion with State Court Administrative Office personnel

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

Supreme Court Administrative Order 90-45 requires courts to provide information on attorney appointments. Under this order, the State Court Administrative Office has the responsibility for monitoring these appointments.

Questionnaire responses indicated low levels of compliance with the requirement for monitoring attorney appointments in relation to gender and race/ethnic factors. Questionnaire responses ranged between a high of thirty-five percent (35%) and a low of fifteen percent (15%). Records which are kept related primarily to billing/accounting purposes and not to gender divisions. Most indicated that a relatively small number of lawyers are involved. Some courts parcel appointments on a bid/contract basis or to the public defender which makes record-keeping unnecessary. Others simply rotate appointments through a list of qualified attorneys. Barriers listed included no need to monitor and a very small number of attorneys to do the appointments. Interestingly, a number of respondents listed limitations of existing available technology as a barrier to implementation.

In this area there is almost no implementation of the recommendation to keep and monitor records with regard to appointments to fee-generating positions on the basis of gender. The survey responses suggest that the perception is that there is little or no need to do so either because of small numbers or there is no existing disparity.

On May 7, 1997, the Supreme Court amended MCR 2.403 (Mediation) and postponed the effective date of recent amendments to MCR 2.403, 2.405 and 3.216 and adoption of new MCR 2.404 to October 1, 1997.

The delayed effective date for the mediation amendments will permit courts the time needed to create mediation plans required by new MCR 2.404 and to have those plans approved by the State Court Administrative Office as local administrative orders. All current local administrative orders governing mediation practice will be revoked October 1, 1997, and must be replaced by local administrative orders reflecting the new requirements of MCR 2.404.

To assist courts in creating their new plans, the State Court Administrative Office will develop plan guidelines, a sample mediator application form, and a model local administrative order. These materials will be distributed to chief judges by July 1, 1997.

**Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- The Supreme Court and the State Court Administrative Office should continue their efforts to develop computer programs/reporting mechanisms for local courts. The Michigan State Legislature should provide funding.
- Per MCR 2.404, courts will submit an annual report to the State Court Administrative Office on the operation of the court's mediation program. The State Court Administrative Office will be developing reporting criteria in consultation with judges, court administrators, mediation clerks, and other interested parties in the coming months, with final report criteria to be established by October 1, 1997.
- These reporting criteria should include statistics related to appointments to fee-generating positions by type of position, gender and fee generated.

**APPOINTMENT OF WOMEN TO FEE-GENERATING POSITIONS**

**Gender Recommendation VII-7: Such appointments should be distributed fairly among qualified male and female attorneys.**

**Summary of condition prompting 1989 recommendation:**

The 1989 Task Force found that in comparison to their male counterparts, women attorneys did not receive an equitable share of the available appointments in all jurisdictions, or of the assignments to more serious criminal cases and cases which were high profile or economically lucrative.

**Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

This recommendation focuses on the fairness of distributing fee-generating appointments between male and female attorneys. Here the level of implementation appears to be very high, ranging from a high of eighty-five percent (85%) to a low of seventy-five (75%). However, the way the question was framed in the survey, to indicate anything other than a high level of implementation would be to admit to gender bias in rather clear terms.

The procedures for equitable distribution of appointments include contract, random selection, rotating basis, judicial monitoring, and solicitation of all interested attorneys. A number said that there aren't enough attorneys for appointments so that anyone who wants them gets them. Some listed the following barriers to implementation: only 1 woman applied, no women applied, the firm which has the contract is required to meet the city's requirements regarding gender-bias issues, the city clerk's office handles it, the court has no management authority of the public defender.

There appears to be a high level of implementation of this recommendation, based on self-reporting by the courts.

**Recommended Action:**

This recommendation has been substantially implemented. Continued implementation of the recommendation is required. In addition, the State Bar of Michigan Task Force recommends:

- A mechanism should be developed to allow State Bar members to contact the State Court Administrative Office to report problems in this area. A formal response mechanism should be developed to handle these complaints.

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- Per MCR 2.404, courts will submit an annual report to the State Court Administrative Office on the operation of the court's mediation program. The State Court Administrative Office will be developing reporting criteria in consultation with judges, court administrators, mediation clerks, and other interested parties in the coming months, with final report criteria to be established by October 1, 1997.
- These reporting criteria should include statistics related to appointments to fee-generating positions by type of position, gender and fee generated. The State Court Administrative Office should monitor and report annually on distribution of fee-generating assignments.

**APPOINTMENT OF WOMEN TO FEE-GENERATING POSITIONS**

**Gender Recommendation VII-8: Mechanisms for appointment of assigned counsel in the jurisdictions in which their members practice should be reviewed and a means should be developed to ensure that appointments to fee-generating positions are fairly distributed among qualified male and female attorneys.**

**Summary of condition prompting 1989 recommendation:**

The 1989 Task Force found that in comparison to their male counterparts, women attorneys did not receive an equitable share of the available appointments in all jurisdictions, or of the assignments to more serious criminal cases and cases which were high profile or economically lucrative.

**Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

Questionnaire responses report implementation levels to be relatively high, ranging from fifty percent (50%) to sixty-five percent (65%). However, rather than describing a review process, a number of respondents repeated the method by which appointments are made (rotation, contract, etc.) rather than how those methods are monitored for fairness. Those who did respond to the question indicated that there are a number of different ways to monitor the procedure: annual review by the judges, review by a bar association committee, weekly review of appointments, having all members of the (very small) bar association participate in the appointments. With regard to barriers to monitoring procedures, a number of issues were mentioned: lack of time to do so, no problem exists, unnecessary to monitor the contract.

**Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- The Michigan Judicial Institute should include this issue in training programs for chief judges and court administrators.
- Per MCR 2.404, courts will submit an annual report to the State Court Administrative Office on the operation of the court's mediation program. The State Court Administrative Office will be developing reporting criteria in consultation with judges, court administrators, mediation clerks, and other interested parties in the coming months, with final report criteria to be established by October 1, 1997.
- These reporting criteria should include statistics related to appointments to fee-generating positions by type of position, gender and fee generated. The State Court Administrative Office should monitor and report annually on distribution of fee-generating assignments.



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### MEDIATION

**Gender Recommendation VII-9: The number of women appointed to mediation panels should be increased through the use of the following mechanisms:**

- a. Consistent, established objective criteria for appointment;
- b. A clear, advertised and available application process;
- c. Public access to mediation statistics profiling selection and panels;
- d. Inclusion of women representatives as plaintiff, defense and neutral mediators.

#### **Summary of condition prompting 1989 recommendation:**

Testimony was collected that documented continued abuse of women litigants and attorneys in the mediation process from dismissive behavior to derogatory comments regarding dress, and the ability of women attorneys.

Some mediation panel members were insensitive to the existence and impact of gender bias in their decision making and their treatment of women attorneys and litigants.

The 1989 Task Force found that many mediation panels did not include a representative number of female participants.

#### **Research methodology in 1997:**

Circuit Court Chief Judges Questionnaire

Anecdotal Information

#### **Status of the implementation of the recommendation in 1997:**

The status of this implementation varied greatly throughout the state.

All responding Region I counties required that mediator be members in good standing with the State Bar of Michigan and submit an application. Some also required five years of experience. Other requirements varied. For example, two judges in the same circuit (Oakland County) listed different criteria (with one simply saying everyone with five years experience is qualified, and the second sending an application with varied additional requirements). As to the availability of the application process, eighty percent (80%) of the respondents make the selection criteria available upon request. Few have a set period of review, or regularly solicit or advertise for mediators. Only twenty percent (20%) of the respondents compile statistics on the gender of their mediators, citing a lack of resources or the lack of any Supreme Court requirement. Some courts were able to provide a list of mediators, however they could not provide information about the gender make-up of panels. Women were included as plaintiff, neutral and defense mediators at rates ranging from seven percent (7%) to eleven percent (11%) of the total number of mediators.

For Region 2 courts, the respondents listed widely varying selection criteria. Most reported soliciting applications on an annual basis and accepting written letters of interest detailing the applicant's experience in lieu of a formal application. All made the selection criteria available upon request. Only sixty-seven percent (67%) of these courts made information available to the

public on the composition of its mediation panels. Generally the local mediation clerk (who is sometimes the circuit court judge's secretary) is responsible for compiling this information. Courts report that an average of seven percent (7%) of their mediators are women, who serve mainly in the plaintiff and neutral categories.

Region 3 is comprised of only two courts. One uses a written application with objective criteria and solicits applications every four years through local legal publications. Its selection criteria is available upon request. The other did not report its selection criteria, but solicits applications every three years by notice in its local bar newsletter. The first court reports that thirteen percent (13%) of its mediators are women, while the second did not report on this statistic. The thirteen percent (13%) rate for the first court is comparable to the local bar association's records that fourteen percent (14%) of its members are women.

Most Region 4 courts require five years of practice and good standing with the State Bar. A smaller number cited demonstrated civil experience and a local practice. Sixty-four percent (64%) of these courts reported their selection criteria being available upon request. Most reported accepting applications annually or upon request, but few reported any formal method of solicitation, relying mostly on word of mouth or individual contact. A smaller number advertised through the local bar association. These factors reflect the smaller number of attorneys practicing in these small counties. Seventy-three percent (73%) of these courts make composition of the panels available to the public, usually through the court administrator or mediation clerk. Minimal statistical information is compiled as a result of the small number of mediators. Four courts specifically noted that no one has ever asked for this information. A review of the survey information reveals that women comprise about two percent (2%) of Region 4 mediators.

Although it appears that progress has been made since the 1989 Task Force reports, there are wide gaps by county in the amount of progress and there is still vast room for improvement. Women comprise twenty percent (20%) of Michigan's legal profession. No region has succeeded in reaching that level. Anecdotal information was collected during this process that reflects continued discourteous, dismissive and outright biased treatment of female attorneys and litigants in the mediation process.

On March 5, 1997, the Michigan Supreme Court issued MCR 2.404 and amended 2.403, 2.405, and 3.216, all of which deal with the process of mediation and the selection of mediators in civil and domestic relations cases. This provides for established criteria, annual application and review of mediation panels, and annual reporting to the State Court Administrative Office on the composition of mediation panels. In May 1997, the effective date of these rules was pushed back to 10-1-97. This will address many of these problems and make a vast change in the quality and fairness of mediation throughout the state.

**Recommended action:**

This recommendation has been partially implemented. Further implementation requires:

- Monitor compliance with the new mediation rule MCR 2.404, and reevaluate after one full year under the new rule (end of 1998).
- Encourage the Supreme Court and State Court Administrative Office to continue to provide leadership and supervision in this area.

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### MEDIATION

**Gender Recommendation VII-10: Courts should monitor any agencies to which they refer cases for mediation for gender diversity and should decline referrals to any agency which does not fairly utilize women mediators. Where mediators are routinely appointed by individual judges, efforts should be made to report and review those appointments based upon the same consideration.**

#### **Summary of condition prompting 1989 recommendation:**

Testimony was collected that documented continued abuse of women litigants and attorneys in the mediation process from dismissive behavior to derogatory comments regarding dress, and the ability of women attorneys.

Some mediation panel members were insensitive to the existence and impact of gender bias in their decision-making and their treatment of women attorneys and litigants.

The 1989 Task Force found that many mediation panels did not include a representative number of female participants.

There was identified a proliferation of private mediation and alternative dispute resolution methods that were beyond the control of the courts once referrals were made.

#### **Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaire

Anecdotal Information

#### **Status of the implementation of the recommendation in 1997:**

In responding Region I courts, one hundred percent (100%) of the respondents reported using outside agencies or private means of alternative dispute resolution. No court reported doing any monitoring of the composition of these outside firms. Respondents cited the private nature of this process as the reason for this failure to monitor. They further stated that attorneys select the method of alternative dispute resolution, and the court cannot compel them to do so, or to select a particular individual or firm to act as mediator or arbitrator.

In Region 2 courts, only one court said that an alternative dispute resolution program was under development. The rest did not acknowledge sending cases to outside agencies.

In Region 3, one of the courts did not use alternative dispute resolution programs, while the other did, but again cited no knowledge of the composition of or compensation of these agents, citing the private nature of the process as being prohibitive of collecting the information requested.

In Region 4, thirty-three percent (33%) of the respondents acknowledged using outside alternative dispute resolution programs, but none kept any statistics as to the composition of or compensation of the agents, citing the private nature of the program.

**Recommended Action:**

This recommendation has not been implemented. The 1989 Task Force recommendation should be implemented as written. In addition, the State Bar of Michigan Task Force recommends:

- The Supreme Court should promulgate rules that control the selection of mediators, arbitrators, agencies, and other alternative dispute resolution alternatives to insure race, ethnic and gender diversity. The new proposed mediation rule, MCR 2.404 ostensibly will accomplish this for mediators, but a parallel rule may be necessary for developing forms of alternative dispute resolution. Compliance with the new mediation rule should be monitored and reevaluated after one full year under the new rule.

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### MEDIATION

**Gender Recommendation VII-11: To the extent that courts, either by practice or court rule, refer cases to alternative dispute resolution, assignments as mediators, arbitrators or special masters should be available to attorneys regardless of gender. The referring court or judge has the affirmative obligation to ensure that any private agency receiving such assignments utilizes lawyers from both genders.**

#### **Summary of condition prompting 1989 recommendation:**

Testimony was collected that documented continued abuse of women litigants and attorneys in the mediation process from dismissive behavior to derogatory comments regarding dress, and the ability of women attorneys.

Some mediation panel members were insensitive to the existence and impact of gender bias in their decision-making and their treatment of women attorneys and litigants.

The 1989 Task Force found that many mediation panels did not include a representative number of female participants.

#### **Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaire

Anecdotal Information

#### **Status of the implementation of the recommendation in 1997:**

In responding Region 1 courts, one hundred percent (100%) of the respondents reported using outside agencies or private means of alternative dispute resolution. No court reported doing any monitoring of the composition of these outside firms. Respondents cited the private nature of this process as the reason for this failure to monitor. They further stated that attorneys select the method of alternative dispute resolution, and the court cannot compel them to do so, or to select a particular individual or firm to act as mediator or arbitrator.

In Region 2 courts, only one court said that an alternative dispute resolution program was under development. The rest did not acknowledge sending cases to outside agencies.

In Region 3, one of the courts said they did not use alternative dispute resolution programs, while the other did, but again cited no knowledge of the composition of or compensation of these agents, citing the private nature of the process as being prohibitive of collecting the information requested.

In Region 4, thirty-three percent (33%) of the respondents acknowledged using outside alternative dispute resolution programs, but none kept any statistics as to the composition of or compensation of the agents, citing the private nature of the program.

**Recommended action:**

This recommendation has not been implemented. The 1989 Task Force recommendation should be implemented as written. In addition, the State Bar of Michigan Task Force recommends:

- The Supreme Court should promulgate rules that control the selection of mediators and arbitrators to insure race, ethnic and gender diversity. The new proposed mediation rule, MCR 2.404, should accomplish this for mediation. There may be the need to extend this oversight to other forms of alternative dispute resolution. Compliance with the new mediation rule should be monitored by the State Court Administrative Office and reevaluated after one full year under the new rule.

## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### MEDIATION

**Gender Recommendation VII-12: Appointing agencies should establish standards for conduct of mediation panels, arbitrators and special masters and make these individuals aware that discrimination in the discharge of their duties is not acceptable in any form or manner.**

#### **Summary of condition prompting 1989 recommendation:**

Testimony was collected that documented continued abuse of women litigants and attorneys in the mediation process from dismissive behavior to derogatory comments regarding dress, and the ability of women attorneys.

Some mediation panel members were insensitive to the existence and impact of gender bias in their decision-making and their treatment of women attorneys and litigants.

The 1989 Task Force found that many mediation panels did not include a representative number of female participants.

There was identified a proliferation of private mediation and alternative dispute resolution methods that were beyond the control of the courts once referrals were made.

#### **Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaire

Anecdotal Information

#### **Status of the implementation of the recommendation in 1997:**

The status of this recommendation should be separated into two areas: court rule mediation, and other more intensive or advanced forms of alternative dispute resolution. No respondent monitored or trained those persons providing facilitation, arbitration, or any alternative dispute resolution, other than court rule mediation.

In Region I courts, only twenty percent (20%) of the respondents offered any formal training to their mediators. Of those offering training, only twenty-five percent (25%) made this training mandatory, and zero percent (0%) offered training on eliminating racial, ethnic, and gender bias.

In Region 2 courts, thirty-three percent (33%) of the respondents offered formal training, and fifty percent (50%) of those mandated training, but zero percent (0%) offered any training on eliminating bias.

In Region 3, one respondent offered no formal training, or any bias elimination training. The other respondent mandated formal training for all mediators offered annually, with a component of the training focused on eliminating bias.

In Region 4, no respondent offered any formal training, or mandated it.

Regrettably, every region reported receiving complaints involving gender bias in mediation, and two regions reported complaints regarding ethnic bias. Additionally, several anecdotal incidents regarding ethnic, racial and gender bias were collected just in the metropolitan Detroit area. These included:

- a client being termed “a dumb Polack” during the mediation by the mediator;
- a client being demeaned by a mediator as a “retard” due to diminished mental capacity;
- a mediator inquiring as to the race of the client in question, and devaluing the award because “if your client is black, you won’t get any blacks on your jury in Oakland County”;
- an attorney being told that the life of a black boy is not as valuable as a boy from Grosse Pointe, in regards to where his client resided; and
- a female attorney who was referred to as “honey” throughout the mediation by one of the mediators.

No respondent acknowledged having a code of conduct for mediators, but several noted requiring mediators to abide by Michigan Court Rules, including MRPC 6.5, which requires courtesy and respect to attorneys, parties, witnesses and litigants.

**Recommended action:**

This recommendation has not been implemented. The 1989 Task Force recommendation should be implemented as written. In addition, the State Bar of Michigan Task Force recommends:

- Training should be provided to all mediators on the adverse effect bias and discrimination have on the justice system.
- Standards of conduct should be established by the Supreme Court and/or the State Court Administrative Office that prohibit bias or discrimination in the performance of the duties of mediators, arbitrators and special masters.



## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### MEDIATION

**Gender Recommendation VII-13: Women should be present in all aspects of mediation, arbitration, or alternative dispute resolution, and the compensation of these positions shall be provided without disparity based upon the gender of the individual.**

#### **Summary of condition prompting 1989 recommendation:**

The 1989 Task Force report found women to be under-represented in all aspects of mediation, and therefore, not getting a fair share of the court-ordered compensation being generated by mediation.

#### **Research Methodology in 1997:**

Circuit Court Chief Judges Questionnaires

Review of proposed mediation rule MCR 2.404

#### **Status of the implementation of the recommendation in 1997:**

Women are now represented better in the mediation process than they were in 1989, but they are not represented at the twenty percent (20%) of the legal profession that they currently comprise. No statistics are available for facilitation, arbitration or anything other than court rule mediation. In this area, all mediators are compensated equally, but not all courts responding to the survey have a mechanism in place to guarantee that each mediator selected serves an equal number of times, and has the opportunity to make the same income.

In Region 1, sixty percent (60%) of the respondents have a mechanism to guarantee equal opportunity to serve.

In Region 2, one hundred percent (100%) of the respondents have this mechanism in place.

In Region 3, one respondent (fifty percent [50%]) has the mechanism in place.

In Region 4, only forty-six percent (46%) of the respondents have this mechanism in place, most often citing their small size, and the difficulty or recruiting any mediators as a factor.

#### **Recommended action:**

This recommendation has been partially implemented. Further implementation requires:

- The new proposed mediation rule, MCR 2.404, ostensibly will accomplish this for mediation. There may be the need to extend this oversight to other forms of alternative dispute resolution. Courts should be monitored for compliance with the new mediation rule and reevaluated for compliance after one full year.
- The State Court Administrative Office should be used as a clearinghouse for information on mediation compensation and should make available to non-complying courts the methods used by those courts that comply.

**TREATMENT OF COURT PERSONNEL**

**Gender Recommendation VII-14: Standardized employment policies and procedures should be adopted by the Supreme Court for the administration of Michigan courts with particular emphasis on:**

- a. equal employment goals;**
- b. sexual harassment;**
- c. disability and parental leave; and**
- d. flexible work schedules.**

**All courts should be required to promulgate written policies which accord with these standards.**

**Summary of condition prompting 1989 recommendation:**

Michigan courts do not have uniform policies and standardized procedures relating to personnel and employment matters. As a result, many court employment practices perpetuated gender bias.

Courts lack parental leave and temporary disability policies.

**Research Methodology in 1997:**

Discussions with State Court Administrative Office personnel

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

The State Court Administrative Office has developed and distributed model policies that address these issues.

Based on questionnaire responses, the levels of implementation are relatively high, with the following percentages of reporting courts indicating that written policies and procedures are in place:

1. As to equal employment goals – sixty percent (60%) to eighty-five percent (85%)
2. As to sexual harassment - sixty percent (60%) to ninety percent (90%)
3. As to disability and parental leave – sixty-five percent (65%) to ninety percent (90%)
4. As to flexible work schedules – forty percent (40%) to sixty-five percent (65%)

Many courts indicated that they did not need to adopt these written policies and procedures because such policies were already in place in union contracts, county policy, county personnel rules, or city guidelines. Other barriers listed included no need, small staff size, lack of time to develop, and the use of the State Court Administrative Office manual for this purpose.

## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### TREATMENT OF COURT PERSONNEL

Here it seems that implementation is high partly because these issues have been addressed in other governmental units and applied to the courts. Again, there appears to be at least some desire to rely on the State Court Administrative Office for the development of uniform policies and procedures.

#### **Recommended Action:**

This recommendation has been substantially implemented. Continued implementation of the recommendation is required. In addition, the State Bar of Michigan Task Force recommends:

- Training described in the 1989 recommendation for chief judges and court administrators should be mandated.
- The Supreme Court and the State Court Administrative Office should continue to develop model policies, procedures, standards and guidelines, and require their adoption.
- The State Court Administrative Office should address this issue when conducting management studies.
- Model personnel policies developed by the State Court Administrative Office should be provided to local chief judges and court administrators.
- The Supreme Court should require mandatory adoption of these policies by all courts.

## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### TREATMENT OF COURT PERSONNEL

**Gender Recommendation VII-15: Data should be collected annually from Michigan courts which correlates job classification, salary level and hiring, recruitment and promotion decisions with gender factors.**

#### **Summary of condition prompting 1989 recommendation:**

The 1989 Task Force found that there was a lack of standardized data collection regarding the employment status, recruitment, hiring and benefits respectively accorded male and female employees in Michigan courts.

#### **Research Methodology in 1997:**

Discussion with State Court Administrative Office personnel

#### **Status of the implementation of the recommendation in 1997:**

The State Court Administrative Office has developed a Court Employee Demographics Survey and compiles yearly information from courts.

#### **Recommended Action:**

This recommendation has been fully implemented. In addition, the State Bar of Michigan Task Force recommends:

- The State Court Administrative Office should continue to monitor the employment practices in Michigan courts. More analysis and detail should be provided in the annual report issued by the State Court Administrative Office with a clear focus on gender bias issues.
- Courts should be notified when demographic concerns appear with follow-up to assist them in fairly implementing employment policies.

## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### TREATMENT OF COURT PERSONNEL

**Gender Recommendation VII-16: Training programs should be developed for the executive component (Chief Judge, Court Administrator) of the courts to teach administrative topics which impact disparately upon male and female court employees.**

#### **Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors include aggression, assertiveness and other departures from the "feminine" ideal.

#### **Research Methodology in 1997:**

Michigan Judicial Institute Questionnaire

#### **Status of the implementation of the recommendation in 1997:**

The Michigan Judicial Institute has sponsored training programs to address these issues; such training is mandatory for new judges and magistrates.

#### **Recommended Action:**

This recommendation has been substantially implemented. Continued implementation of the recommendation is required. In addition, the State Bar of Michigan Task Force recommends:

- The Michigan Judicial Institute should also include this topic in their training program for chief judges and court administrators and such training should be mandatory.

**TREATMENT OF COURT PERSONNEL**

**Gender Recommendation VII-17: Education programs should be developed for all judicial and court support personnel addressing issues of gender bias and sexual harassment in the administrative environment.**

**Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors include aggression, assertiveness and other departures from the "feminine" ideal.

**Research Methodology in 1997:**

Discussion with Michigan Judicial Institute personnel

Circuit Court Chief Judges Questionnaires

District Court Chief Judges Questionnaires

Probate Court Chief Judges Questionnaires

**Status of the implementation of the recommendation in 1997:**

The Michigan Judicial Institute has developed a diversity training program.

Questionnaire responses reported implementation ranging from a high of sixty percent (60%) to a low of fifteen percent (15%). Of the reporting counties, which have implemented this recommendation, many cited the Michigan Judicial Institute as the source of training. The most frequent scheduling was semi-annually. Some use county programs, staff meetings and in-house seminars. Very few use outside providers.

The barriers to providing training most frequently cited are lack of resources (money, space) and time. Some cited small staff numbers making training difficult to schedule. Others indicated no need for training because there are no gender-bias problems.

## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### TREATMENT OF COURT PERSONNEL

Again, implementation of the recommendation is somewhat mixed. Many of the respondents seem not to recognize the need for or benefit from training, but many more indicated that limited resources simply prevent pursuing such a program of staff training.

#### **Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- Everyone in the system recognizes the need for quality training programs for court personnel. However, considerable increases in state appropriations for the Michigan Judicial Institute would be needed for full implementation of this recommendation. Training, whether in-service locally or through the Michigan Judicial Institute, is an expensive undertaking both to develop and present, as well as to free up staff so they can attend. Adequate financial resources are a key to the successful implementation of this recommendation.

**TREATMENT OF COURT PERSONNEL**

**Recommendation VII-18: A mechanism for monitoring administrative compliance with Supreme Court standards should be developed.**

**Summary of condition prompting 1989 recommendation:**

Female litigants, witnesses, judges, lawyers and court personnel in the Michigan court system were subjected to discourteous and disrespectful conduct not encountered by their male counterparts.

Sexual harassment of women occurred in the Michigan court system, including jokes, sexual references, physical touching and implied or overt pressure for sexual favors.

Some judges and attorneys appeared to accord less credibility to the claims, testimony and statements of female litigants, witnesses and lawyers. They expressed undue impatience with or harsh criticism of women in the courtroom, which they did not express with respect to men in comparable situations.

Some judges and attorneys appeared to tolerate or encourage certain behavior by male professionals, which they devalued in female professionals. These behaviors include aggression, assertiveness and other departures from the "feminine" ideal.

There was a lack of standardized data collection regarding the employment status, recruitment, hiring, and benefits respectively accorded male and female employees in Michigan courts.

**Research Methodology in 1997:**

Discussions with State Court Administrative Office personnel

**Status of the implementation of the recommendation in 1997:**

The State Court Administrative Office provides management assistance for local courts and the State Court Administrative Office regional administrators are responsible for on-going contact/review of local court operations.

**Recommended Action:**

This recommendation has been partially implemented. Further implementation requires:

- The State Court Administrative Office should continue its efforts to review local court operations and make recommendations for improvements when necessary.
- Specific standards and consequences for non-compliance need to be developed.



## GENDER BIAS WITHIN THE COURT ENVIRONMENT

### TREATMENT OF COURT PERSONNEL

**Gender Recommendation VII-19: The Michigan legislature should implement "One Court of Justice" to facilitate standardized administrative delivery systems and uniform, equitable enforcement of gender-neutral policies and management practices.**

#### **Summary of condition prompting 1989 recommendation:**

Michigan courts do not have uniform policies and standardized procedures relating to personnel and employment matters.

#### **Research Methodology in 1997:**

Review State laws

#### **Status of the implementation of the recommendation in 1997:**

In 1996, the legislature indicated in the court reform laws that there would be reduced state money available to courts and that funding court operation is a local issue/responsibility.

#### **Recommended Action:**

This recommendation has not been implemented. The 1989 Task Force recommendation should be implemented as written. In addition, the State Bar of Michigan Task Force recommends:

- The legislature should change its position so as not to impose unfunded mandates.
- Funding issues need to be addressed at the state and local levels.