

Chapter 6

Minorities in the Civil Courts as Litigants and Witnesses

This chapter, in a report on diversity, is itself diverse. It concerns all aspects of the judicial system as it relates to civil law, most simply defined as anything that doesn't relate to criminal law or juvenile justice. Many subjects not covered by the other subcommittees are subsumed under the "civil" heading: from workers' compensation to small claims, landlord-tenant disputes, civil jury trials and administrative hearings.

Testimony at task force hearings tended to focus on the criminal justice system, with correspondingly fewer comments addressed to problems arising in civil litigation. This could be interpreted to indicate that less bias is perceived in the civil system. The task force believes that such a conclusion is unwarranted and that the reduced number of complaints probably can be attributed to two factors: on the one hand, an overrepresentation of minorities at the charging level in the criminal justice system (regardless of the cause); and, on the other, an underrepresentation of minorities in civil litigation.

Testimony and communications from individuals, as well as responses to the task force surveys, fell into the following categories: (1) issues concerning the accessibility of the civil justice system to racial and ethnic minorities; (2) the conduct of litigation; and (3) the ongoing need for information, available to the public as well as the court system. A fourth issue, involving juries and the composition of jury pools, is discussed in Chapter 7.

Access

Findings

The task force heard anecdotal testimony indicating that minority litigants lack sufficient knowledge about the civil justice system. Moreover, many minorities believe they can obtain little if any help from it, and frequently may be unrepresented by counsel. More than half of all survey respondents (and more than two-thirds of minority respondents) agreed that minority litigants "use the courts less." Correspondingly, more than 80 percent of all respondents (and only slightly less than 80 percent of minority respondents) believed that minority litigants distrust the legal system more than do nonminority litigants. Almost three-fourths of all respondents (and slightly more of the

minority respondents) agree that minority litigants are less likely to understand the legal system.

Several witnesses at hearings emphasized the need to translate court forms into commonly used foreign languages, particularly in forcible entry, small claims and abuse prevention matters, where litigants often are unrepresented by counsel. More than 48 percent of all respondents to the survey (and two-thirds of those who had an opinion on the subject), agreed that more “court papers” should be prepared in other languages. Where court personnel as well as non-English-speaking individuals must also use the forms, at least one witness suggested that the language barrier could be lowered by preparing and making available, in the appropriate foreign languages, general informational materials that adequately describe the English content of the forms. Several witnesses suggested that all commonly used forms should ask whether an interpreter is needed for court events in order to facilitate appointment of interpreters where necessary. Oregon State Bar informational materials could be translated into common foreign languages and made available at courthouses in order to provide adequate information to litigants who do not speak English.

Many witnesses stated that true accessibility to the legal system requires the availability of bilingual court staff. A system is truly accessible when simple questions can be asked and answered regardless of the racial, cultural or linguistic background of the questioner. This concern is also addressed in Chapters 2 (Interpreters) and 3 (Minorities Working in Oregon Courts).

Problems relating to access do not result solely from language incompatibility. Several witnesses pointed out that even English-speaking members of racial or cultural minorities may need a form of “interpreter” just as much as persons who don’t speak English. Various called “cultural interpreters,” “cultural advocates” or ombudspersons, these individuals would be available to respond to requests for assistance and information in civil cases, as well as to receive and forward complaints about discrimination or bias in the conduct of litigation, both civil and criminal. The task force believes that such an individual could help solve communication problems that arise for litigants, lawyers, court staff and judges and could assist in reducing the perception that the civil justice system is inaccessible and insensitive, if not discriminatory.

Accessibility issues arise also in relation to administrative remedies such as workers’ compensation. The task force heard testimony that Hispanics who are injured on the work site are not told about workers’ compensation benefits and frequently have no knowledge of their rights. Even if they know that benefits might be available, some Hispanic workers fear retribution and are reluctant to report that injuries are work-related, witnesses said. Even if these hurdles are overcome, lack of qualified interpreters and bilingual attorneys create ongoing difficulties. Even where interpreters are available, attorneys often do not have the necessary language skills and cultural understanding to evaluate their clients’ claims and communicate adequately with experts and referees. For example, physical complaints may be related stoically or with histrionics, either of which may cause a valid claim to be depreciated when, in fact, the claimant’s demeanor is a function of cultural tradition rather than lack of discomfort,

malingering or deviousness. Thus, multiple layers of problems result in decreased accessibility to compensation benefits for minority workers. The task force believes that similar problems probably reduce access to other statutory benefits as well.

Recommendations

Recommendation Number 6-1

The Chief Justice should ask the Uniform Trial Court Rules Committee (or other appropriate body) to consider a rule to the effect that relevant documents in languages other than English may be accepted by the court so long as they are accompanied by certified translations, or are themselves translations of English documents which are in the file.

Estimated date for implementation to be completed: March 1, 1995.

Estimated cost of implementation: Minimal.

Recommendation Number 6-2

The Oregon State Bar should translate “Tel-Law” tapes and other public informational materials into common foreign languages. These materials—both the English and the non-English versions—should then be made available in each county courthouse, so that courthouse personnel can refer the public to them for information.¹¹

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

Recommendation Number 6-3

ORS 656.056 should be amended to require all employers subject to the Workers’ Compensation Act, who know or should know that one or more employees do not speak English or read English, to post notices in the appropriate foreign languages that inform workers of their rights and to provide claims forms in the appropriate foreign languages. The law also should be changed to require the Workers’ Compensation Division of the Department of Consumer and Business Services to prepare such notices and forms for use by employers when appropriate and to notify employers

of their availability. The legislation might include provisions that noncomplying employers, as well as their insurers, who fail to post the notices should not be able to avail themselves of time limitations in the Act, if the failure of a worker to file a claim results from the failure to post the notices. The legislature should also consider such legislation in other areas of the law.

Estimated date for implementation to be completed: July 1, 1996.

Estimated cost of implementation: Unknown.

Recommendation Number 6-4

The Oregon State Bar, as a part of its public outreach efforts and with the cooperation of other professional organizations, should engage in a public education campaign among minority communities regarding the civil justice system and available rights and remedies. The task force points out that the Oregon Workers' Compensation attorneys have, in a private communication, expressed interest in assisting the Bar with such a public education effort among minority workers. The task force believes that such a program could do much to diminish the perceived inaccessibility of the compensation system.

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.

The Litigation Process

Findings

More than two-thirds of all respondents (and 80 percent of minority respondents) reported instances of lawyers having difficulty communicating with minority witnesses or litigants because of cultural differences that are not language-related. More than half of all respondents (and almost two-thirds of minority respondents) have observed instances of lawyers' stereotyping witnesses or litigants because of their race or ethnic origin. More than half of all respondents (two-thirds of those who had an opinion), and more than 60 percent of minority respondents (three out of four of those with an opinion) believed that cross-cultural diversity training for all legal personnel would help attain fair treatment.

A clear majority of all respondents indicated that they "never" or "rarely" observed courts showing disrespect or discourtesy toward minority litigants. On the other hand, it is

troubling to note that six percent of all respondents (and more than 20 percent of minority respondents) stated that they observed such behavior more often than “rarely.”

Fewer than nine percent of respondents believed that child support awards are enforced less vigorously for minority than for nonminority children; slightly less than 15 percent believed that the courts treat domestic violence cases more seriously when nonminorities are involved. Nevertheless, these figures are troubling. Stated another way, 10 to 15 percent of respondents perceive that minority litigants are treated less fairly than nonminority litigants. The task force believes that all lawyers should participate in the sort of cross-cultural diversity training that is recommended in Chapter 3 for judges and other court personnel.

Some witnesses at the hearings said attorneys handling workers’ compensation claims for minority claimants sometimes lack the necessary cultural understanding to evaluate adequately their clients’ claims and to communicate adequately with experts and referees.

Fewer than 25 percent of all respondents (but almost 45 percent of minority respondents) believe that juries will award less compensation to minority plaintiffs than to nonminorities. On the other hand, in answer to another question, 40 percent of all respondents (55 percent of minority respondents) agreed that minority litigants are less likely to win a personal injury suit, and slightly greater percentages in each category (almost 45 percent of all respondents and almost 60 percent of minority respondents) agreed that minority litigants are likely to receive less compensation from a jury. Approximately 40 percent of all respondents (and more than 60 percent of minority respondents) believe that claims for minority plaintiffs are settled for less money than would be recovered by nonminority plaintiffs. The task force believes that the best response to perceived differences in jury verdicts is to take steps to ensure diversity on the jury panels, as set forth in Chapter 7. Likewise, the task force believes that the perceived difference in settlement value will decrease as juries become less likely to award less compensation to minority litigants and as insurers become aware of this change.

Recommendation Number 6-5

As a part of the Mandatory Continuing Legal Education requirement, the Oregon State Bar and Supreme Court should require all lawyers to certify completion of at least three hours of cross-cultural diversity training during each reporting period. The bar should also certify appropriate cross-cultural diversity training programs to meet this requirement.

Estimated date for implementation to be completed: July 1, 1995.

Estimated cost of implementation: Minimal.

The Need for Further Information

Findings

As already stated, review of the civil justice system was made more difficult by the lack of any statistical information of the sort that is more readily available in both criminal and juvenile justice systems. For example, the task force had no way of finding out the proportion of claims brought by minority as opposed to nonminority plaintiffs, much less tracking their disposition. If more complete court records were available, bias could be revealed where it exists and thereby reduced. More complete court records might also reveal the lack of bias and dispense with the need for taking steps to avoid a problem that does not exist. The task force believes that an adequate computerized record-keeping system and court forms that encourage litigants to provide voluntarily the necessary data would help immeasurably in terms of subsequent reviews by the Judicial Department, oversight committees and public interest groups.

Recommendation Number 6-6

The State Court Administrator should develop forms (to be filed with the initial appearance) asking civil litigants in all cases to provide information, including race and ethnic origin, for demographic, statistical and record-keeping purposes. The administrator should also be requested to develop a computerized record for this information, which would support searches using variables that include racial and ethnic origin and would be available to members of the public. (The task force notes ORS 18.425, which requires all attorneys to file, in every civil action for personal injuries, a civil action reporting form. This might be an avenue to obtain the information.)

Estimated date for implementation to be completed: January 1, 1996.

Estimated cost of implementation: Unknown.