

Achieving Fairness Through Bias-Free Behavior: *A Pocket Guide for the Courts*

Madelynn Herman

**Race and Ethnic Fairness Initiative
National Center for State Courts**



**Adopted as proposed by the CCI/COSCA Access
to and Fairness in the Courts Committee at the
57th Annual Meeting on August 3, 2005.**

**Copyright 2005 National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185-4147
Web site: www.ncsconline.org**

A nonprofit organization providing leadership and service to state courts

Table of Contents

- v Acknowledgments
- vii Introduction
- 1 Joint Resolution of the Conference of Chief Justices and Conference of State Court Administrators
- 2 Recognizing Bias
- 3 How Bias Is Manifested in the Courtroom
- 4 Your Role in Eliminating Bias in the Courtroom
- 6 Ensuring Bias-Free Behavior and Communication
- 7 Demonstrating Respect, Neutrality, and Fairness
- 8 Institutionalizing Fairness
- 10 Codes of Conduct and Bias
- 11 Court or Disciplinary Cases Involving Bias
- 13 Conclusion
- 14 Resources

Acknowledgments

The states of California, Georgia, Kentucky, Massachusetts, Michigan, New Mexico, New York, Texas, and West Virginia have produced guides, handbooks, pamphlets, or brochures in order to assist the courts in their states to address the issues of race and gender fairness in the courts. Many of these guides were reviewed and utilized in part for the completion of this pocket guide.

The development of this pocket guide would not have been possible if not for the National Center's support of this important initiative. Many thanks to the members of the NCSC Race and Ethnic Fairness Initiative who played an instrumental role in the review of this pocket guide. Members include: David Rottman, Research Services; Jose Dimas, Government Relations; John Douglas, Court Consulting Services; Shelley Fischer, Executive Office; and Lori Gomez, Communications. Finally, this author would also like to recognize the assistance of the NCSC intern Kimberly Ryan in developing this pocket guide.

Please send any comments or suggestions regarding this pocket guide to: Madelynn Herman at mherman@ncsc.dni.us or 757-259-1549.

Introduction

As our population becomes more diverse, the treatment of minorities in the courts continues to be a major concern for the justice system. Achieving fairness and portraying fair treatment in our courts is a profound challenge. Progress has been made in this effort by understanding and addressing bias in the courts through the establishment of task forces, commissions, and committees as well as the implementation of their recommendations. Thirty states are currently members of the National Consortium on Racial and Ethnic Fairness in the Courts, an organization that shares knowledge and technical assistance on this subject with courts and the legal community.

Yet nationwide surveys tell us minorities believe they are treated unfairly in the courts, and even the perception of unfairness impacts the public's trust and confidence in the courts and justice system. In the 1999 national survey conducted by the National Center for State Courts, "How the Public Views the State Courts," it was revealed that:

- Almost 70 percent of African-American respondents said that African-Americans, as a group, received "somewhat" or "far" worse treatment from the courts than other citizens. This perception was also affirmed by more than 40 percent of other respondents.
- A majority of respondents believe that non-English-speaking individuals received "somewhat worse" or "far worse" treatment from the courts. However, a greater number of Hispanics (59 percent) and African-American respondents (66 percent) held that belief.
- Fifty-six percent of all respondents agreed, "Most juries are not representative of the community." However, a greater number of Hispanics (66 percent) and African-Americans (70 percent) held that belief.

On December 12, 2003, the Conference of State Court Administrators (COSCA) passed a resolution affirming the support of the National Consortium on Racial and Ethnic Fairness in the Courts. Previously, in December of 2001, COSCA had issued a position paper on the state courts' responsibility to address issues of racial and ethnic fairness in the courts. They outlined several strategies and goals for the judiciary that would have both immediate and long-term effects on improving fairness in the courts, including:

- Conducting educational, professionalism, and sensitivity awareness programs on racial and ethnic bias for all judicial and nonjudicial court employees;
- Establishing state court task forces or commissions to identify problems in the courts, make recommendations, and promote dialogue;

- Providing relevant information about court policy relating to bias of any kind and creating a mechanism to investigate allegations of bias in the courts;
- Developing strategies to promote a representative workforce; and
- Engaging in outreach to increase awareness about how the courts work.

This pocket guide was created to assist the courts in their efforts to ensure that all participants are treated equally and free of bias, regardless of race, gender, or ethnicity. The pocket guide begins by defining bias, and then provides information regarding the various ways bias manifests within the judicial system. The responsibilities of judges and court liaisons concerning bias are outlined, and information and tips on the management and prevention of bias in the courtroom are provided. Tips for institutionalizing fairness, codes of conduct relating to bias, as well as actual judicial cases involving bias, are also listed. It is our hope that this pocket guide will provide some assistance toward the goals of bias-free behavior in the courts, thus affording all who interact with the court system their intrinsic rights to dignity, respect, and fair treatment.

A joint resolution of the Conference of Chief Justices and Conference of State Court Administrators was passed on August 5, 2005 in support of the state courts' responsibility to promote bias-free behavior. In doing so, CCJ/COSCA endorsed the recommendations and strategies set forth in this pocket guide.

JOINT RESOLUTION OF THE CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS

Resolution 12

In Support of State Courts' Responsibility to Promote Bias-Free Behavior

WHEREAS, significant progress has been made in combating racial and ethnic prejudice in the United States; and

WHEREAS, bias and prejudice have no place in the courts; and

WHEREAS, the courts have the special role as impartial arbiters of disputes; and

WHEREAS, many states have undertaken a variety of effective strategies to prevent bias in the justice system such as:

- establishing and enforcing court policy and procedures for reporting and handling allegations of bias;
- appointing task forces to promote racial and ethnic fairness;
- promoting a representative workforce;
- conducting educational awareness programs for court personnel;
- providing adequate interpreter services and multilingual court forms; and

WHEREAS, the National Center for State Courts has published a useful guide entitled “Achieving Fairness Through Bias-Free Behavior: A Pocket Guide for the Courts” that addresses these strategies and gives recommendations for dealing with bias; and

WHEREAS, the National Center for State Courts has provided technical assistance and consultation to state court systems on inquiries regarding racial and ethnic bias in the courts;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators:

1. Endorse the recommendations and strategies set forth in the NCSC’s “Achieving Fairness Through Bias-Free Behavior: A Pocket Guide for the Courts”; and

2. Encourage each Chief Justice and State Court Administrator to take a leadership role in eliminating bias in the nation's state courts.

BE IT FURTHER RESOLVED that the Conferences urge judges and court administrators:

3. To be vigilant of the various ways in which bias can manifest itself in the justice system; and
4. To take active steps to eliminate bias in the justice system as outlined in the "Achieving Fairness Through Bias-Free Behavior: A Pocket Guide for the Courts"; and
5. To be familiar with exemplary Codes of Conduct relating to bias in state court systems as highlighted in "Achieving Fairness Through Bias-Free Behavior: A Pocket Guide for the Courts"

Adopted as proposed by the CCJ/COSCA Access to and Fairness in the Courts Committee at the 57th Annual Meeting on August 3, 2005.

Recognizing Bias

A fundamental principle of our constitutional government is that discriminatory treatment on the basis of race, gender, economic class, religion, or physical condition cannot and will not be tolerated. Bias damages a court in its fundamental role as a dispenser of justice.

Excerpted from the final report of the Michigan Supreme Court Citizen's Commission to Improve Michigan Courts (1986).

Bias is an attitude or point of view that colors our judgment. This section includes definitions of four types of bias and does not claim to be an exhaustive list of all biases.

■ Racial Bias

Racial bias is a performed negative opinion or attitude toward a group of persons who possess common physical characteristics (e.g., color of skin, eyes and/or hair; facial features; etc.) genetically transmitted by descent and heredity, which distinguish them as a distinctive division of humankind (e.g., Asians, African-Americans, Caucasians, etc.).

Racial bias is an attitude or behavior based upon a stereotype that one person or group of people has formed about another. It is demonstrating preference for or an inclination to favor one based on a person's historical classification of race, nationality, or geographic distribution.

■ Ethnic Bias

Ethnic bias is a performed negative opinion or attitude toward a group of persons of the same race or national origin who share common or similar traits, languages, customs, and traditions (e.g., Arabs, Hispanics, Asians, etc.).

Ethnic bias is demonstrating a preference for or against a group of people sharing a common and distinctive racial, national, religious, linguistic, or cultural heritage.

■ Gender Bias

Gender bias is behavior or decision making, which is based on or reveals stereotypical attitudes about the nature and roles of men and women; perceptions of their relative worth; or myths and misconceptions about the social and economic realities encountered by both sexes.

Gender bias is the predisposition or tendency to think about or behave toward people on the basis of their sex. It is reflected in attitudes and behaviors based on stereotypical beliefs about the sexes, rather than an independent evaluation of each individual's abilities and experiences. If an outcome more often adversely affects one gender versus another, for whatever the reason, that too may be considered gender bias. Gender bias may be male or female oriented.

■ Sexual Orientation Bias

An act or intention where one exhibits impartial judgment stemming from prejudice concerning another's sexual orientation. Sexual orientation encompasses heterosexuality, homosexuality, and bisexuality.

How Bias Is Manifested in the Courtroom

◆ Judges

- ◆ Judging cases of those not proficient in the English language as less important or unworthy of the court.
- ◆ Subjecting victims of crime to unjust scrutiny because of the nature of the act(s) perpetrated against them, their gender, race, ethnicity, sexual orientation, disability, religion, or social class.
- ◆ Hesitating to award a father primary child custody or giving a smaller support order if the paying spouse is the mother.
- ◆ Not affording jury members directives on how to make bias-free verdicts.

◆ Court Staff

- ◆ Assuming that the ability of court personnel is related to their race, sex, ethnicity, disability, or religious affiliation.
- ◆ Making assumptions about the needs of an individual petitioning assistance due to their race, sex, ethnicity, or disability.

◆ Attorneys

- ◆ Inferring women and minority lawyers to be passive in their advocacy.
- ◆ Disparaging responses and recognition to particular individuals based on race, ethnicity, sex, sexual orientation, religious affiliation, or disability.

◆ Victims

- ◆ Subjecting sexual assault victims to unjust scrutiny or stereotypes because the alleged crime is of a sexual nature.
- ◆ Awarding batterers custody of the children or unsupervised visitation with them, even where there are outstanding allegations of child abuse.
- ◆ Allowing batterers to destroy the battered partner financially through costly litigation, and denying battered partners' access to the affordable, quality legal representation they need.

◆ Witnesses

- ◆ Making derogatory comments to or addressing witnesses based on their race, ethnicity, sex, sexual orientation, religious affiliation, or disability.
- ◆ Implying that a witness is not valuable or is unreliable because of his or her race, ethnicity, gender, sexual orientation, religious affiliation, or disability.

Your Role in Eliminating Bias in the Courtroom

Judges

- ▲ Exhibit leadership and set the standard for non-biased communication and disposition in the courtroom and judicial operations.

- ▲ Correct discriminatory attitudes or comments made by any participants.
- ▲ Regard all litigants, attorneys, and court employees with respect, fairness, and dignity.
- ▲ Circumvent any personal biases in decision making and court interactions.
- ▲ Be mindful of bias even in chambers.

Court Staff

- ▲ Regard judges, litigants, attorneys, and other court personnel with equality, respect, and courteousness.
- ▲ Monitor for and abolish all bias-natured behaviors and attitudes.
- ▲ Expect non-biased treatment from judges, litigants, and attorneys.

Attorneys

- ▲ Regard judges, litigants, court personnel, and other attorneys with equality, respect, and courteousness.
- ▲ Prepare for and try cases on schedule.
- ▲ Represent all clients with paramount effort.
- ▲ Consider your approach and mind-set and eradicate attitudes and behaviors that may be biased in nature.
- ▲ Object to gender or racially biased statements or remarks made by judges, court staff, or litigants.

Litigants or Citizens Using the Court

- ▲ Approach and regard judges, attorneys, court personnel, and other citizens using the court with respect and courteousness.
- ▲ Monitor your own behavior, attitudes, and comments to ensure a non-biased display of interaction in the court.
- ▲ Object to gender or racially biased statements or remarks made by judges, attorneys, or court staff.
- ▲ Request that the court provide an interpreter if you are unable to communicate in English or are hearing impaired.

Ensuring Bias-Free Behavior and Communication

In our system of government, it is imperative that all persons have confidence in the fairness and neutrality of our judicial process. If participants in the judicial system, whether they are litigants, attorneys or the public at large, sense that one group is more credible, more powerful and more effective in the judicial arena than another group, then a system premised on the concept of equal rights and equal access to justice for all, is weakened.

Excerpt from the Final Report of the New Mexico Task Force on Women and the Legal Profession (November 2, 1990). See Handbook on Gender Equality in the Courts—A Guide for All New Mexico Courts, State Bar of New Mexico Committee on Women and the Legal Profession and the New Mexico Supreme Court (revised October 2000).

- Let your behavior communicate your expectation of bias-free behavior and civility
- Use appropriate titles and be consistent in your forms of address
 - Judge or Your Honor
 - Counselor or Attorney
 - Ms. or Mr. (unless Miss or Mrs. are requested)
 - Dr., Officer, Representative, or Senator
- Use gender-neutral or gender-inclusive terms when addressing a group
 - Members of the jury, bar
 - Counselors
 - Ladies and gentlemen
 - Colleagues
- Do not use diminutive or endearment terms
 - Honey, sweetie, dear
 - Little lady, pretty girl, young lady
 - Son, boy
- Refrain from commenting on physical appearance
 - Skin color or ethnicity
 - Dress or hairstyle

- Specific body parts or pregnancy
- Age, height, or size
- Disability

- Avoid using racial, ethnic, or other descriptors when unnecessary
- Do not communicate racial, ethnic, sexual, or stereotypical remarks, gestures, jokes, or other analogous biases in the court
- Avoid unnecessary touching
- Treat all people with equal dignity and respect
- Avoid assumptions or inquiries as to a person’s profession or agenda in the court
- Be mindful of bias even in chambers
- Intercede when anyone exhibits behavior that appears to be biased

Demonstrating Respect, Neutrality, and Fairness

Conduct on the Bench

- Align intent with impact
 - Be conscious and pay attention to how your words and/or behavior are received by listeners
- Be aware that nonverbal communication is also important
 - Keep in mind that more than 70 percent of communication is non-verbal
- Put intent on a “loudspeaker”
 - Brief remarks can be made by the judge about his or her role and intention to demonstrate respect, neutrality, and fairness
- Ask for additional information if needed

- Ask open-ended questions
- Paraphrase, summarize
- Observe HOW things are said
- Show respect for interpreters

Court Staff Behavior

- Be conscious of the diversity among court staff
 - Different ideas and values enhance the management and direction of a court
- Have open dialogue about the importance of cultural competency with staff and be a “cultural competency” coach
 - Coaching reflects the valuing and utilization of employee differences and proves to be a powerful safeguard against costly misunderstandings, employee dissatisfaction, and turnover

The Courtroom Environment

- Provide multi-language signage
 - This sends the message that inclusiveness and being well informed are important
- Display ethnic/cultural art, posters, pictures, etc., throughout the courthouse
 - Displays reflecting the ethnic and cultural diversity in your particular community are helpful in reducing anxiety about being in an otherwise unfamiliar setting

These suggestions were adapted in part from Judge Ron Mamiya’s presentation to the Washington State New Judge Orientation, 2001.

Institutionalizing Fairness

Value Bias-Free Behavior

- Provide an atmosphere in which court staff realizes the importance of bias-free behavior.

- Make sure that a commitment to bias-free behavior is communicated to all staff.
- Make fairness a part of the court's long-range planning.

Hire a Diverse Staff

- Establish effective recruitment, hiring, promotion, and retention practices that are inclusive of qualified minorities and women.
- Develop or adjust personnel practices to promote a representative workforce.

Study Fairness and Implement Solutions

- Collect the necessary data to monitor fairness in the courts.
 - Focus groups, personal interviews, surveys, public hearings, and court watching are methods to gather data and monitor fairness.
- Establish a task force or committee to study bias in the courts or implement recommendations of established task force or committee reports.
 - Make sure that report findings are disseminated throughout the justice community.
 - Periodically assess whether recommendations are being implemented.
- Analyze efforts for effectiveness and then adjust accordingly.

Educate and Train Staff

- Develop training programs in fairness, diversity awareness, cultural competence, and cultural sensitivity.
 - Provide tools and definitions for creating a clear understanding of what is acceptable behavior and what is not.
 - Encourage or require staff to attend training programs.
 - Make sure that training programs are available in every sector of the justice system.

Develop Complaint Policies and Procedures

- Establish and implement effective complaint policies and procedures to respond to complaints of bias.
 - Include anti-bias provisions in employee codes of conduct.

- Create a mechanism to investigate both formal and informal allegations of bias.

Collaborate with Others

- Collaborate and create alliances with other agencies and individuals outside the courts that might be able to assist with studying fairness, recruiting a diverse workforce, or education and training efforts.

Codes of Conduct and Bias

Nowhere is our Nation’s commitment to equality under law for all its citizens more powerfully embraced than in its courts. Citizens look to the courts to protect and enforce the great guarantees of individual equality embodied in the Constitution and to give life to the rules that bind together this Nation as a policy.

Excerpt from The Gender, Race and Ethnic Bias Task Force Project in the District of Columbia Circuit (1995).

Judicial Codes of Conduct

Canon 3(B)(5) and (6) of the Code of Judicial Conduct states:

“A judge shall not, in the performance of judicial duties, by word or conduct manifest bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.”

“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others.”

Section 1(a) of the Standards of Judicial Administration (Appendix to the California Rules of Court Division 1) advises each judge:

“...in all courtroom proceedings, (to) refrain from and prohibit others from engaging in conduct that exhibits bias....”

Section 7-730 Races and Culture of the New Mexico Judicial Ethics Handbook:

“A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation, or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.” NMRA 21-3000(B)(5).

Court Employee Codes of Conduct

Tenet 10: Discrimination of the Code of Ethics for Court Employees of California states that court employees must:

“Guard against and, when necessary, repudiate any act of discrimination or bias based on race, gender, age, religion, national origin, language, appearance, or sexual orientation.”

Arizona Code of Conduct for Judicial Employees (effective August 20, 1997):

“Judicial employees shall perform their duties without bias or prejudice, shall not manifest by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.”

Court or Disciplinary Cases Involving Bias

Judges reprimanded for race and ethnic bias

- A Florida judge was reprimanded for stating at a hearing, “Now, you can throw your Italian temper around in the bars but you don’t throw it around in my courtroom... I’m just as Irish as you are Dago.” *In re Carr*, 593 So. 2d 1044, 1045 (Fla. 1992).¹
- A New York family court judge was removed from office for conduct including twice making racially charged comments. This pattern of conduct created the appearance of an unfair system for litigants and damaged public confidence in the judiciary. *In re Esworthy*, 568 N.E. 2d 1195, 1196 (N.Y. 1991).²

1 *New Mexico Judicial Ethics Handbook*, Ethics Part 7: Demeanor and Impartiality.

2 *Ibid*.

- A California judge’s repeated use of racial slurs violated the code even though most of the remarks were made during in-chambers conferences, and not in open court. *In re Stevens*, 6445 P.2d 99, 100 (Cal. 1982).³

Judge reprimanded for exchanging notes with staff that created an appearance of bias

- The Judicial Council for the United States Court of Appeals for the 9th Circuit publicly reprimanded a judge for writing and exchanging in open court notes that could reasonably be interpreted as reflecting bias and for condoning the practice among his courtroom staff. *In re McDonald*, Order and Memorandum (September 11, 2000).

Judge brought before board for exhibiting religious bias

- A Pennsylvania judge favored persons appearing before him based on their religious beliefs. He left the bench and physically embraced defendants as “brothers in Christ.” *In Judicial Inquiry & Review Board v. Fink*, 532 A. 2d 358, 368 (Pa. 1987).⁴

Judge’s failure to intervene for gender bias

- Concurring opinion, noting the need for intervention by the trial court in response to counsel’s egregious gender bias, observed: “A judge should be vigilant in maintaining the integrity of the judicial system by putting a stop to an attorney’s misconduct in a manner that lets the attorney know the remarks or conduct, or both, will not be tolerated.” *In Vitko v. Vitko*, 524 N.W.2d 102, 105 (N. Dak. 1994).⁵

Judge sanctioned for comments that manifested socioeconomic bias

- A Wisconsin judge was publicly reprimanded by the Wisconsin Supreme Court for his intemperate expression of personal views concerning the character of a person who was not before him and for statements in his letter of apology that manifested a bias on socioeconomic status. *In the Matter of Michelson*, 591 N.W.2d 843 (1999).⁶

3 Ibid.

4 Ibid.

5 *Gender Bias—Guidelines for Judicial Officers*. Judicial Council Advisory Com. on Access and Fairness, August 1996.

6 *Judicial Conduct Reporter* 21, no. 2 (Summer 1999).

Conclusion

So long as we proclaim that justice in America is “of the people, by the people, and for the people,” it is critical that we guarantee the inclusion of “all the people” in every aspect of the justice system. The public’s trust in our system requires that issues of race, gender, class, culture, language, disability, sexual orientation, and gender identity be understood by both the bench and the bar and that we act to eliminate all barriers to equal access to justice based upon those issues.”

W. Francesca Ferguson, Assistant U.S. Attorney for the Western District of Michigan and Commissioner on the Cultural Issues and Language Barriers Committee (July 2002).

Bias in the courts can erode public confidence in the impartiality of the judiciary. As the visible leadership of the courts, judges play a key role in eliminating bias from the justice system. As officers of the court, attorneys have an important role in maintaining the dignity and integrity of the court. And since citizens often have their first experience with the court system through court employees, court employees also play a critical role in eliminating bias in the justice system by conveying respect and dignity to all citizens doing business with the courts.

It is our hope that this pocket guide will assist the courts in their commitment to the equal treatment of all citizens in addition to creating discussion and analysis of issues of bias and fairness and their impact on the courts.

Resources

The **National Consortium on Race and Ethnic Fairness in the Courts**. See: <http://www.ncsconline.org/consortium/index.html>

The **NCSC Race and Ethnic Fairness Initiative** includes a link to an electronic database of the main findings and recommendations of the various commissions and task forces established by state judicial branches to investigate and improve racial and ethnic fairness in their courts. See: http://www.ncsconline.org/projects_initiatives/REFI/reb.htm

The **NCSC CourTopics Database** at <http://www.ncsconline.org/WCDS/topicclisting.htm> provides a wealth of information on fairness issues, including resource guides, frequently asked questions, and other publications. See the following topics for a host of resources:

Racial Fairness Online Resources:

http://www.ncsconline.org/WCDS/Topics/topic1.asp?search_value=Racial%20Fairness

- Race and Gender Fairness in the Courts: Task Force, Commission, and Committee Reports
- Combating Racial Bias in the Justice System: Frequently Asked Questions
- Combating Bias in the Courts: Resource Guide
- Best or Promising Practices for Combating Bias in the Courts: Reference List
- Diversity Resource Guide
- Racial Profiling Resource Guide

Gender Fairness Online Resources:

http://www.ncsconline.org/WCDS/Topics/topic1.asp?search_value=Gender%20Fairness

- Gender Bias: Resource Guide
- Gender Bias: Frequently Asked Questions
- Best or Promising Practices for Combating Bias in the Courts: Reference List
- Combating Bias in the Courts: Resource Guide
- Race and Gender Fairness in the Courts: Task Force, Commission, and Committee Reports