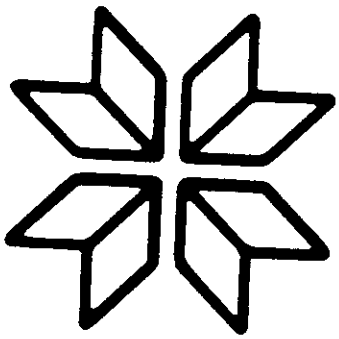
REPORT OF

THE NEW YORK STATE

JUDICIAL COMMISSION ON MINORITIES



VOLUME ONE
EXECUTIVE SUMMARY
APRIL, 1991

THE REPORT OF THE NEW YORK
STATE JUDICIAL COMMISSION ON MINORITIES
CONSISTS OF FIVE VOLUMES

Volume One: Executive Summary

Volume Two: The Public and the Courts

Volume Three: Legal Education

Volume Four: Legal Profession, Nonjudicial Officers, Employees And Minority Contractors

Volume Five: Appendix -- Staff Reports and Working Papers

MESSAGE FROM THE CHAIRMAN

April, 1991

Chief Judge Sol Wachtler
Court of Appeals Hall
Albany, New York

Chief Judge Wachtler:

I am forwarding the final report of the New York State Judicial Commission on Minorities to you with this letter.

It has been my privilege to succeed Franklin Williams as the Chairman of this Commission. Shortly before he died in May of last year, he prepared a transmittal letter to you which I am forwarding together with a copy of our report.

This report shows, not surprisingly, that there is still racism in our society and so, not surprisingly, in our court system too.

While our report shows instances of overt racism such as the segregated locker rooms for court employees we uncovered in a Bronx courthouse, and the use of racially derogatory terms by judicial and nonjudicial employees, in many other instances, the examples of racism discovered were more subtle and show neglect as much as racism.

Perhaps the best example of this was the inability of the Office of Court Administration for many years to adopt an Affirmative Action Plan for nonjudicial employees. When we asked a former Chief Administrative Judge why a draft Affirmative Action Plan had not been adopted, he testified it "fell between the cracks." This plan was drafted before you took office and so this event did not happen "on your watch." Indeed when we brought this matter to your attention, you moved promptly to correct it.

It is not unfair to say, however, that during the last decade much of the energy has gone out of society's efforts to improve the circumstances of racial minorities. Many of these efforts have, in other words, "fallen between the cracks."

Our report shows, for example, that the representation of minorities in large law firms is disappointingly low, that New York's law schools' outreach to minorities needs improvement, and that minorities perceive that they are treated much less favorably in the court system than white people.

In sum, our report shows that much needs to be done. We are hopeful that you will be able to do your part for the Unified Court System of the State of New York.

Sincerely,

James C. Goodale

James C. Goodale
New York, New York

DEDICATION

Photograph by Bachrach

Franklin Hall Williams
Chairman, The "Williams" Commission
January 21, 1988 - May 20, 1990

On Sunday, May 20, 1990, our steemed chairman, Franklin Hall Williams, assed from this life. Although we mourn is passing, we celebrate in this report the ulmination of his achievements in a life edicated to the betterment of us all.

Franklin H. Williams, lawyer, educator nd public official, was active in civil rights ıroughout his long career. Born in lushing, New York, he graduated from incoln University. After serving in World Var II in a racially segregated unit of the ırmy, he passed the New York State bar xamination after receiving his law degree om Fordham University in 1945.

Soon after graduation, Chairman Villiams became an assistant to Thurgood larshall, then special counsel to the ational Association for the Advancement f Colored People, and now an Associate ıstice of the United States Supreme Court. t the NAACP, Mr. Williams won gnificant reversals of death sentences for ack youths who had been convicted of ıpital crimes.

In 1950 he was appointed regional rector of the NAACP for nine western ates, Alaska and Hawaii. He held the post ır nine years, during which time his office ınducted drives for legislation on minority nployment, open housing and other civil ghts initiatives. Under his direction, the AACP won the first successful judgment in major case involving school desegregation ıd the removal of restrictive covenants on al estate in California.

In 1959, Chairman Williams was ıpointed an assistant attorney general in alifornia. Two years later he joined rgeant Shriver, the first head of the Peace orps, traveling around the world to epare for the dispatch of American lunteers.

In 1961, as a member of the United States delegation to the United Nations Economic and Social Council, he won passage of a resolution calling for an international version of the Peace Corps under United Nations auspices. Two years later, he became the first black person to be named United States representative to the Economic and Social Council, and was later appointed Ambassador to Ghana.

On his return from Ghana in 1968, Chairman Williams was chosen to head a new Urban Center at Columbia University, which initiated changes in the curriculum and issued a major study, "The Uses of the University."

Upon assuming the presidency of the Phelps-Stokes Fund, an educational foundation dedicated to advancing opportunities for American minority groups and Africans, Chairman Williams persuaded the organization to divest itself of holdings in corporations doing business with South Africa, seven years before the formulation of the Sullivan Principles, which have guided many other American institutions and businesses in such actions.

In October of 1987 Chief Judge Sol Wachtler appointed Franklin Williams to chair the New York State Judicial Commission on Minorities. Chairman Williams accepted the offer on condition that the Commission be financially independent of the court system, citing his grandfather's wisdom, "He who pays the piper calls the tune."

Under his leadership, which continued until the day before he died, the Commission raised close to one million dollars from independent sources; met with every judges' group in the state; conducted ground-breaking research on the judiciary, legal education and the legal profession;

issued an interim report which formed the basis of the Unified Court System's effort to increase minority representation in the nonjudicial work force; and called together similar commissions in a landmark meeting out of which was formed the National Consortium of Commissions and Task Forces on Race/Ethnic Bias in the Courts.

His wisdom, brilliance and insight have had profound effect on the lives of us all. We thank him for his energy, his commitment and his caring. And we dedicate this, our final report, to his memory.

CHAIRMAN WILLIAMS' LETTER OF TRANSMITTAL

Honorable Sol Wachtler
Chief Judge of the State
of New York
Court of Appeals Hall
Albany, New York

Dear Chief Judge Wachtler:

It is with great pride and pleasure that I submit this the final report of the New York State Judicial Commission on Minorities.

Our mandate has allowed us to examine the treatment of minorities as public users of the courts, nonjudicial employees and judicial officers. Accordingly, the work of the staff and the commissioners has culminated in what we believe to be the most comprehensive review to date of a state's court system, legal educational institutions and legal profession in relation to minority issues.

The Public and the Courts

I have stated that the chair of this Commission would be the "jewel in my crown." Little did I realize then that the circle of this "crown" would see me traveling around this country and our world in defense of freedom only to return to New York State to continue the "good fight" (as we said in the NAACP) at home. Through these travels and experiences I have witnessed the maturation of racial bias in this country. The crude "colored/white" signs on the Southern landscape have become the exquisitely subtle "colored/white" signs in the Northern mindset.

We have grown up watching and lamenting the apartheid-like racism of the South and we have all had a nodding acquaintance with what has been called the "Southern brand of justice." Yet, without the same blatancy or even the same racial animus, minority users of our courts in New York State face many of the same travesties as did their Southern counterparts--unequal access, disparate treatment and frustrated opportunity.

Witness our findings:

- -- the frequency of all-white juries in counties of substantial minority populations;
- -- minorities clustered in the worst courts in the state;
- -- Blacks receiving sentences of incarceration where Whites do not--and longer sentences than similarly situated Whites;
- -- underrepresentation of minority administrators despite their availability in the labor pool;
- -- statutory right of court interpretation for Polish and Italian litigants in Erie County while Asian Americans and Hispanics in upstate counties go wanting;
- -- judges taking twice as long to explain to Whites certain of their rights in Housing Court as they do to Blacks.

Sadly, the list goes on, as our final report details. The point it makes, however, is that there is more here than just the perception of a biased court system. There is in New York State in the 1990's the reality of a biased court system.

We recognize that no institution can escape the long shadow cast by our country's history of racial and ethnic discrimination.

And in this, the courts stand not alone. Yet, we have found that the courts have contributed in their own way to the reality of bias in our courts, and they must be held accountable. Thus, creation of an atmosphere without even the appearance of racial bias must be the prime objective of the courts as we look to the new century. We believe our recommendations will greatly assist that effort.

Legal Education

You have much to be proud of in this area. The law schools, as the source of persons to fill the judicial ranks are, in varying degree, committed to equal access and enhanced opportunity for success of minority students. Each school has some sort of assistance program.

Our review of these institutions has allowed us to identify and combine the best programs from all of the schools. We believe that our "model program" will allow the schools to continue and reinforce their efforts to attract, educate and graduate minority students.

Legal Profession, Nonjudicial Officers, Employees and Minority Contractors

Under your administration the number of minority judges has risen from the stagnant token numbers maintained for so many years to almost parity with the numbers of minority attorneys. In addition, your "Workforce Diversity Program" for the nonjudicial work force has established New York as the standard-bearer for affirmative action at its best.

Conclusion

With the submission of this report, you and I have indeed come full circle. You recall my statement before accepting the chairmanship of this commission that you should not open the "wound" unless you are prepared to heal it. As we have experienced with the Commission's interim report, the wound must be lanced before the antiseptic is applied. As my life's work will attest, there is no "quick fix" to the problem of racial bias.

This final report, therefore, details the bases of the perceptions of bias held so strongly by so many people, not just minorities. We set forth the objective reality as well as the subjective experience so that the entire picture may be observed. We discuss the reasons behind, and the rationales for, the passions which have been running deep throughout this court system.

We do so not to inflame but to explain, to give context to the recommendations which we have tailored to your areas of authority or spheres of influence.

I once told you that faith in your goodwill is all I have to support my belief that you would countenance our reasonable recommendations. Well, I now have more than that. I have witnessed as you withstood the test of your stated commitment, and I have seen the positive results of your demonstrated commitment to social justice.

While the courts and the legal profession stand not alone in the matter of color, your leadership in establishing the Commission, in adopting and truly implementing a diversity program, and in continuing the self-analysis thus commenced, sets your court and you as the role models for the rest of the nation's courts and other of our societal institutions.

I know that I speak on behalf of all members of the Commission and staff that we stand ready, willing and able to assist you professionally and to support you morally as

you and the members of your administration continue "to fight the good fight."

With warmest regards, your chairman, your public servant, your friend,

Franklin H. Williams

Dated: May 16, 1990
New York Hospital
New York, New York

ACKNOWLEDGEMENTS

The Commission would like gratefully to acknowledge the work of the following for their writing/editing/consulting efforts: Hon. Dorothy Chin Brandt, Prof. Peggy C. Davis, Hon. Nicholas Figueroa, Hon. Samuel Green, Serene K. Nakano, Esq., Prof. Cynthia Straker Pierce, Steven Wolfe, Esq., Edna Wells Handy, Esq., Prof. Verna Sanchez, David Klein, Esq., Andrea Wolfe, Esq., Dr. Monica Holmes, Prof. Beverly McQueary Smith, Prof. Homer LaRue, Prof. Leroy Clark, Prof. Douglas Colbert, Prof. Merrick Rossein, Prof. Derrick Bell, and Richard K. Farrell.

Writing the report would not have been possible without the effort of the research staff, directed by Dr. Holmes, which included: John Bassler, Ph.D. (Research Consultant); Iona Mara-Drita (Research Associate); Marie Charles, Jessica Downey, Richard K. Farrell, Eric Gordy, Carol Hernandez, and Jennifer K. Ulemann (Research Assistants); and Heather Butts, Samantha Butts, Erika Clare, Tamitope Fasoye, Joanne Holder, Nancy Svagick and Leva Wilks. Others who contributed to the research effort include: Gregory Bradley; Abe Fineberg; Tonya Gonnella-Frichner; Debra Harris, Esq.; Brenda Murphy; Prof. R. Joseph Novogrod; Gary Perlman; Barbara Quachenbos; Rafael Rafaelli (Intern); and Gregory Schwartz.

We also note the effort of our friend and colleague Preston Lewis who worked voluntarily and tirelessly for the Commission until his passing in June 1990, as well as the volunteer work of Julian Ross.

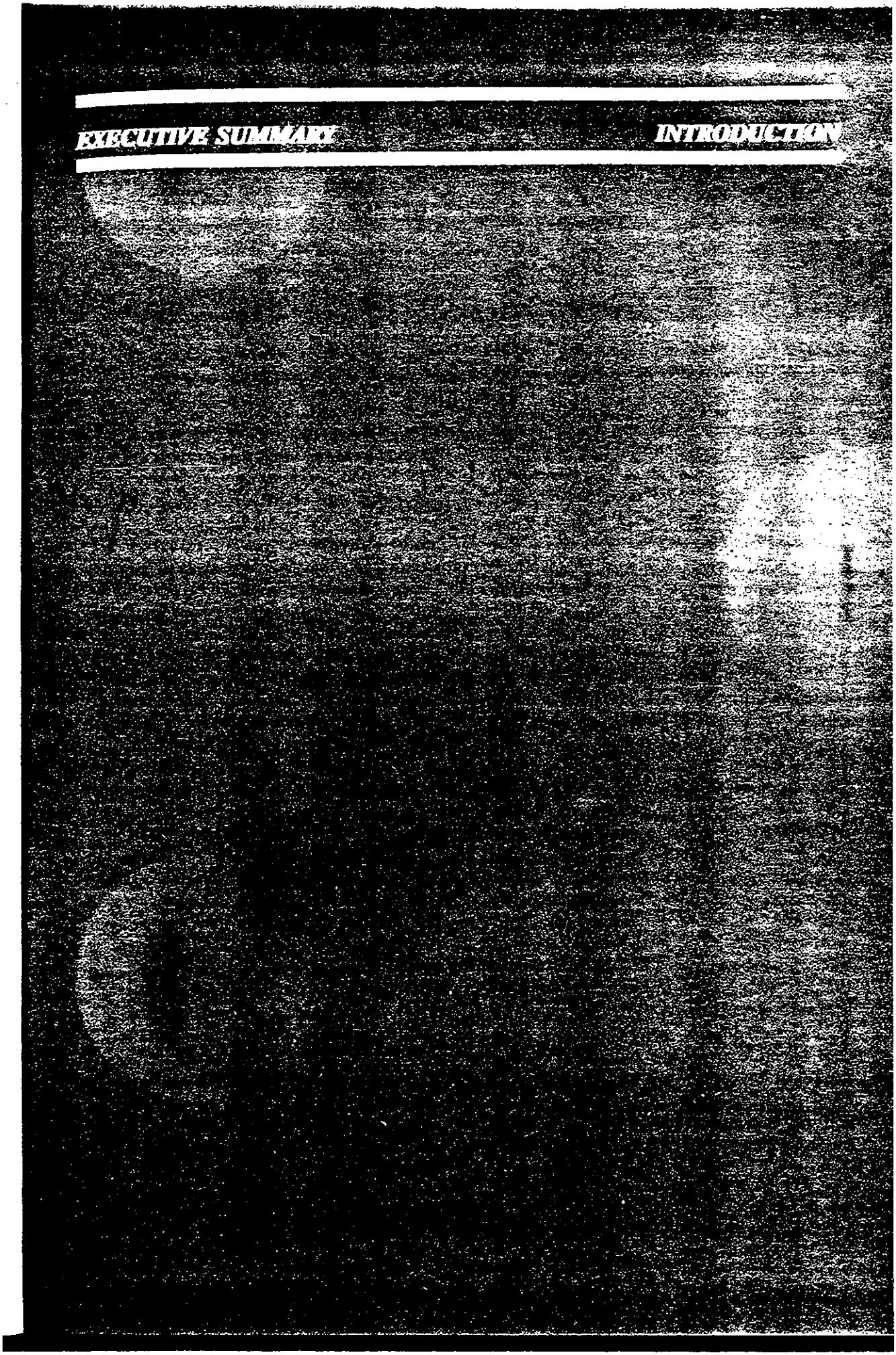
The Commission would also like to acknowledge the work, dedication and the support received from counsels Linda Chin (Jan. 1988-Sept. 1989) and David Klein (Sept. 1989-April 1991).

Without a capable, efficient and supportive administrative staff, the report would not have been possible. With this in mind, the Commission extends special appreciation to Donna Cupid-Weekes, Iris Torres Nieves, Sue P. Fields and Lynette Brown, who comprised our full-time staff, and to Thomas Chesson, Donald Mengay, Ph.D. and Cecelia Marks, who served ably on a part-time basis.

The Commission would also like to thank the firms of Debevoise & Plimpton (notably Philip Harvey, Esq.), Rubin, Baum, Levin, Constant & Friedman, and Skadden, Arps, Slate, Meagher & Flom, and the publishing firm of Matthew Bender, for their invaluable assistance in organizing and editing this report, and also Howard J. Rubenstein Associates, Inc. for their efforts on behalf of the Commission. In addition, we note our appreciation to IBM, for its "Executive Loan" program and its now retired executive, George DeCou, Jr. for his exemplary development strategy and fund raising efforts.

We wish to note the generosity of the Office of Court Administration, and the untiring assistance of Chief Administrator Matthew T. Crosson, Deputy Chief Administrator Jonathan Lippman, and Deputy Counsel Ann Pfau.

Finally, we express our deepest appreciation for the extraordinary work and dedication of our Executive Director, Edna Wells Handy.



> *Some of our courts...have lost the confidence of the poor....The belief is pervasive among ghetto residents that lower courts in our urban communities dispense 'assembly-line' justice; that from arrest to sentencing the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities. We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders.*

This statement aptly captures the extent of minority dissatisfaction with the courts of New York State. Many minorities perceive that the courts do not treat them fairly.

This is not the statement of one of the many public hearing witnesses who testified so painfully before the New York State Judicial Commission on Minorities about their negative experiences in New York State courts. Nor are they the words of Chief Judge Sol Wachtler, who echoed the same thought when he created this Commission to explore the treatment of minorities in the courts and in the legal profession, stating: "We are concerned with a growing perception . . . that minorities are not treated fairly in our courts."

This statement was made almost a quarter of a century ago by the National Advisory Commission on Civil Disorders (the Kerner Commission), established by President Johnson and charged with the responsibility for determining the causes of the urban riots that were deepening racial divisions in the country. That Commission's conclusion was: "Our nation is moving toward two societies, one black, one white -- separate and unequal."

Today, the New York State Judicial Commission on Minorities finds that little has changed for minority users of the courts. Although there has been an increase in the number of minority judges and attorneys, change for the minority court user has been so slow in coming that this Commission is constrained to draw the basic conclusion that there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.

The system serving most minorities does not conform to our society's notion of individualized justice, of hallowed halls, of impartial, reflective decision-making. Many minorities in our courts receive "basement justice" in every sense of the phrase -- from where their courts are located (for example, the Housing Court in the Bronx) to the "assembly line" way in which their cases are decided. Similarly, many minorities who work in the courts, or in the legal profession, are relegated to the bottom tiers.

This "double-tiered justice" lies at the core of the perception that many minorities have of our state courts. The history of their interaction with the courts has been marked by swings of grand hope and deep despair. The hope which followed the Kerner Commission report was that at last the courts would treat minorities the way they treat Whites -- as individuals. But this hope has not been realized. Nearly a quarter of a century later, inequality, disparate treatment and injustice remain hallmarks of our state justice system.

ESTABLISHMENT OF THE NEW YORK STATE JUDICIAL COMMMISSION ON MINORITIES

In 1987, members of the Coalition of Blacks in the Courts met with Chief Judge Sol Wachtler to discuss both the despair felt by judges, nonjudicial officers and litigants regarding the treatment of Blacks in the courts and the underrepresentation of Blacks within the judiciary and the legal profession.

In response to this report of biased treatment, and to chronic inattention by court administrators, the Chief Judge established the New York State Judicial Commission on Minorities. The Chief Judge himself recognized the importance of the task of the Commission given the growing perception of bias, the relative absence of minorities as plaintiffs in civil litigation, and the paucity of minority lawyers appearing before the Court of Appeals.

The Chief Judge selected Franklin H. Williams to chair the Commission. It was agreed that the Commission would be financially independent of the court system, receiving only in-kind contributions from the courts. Monies for its operating budget would come from private sources.

On January 21, 1988, the Chief Judge announced the formation of the Commission. The members were James C. Goodale, Nicholas Figueroa, Bradley Backus, Sheila Birnbaum, Peggy Davis, Samuel Green, Serene K. Nakano, Juanita Bing Newton, Cynthia Straker Pierce, Maria Ramirez, Robert Reaves, Constantine Sidamon-Eristoff, Anthony Suarez, Cyrus Vance and Ivan Warner. Commissioners Dorothy Chin Brandt and Steven Wolfe joined in 1990.

On June 4, 1990, Chief Judge Wachtler appointed James C. Goodale, former Vice-Chairman of the New York Times and a partner in the New York City law firm of Debevoise & Plimpton, to succeed Franklin Williams as Chairman of the Commission.

During the Commission's formative period, it became clear that a complete picture of the treatment and representation of minorities could not be obtained without studying each minority group's particular experiences and perceptions. Therefore, where appropriate, the Commission distinguished between groups to present a fairer representation of the facts. In particular, separate treatment of the concerns of Indian Nations was required because of the uniqueness of their position in regard to the courts and the legal profession.

The Commission was challenged, early on, to define the term "minority." Many groups, from gays and lesbians to the physically challenged, sought inclusion. The Commission chose a definition in keeping with historical race-based definitions of "minority." Thus, when the Commission speaks of "minority," it means Blacks, Native Americans, Asian Americans and Hispanics. The Commission recognizes that the term "minority" may have diminished reliability in light of changing demographics and notes that the names by which the Commission may refer to particular groups may not be those of current choice.

APPROACH

The Commission's mandate was threefold. First, it was to ascertain how both the public and court participants perceive treatment of minorities in the courts. The Chief Judge explicitly called upon the Commission to examine the courtroom treatment of minorities, as well as the extent to which minorities voluntarily use the courts.

The second mandate charged the Commission to review the representation of minorities in nonjudicial positions, e.g., court clerks, court reporters and court officers. If underrepresentation were found, the Commission was to recommend ways to increase the numbers of minorities in nonjudicial positions.

The Commission's third mandate was to review the two selection processes for judges -- elective and appointive -- to determine which results in greater minority representation. In addition, the Commission was to examine the representation and treatment of minorities within the legal profession. Finally, the Commission was given a broad mandate to review other areas it deemed appropriate to complete its investigation.

Among its fact-finding efforts, the Commission held public hearings and meetings; conferred with judges, court administrators and bar association leaders; convened focus sessions; and conducted a series of original studies.

Public Hearings

The Commission held public hearings early in its life to maximize public involvement in its effort and to assist in its identification of issues. The first hearing was held in Albany on April 28, 1988; the second in Buffalo on May 26, 1988; the third in New York City on June 29th and 30th, 1988; and to accommodate all who wished to testify, a fourth in New York City on July 26, 1988.

Public Meetings

The Commission next held a series of public meetings in each county in the state with a minority population of at least 10%, excluding those counties in which a public hearing had been held. A special meeting was held in Green Haven Prison and the Commission made some additional inquiries of participants at two electronic town meetings in Westchester and Dutchess Counties sponsored by the Martin Luther King Jr. Commission. These two meetings allowed participants to record their opinions on a computer terminal, thereby providing an instant poll.

Judges' Meetings

The Chairman, Vice Chairmen and Executive Director met with most of the judges in the state at three successive Judicial Conferences in Rochester and visited many judges in their home districts.

Court Administrators' Meetings

The Executive Director met with court administrators throughout the state.

Bar Associations' Meetings

The Commissioners met with the leaders of various bar and community associations, including the Asian American Legal Defense and Education Fund, the Association of the Bar of the City of New York, the Coalition of Blacks in the Courts, the Hispanic Court Officers Association, the Metropolitan Black Bar Association and the New York State Bar Association.

Complaint Process

To address the apprehension expressed by many people that they would suffer reprisal for cooperating with the Commission, an anonymous complaint hot line was established in Chairman Williams' upper Manhattan office. These complaints, along with others, were investigated and/or referred to proper authorities as part of the Commission's formalized complaint process. All complaints to the Commission hot line

became a part of the data bank, along with other data collected on a given issue.

Research Studies

The research program of the Commission consisted primarily of a number of studies. These studies included:

1) Litigators' Survey: The Commission conducted a survey limited to litigators who reported ten or more appearances in New York State courts during the prior year, in order to obtain information about their experiences with the treatment of minorities in New York State courts and in the legal profession. Separate samples were constructed of 134 black, 130 Hispanic, 74 Asian-American and 146 white litigators practicing in New York City, and 102 minority and 154 white litigators practicing outside New York City. The overall response rate was 81%, with no group having a response rate lower than 77%. Details are provided in "The Report of Findings from a Survey of New York State Litigators," issued in the Appendix.

2) Judges' Survey: The Commission also conducted a survey of judges in New York State. At the time of the survey there were 1,129 judges in the state (87 minority, 1,042 white). The study sample of 76 minority and 565 white judges represents response rates of 87% and 54% respectively. The judges responding to the survey were representative of all judges in the state, both in terms of the type of court on which they sit and location of court (i.e., New York City vs. outside New York City). Details are provided "The Report of Findings from a Statewide Survey of the New York State Judiciary," issued as a separate report in the Appendix.

3) The Commission's third major research project involved an in-depth study of the minority experience in the 15 law schools in New York State. Telephone interviews were conducted with persons responsible for student recruitment and admissions, curriculum, faculty hiring, moot court, law review, clinics and placement, as well as with the heads of all minority student organizations. In addition, race data were collected on applicants, admittees, enrollees, graduates and placements for the classes of 1986-1988. Bar examination pass rate data by race were obtained from all schools for these same years. These data, while limited because they do not distinguish between first-time and repeat takers, and because they reflect the experience of only 59% of all persons taking the New York State Bar examination (those graduating from New York law schools), constitute the first such data collected in New York State. The law school study is presented as Volume Three; the bar examination data are treated separately in Chapter 1 of Volume 4.

4) A survey of 31 judicial screening committees sponsored by bar associations in the 15 counties with the highest proportions of minority residents was undertaken to determine (a) the extent and timing of the committees' input into the judicial selection process, (b) the criteria by which the committees rate candidates and the extent to which diversity is valued, and (c) the race/ethnic composition of the screening committees. Committee chairpersons were also sent a brief questionnaire. Follow-up calls and interviews resulted in an 87% response rate.

5) The Commission sent questionnaires to Administrative Judges to obtain information regarding court procedures and personnel. Questionnaires were returned by all recipients except one Surrogate Court judge.

6) The Commission conducted a secondary analysis of data collected by the New York City Task Force on Housing Court to

ORGANIZATION OF THE FINAL REPORT

Certain of the initial twenty issues were combined to avoid duplication and to enhance investigation. The Commission referred the matter of Juvenile Cases (Issue 15) to the newly created Permanent Judicial Commission on Justice For Children. Thus, the final listing, reflected in the organization of the Commission's final reports, is as follows:

Volume One consists of this Executive Summary.

Volume Two, The Public and the Courts, discusses those issues facing the minority court user. The chapters in that volume are:

1. Perceptions, Court Facilities, Treatment and Utilization
2. Legal Representation
3. Pretrial Processing and Criminal Penalties
4. Civil Case Outcomes
5. Availability and Quality of Language Interpretation in the Courts
6. Minority Representation on Juries
7. Native Americans and the Court System

Volume Three, Legal Education, presents the Commission's law school study. The chapters in that volume are:

1. Review of Literature and Data on Legal Education
2. Synthesis of Findings from the Law School Study
3. Law School Case Studies

Volume Four, the Legal Profession, Nonjudicial Officers, Employees and Minority Contractors, addresses issues relating to the representation and treatment of minority lawyers, judges, and nonjudicial employees and the use of minority business enterprises as contractors with the Unified Court System. The chapters in that volume are:

1. Admission to Practice: the Bar Examination
2. The Legal Profession
3. The Judiciary
4. The Nonjudicial Work Force
5. Alternatives to Testing
6. The Court Officer Problem
7. The Nonjudicial Work Environment
8. Minority Contractors

Volume Five, Appendix, contains all appendices to the Commission's full report. They include the reports of the litigators' and judges' surveys, staff working papers, and reports prepared specifically for the Commission's use by members of Native American communities.

The establishment of the present Commission and its work just described were but the first steps in identifying and correcting problems concerning the treatment of minorities within the judicial system. To rectify the problems identified by the Commission, a series of recommendations are being made. These recommendations are presented at the conclusion of each chapter. It is our hope and expectation that adoption of these recommendations, or of most of them, will make a dramatic contribution to the achievement of racial equality in all aspects of the court system.

However, because the problems identified in this report have been many years in the making, they are not going to be eliminated by a single initiative, no matter how well-conceived. A continuing effort is needed to eliminate the vestiges of bias that exist within the judicial system and to forestall the development of new patterns of discrimination. For this reason, the

determine the association of race with outcome and process variables.

7) The Commission analyzed data on the race/ethnic composition of New York State judicial and nonjudicial personnel by administrative district and/or court jurisdiction. The purpose of this analysis was to determine the geographic areas/courts in which minorities were underrepresented in relation to the pool of minority lawyers (in the case of judges) and to pools of potential employees (in the case of other employees).

8) A survey of all judicial screening/ nominating committees for appointing authorities was conducted to determine the race/ethnic composition of their membership and of persons screened, recommended and appointed to the bench. Analyses were conducted to determine the representativeness of those screened, recommended, and appointed relative to the pool of minority attorneys, and the success ratios of minorities relative to the success ratios of Whites in becoming judges.

9) A secondary analysis of data collected by the New York State Bar Association on the unmet legal needs of the poor was undertaken to determine the relationship between race and unmet legal needs.

* * *

To separate perceptions from the reality of bias, the Commission relied on a wide range of studies and analyses. Indeed, from a practical point of view, the reality of bias could only be studied by tapping the perceptions of a variety of participants in the system. The alternative, a courtroom observation study, was rejected following a pilot study. The pilot study uncovered methodological challenges which led to the conclusion that court observation was not feasible for the Commission to undertake.

Because of the subtlety of much racial bias and the possibility of competing explanations for any given finding, the Commission tried to approach each issue using data from a variety of sources. For example, a report by a witness at the public hearings was investigated in a number of ways. In this manner, the Commission was able to obtain a high degree of agreement or "convergent validity" with respect to many of its findings. Because convergent validity relies on obtaining information from different sources using different methodologies, it increases confidence in the validity of the findings.

THE ISSUES

The Commission's public outreach led to the identification of issues which the Commission chose to study. Those issues, rated in order of importance, were:

1. Courtroom Treatment
2. Judicial Selection
3. Legal Representation
4. Nonjudicial Employment
5. Perceptions of Bias
6. Civil Case Outcomes
7. Availability and Quality of Interpretation
8. Legal Education
9. Criminal Case Outcomes
10. Minority Representation Among Attorneys Working in Public Agencies
11. Pretrial Processing
12. Judicial Work Environment
13. Nonjudicial Work Environment
14. Legal Profession
15. Juvenile Cases
16. Bar Passage
17. Utilization of the Courts
18. Jury Issues
19. Fiduciary Assignments
20. Contractors

Commission recommends the appointment of a new commission to continue its work.

THE COMMISSION RECOMMENDS THAT A NEW COMMISSION BE ESTABLISHED WITH A FIVE YEAR MANDATE SUBJECT TO RENEWAL

Effective implementation of the initiatives recommended by the Commission will require continued monitoring. Adjustments and further interventions will be needed as conditions change and experience accumulates. We therefore urge that a new commission be appointed to succeed us for a five year period, with the option for renewal. Three major considerations support this recommendation.

First, the recommendations of this Commission cover many facets of the legal system, and there is no one administrative body now in existence that could effectively monitor them all. Without a successor commission, there may be a lack of systematic and continued implementation. In that event, the disparate treatment of minorities will continue and the perception by minority members of unfairness will be reinforced. Any such result would mean that the efforts of this Commission had been wasted.

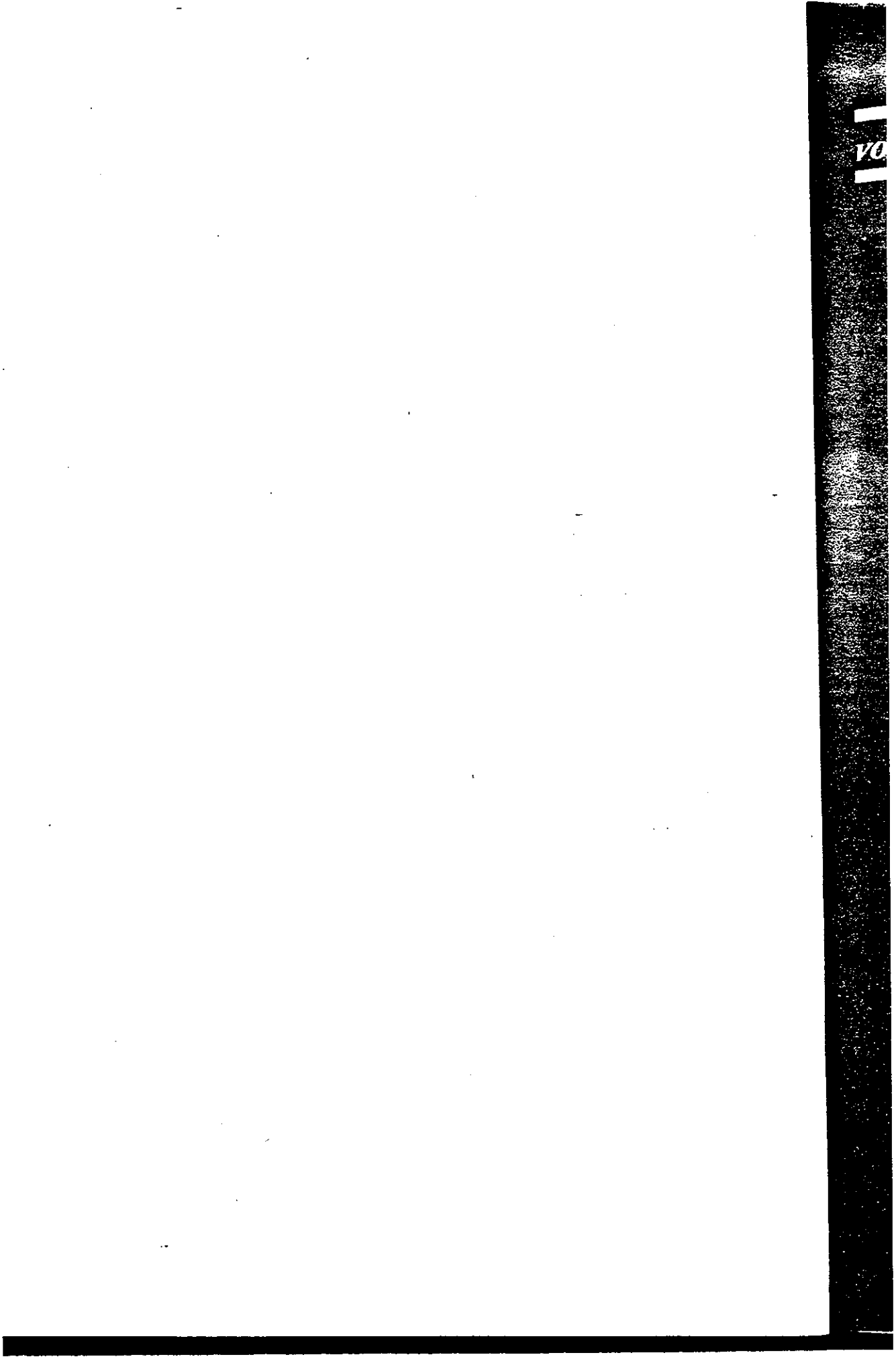
Second, the problems that the Commission has addressed are unlikely to be overcome by a single initiative. They constitute a complex set of elusive and shifting obstacles that are subject to changing social conditions. Bias eliminated in one form is likely to reemerge in another guise. Until substantive equality is achieved in society as a whole, the judicial system will face continuing difficulties in living up to its commitment to equal treatment. A new commission could monitor manifestations of bias in the judicial system on an ongoing basis, respond to new problems as they arise, and recommend additional remedial actions as they are needed.

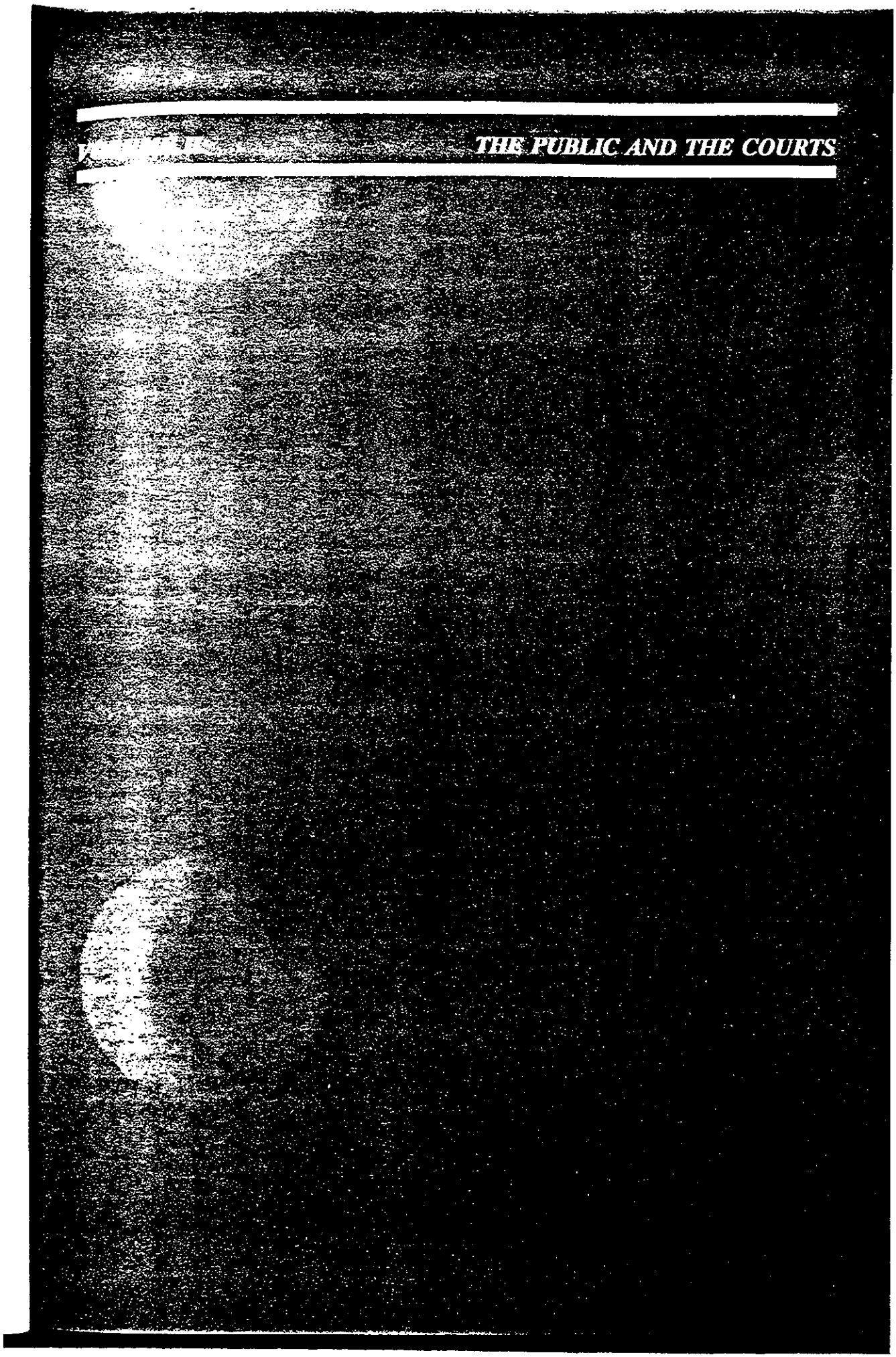
Finally, the problems addressed by the Commission are national in scope and are currently attracting the attention of similar bodies in many other states. Cooperation among the various state commissions and task forces active in this area would enhance both their effectiveness and their efficiency. A new commission is needed to maintain and cultivate this cooperation.

This latter point warrants a further word of explanation. In the course of its work, the Commission addressed inquiries to various states as to their experiences concerning the treatment of minorities within the judicial system. The Commission learned that three other states -- New Jersey, Michigan and Washington -- had established similar task forces or commissions to investigate the problem, and that several more were in the formative stage.

The New York State Judicial Commission on Minorities assumed a leadership role in facilitating communication and cooperation among these state bodies. In December 1988 the Commission hosted a meeting attended by representatives of similar task forces and commissions from Michigan, New Jersey, New Mexico, Washington and Nova Scotia. Also in attendance were representatives from the United States Department of Justice, the National Center for State Courts, the Carnegie Corporation; the legal press; the President of the Coalition of Blacks in the Courts of New York State and several New York State court judges, including Chief Judge Wachtler.

These commissions and task forces differed in many respects. Some were strictly temporary. Others were formed for an indefinite period. State legislatures had





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played a role in establishing some. Others were established by the state courts or the state bar. The task forces and commissions also varied with respect to their methodology, size, composition, sources of funding and specific areas of inquiry. Nevertheless, they had all identified, and were working to redress, similar problems of racial and ethnic bias in their court systems.

To facilitate cooperation and collaboration among the various state groups (for example, in the development of research instruments), and to encourage and assist the establishment of similar commissions or task forces in other states, the participants at the December 1988 meeting agreed to form the National Consortium of Commissions and Task Forces on Racial/Ethnic Bias in the Courts. Commissions or task forces focusing on racial and ethnic bias have now been established in California, the District of Columbia, Florida, Massachusetts, Michigan, New Jersey, New York, Nova Scotia and Washington, and by the American Bar Association. Having played a leading role in fostering this productive interstate collaboration, New York would waste an important opportunity if it were to marginalize its own participation in the Consortium by permitting its own Commission to expire.

A clear trend is evident favoring the establishment of commissions or task forces to address problems of racial and ethnic bias in state judicial systems. It is less clear whether the trend will continue. The oldest state task force, the New Jersey Supreme Court Task Force on Minority Concerns, is only five years old. A crucial test of states' commitments in this area will come as existing commissions complete their initial assignments. The first task force to submit its final report, the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, was permitted to expire, a development that has led to serious questions about how implementation of the Michigan task force's recommendations will be accomplished.

In contrast, the Supreme Court of Washington has recently issued an order establishing a Minority and Justice Commission to continue the work of the Washington State Minority and Justice Task Force. The task force will expire with the issuance of its final report, but the new Commission will carry on its work with an initial five year mandate subject to renewal.

We recommend that New York State follow the example of Washington State. In doing so, New York can play a decisive role in establishing a national pattern. A successor commission is needed to ensure continuing progress towards the achievement of racial equality in our judicial system and to enable New York to continue its reciprocal support for similar efforts in other states.

The new commission would undertake the following:

1. Monitor the implementation of the various programs recommended by the Commission, thereby ensuring that they are put into and remain in effect;

2. Collect and analyze race data pursuant to the recommendations of the Commission. Where these data reveal racial inequality or disparate treatment of minorities, to suggest methods for correcting the problems;

3. Serve as a clearinghouse for statewide data for and programs relating to the treatment of minorities within the judicial system. This would allow each county within the state to learn of programs and procedures implemented in other counties. In appropriate instances, some programs could be standardized and/or centralized under the authority of the commission;

4. Review the hiring criteria of the agencies within the judicial system, as well as the hiring of contractors;

5. Collect and monitor complaints of racial bias within the judicial system. Where appropriate, these complaints would be forwarded to the commission or agency with jurisdiction to discipline (e.g., the Chief Administrator of the Unified Court System, State Human Rights Commission, attorney disciplinary committees, Commission on Judicial Conduct). In addition, the commission could propose overall remedies designed to ensure against repetition of the offending conduct;

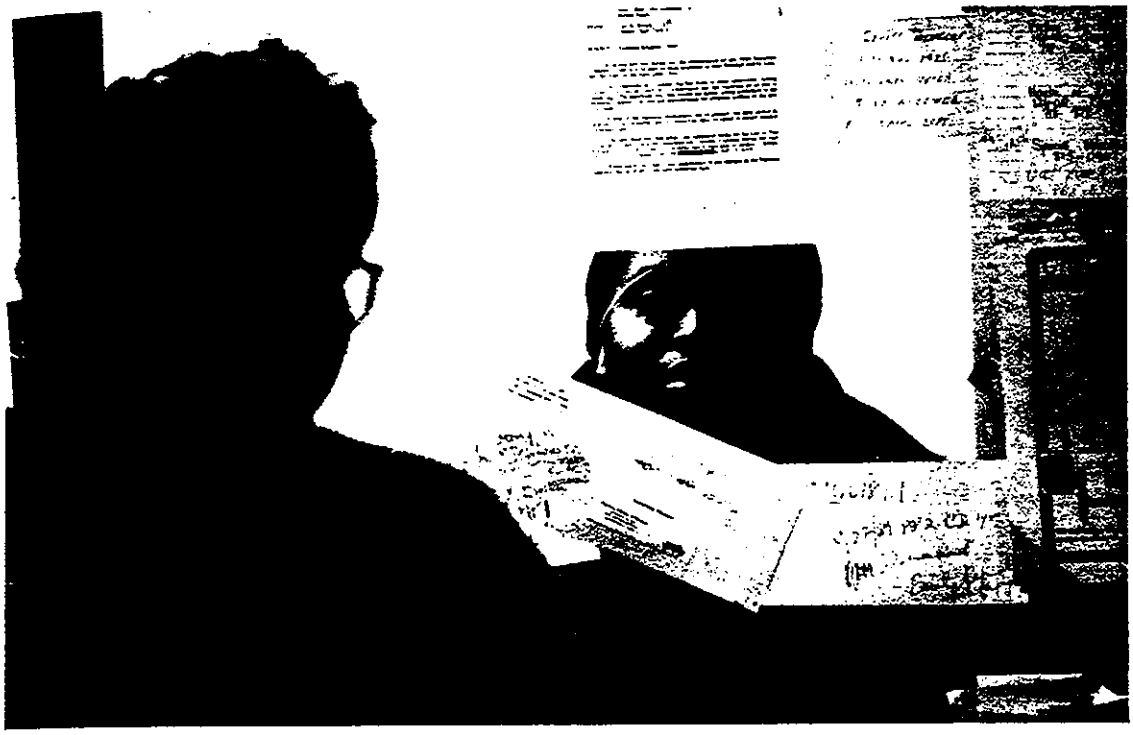
6. Signify to minorities and to all participants in the legal system that the policy of this state is to eliminate racial bias within the legal system and that there is genuine concern that there should be equal justice for all;

7. Review existing and pending legislation affecting minorities and the state court system, to comment thereon and to recommend new legislation, where appropriate and necessary;

8. Participate in the work of the National Consortium of Commissions and Task Forces on Racial/Ethnic Bias in the Court, which was spearheaded by the late Chairman. The successor commission would continue to exchange information about programs and work to foster a national policy which seeks to eliminate racial and ethnic bias in the courts;

9. Interact with local bar associations, law schools and community groups in an effort to develop educational and other programs designed to address racial and ethnic bias in the legal profession;

10. Report annually to the Chief Judge on the condition of the legal system from the standpoint of minorities.



Queens Courthouse - Clerks Office

Introduction

Reduced to their essence, the numerous complaints, testimony and comments received by the Commission reflect the perception that minorities are stripped of their human dignity, their individuality and their identity in their encounters with the court system. Many minorities feel that those in authority do not treat them with consideration. To the courts, minorities are "those people."

To understand the basis of this perception, the Commission traced the steps of a minority person's involvement with the court system. In so doing, the Commission found that at critical junctures minorities are, in fact, stripped of their dignity. That stripping process begins when, in many instances, minorities must enter court facilities that are unfit for human visitation. It continues with the way in which their cases are processed and decided.

Accordingly, Chapter one of Volume II describes public perceptions of the treatment of minorities in the courts. It also describes the physical condition of many of the courts used most frequently by minorities, discusses the treatment of minorities in court and presents information on the utilization of the courts by minorities. Chapter two explores the adequacy and availability of legal representation for minorities. Chapter three presents the Commission's findings on pretrial processing and criminal penalties. Chapter four

examines whether minority and similarly situated white plaintiffs receive equal judgments in civil actions. Chapter five details the findings of the Commission's inquiry into the shortcomings of interpretation services. Chapter six examines the question of whether minorities are underrepresented on juries. Chapter seven discusses the special legal problems faced by Indian Nations in New York State.

CHAPTER ONE: PERCEPTIONS, COURT FACILITIES, TREATMENT AND UTILIZATION

Overview

The Commission's first mandate focused on how minorities perceive the courts of New York State and on the degree to which minorities voluntarily use them. This required the Commission to examine how minorities are treated in the courts and how the courtroom setting affects their view and use of the courts.

The Commission considered these issues together because of the effect each has upon the other. Minorities may have perceptions regarding the ability of the courts to treat them fairly, whether or not they have had actual experience with the system. These general perceptions are shaped by a host of factors, including long histories of mistreatment of minority groups and lack of information about the courts. Moreover, these perceptions may be shaped by knowledge or beliefs concerning involuntary use among some minority groups of so-called "ghetto courts," that is, Housing, Family and Criminal Courts in New York City.

These perceptions, in turn, may deter minorities from affirmatively using the courts to seek legal redress. Where there has been use of the courts by minorities -- especially where the use has been involuntary because of an arrest or other compulsory process -- experiences with the courts may have been largely negative. These experiences may diminish any desire to seek further involvement with the court system.

The perception of many minority users of the New York State court system may be best understood from the perspective of the minority litigant who experiences a series of unfolding events.

First, the minority litigant often encounters dilapidated, crowded and ill-maintained court facilities. This initial perception of "justice degraded" is then fortified by any number of factors facing the minority litigant that contribute to the perception that the system is racially biased. For example, the litigant often encounters "informational barriers" created by the virtual absence of information explaining where to go in order to negotiate the system. The inability to read or communicate in English, for significant numbers of minorities who are recent immigrants, may compound this difficulty.

Next, the minority litigant may be faced with a virtually white courtroom -- white, except for similarly situated parties (e.g., defendants facing prosecution in the criminal courts or tenants facing eviction in the housing courts). With disturbing frequency, the minority litigant then may face discourteous treatment by court personnel, attorneys and judges.

Due to economic circumstances, the litigant may believe that he or she does not stand on equal footing with his or her adversaries, owing largely to the absence of counsel.

Finally, the cases of many minority litigants are disposed with bewildering speed -- the phenomenon known as "assembly line justice," especially prevalent in "ghetto courts."

In sum, from the moment the minority litigant enters the courthouse, he or she may be confronted with myriad factors that undermine the notion that the courts mete out fair and equal treatment for all and which support the perception of a racially biased court system.

The Commission's report details the general perception of the treatment of minorities in the courts; the physical state of the courts predominantly used by minorities; the treatment received by minorities in the court system; and court utilization by minorities.

Perceptions

There is a widespread perception that certain minority groups are not treated fairly in the courts. A New York Times opinion poll published at the beginning of the Commission's tenure indicated that certain minorities, and a substantial number of Whites in New York City, shared this perception. And a New York Times poll conducted some two and a half years later showed that this perception had remained firm.

This perception of bias in the courts is not limited to New York City. A national study by the American Bar Association found that mistrust of the courts was significantly greater among black and Hispanic, than among white, respondents. The survey, which included New York State respondents outside New York City, revealed that Blacks and Hispanics throughout the state believe that the court system is biased against them.

The Commission sought to understand the reasons for these perceptions. In doing so, the Commission found that the physical conditions of the courts which minorities must use are a major source of their dissatisfaction with the system, especially in New York City.

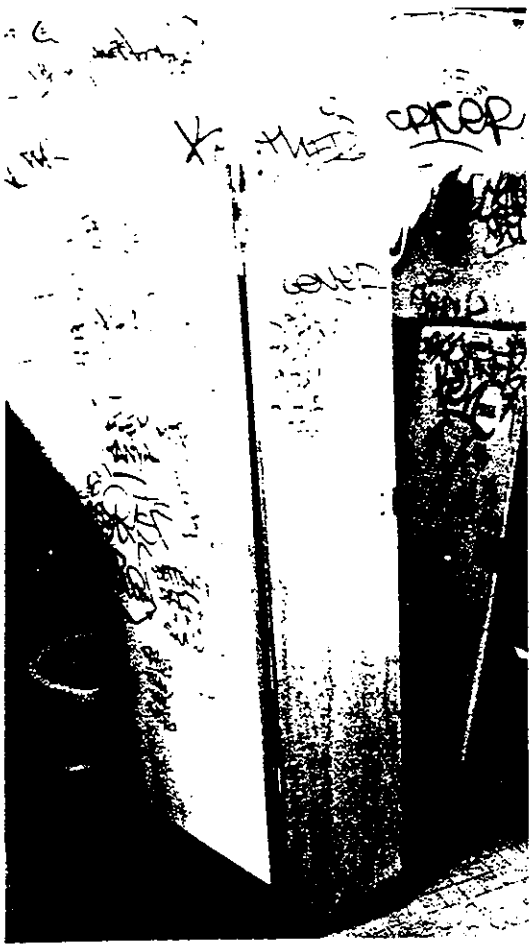
Court Facilities

As required by legislation enacted in 1987, in August of 1989 New York City submitted to the Office of Court Administration a long-term capital plan for court construction and rehabilitation known as the "Master Plan." Fiscal difficulties and modifications are delaying full implementation of the Master Plan. However, in light of the grossly deteriorated conditions which will persist should such delay continue, the Commission urges New York City to adhere to the Master Plan.

Evidence collected by the Commission confirmed the inadequate and often unsanitary conditions of the "ghetto courts" of New York City. The importance of these conditions to the daily lives of minorities cannot be overemphasized, nor can their sorry state be overstated.

The information before the Commission detailed the shock, dismay and anger experienced by minority users of the "ghetto courts." For example, a compelling statement came from a white respondent to the Commission's litigators' survey:

> **Most people only have contact with the judicial system at the lowest level: Housing Courts, Criminal Court, Family Court. And most of the people who have to go to those courts in N[ew] Y[ork] City are probably minority. What message is sent when these courts have facilities that are totally inadequate? A waiting room for 3 or 4 housing parts that has seating for 15 people and a calendar of 150 people? No public water fountains. No hand towels or toilet tissue in the bathrooms. There are no doors on the commodes at the Bronx Family Court. Would this be tolerated at the Appellate Division? It sends a message to the people in these courts that they aren't worth much.**



Bronx Criminal Court

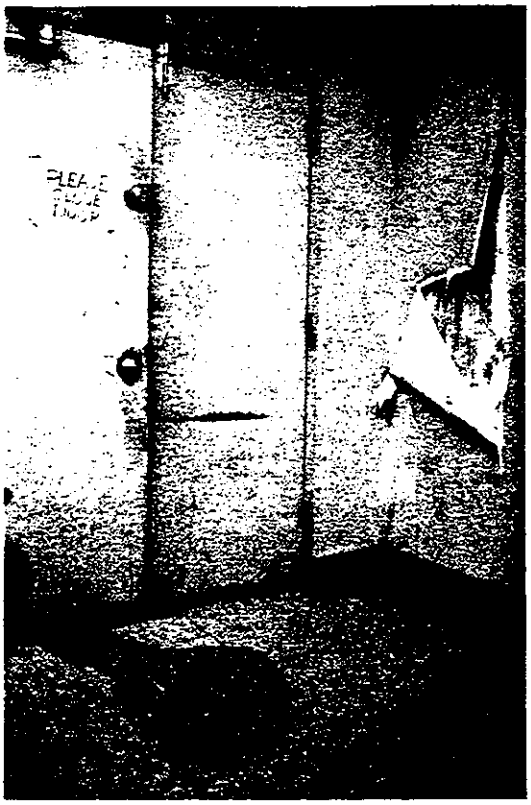
Tellingly, the judges and litigators who responded to the Commission's surveys consistently ranked the adequacy of the "ghetto courts" far below other state courts. The Commission's visits to, and photographs of, a substantial number of courts that are heavily used by minorities throughout the state confirm the conditions described by hearing witnesses.

Bronx Housing Court

Housing Court

It is widely known that among the most inadequate and even degrading court facilities in the State are those currently occupied by the Housing Part in New York City. In the past, I have compared conditions in the Bronx Housing Part to a bazaar in Calcutta: teeming throngs of people, nervous, excited and jammed together in a tiny smoke-filled, filthy place. Some courtrooms in the Bronx Housing Part are so small that the court system had to provide them with miniature furniture simply to allow judges and litigants room to move.

-- Hon. Sol Wachtler



Brooklyn Housing Court

In 1983, the City-Wide Task Force on Housing Court (the "Housing Court Task Force") conducted an observational field study of Housing Courts located in New York City and documented their deplorable conditions. The findings in their report continue to have validity. For example, the Bronx Housing Court, which is located in the basement of the Supreme Court building, was described as having garbage dragged through the hallways each morning. Commission data confirm that these unsanitary and dehumanizing conditions exist to this very day. As one litigator stated:

Bronx Housing Court

"I have witnessed many occasions when litigants have passed out because of the waiting in poor conditions."

The Housing Court Task Force described Brooklyn, along with the Bronx, as having the worst physical conditions. An observer described a courtroom that "looked like a bus depot"; a line of some 50 persons waiting for elevators; "[a]pproximately 100 tenants [in] line to answer dispossesses"; and a lack of signs posted to direct tenants. These overcrowded conditions persist today.

Brooklyn Housing Courtroom

(Same courtroom as depicted at left above.)

In contrast, conditions in Manhattan's Housing Court are better than those in the Bronx and Brooklyn. As one judge testified at the Commission's public hearings, Manhattan Housing Court has better facilities than Brooklyn "because some of the tenants who come before that [Manhattan] court are not the down-and-out .... We are talking ... about affluent and white tenants. The court is a better court for that reason."

Civil Court

A white respondent to the Commission's judges' survey described the conditions in Civil Court parts in the following terms:

> **The disrepair, and often, unhealthiness, of our court facilities is a monument to racial bias. It takes no in-depth examination to see the vast discrepancy between the facilities in Civil Court in which most minority litigants appear -- namely, Housing and Small Claims Court -- and the better facilities maintained for those litigants, usually white and/or of financial means, in the same courthouse.**

The problem of the Civil Court facilities is compounded by the crushing dockets in the criminal courts. Originally, the Manhattan Civil Court building exclusively housed courts of civil jurisdiction. One judge commented that in order to meet the criminal case load, "Civil Court is being pushed into whatever space is left."

Brooklyn Criminal Court - Holding Cell

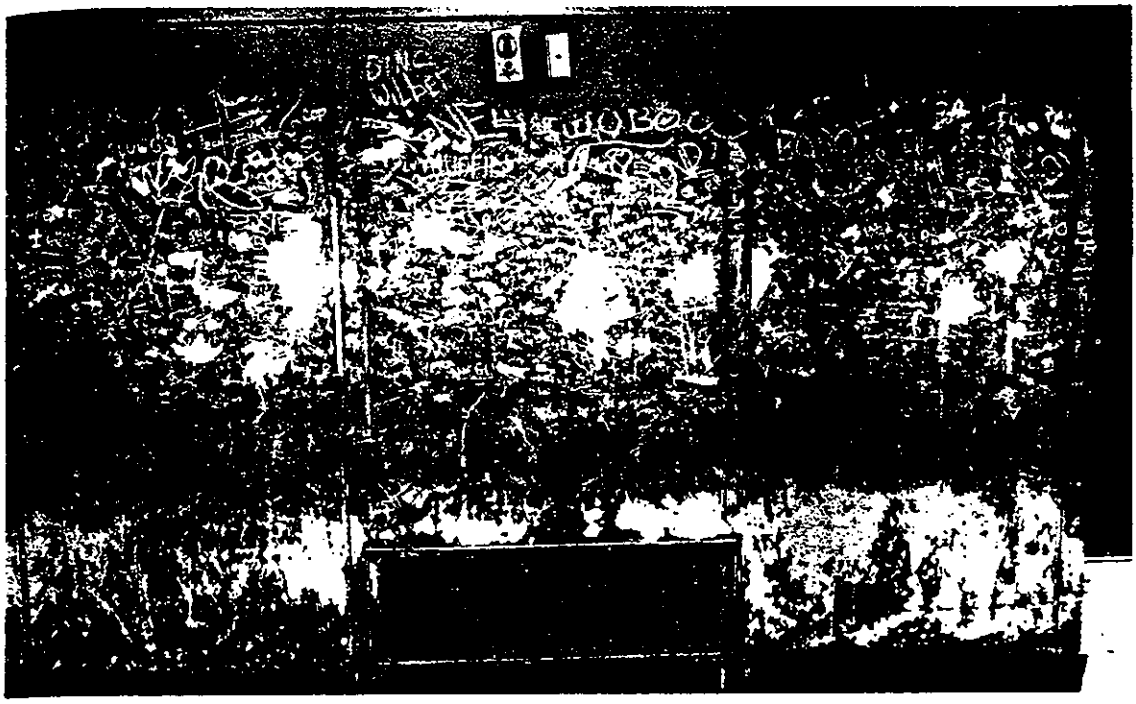
The Manhattan Criminal Courts have been described as the "busiest, and certainly the dirtiest in the United States." As one Legal Aid attorney noted:

> **I was working arraignments the other day . . . [in] one of the largest courtrooms, and there was a rat there running around.**

In a similar vein, one witness at the Commission's public hearings described facilities at 100 Centre Street, which house certain City Criminal Courts, as the "roach coach."

Not only are the court facilities filthy, but as the Chief Judge pointed out, the inadequate space interferes with the courts' ability "to administer justice . . . to the defendants. . . . In some places, we don't even have room for defendants to consult with their lawyers."

Manhattan Criminal Court - Door to Arraignments



Brooklyn Family Court

The Family Courts in this state, especially in New York City, have been long neglected -- both in terms of maintaining adequate facilities and having sufficient numbers of judges and other personnel to attend to the burgeoning caseload. The Fund for Modern Courts has aptly described Family Court as a "poor people's court" and warned that "[b]ecause its clientele are generally poor and minority, because its proceedings are generally closed to the public, and because it has been shortchanged in the past, many fear that the Family Court will be shortchanged again when facilities are being upgraded."

Courtroom Treatment And Case Disposition

Once inside the facilities just described, the minority litigant may well face a series of other dehumanizing circumstances.

Lack of Information To Negotiate the Court System

Many minorities fear involvement with the courts. Their fears are exacerbated by the general unavailability of information on how to use the courts. There is little information available telling the litigant where he or she should go to appear in a hearing or proceeding, and little information concerning courtroom procedures.

The Commission heard testimony regarding the general absence of signs directing litigants how and where to proceed. Where signs do exist, especially in the "ghetto courts," they are often hand-lettered, showing a lack of any concerted effort by the court to provide meaningful information. Moreover, in some instances, the signs provide only negative information, admonishing the litigants what not to do rather than providing helpful information on where to appear and what to do.

Queens Courtroom

Race of Courtroom Work Force and Attorneys

The minority litigant who enters the courtroom may also perceive the environment to be hostile because of the virtual absence of minorities among the judicial and nonjudicial work force in some jurisdictions.

One Albany hearing witness testified that

> **The [black or Hispanic defendant] appears in a court filled with white people in charge of everything[:] court clerks, stenographers, lawyers, district attorney[s], judges and jurors. Everyone who is running the system is white and everyone to whom something is happening is Black or Hispanic; and if his case goes to trial, an all-white jury and judge will determine his [fate] . . . .**

This perception was echoed by a witness in Buffalo who testified:

> **[B]ecome, if you will, the parents of a 16 or 17-year-old, or the youngsters themselves, and walk into City Court[.] [Y]ou cannot help but notice that most of those in the courtroom who are of color are seated where you've been told to [sit]. More often than not, . . . the court clerks and the judges will all be nonminority. It is clear that white folks are in charge, and this justice means, "just us."**

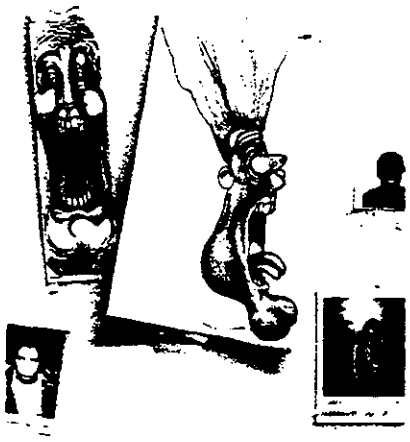
Assembly Line Justice

Bronx Housing Court

The time spent in obtaining the disposition of a case in one of the "ghetto courts" may be exceedingly brief. Thus, after enduring deplorable facilities and discourteous or dehumanizing treatment, the minority litigant's "day in court" may amount to no more than 4-5 minutes of the court's attention. This phenomenon, which was repeatedly described by observers in the Criminal Courts (an average of 4 minutes per case), Family Courts, and the Housing Courts (approximately 5 minutes per case), has been described aptly as "assembly line justice."

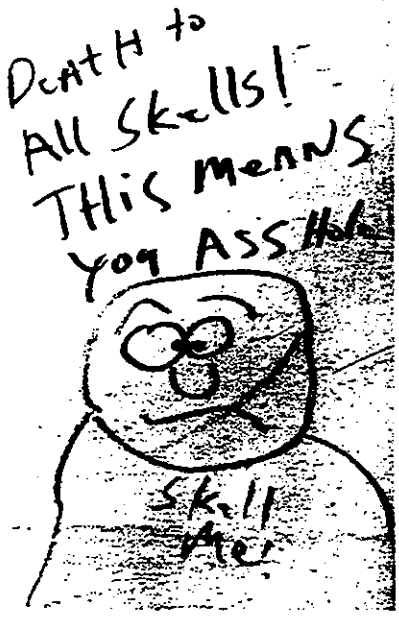
One attorney testified before the Commission that most Brooklyn Housing Court judges do not read the case files to ascertain whether the tenant has any defenses before they sign stipulations, in part because "they are swamped and they are trying to deal, from their point of view, with as many cases as possible, as quickly as possible." One criminal defense attorney explained that "[j]udges are concerned more with dispositions and getting their calendars completed."

Brooklyn Housing Court



Brooklyn Courtroom - Clerk's Area

Racial Jokes, Epithets or Demeaning Remarks



Brooklyn Criminal Court - Holding Cell

("Skell means . . . bum, . . . trash . . . nigger . . .")

The 1983 remark of a Queens Supreme Court justice that "there's another nigger in the woodpile" was mentioned to the Commission at its hearings, in public meetings and in comments in both the judges' and litigators' surveys, as evidence of overt racism existing in the courts. Fourteen percent of all litigators surveyed by the Commission stated that "judges, attorneys, or courtroom personnel publicly repeat ethnic jokes involving minorities, use racial epithets or make demeaning remarks about a minority group" "often/very often"; another 23% stated that this behavior occurs "sometimes."

Examples of such remarks were provided by many respondents to the Commission's survey. A white litigator practicing outside New York City alluded to

> **judges and attorneys making references to the injuring of minorities as "one less," "just another black person" or "should have killed him."**

An Hispanic litigator in New York City stated:

> **I've heard judges tell criminal defendants: "In [the] USA we don't steal, unlike what you're used to in X Latin American Country!" I've heard judges talking about "not having a Chiua-man's chance" to Asians.**

A white litigator outside New York City wrote, "A Family Court attorney repeatedly called [a] party 'boy' and [the] judge refused to admonish the attorney." An Hispanic litigator in New York City wrote:

> **. . . Civil Court judges constantly make remarks showing disdain and insensitivity about women with children, particularly women of color (e.g., "deadbeats," "rabbits").**

A black litigator in New York City observed:

> **Once in Civil Court - Housing Part - Kings, while representing a black client, the judge--in open--court remarked that the landlord (who was white) was "stuck" with a "Tarbaby."**

Racial bias against litigants is sometimes compounded by gender bias. For example, one witness testified that in a Housing Court nonpayment proceeding, a judge remarked of a black female professional who had lost her position with a major university, "maybe she can turn a trick and be able to get the money she needs."

The statements cited above are examples of overt racial bias. Modern forms of racial bias, however, may be far more subtle. One witness, employed as a pro se law clerk in Housing Court, gave an example of such subconscious racial bias:

> **For instance, an example of the sort of racism that's involved -- and that's not to say that even many of the judges are aware of the . . . level of the remarks . . . [is] a judge who is heard as saying in the courtroom to a court officer," Let me have that Chinese case."**

Addressing Minorities By First Name

It is almost inconceivable that minorities are still being addressed by their first names in formal court proceedings. In 1964, two justices of the United States Supreme Court labelled such treatment a "relic . . . of slavery." Yet 16% of litigators surveyed by the Commission reported that minority attorneys, litigants or witnesses are addressed by their first name, while white attorneys, litigants or witnesses are addressed more formally "often/ very often"; an additional 20% reported that it happens "sometimes."

Although this question was not asked of judges, numerous minority and white judges commented on the phenomenon. One black judge stated that he would issue contempt citations for such behavior. A white judge put it:

> **There have been occasions when witnesses and/or defendants who are minorities were treated in a patronizing fashion and addressed by their first names . . . . As an attorney I would object. As a judge, I would admonish the offending party.**

Disrespect and Discourtesy by Court Personnel to Minority Litigants

A black court officer testified regarding her experiences working in the Criminal Courts in New York County:

> **I was told by fellow court officers that these people who enter [the courtroom] doors are slimes. They're called slime and motes. . .**
>
> **Not only defendants, anyone. Anyone, any minority entering into the courtroom. It can be a defendant. It can be a friend or relative of the defendant.**

This court officer continued:

> **[T]he children were considered baby slime. I was told this by fellow court officers. I was told that I was not to show these people, any courtesy whatsoever. If I told them to take off their hat -- I was to tell them and not ask them.**

Treatment of Witnesses

Minority witnesses are also victims of discrimination and disrespect by court personnel. Respondents to the Commission's litigators survey reported numerous incidents where court personnel gave greater credence to white than minority witnesses, or mocked black dialect, speech or vernacular.

The litigators surveyed also reported that white judges give more credibility to the testimony of white witnesses than to the testimony of comparable minority witnesses. One in five litigators said that white judges give more credibility to white than to minority witnesses. Similarly, one in five litigators reported better treatment of white than of minority witnesses by attorneys conducting cross-examination. And one in four minority judges said that this preferential treatment occurs "often"/"very often."

The following comment by a litigator is a vivid example of the treatment accorded some minority witnesses. According to a white New York City litigator, a judge

> **in [a] conference following black expert witness testimony [did a] burlesqued imitation of [the] testimony using Amos 'n Andy type of speech.**

Experience with Courtroom Bias and Efforts to Protest

A telling example of the tenacity of racial attitudes in the courts is the response of litigators and judges to a question about their own experiences with unfair and insensitive treatment. Nearly half (45%) of all the litigators questioned stated that they had witnessed unfair, insensitive or differential treatment of minority attorneys, litigants, jurors or witnesses in the courtroom. Yet the majority of them failed to make an official report of the incident.

The reasons given by those who refrained from reporting the bias are striking. Over one third stated that they refrained from making a report because they feared reprisals against their clients (38%) or against themselves (41%). Thirty-one percent stated that protest was "a waste of effort." Nearly one fourth (24%) stated that they did not know to whom they could report biased behavior. Twenty-one percent said that the behavior was too subtle or that they lacked proof, and 18% said that the problem was resolved without their making a formal protest.

Forty-two percent of the minority judges surveyed (as opposed to 15% of white judges) reported that they had experienced a situation in their courtrooms in which they perceived the treatment of minority attorneys, litigants, jurors or witnesses to have been unfair or insensitive.

Utilization Of The Court

Given minorities' reports of the inadequacy of the facilities and the dehumanization experienced by them at the hands of those working within the system, minorities are clearly less likely affirmatively to seek legal redress in our courts.

The Commission examined a number of barriers which may account for the underutilization of the civil courts by minorities, including: psychological reasons; economic inability; past negative experiences; and informational, language and cultural barriers.

Psychological Barriers: The Recurring Problem of Perception

The National Center for State Courts has noted:

> **The psychological barrier probably is felt most by minorities . . . . In some instances alienated, in others merely fearful, they are reluctant to enter the unfamiliar, imposing, complicated environment of the regular courts . . . . American courts can appear a very alien environment to a Black and [Asian American], or a [Hispanic]-American. For the most part, judges are European Whites; the prosecutors, lawyers, clerks and other court personnel are the same . . . . For the purposes of this report, we are not so concerned with the plight of the individual minority group members who may be deprived of the opportunity to become lawyers or judges. We are more worried about the hundreds of thousands or millions of their fellow citizens who are deprived of an adequately integrated legal system.**

Many of the hearing participants agreed that the courts are perceived as alien environments by minorities. As one Legal Services attorney testified:

> **We find that when our clients come to us they're not seeking affirmative assistance from the courts. We find that they do not believe they are going to get justice in the courts and so they're not eager to get there.**

Economic Barriers

Economic barriers affect minorities disproportionately, since Blacks and Hispanics are overrepresented among lower income groups. While fewer Asian-American families live below the poverty level, certain new Asian-American immigrants do face significant economic barriers. One effect of low income is an inability to retain counsel.

Several witnesses described a variety of other barriers relating to economic status that impede minority use of the court system: lack of childcare facilities; daytime court sessions that are inconvenient to litigants who cannot afford to miss work; the prospect of losing one's salary or job if one is a litigant; and the heavy court calendars that create uncertainty in arranging work schedules. Other economic barriers include costs associated with litigation, including court filing fees and the expense of obtaining deposition transcripts.

Bronx Supreme Court

Bronx Housing Court

These economic barriers are especially daunting to minorities who may perceive that they will not prevail in any litigation.

Negative Experiences with Ghetto Courts

A judge testified before the Commission that underutilization of the courts by minorities may result from the fact that:

> **too often the minority community members' experience with the court has been involuntary, and [in] most instances negative. It has either been an arrest, eviction, or foreclosure or garnishment.**

An attorney testified that her client had petitioned for custody of her grandson, who had been placed with the Commissioner of Social Services:

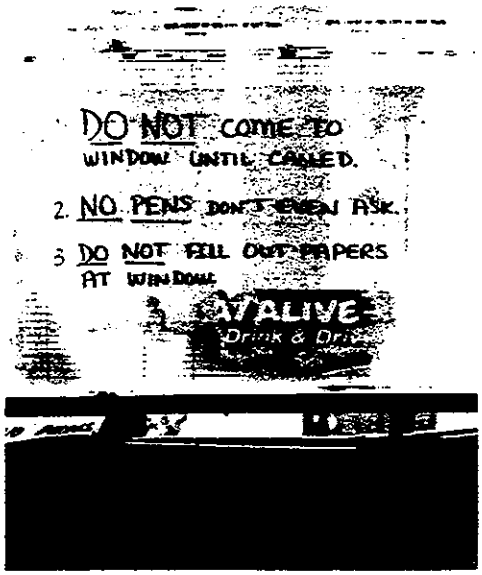
> **[She] was reduced to tears by the sitting judge in the intake part who in no uncertain terms told her that she had a great deal of nerve to assume that she had a prior right over the Commissioner of Social Services to determine the best interest of the child.**

Based on this and other observations, this attorney concluded that "people coming before the Family Court are treated frequently by the personnel, and also frequently by the judges, as criminals."

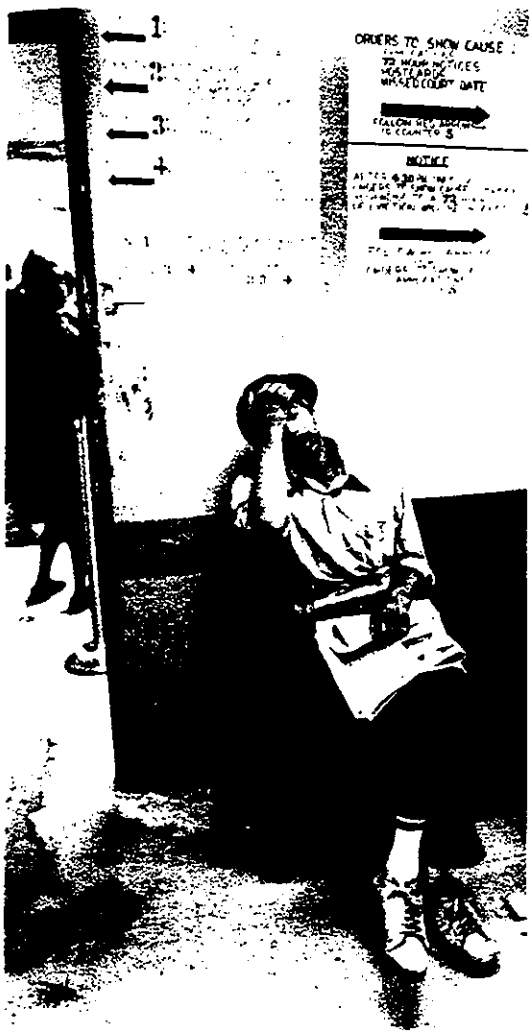
Informational Barriers

Informational barriers also have a disproportionate impact on minorities. First, a greater proportion of Blacks and Hispanics, in comparison to Whites, are not high-school or college graduates. The National Center for State Courts determined that Blacks and Hispanics have less information about the court system than do Whites. Moreover, as suggested by a Korean-American witness before the Commission, the lack of this information can decrease the likelihood that minorities will make use of the courts:

> **[W]hy is it that my fellow Koreans do not participate in this [judicial] system? Why do we not embrace this forum that potentially gives equal time to each individual regardless of race, color, religion, wealth, or level of education? Why do we [not], . . . after all avenues for conciliation are exhausted, pursue our rights? Why do we stand by while injustices are done to us and not seek assistance when available? It is because we do not know our rights and due processes under the law. It is because we do not know that the judicial process is open to us. It is because Koreans have not understood what is available nor how to exercise the rights conferred to us by the United States Constitution.**



Queens Clerks Office



Brooklyn Housing Court

In addition, minority litigants may lack practical information concerning court usage. As one witness put it:

> **There is no attempt to have any sort of information distributed in the courts in the [form] of pamphlets of information, in the [form] of just a booth in the lobby where somebody can come and say, ["h]ey, what's going on, Where do I go, what happens here?"**

One witness testified that the only Office of Court Administration brochure she could locate after considerable effort was one relating to Small Claims Court. She explained why the dissemination of information regarding procedures was important to utilization:

> **The lack of information [such as brochures] available explaining litigation procedures . . . probably affects minorities to a greater extent. Information is vital and will encourage use of the court system to solve problems and disputes such as mediation, but if you don't know about them you can't choose them. Information is needed to understand just what is ahead in terms of time, money and legal assistance required.**

Language Barriers and Cultural Considerations

Language barriers are formidable to many Asian Americans, Haitian Creoles, and Hispanics who, if their fluency in English is limited, may not be able to understand court proceedings and may, therefore, not seek the intervention of the courts to redress grievances. In Housing Court, this barrier may have profound effects for Hispanic litigants who, according to a courtroom observational study, comprised 26.4% of all tenants -- twice their representation among the New York City population.

In addition to linguistic barriers, differences in cultural values may deter persons of some nationalities from using litigation to settle differences. One commentator has noted that, largely due to the influence of Buddhist, Taoist or Confucian doctrines, "[i]n Asian society the law as a method for settling disputes is regarded as something to be avoided." Thus, there is a preference among some

first-generation Chinese Americans, for example, to settle legal disputes through informal mediation and community groups.

This preference was echoed by several Asian-American hearing participants. For example, among some Chinese Americans, the cultural emphasis on amicable resolution of disputes, coupled with the traditional view of Chinese courts as "place[s] of punishment first and citadels of justice second . . . still exert a powerful influence on people."

FINDINGS

1. There is a general public perception of bias in the courts of the State of New York.

2. Vestiges of long-standing discrimination by a variety of institutions and entities against Blacks, Hispanics, Asian Americans and Native Americans pervade their respective perceptions of their ability to achieve justice in the courts of the State of New York.

3. The facilities of many courts used mainly by minorities -- particularly the so-called "ghetto courts" of the City of New York, namely, the Family, Criminal, Civil, and Housing Courts -- are grossly deteriorated and inadequate.

4. The lack of readily available information about the court system makes it difficult for all users of the court system to negotiate the system.

5. The minority litigant who enters the courtroom may perceive the environment to be hostile, especially in the "ghetto courts."

6. Nearly half of all litigators surveyed by the Commission reported experiences of unfair, insensitive or otherwise different treatment of minority attorneys, litigants, jurors or witnesses in New York State courtrooms. Substantial proportions of judges also reported this behavior.

7. Court personnel are frequently disrespectful and discourteous to minority litigants, family members and witnesses. They refer to them by derogatory terms such as "skell" (defined as "bum, worthless person, trash, nigger").

8. The confidence of minority litigants in the court system is undermined by the speed with which their cases are frequently decided, a phenomenon known as "assembly line justice." 3.

9. There are many barriers to greater utilization of the court system by minorities. Minorities often cannot afford counsel, confront serious language barriers and perceive the courtroom as a culturally alien and hostile place.

RECOMMENDATIONS

1. The City of New York must take prompt action to cure the crisis regarding the deteriorated facilities of the "ghetto courts" by implementing the 1989 Master Plan. The City should avail itself of funding mechanisms authorized by statute. At the very least, the crisis regarding the physical condition of deteriorated "ghetto courts" must be addressed by the avoidance of space allocations that crowd "ghetto court" facilities.

2. To the extent that the Office of Court Administration has not implemented programs of sensitivity training for judges and nonjudicial personnel, it should implement them. Training should include, as a critical component, 4.

a program of "cross-cultural competence," which would include: (a) the capacity to understand and appreciate different values, languages, dialects, cultures and life styles; (b) a capacity for empathy that transcends cultural differences; (c) avoidance of conduct that may be perceived as demeaning, disrespectful, discourteous or insensitive to persons from other cultural groups; and (d) a critical understanding of stereotyped thinking and a capacity for individualized judgment.

3. The court system should be made more "user-friendly" by at least two means.

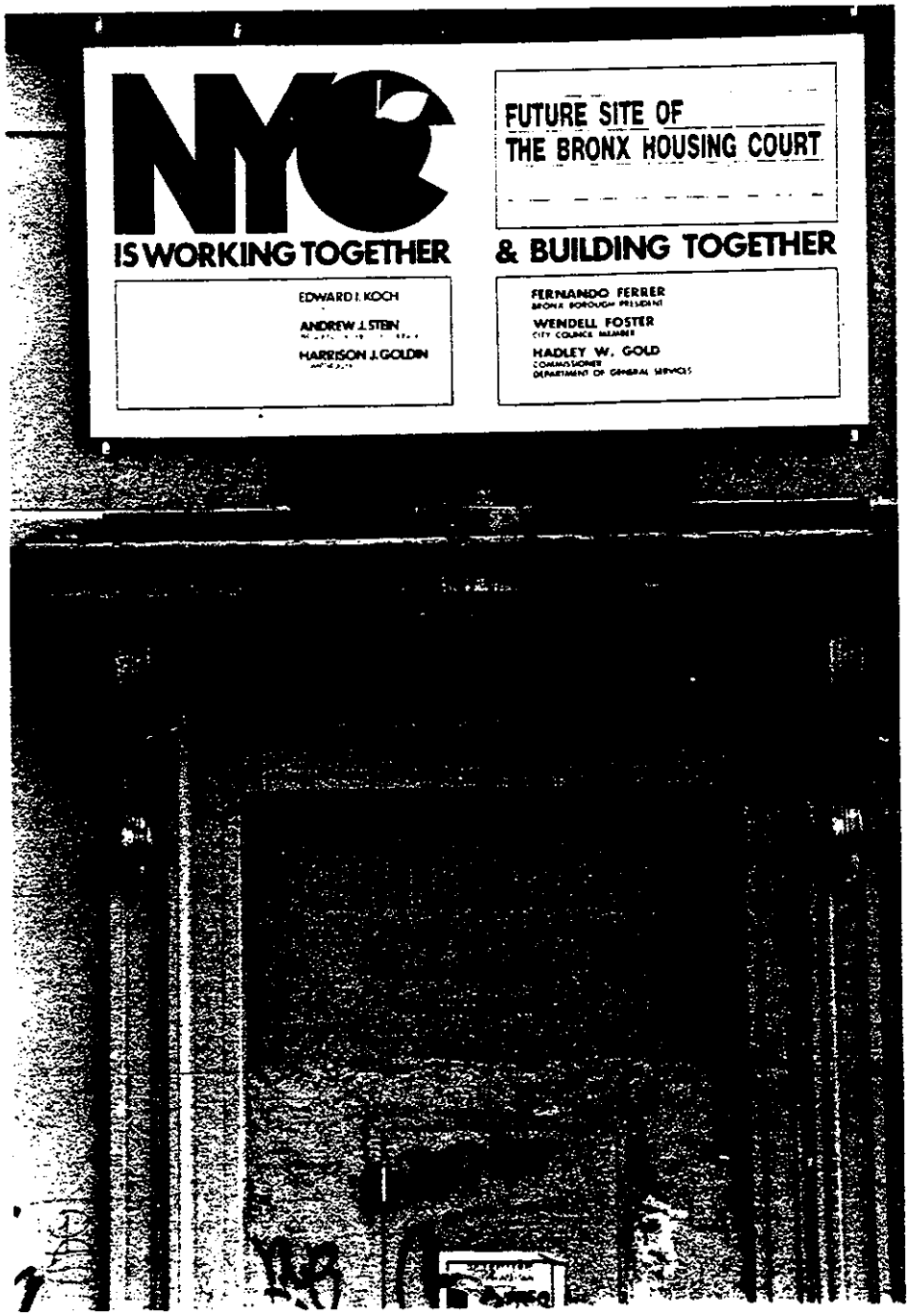
   (a) First, there should be an Office of Ombudsperson in each court to assist all persons in understanding court processes, to secure interpretation services and to locate facilities (such as childcare facilities, where they exist). The Office of Ombudsperson would also notify all users of a court (i) that complaints about the court or about court personnel can be made to that office, and (ii) that the office would attempt to resolve all complaints expeditiously.

   (b) Second, informational brochures, written in easily understandable English, and translated into Chinese dialects, Haitian Creole, Korean and Spanish, should be published and made available in each clerk's office and Office of Ombudsperson. These brochures should contain information relating to dispute-resolution entities other than the courts.

4. The judicial outreach program that is being conducted by the Office of Court Administration on a pilot basis to communities, and the voluntary judicial mentoring of high school students, should be continued and expanded.

5. Existing court-tour programs sponsored by the Office of Court Administration should be expanded, taking into account the needs of "language minorities," including Asian Americans, Haitian Creoles and Hispanics.

*[Commissioner Davis issues a separate statement as to the entire report, appended to Volume IV.]



The proposed future site of the Bronx Housing court, which once before fell victim to a budget crisis.

Bronx Housing Court - Unrepresented Tenant

Overview

A white litigator in New York City wrote in response to the Commission's survey:

> **I believe that inadequate legal representation of poor and middle class people is one of the basic causes of racial unfairness in [the] N[ew] Y[ork] S[tate] Unified Court System, since most minorities are poor or middle class and often cannot find or afford a competent lawyer to represent them in times of need. Until [legal representation] is made available and affordable . . . , the vast majority of the minority people will either not get their day in court when they need it, else will not be well-represented by competent counsel when they do get their day in court.**

The quality and availability of legal representation for minorities is inextricably tied to the more general issue of legal representation for the poor. The statistics on poverty in the State of New York show that a significant proportion of the population lives at or below the "poverty level," and that racial and ethnic minorities are disproportionately represented among the poor. While 14.6% of the state's total population lived below the poverty level in 1987, 11.5% of Whites, 31.6% of Blacks and 38.1% of Hispanics lived below the poverty level.

The issue of legal representation of ıorities raises the question of whether ıorities receive adequate representation. lequate representation," for the purpose this discussion, is defined more broadly n the legal term "effective assistance of ınsel." "Adequacy" is defined here, for h criminal and civil cases, by the per-ved disparity in the adequacy of represen-on given to Whites, on the one hand, l to minorities on the other.

Although the right to counsel is ıranteed in criminal cases, the ıvailability of legal assistance for the ıority poor in many civil cases remains a ticularly troubling issue. As described in preceding chapter, the cost of securing nsel is a significant barrier to utilization :he courts by minorities. In addressing question, the Commission focused on unmet legal needs of the poor, especial-he minority poor, in Housing Court.

In its full report, the Commission mined the history of legal representation, unavailability of counsel for poor people ivil cases, and the problem of inadequate resentation in Housing Court.

quacy of Representation in Criminal l Civil Cases

One black judge commented on the quacy of the attorneys assigned to ority clients:

> **With respect to the [F]amily [C]ourt, in the County of Westchester, the County Attorney's Office prosecutes all j[uvenile] o[ffender], neglect, abuse, [and] [g]uardianship cases.... Most of ... attorneys assigned to Family Court from the County Attorney's office have less than two years legal experience, limited courtroom experience, no significant training and in many cases are not admitted to the Bar yet. This works to the detriment of the respondents as well as the non-white and white children in whose interest these cases are brought. There appears to be an attitude that these issues and people are not important enough to warrant diligent and experienced attorneys.**

This criticism comports with the survey responses of the judges and litigators on the question of the adequacy of legal representation for indigent litigants.

Minority judges surveyed reported poor quality of representation more often than did white judges for all litigants, and particularly for minority litigants. Forty-nine percent of minority judges surveyed answered that inadequate representation for minority litigants occurs "often/very often." Ten percent of the white judges surveyed believe that minority litigants receive inadequate representation "often or very often." Significantly more litigators reported that minorities receive inadequate legal representation more often than do Whites.

Black and Hispanic litigators rated inadequate representation of minorities as a more frequent occurrence than did white litigators, either in or out of New York City. On average, Asian-American, Hispanic and black litigators responded that minorities "often" suffer from inadequate representation.

One black litigator from outside New York City wrote:

> **The dismantling of the Legal Services Program has severely impacted the delivery of legal services to poor and disadvantaged people from around the country. The disenfranchised**

and powerless are legion. Access to the legal/judicial system is primarily limited to those fortunate enough to be able to afford it. The growing gap between the rich and the poor, black [and] white, is intensified in criminal or civil proceeding[s] where ironically "equal protection" in -- the halls of justice -- is to a large part separate and unequal.

A black litigator from New York City asserted:

Most white litigants can afford a private attorney who will usually provide more adequate representation than his overworked and overloaded legal aid counterpart, who represents most of the minority litigants.

An Asian-American litigator in New York City stated:

Almost all 18B [court assigned] attorneys are white, and insensitive and unaware of the cultural issues of the extended Latino family which are important in the context of child placement.

Studies of Adequacy of Representation

Virtually all of the studies on the question of adequate legal representation have been undertaken in the criminal context. This is so because representation for criminal defendants, unlike that for civil litigants, is generally provided to litigants in New York State courts pursuant to a clear constitutional mandate. With respect to court-appointed representation, the literature indicates severe shortcomings ranging from an inability to establish an attorney-client relationship, to actual misconduct in conducting the defense. These problems disproportionately affect minorities who are overrepresented as criminal defendants.

The bulk of indigent criminal defense services in New York City are provided by the Criminal Defense Division of the Legal Aid Society. Public Defender offices and "18-B panels" (private practitioners available for court assignment) provide these services in the rest of the state.

Several studies agree that the increasing number of cases going to 18-B panel attorneys results in representation which is inadequate to meet the demand for defense services. These studies conclude that the 18-B system functions in such a way that many court assigned-attorneys are deprived of basic support services; continuous representation is discouraged; and thorough investigation of facts, or the use of expert witnesses, is made difficult.

Another recent study by the Association of the Bar of the City of New York, Subcommittee on Advocacy Misconduct, found that 50% of 123 federal and state judges who hear criminal cases in New York City stated that advocacy misconduct is a "serious" or "very serious" problem. Two thirds of these judges believed that existing sanctions are of "little use" or "no use." Approximately half of these judges declared defense attorneys to be the "major offenders" in this regard, and some single out the Legal Aid Society and 18-B attorneys as most responsible.

For 76% of the judges, the major type of misconduct reported was failure to make required court appearances. More than half of them reported disrespect to opposing counsel or to the court; failure to file papers on time; and such tactics as "baiting, tricking, and insulting" witnesses, and questioning witnesses in a manner "particularly demeaning to minorities or

women because of their jobs, neighborhoods, or lifestyles" (emphasis added).

Prosecutors, too, were charged with a range of misconduct including "racism in addressing witnesses" and attacking defendants based upon their prior background or material that had nothing to do with the crime charged.

Availability of Representation

Unlike the criminal arena, there is no automatic right to legal representation in civil cases upon a showing of indigency. An indigent litigant in New York State has a right to assigned counsel in civil proceedings only if required by the due process clause of the United States or the New York State Constitution, or by statute. The United States Constitution requires appointed counsel only if the litigant faces the loss of physical liberty. Otherwise, there is a rebuttable presumption against the right. Whether federal due process requires appointment of counsel in civil matters must be determined on a case by case basis in light of the particular facts and circumstances presented.

New York State recognizes a right to counsel under the state constitution in two instances not recognized under the federal constitution: termination of parental rights and final parole-revocation hearings. New York statutes also require that counsel be appointed in a variety of Surrogate's Court and Family Court proceedings. The major exceptions to this requirement are in support proceedings and, for the petitioner, in paternity proceedings. In these proceedings, the prevailing party may be entitled to an award of attorney's fees. Absent a constitutional or statutory right to counsel, the court has discretion to appoint counsel to serve without compensation.

Although no studies have been conducted which focus exclusively on the legal representation of minorities, there are studies of the legal needs of the public that suggest that minority persons are in greater need of legal service than are the general population or other persons who are poor but white.

For example, the New York State Bar Association (NYSBA) conducted a survey in 1989 to determine the most pressing problems among those poor persons who had experienced more than one civil legal problem in a given year. More than 60% of the problems occurred more than once in the year. Researchers characterized these figures as "very conservative estimates of the unmet civil legal needs of the poor in New York . . . ."

The most frequently experienced problems were:

1. housing (34.4% of the respondents)
2. public benefits (22.1%)
3. consumer problems (15.4%)
4. health (15.2%)
5. utility (13.2%)
6. discrimination (11.1%)

The Commission, in cooperation with the Spangenberg Group, analyzed the NYSBA's data to determine the unmet needs of the minority poor. The data permitted a comparison of the needs of Blacks and Whites. Black heads of households reported significantly more unmet legal needs than Whites.

Moreover, statistics on the unmet civil legal needs of the poor appear in a report by the Executive Director of the Legal Aid Society. That report details the following:

1. There are approximately 2,000,000 poor persons in the City of New York who are eligible for civil legal services.

2. Approximately 400,000 of those 2,000,000 will actually require the services of a lawyer in a given year.

3. The combined resources of all legal services agencies in the City of New York allow them to help only 60,000 poor people per year.

The Commission's surveys of judges and litigators support the above data. More than 40% of the minority judges reported that minority litigants are "often/very often" unrepresented, as opposed to 8% who reported the same for white litigants.

More litigators reported inadequate legal representation for minority than for white litigants. Black and Hispanic litigators on average reported a lack of representation for minority litigants "often," while white litigators reported the absence "sometimes."

Housing Court

Brooklyn Housing Court

Minorities represent 81.8% of Housing Court litigants in New York City, the vast majority of whom are unrepresented (83% of Blacks, 81% of Hispanics), and many of whom face eviction. Indeed, housing was identified as presenting the most serious example of an unmet legal need by respondents in the NYSBA survey in every region of the state, except upstate rural counties, where public benefits was ranked as the most important problem area. In New York City, housing was reported to be a very significant problem by 40.5% of the respondents. The Commission's analysis further revealed that Blacks had at least one housing problem much more frequently than Whites.

The Commission's secondary analysis of the City Wide Task Force report revealed certain disparities in treatment when the parties had no attorneys. For example, when no attorney was present, no Hispanic tenant requested a rent abatement as compared to 12-14% of black and white tenants, leading to the conclusion that language may have been a barrier. However, these differences between black, white and Hispanic tenants disappeared when they were represented by counsel.

Comments from the public, judges and litigators alike all describe the exacerbation of these problems when no counsel is present. For example, an Hispanic litigator in New York City commented:

> **Essentially, my comments relate to the manner in which minorities, particularly poor pro se defendants are treated in Housing Court. Although I have found some court staff, clerks, law assistants wh[o] have endeavored to be helpful, I have also found unsympathetic judges and in some cases judges who apparently go by some rather offensive stereotypes. . . . It is often evident in cases where a judge impatiently discounts the veracity of a pro se tenant's complaint because the tenants may be inappropriately attired, perhaps not fluent in English whereas the agent for the**

landlord is appropriately attired and almost invariably appears with an attorney.

An Hispanic litigator in New York City recounted:

[Judge] speaking to pro se minority litigant: "Ms. X you have to demonstrate both an excusable default and meritorious defense in this hearing." [The] litigant has a blank look on her face. She obviously doesn't understand what the judge is talking about and the judge just looks at her and says "proceed [with] your case."

A white litigator in New York City recalled:

a judge telling his court clerk not to explain to a pro se minority litigant what an adjournment was.

An Asian-American litigator in New York City wrote:

[A j]udge . . . told a poor Hispanic female pro se tenant that he was going to give her more time to pay the amount owed and then something to the effect [that] a good looking woman like her could get a waitressing job and have no problem getting good tips.

Efforts to Increase the Availability or Adequacy of Counsel

Some Commissioners believe that legal representation should be afforded to the poor in civil cases. The Commission notes that there are several efforts being undertaken to improve legal representation for the poor. The Pro Bono Project of the Association of the Bar of the City of New York is one that is addressing the need in Housing Court. The project involves 58 associates from five New York City firms who have handled 158 cases. In all of the cases handled, the indigent tenants avoided eviction. In nearly 50% of the cases, needed repairs were obtained for tenants' apartments. Partial abatements of rent were either agreed to by the landlord or were ordered by the court in 30% of the cases.

A second effort culminated in the report of the "Marrero Commission," which recommended that all practicing attorneys provide 20 hours per year of pro bono time. The Chief Judge is monitoring voluntary compliance with that recommendation.

The New York State Defenders Association has designed a course for certification of public defenders to enhance the competence and racial sensitivity of public defenders. Its curriculum provides detailed training and reeducation which may provide a model for other agencies that provide legal assistance to the poor.

Finally, the Commission notes that the New York State Bar Association recently endorsed mandatory continuing legal education (CLE) requirements. Course offerings for attorneys providing assistance to indigents, to enhance their ability to provide effective service, could be viewed as a means to satisfy any mandatory CLE requirements.

FINDINGS

1. Since minorities are disproportionately represented among low-income segments of the population, the availability of legal representation to individuals with low incomes significantly affects the availability of legal representation to these minority group members.

2. There has been a growing recognition in New York State of the importance

of competent legal representation in both criminal and civil matters.

3. Nevertheless, measures currently in place are inadequate to ensure competent, let alone equal, legal representation for the minority poor.

4. Evidence from Commission surveys of judges and litigators also supports the conclusion that minorities are more likely than Whites to suffer from inadequate legal representation.

5. On the civil side, the growth of the Legal Services Corporation (LSC) during the late 1960s and 1970s held promise for extending a range of basic legal services to the poor, but cutbacks, in its funding and range of permissible activities during the 1980s, have enlarged the gap between available resources and existing needs.

6. Laudable efforts have been made within the state to make up for lost federal funding, but they have not been sufficient to close the existing deficit in services.

7. On the criminal side, and in some civil matters, attorneys are provided as a matter of right to indigent defendants, either by government contract with providers of legal services such as the Legal Aid Society or by court appointment of individual attorneys.

8. In recent years, the share of all such legal services provided by court-appointed counsel has grown.

9. A concerted effort is needed to expand the quantity and improve the quality of legal services available to minorities.

RECOMMENDATION

1. Attorneys who represent the indigent on an ongoing basis -- public defenders, the Legal Aid Society and 18-B attorneys -- should be certified for this representation. Certification would require completion of specified courses, including courses in criminal procedure and general litigation. A course in diversity sensitivity training should also be required. Commercial organizations, such as the Practicing Law Institute, should be encouraged to provide these courses at reduced rates for those seeking certification, and for those who have been certified and who are seeking renewal.

Queens Courthouse - Holding Cell

(90% of the New York City jail population is black and Hispanic; 82% of the state prison population is black and Hispanic; nationally, one in four black males is in prison, on parole or on probation)

Overview

Most racial discrimination in the courts is not overt. Rather, it is manifested by decisions which are influenced by attitudes which may not even be consciously held. . . . To prove in any particular case that these attitudes have influenced a decision is well-nigh impossible; to deny the phenomenon in the face of years of courtroom experience would be blindness.

-- White Litigator

The deeply-rooted perception in certain minority communities that the criminal justice system treats minority defendants more harshly than white defendants contributes to the perception of bias in the courts. This perception is shared by a fair number of Whites.

The specter of racism in the disposition of criminal matters looms large when one considers the prison population as an indication of the disparity. Although minorities comprise only 22% of the state's general population, the prison population in New York State is 82% black and Hispanic. The prison data from New York City are

even more sobering: 90% of the jail population is black and Hispanic. Nationally, one in four black males is in prison, on parole or on probation.

It is generally acknowledged that the overrepresentation of minorities in prison is due to socioeconomic and other factors which do not necessarily reflect discrimination within (but may be affected by discrimination outside of) the criminal justice system. There is, however, evidence that racial discrimination may account for some portion of the overrepresentation of minorities in prison.

The Commission's report addresses the treatment of minorities in the pretrial and sentencing phases of the criminal process. The Commission focused its attention on the bail and sentencing phases of the process, because the treatment of minorities at these stages may indicate the overall treatment of minorities by the criminal justice system.

Accordingly, this chapter begins with a discussion of disparities in sentencing, drawing upon research undertaken by other groups and individuals, and on data from the Commission's surveys of judges and litigators. Next, the chapter examines racial disparities which occur earlier in the criminal justice process. Here, the bail determination process receives special attention. The Enforth Corporation Report on pretrial processing and other bail issues are also discussed. Finally, the chapter examines the effect of race on how prosecutors and defense attorneys view individual cases. Here, particular attention is paid to the susceptibility of the plea-bargaining process to racial bias.

Pretrial Processing

Most researchers have focused predominantly upon racially disparate outcomes in criminal cases, without regard to disparities which occur earlier in the criminal process, e.g., in setting the defendant's bail, or in deciding to incarcerate or release the defendant on recognizance (ROR). The Commission recognized that decisions made at every stage of the criminal process affect ensuing decisions. For example, some studies have shown that arrestees who are not released on bail have a greater likelihood of receiving a sentence of incarceration. The Commission therefore examined the earlier stages of the criminal adjudication process to identify disparate treatment that might occur.

One study reviewed by the Commission focused on three pretrial release decisions (ROR, amount of bail set for those not "ROR'd," and the decision to offer a cash alternative to a surety bond -- usually 10% of the surety figure). The researcher examined all criminal cases first arraigned in a New York City county between December, 1974, and March, 1975, to determine how the decisions were affected by certain variables. The race of the defendant was found to have no effect on the decision to release the defendant on his own recognizance; however, race was found to affect the decision to release the defendant on bail or the cash alternative, as well as the amount of bail offered.

The conclusion reached was that "the evidence of some discrimination, however small, in favor of Whites (as compared to Blacks and Hispanics) and against those whose primary language is Spanish suggests that discrimination . . . is still a problem with which to wrestle."

The Commission's Surveys of Judges and Litigators, and Public Hearings Testimony

The Commission's survey of judges and litigators also pursued the issue of whether minority and white defendants are treated

differently at the pretrial stage of their cases. Forty-one percent of minority judges and 2.4% of white judges surveyed responded that Whites are "often/very often" released with or without bail where a minority defendant would not be. Fifty percent of the litigators questioned reported that white defendants are released "often/very often" where minority defendants would be detained.

Judges and litigators were also asked to rate the frequency with which "lower bail is set for white defendants than for minority defendants accused of similar crimes with similar records and similar community ties." Thirty-seven percent of the minority judges but only 2% of white judges believed that lower bail is set for white defendants "often/very often."

Among litigators, 44% reported that lower bail is set for Whites "often/very often" and 46% of the litigators reported that Whites are "often/very often," released in circumstances in which minorities would not be released.

Comments by judges and litigators on their survey questionnaires, as well as testimony at public hearings, also pointed to problems in the current bail system. A black judge wrote that:

> **While the question of race is a factor in setting of bail and criminal disposition, there is a greater emphasis placed on other factors which may themselves be heavily affected by race. These are: employment history; family stability and community ties; educational background; any other prior contact with court; issuance of prior bench warrants; and conviction record.**

One white judge wrote:

> **Black defendants were often less able to make bail even when the amount was relatively insignificant. The reasons for this may be unconnected with class or race but are often attributable to a family having despaired of the recidivist.**

Queens Court - Holding Cell

A public hearing witness expressed the following view of the postarrest procedure faced by a black defendant:

> **Pretrial release or bail, which he probably can't meet, will be determined by a white judge who will use racially and culturally biased criteria to make the release decisions; that is, criteria such as education level, marital status, source of income, et cetera. Factors [are considered] that define one's racial or social status, but not necessarily one's risk or likelihood of appearing in court.**

One black judge stated simply that some judges use irrelevant factors in setting bail, while another witness testified that:

> **. . . [i]n making judgments about releasing a defendant on his or her own recognizance or setting bail, decisions about freedom or detention are all too often premised on middle class assumptions about family structure, aberrational behavior and resources available.**

The Enforth Report

The Enforth Report was a comprehensive study, complete with findings and recommendations, of the arrest to arraignment (ATA) process in New York City. This process, the Report found, was characterized by inordinate delays due to a combination of the following factors: increased arrests, holding space limitations, and an antiquated and overburdened system of recordkeeping. Thus, the Report found that it was not uncommon for arrestees to be detained for as long as 72 hours in New York City before being brought to court for the first time. The recommendations set forth in the Enforth Report are too numerous to permit full discussion here. However, a continued self-analysis by New York City in keeping with the purpose of the Report is necessary.

Plea Bargaining

Approximately 95% of all convictions are the result of guilty pleas; only 5% result from the trial process. A review therefore of the plea negotiations process is warranted to determine whether it results in practices which may be vulnerable to racial bias.

The most important outcome of the plea negotiation is the conviction charge upon which the defendant and prosecutor agree. Since plea negotiations affect sentencing outcomes, the range of sentences available to a defendant is highly contingent upon the conviction charge. If minority defendants are offered less attractive plea bargains than their nonminority counterparts, any apparent similarity in sentences for comparable conviction charges will obscure discrimination at the plea negotiating stage of the criminal process.

Research suggests that racial bias may exist in the negotiation and charge reduction phases of the criminal court process but the evidence of discrimination is not clear. However, the relationship between this and other stages of the criminal justice process lends credence to the perception that plea bargaining does result in disparate treatment. An inability to make bail, for example, may force defendants to accept otherwise undesired plea offers. For example, a black judge noted:

> **There was an invidious distinction in the offers for pleas to a white defendant versus a black defendant. I refused to impose the suggested sentences and insisted on a more equitable plea offer.**

Disparities In Sentencing

The DCJS Study

A widely held perception exists that minority defendants are given harsher sentences than white defendants. The following questionnaire response of one Hispanic judge is typical of many comments received by the Commission:

> **I have often complained about disproportionate sentences meted out to minorities . . . when compared to sentences imposed on their white counterparts for the same crimes.**

Preliminary findings of the relationship between race and sentencing conducted by the New York State Division of Criminal Justice Services (DCJS) provide some support for this perception. The DCJS study found that the criminal justice system does treat Blacks and Hispanics more harshly than Whites in some instances.

Brooklyn Criminal Court - Holding Cell

The DCJS study confirmed racial disparities in two settings: the imposition of fines versus jail time in misdemeanor cases and the chances of incarceration in felony cases. The most consistent preliminary finding by DCJS is the imposition of a fine as sentence for Whites and the imposition of jail as sentence for Blacks and Hispanics, for similar misdemeanors and with similar backgrounds. This finding was state-wide and was not found to be a function of income.

The study found that when data on felonies for the ten most populous counties are separately analyzed, racial disparities obscured in state-wide data become apparent. For example, although state-wide figures did not show a significant difference in the treatment of white and minority felony defendants with prior criminal records, these differences did exist in certain counties. In Westchester County, for example, white felony defendants with prior criminal records had a 39% chance of being incarcerated while similarly situated minority defendants had a 52% chance of being incarcerated.

The DCJS study is particularly interesting because of its examination of the impact of the defendant's prior criminal history on the sentencing process. A defendant with prior convictions was generally treated more harshly than a defendant with few or no prior convictions. Thus, because of differential involvement in certain crimes, there may be nonracial reasons for the sentencing disparity between white and minority defendants. If the ostensibly greater prior involvement of minorities in criminal activity reflects a racially biased tendency to arrest or convict minorities in greater numbers than Whites, then studies which control for prior convictions may miss an important bias-induced effect. The DCJS study tried, to some extent, to take this into account.

The DCJS finding of disparate treatment of minorities in different regions of the state confirmed the results of earlier studies. In a 1980 study of some 11,000 defendants eligible for probation, race had

only a negligible effect on decisions to incarcerate in New York City, but a substantial effect in suburban and "upstate" jurisdictions.

A study of disparate treatment under the state's indeterminate sentencing policy, conducted by the New York State Committee on Sentencing Guidelines, discovered significant differences in sentencing depending upon the race, gender and age of the defendant but found only regional differences in the amount of time served beyond the court-imposed minimum.

Interracial Crimes

The attention of researchers has recently been drawn to the effect that the race of the victim of a crime may have on criminal prosecution. Where the victim of the crime is white and the perpetrator is black, research has shown that prosecutors are more likely to upgrade the charges brought against the defendants. Black defendants therefore face more serious charges, more vigorous prosecution and more severe sentences than white offenders. In rape cases, one study found that where the victim knew the rapist, a black defendant was nearly twice as likely to be incarcerated for raping a white woman as for raping a black woman.

The effect of the race of the victim of a crime on the sentencing process is also illuminated by a large body of capital punishment literature in other jurisdictions. The studies in this area point to a strong relationship between the imposition of the death penalty and the race of both the defendant and the victim of the crime. These studies show that the likelihood that a defendant will be charged with capital murder and sentenced to death are greater when he or she is black and greater still where the victim is white.

Most studies control for the seriousness of the crime charged when they compare the disposition of the cases of white and minority defendants. If racial bias affects the severity of the crime with which a defendant is charged, however, studies which control for severity of charge may simply fail to detect an important source of bias.

Surveys of Judges and Litigators

Additional evidence of disparate treatment in the sentencing phase of the criminal process was uncovered by the Commission in its surveys of both judges and litigators. Overall, 44% of the litigators surveyed reported that white defendants are "often/very often" less likely to receive a prison sentence than black defendants, while only 29% of the respondents stated that this "never/rarely" happens.

Comments offered by the litigators questioned on this subject include the following remark by a white lawyer:

> **I have seen Blacks, convicted of petit larceny and Class A misdemeanors get a full year in jail--but a White get off with probation.**

Similarly, a black lawyer commented:

> **Minority criminal defendants are, without qualification, being treated differently than non-minorities, particularly at sentencing.**

In addition, dispositional alternatives to incarceration may not be considered with equal frequency in cases involving white and minority defendants. Both judges and litigators were asked the frequency with which "in the case of a white defendant/respondent (adult or juvenile) the court is encouraged by counsel to consider a wider

range of dispositional alternatives (e.g., drug treatment programs, community service programs and supervised home release) than that presented in cases involving minority defendants/respondents." Overall, only 9% of all judges reported that this happens "often/very often," and 27% reported that it happens at least "sometimes."

Litigators, by contrast, believe this disparate treatment is much more common. Overall, 37% of the litigators surveyed stated that white defendants "often/very often" have a broader range of dispositional alternatives considered than their minority counterparts.

FINDINGS

1. The Commission adopts the findings of the Enforth Report that the present pretrial processing system from arrest to trial is characterized by inordinate delays due to the following factors: increased arrests, holding space limitations and an antiquated and overburdened system of record keeping.

2. Bail considerations may be based, in part, on the value systems of judges who lack cross-cultural sensitivity to the familial and cultural realities of minority life-styles.

3. The procedures for the return of cash bail are confusing, complex and unnecessarily difficult.

4. There is a perception, supported in some aspects by research findings, that there is a disparity that can be attributed only to race in the rate of convictions and the types of sentences.

RECOMMENDATIONS

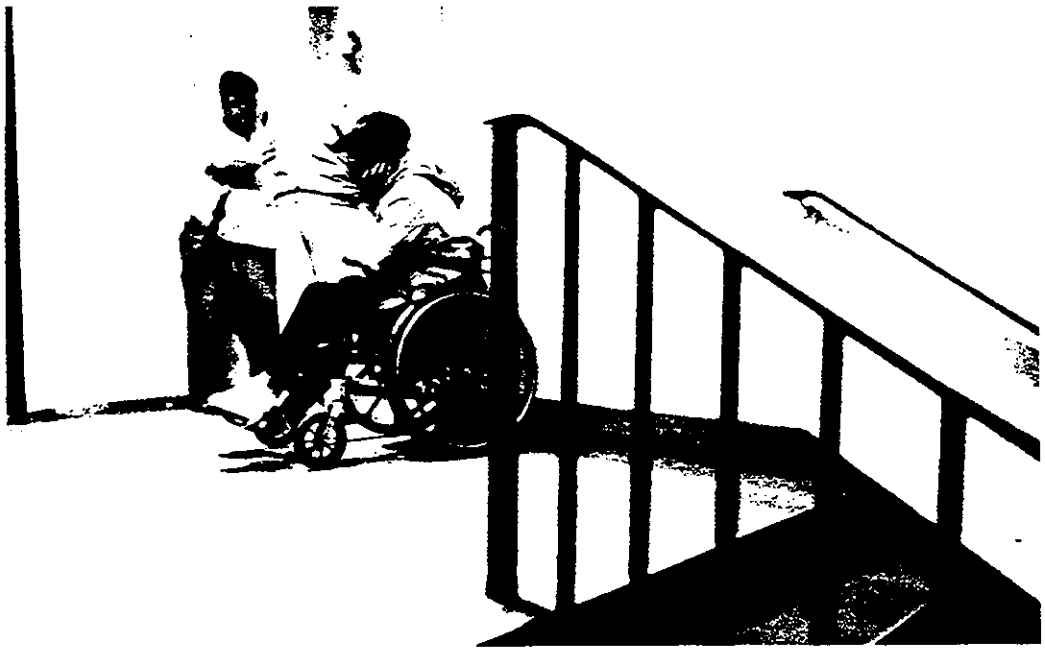
1. Judges should review their bail and sentencing decisions to ensure that they are fair and not influenced by racial or ethnic stereotypes.

2. The Office of Court Administration should adopt a judicial training program that reviews the bail statute, to highlight the available alternatives to money bail.

3. Proof of exoneration should result in the automatic return of cash to the rightful party.

4. Judicial training programs should include a review of alternatives to incarceration, especially with respect to circumstances common among minority defendants.

5. Sentencing statistics concerning the race of victim, defendant and complainant should be maintained along with case outcome and should be published by the Unified Court System in cooperation with the New York State Division of Criminal Justice Services.



Bronx Courthouse

Overview

One white litigator outside New York City stated:

> **[I]n Nassau [and] Suffolk County, with regard to civil plaintiff[s], [t]he one thing I seek to avoid is a jury trial if I have a minority plaintiff. My experience is that a minority plaintiff will receive an unfair jury award.**

Compare this to the statement of a black litigator in New York City:

> **In Manhattan, Kings and Bronx counties, I don't see much discrimination. . . . The three worst counties I have practiced in are Queens, Nassau and Westchester. I've had judges say, "If he wasn't a black, he would be worth much more money." You get much less, especially in Westchester, for a Black or [H]ispanic.**

The Commission finds that a widely held perception exists that awards given by juries to minority plaintiffs in civil cases vary in direct relation to the size of the minority population in the county where the litigation is brought. Where the minority population is low, jury awards tend to be low. Where the minority population is high, jury awards tend to be higher. There is also a widely held perception that in certain counties, usually those with high minority populations, all plaintiffs (minorities as well as Whites) receive high jury awards, with minorities receiving jury awards in amounts higher than expected.

Little research has been conducted on racially disparate case outcomes in the civil context. Moreover, what little research exists in this area is weakened by the fact

that civil awards are usually based on the loss of income suffered by the injured party. Because minority litigants, on average, earn less than their white counterparts, they tend to lose less, monetarily, when injured. The only study on this subject did not control for this disparity in earning capacity and its effect upon comparisons of case outcomes.

The Commission reviewed the following issues relating to civil case outcomes: juror attitudes that may account for variations in awards given in different counties; social science research on racial disparities in jury awards; certain problems in outcomes of the Housing Courts; and other evidence of racial disparity in civil litigation.

Juror Attitudes

Social science research demonstrates that juror racial bias may result in dangerous stereotyping of minority litigants and therefore affect the outcome in many civil cases. The data show that individuals rely upon stereotypes to categorize and evaluate even obviously dissimilar individuals. For example, two researchers conducted a study of personality assessments prepared by undergraduate students on the following ethnic groups: Irish, Chinese and Indian. They found that ethnic stereotypes played a significant role in the way that minority individuals were perceived socially, and also in the kind of impression that a minority individual made upon the people that he or she meets. In general, people were found to disregard facts and to heed stereotypes in the way they structured information and knowledge.

Research has shown that Whites hold two classic stereotypes of Blacks: (a) that Blacks are prone to violent criminal behavior, and (b) that Blacks are less intelligent than Whites. According to these studies, jurors apply these stereotypes when deciding civil cases. The direct consequences of these two stereotypes are: (a) when the evidence is marginal, Whites are given the benefit of the doubt and Blacks are not; and (b) because jurors believe that Blacks have inferior intellects, black attorneys, witnesses or parties may lack credibility in the eyes of these jurors. Moreover, psychologists have shown that:

> **whether we like someone often depends on how similar to us that person appears to be in terms of shared values, attitudes, and beliefs. We also tend to prefer people who are similar to us in age, level of education, status of occupation, and political views.**

Thus, while there is a dearth of empirical data available to assess the validity of the perception that there are racially disparate outcomes in civil cases, there may well be sufficient research on juries to explain this perception.

Research On Racial Disparities

Research on racial disparities in civil outcomes is often precluded by the absence of information in case files about the race of the parties to the litigation. However, a study conducted by the Rand Corporation did obtain that information. Although the study is ten years old, pertains to another jurisdiction and does not account for "loss of income," which is a significant omission, it did conclude that race "seemed to have a persuasive influence on the outcomes of civil jury trials in Cook County [Illinois]."

The Rand Study involved the empirical analysis of 9,000 state and federal jury trials in Cook County for the period 1959-1979. By reviewing reports compiled by the Cook County Jury Verdict Reporter (CCJVR), a private newsletter for law and insurance professionals, the researchers explored the relationship between trial outcomes and

party characteristics (age, race, occupation and gender).

The study demonstrated a consistent relationship between litigant characteristics and jury verdicts over a 20-year period in the same jurisdiction. The results, according to the Rand Study, were "statistically robust, stable over time, and consistent with widely held expectations about how juries treat different kinds of litigants."

The Commission believes that although it cannot be concluded definitively that differences in awards between minority and white plaintiffs are racially motivated, obvious differences do exist.

One judge testified before the Commission that disparities often exist between Blacks and Whites in jury awards in personal injury cases. He stated that "unfortunately, our judges are not sufficiently sensitive to be able to say this [the disparity caused by racist jury attitudes] is wrong and I will set it aside." Another judge noted that injuries suffered by minority persons are not compensated at the same level as those suffered by nonminorities with one possible exception -- in the Bronx where the difference may be due to the ethnic composition of the jury.

The perceptions of these two judges are further supported by the results obtained through the Commission's surveys. Nearly 40% of the minority judges surveyed reported that the relief awarded to a white plaintiff in a civil case is "often/very often" more than the relief awarded to a minority plaintiff in a comparable injury case. Only four percent of the white judges surveyed gave this response.

Of the surveyed litigators with civil court experience, 37% reported that, "often/very often" the relief awarded to a white plaintiff in a civil case is more than the relief awarded to a minority plaintiff in a comparable case. This was the response of 8% of white, 68% of black, 34% of Hispanic, and 28% of Asian-American litigators in New York City, and 16% of white and 65% of minority litigators outside New York City.

A white litigator in New York City observed:

> **[I]n Civil Parts, minority litigants are offered less, pressured more to settle, [and are] more likely to have favorable verdicts reduced by [j]udges.**

A black litigator in New York City noted:

> **In civil cases, sometimes the relief awarded to a white plaintiff is more than the relief awarded a minority plaintiff in a comparable case. In cases of wrongful death, it becomes apparent that the lives of Whites are more highly valued than the lives of minorities.**

Another black litigator in New York City remarked:

> **In civil cases, white plaintiffs are very often awarded more relief than minorities -- it is a socioeconomic issue because the white middle class has a higher income than the black middle class, and the courts take into account income factors. The only time a black plaintiff may receive a fair award is when the city is the defendant. Otherwise, in commercial litigation or malpractice, awards are based upon socioeconomic status.**

A black litigator outside New York City stated:

I have always found that African-American and Hispanic clients have been viewed as less worthy of significant financial awards in personal injury cases than similarly situated white clients by judges and jurors. For some reason African-Americans and Hispanics just are not as valuable a resource as Whites in the eyes of the legal system.

Finally, an Asian-American litigator in New York City commented:

In my early years, the judges usually dismissed issues of rent abatement or issues of habitability when raised by minorities more readily than for Whites. My guess was due to a preconceived assumption that minorities should live in those kinds of situations, when Whites shouldn't, because [minorities] shouldn't expect any better.

Twenty-eight percent of minority judges stated that, "often/very often," a civil case is regarded by attorneys or insurance companies as less "winnable" because the injured party is a minority.

Among litigators with civil court experience, 30% reported that, "often/very often," a civil case is regarded by attorneys or insurance companies as less "winnable" because the injured party is a minority. This was the mean response of 9% of white, 45% of black, 37% of Hispanic, and 15% of Asian-American litigators in New York City and 20% of white and 54% of minority litigators outside New York City.

Housing Court

The most compelling evidence of racial disparity in civil litigation found by the Commission comes from the Housing Court study conducted by the City-wide Task Force on Housing Court. The study consisted of direct observations of events at pretrial conferences before mediators, law assistants and judges. Housing Courts in Brooklyn, the Bronx, Manhattan and Queens were studied.

While the data do not permit the conclusion that disparate outcomes are directly caused by intentional racial bias, statistically significant differences in outcomes were found to be associated with race.

The Commission finds that lack of representation by attorneys for minorities exacerbates outcome disparities. Racial/ethnic differences are moderated when minority tenants are represented by an attorney. Blacks and Hispanics are disadvantaged by not having attorneys in a greater proportion of cases than Whites.

The key finding in this area is that even when the parties have counsel present, minorities experienced less favorable treatment. For example, even when Blacks were represented by counsel, they were made to pay court costs more frequently than Hispanic or white tenants: 91% for Blacks versus 71% for Hispanics and 56% for Whites.

Even with counsel present, there was a discrepancy between the proportions of white and minority defendants who were informed of their right to be heard before a judge: 67% of Blacks, 29% of Hispanics, but 100% of Whites were informed of this right.

Further evidence of disparate treatment was found in cases where judges explained to tenants, all of whom were with attorneys, the consequences of failing to abide by the terms of an agreement. Judges gave such

information in 82% of the cases involving white tenants, but in only 51% of the cases involving black and in only 57% of the cases involving Hispanic tenants.

Other Disparities In Outcome

Enforcement of Child Support Awards

Among litigators in our study with Family Court experience, 22% stated that, "often/very often," "the court enforces a child support award for a white child more vigorously than it does for a minority child in similar circumstances." This was the response of 8% of white, 35% of black, 32% of Hispanic, and 21% of Asian-American litigators in New York City, and 4% of white and 31% of minority litigators outside New York City.

Treatment of Domestic Violence Cases

Overall, 30% of the litigators who handle domestic-violence cases reported that, "often/very often," the court treats a domestic-violence case involving a white couple more seriously than one involving a minority couple in similar circumstances. This was the mean response of 18% of white, 48% of black, 41% of Hispanic, and 29% of Asian-American litigators in New York City and 8% of white and 41% of minority litigators outside New York City.

FINDINGS

1. A widespread perception exists that minorities tend to receive smaller awards in civil cases than similarly situated nonminorities in counties with low minority populations.

2. An extensive body of social science research tends to confirm that juror behavior in civil cases is affected by racial considerations in ways that disadvantage minority litigants.

3. There is one study conducted in Cook County, Illinois, which indicated that black litigants lost more often than white litigants in civil actions, both as plaintiffs and defendants, and that they received smaller awards.

4. The Commission's analysis of data from a study of housing courts in New York City confirms the existence of significant disparities in the treatment of minority and nonminority litigants.

RECOMMENDATION

1. The Commission recommends that the Office of Court Administration collect racial data on litigants in civil cases, (a) to prepare a study on this subject to determine whether there is a disparity in civil case outcomes and damage awards based on race, and (b) to consider distribution of the study to judges for the monitoring of the consistency of awards to minority and nonminority litigants in civil cases.

   *[Commissioners Birnbaum and Nakano dissent from this recommendation. They believe that such a study is unlikely to uncover anything but differences in jury awards acknowledged by the majority among counties; that recommendations by the Commission, as to which they have joined, e.g., to increase the numbers of minorities on juries, will ameliorate any outcome disparities; that the law requires juries to take into account differences in income; and that, in light of the speculative nature of the study, the court's budget crisis militates against such a study.]

CHAPTER FIVE: THE AVAILABILITY AND QUALITY OF LANGUAGE INTERPRETATION IN THE COURTS

Queens Courthouse - Clerks Office

Overview

A critical issue for members of the Asian-American, Haitian and Hispanic communities statewide is the availability and quality of language interpretation in court proceedings. As previously discussed, English nonfluency deters some persons from using the courts of New York State. Those who do use the courts often find themselves disadvantaged by the inadequacy of the language services provided. The absence of competent language interpreters in court proceedings inevitably contributes to the perception of racial bias held by many minorities.

As stated by the Commission's late chairman, Franklin H. Williams:

> **Clearly, if the . . . litigants do not understand what's happening in the courtroom, [they] can't possibly be considered to have gotten equal justice.**

The Commission examined the availability of interpreters, the extent to which the law mandates that courts provide interpreters in both criminal and civil cases, and the Commission's data on the level of satisfaction among litigators and judges with the availability and quality of interpretation.

The Availability of Interpreters

> **[It is a] common practice for Hispanics . . . to utilize friends, family members, and neighbors for legal translations . . . people who have no knowledge of the legal system, nor how to translate or interpret.**
>
> – Commission Hearing Witness

Presently, both the federal and New York State constitutions provide the right to an interpreter in criminal proceedings. Under the federal constitution, failure to provide an interpreter when needed may deprive the defendant of a fair trial. In the civil context the right to a court-appointed interpreter is not explicit, but at least one court has found that, at common law, a court has not only the authority, but also the duty, to appoint an interpreter where one is needed.

Despite these constitutional and common law guarantees, the needs of linguistic minorities are a stepchild in the legal system. The New York State Legislature has not seen fit to guarantee further these rights. The existing statutes, which include a 1914 statute providing for court appointed interpreters for Polish and Italian court users in Erie County, result in uneven availability of interpretative services throughout the state.

The Commission's survey of Administrative Judges shows that lack of availability is a frequent problem. Interpreters with proficiency in Spanish, Chinese and certain African dialects are sorely needed.

Despite the apparent need for interpreters in languages other than Spanish, the only language for which there are full-time interpreters is Spanish. And in this respect, the service is inconsistent. According to data provided to the Commission by the Administrative Judges, there are no full-time Spanish interpreters in Albany, Erie, Nassau, Richmond and Westchester Counties. With the exception of the Seventh Judicial District (Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates) and Suffolk County, all full-time Spanish interpreters are in New York City.

This inconsistency of interpretative services is compounded by the virtual absence of statistics evidencing the extent of the need. Only three judicial districts, the First (Supreme Court, Criminal Term), the Seventh and the Eighth, maintain statistical data on the number of requests for specific language interpreter services. Absent data on the number of cases requiring interpreters, it is impossible for Administrative Judges to engage in a meaningful planning process or to make substantiated representations regarding their need for additional interpreters.

In response to the Commission's survey of judges' satisfaction with the availability of court appointed interpreters, 50% of Hispanic and Asian-American judges expressed dissatisfaction. Similarly, 42% of black, 48% of Hispanic, and 52% of Asian-American litigators in New York City and 43% of minority litigators outside New York City, reported that lack of interpreters "often/very often" adversely affects their clients. This compares with 26% of white litigators in New York City, and 20% of white litigators outside New York City.

It is striking that Asian-American litigators, whose responses are not significantly different from those of white litigators in New York City on most of the items throughout this report, describe adverse impact on minorities in this area in much higher proportions than did Whites. Proportionately, twice as many Asian-American (52%) as white litigators in New York City (26%) reported adverse impact associated with lack of interpreters. An Asian-American litigator practicing in New York City, noted:

> **In a criminal trial involving a[n] Hispanic male, the defendant's father needed a translator to testify. [The Judge] railed loudly and long against people who**

"come here and have no respect and can't learn English." I feel the defendant did not have a chance.

Quality Of Interpreters

Administrative Judges also expressed dissatisfaction with the quality of interpreters. Among the reasons they cite for this dissatisfaction were the absence of a uniform screening mechanism, the lack of testing before hiring (applicable only to per-diem interpreters), inadequate monies to pay qualified interpreters, the failure to provide literal translation, the need for improved training and the absence of a uniform procedure for the evaluation of interpreters. In some districts, there is no formal evaluation procedure at all, and the competence of an interpreter either is not judged or is informally determined by the "parties involved," which in too many instances means the trial judge or court personnel.

Other judges, including Asian-American and Hispanic judges, reported higher levels of satisfaction with the quality of interpreters. Substantial proportions of litigators report that the low skill levels of interpreters "often/very often" adversely affect their clients. One black litigator noted:

The interpreter problem is especially serious for Spanish and Chinese defendants (Chinese because there are so many dialects). Lack of communication and problems because of colloquialisms adversely affect minority defendants. Even if an interpreter is certified, he or she is not necessarily qualified.

Work Environment

At the request of certain interpreters in New York City, the Commission held a focus session to discuss their experiences. Common to these interpreters was the view that they are treated as "second-class" employees. As evidence of their mal-treatment they identified such things as the absence of locker rooms or offices, the lack of supervisors who themselves are interpreters and the frequent failure to provide a place for them to sit during court proceedings.

Efforts By Other Jurisdictions

Faced with comparable issues of interpreter availability and quality, the states of New Jersey and Washington have responded by creating comprehensive plans. The findings and recommendations of these jurisdictions have been carefully considered in formulating this Commission's recommendations.

Federal law, too, supplies an instructive model for New York State. It sets forth a comprehensive plan relating to interpreters under the Court Interpreters Act. Under that Act, the Director of the Administrative Office of the United States Courts is empowered to establish a complete program to facilitate the use of interpreters in federal courts. That program requires certifying the qualifications of interpreters and prescribing the requirements for certification. Each federal district court is required to maintain on file a list of all certified interpreters. Under one portion of the statute, even if the presiding judge refuses to appoint an interpreter the litigant may nevertheless request assistance from the Administrative Office in obtaining a certified interpreter.

FINDINGS

1. A wide variety of languages is spoken by linguistic minorities, whose access to the courts and opportunities for full integration in courtroom processes in many courts is significantly impaired by the unavailability of interpreters.

2. The existing statutory scheme commits to the discretion of local court administrators the responsibility to determine the interpreter needs of their respective courts. There is no central entity that monitors the availability of interpreters or the planning process in which local court administrators engage in order to determine the numbers of interpreters needed.

3. Most courts maintain no data on the numbers of litigants requiring interpretation of court proceedings and are therefore unable to document the need for these services in submitting budget requests.

4. The quality of both full-time and per-diem interpreters is reported to be low in many courts.

5. In 1986 the Office of Court Administration sought to rectify the problem of poorly qualified interpreters through training sessions and development of competitive examinations for some languages. Lists of qualified interpreters are being disseminated to local courts.

6. Nevertheless, the evaluation of the competence of interpreters is all too often left to informal procedures, such as evaluation by judges, satisfaction of the parties, appraisal by court personnel.

RECOMMENDATIONS

1. The Chief Judge should encourage and the legislature should enact a comprehensive statute that ensures that linguistic minorities have access to interpreters in court proceedings.

2. The Office of Court Administration should require local court administrators to maintain the data necessary to determine the interpreter needs of minority litigants within their respective jurisdictions and to allocate resources accordingly.

3. There should be a state office to prescribe the qualifications of full-time and per-diem interpreters; to ensure a uniform certification process; and to administer their training.

4. There should be a code of ethics to govern all persons who interpret court proceedings.

Queens Courthouse - Jury Box

Overview

After 46 years of observing the racial composition of juries in the state courts in Buffalo, New York, a black resident stated:

> **When I first started this observation [in the Buffalo City Court, the County Court and the Supreme Court,] I would perhaps see one black juror, but seldom on a criminal case where there is a black defendant. That was many years ago. What is the situation like today? Today[,] I see perhaps one or two black jurors [serving] as jurors but seldom in cases where the defendant is black. Has there been a change? Yes, but it appears to be for the worse, because as the black population has dramatically increased [the] incidence of black jurors has not.**

Many consider "trial by jury" to be the foundation of the American justice system because it allows for the participation of average citizens in the evaluation and judgment of their peers. Thus, in a diverse society like ours, the perception that members of any community are excluded from jury service undermines the credibility of the legal system.

The Commission sought to understand the basis of the perception that members of certain minority communities were being intentionally and unintentionally excluded from service. This was no easy task. The Commission had to first determine the extent to which there is underrepresentation; and then examine the initial and in-

court selection processes as sources of underrepresentation.

Minority Underrepresentation On Juries

Despite the fact that the Office of Court Administration (OCA) has not maintained comprehensive data on the numbers of minority jurors serving within the New York State court system, the Commission was able to collect data on the extent of minority underrepresentation by surveying judges and litigators throughout the state.

The Commission's survey of trial judges showed that a minority litigant in New York State who does not live in Brooklyn, the Bronx, Manhattan or Queens, has a high probability of having her or his case heard by an all-white jury. Thus, judges in all other counties, including other counties with significant minority populations, reported that minority litigants appear before all-white juries with considerable frequency.

Numerous judges expressed their personal views about the reasons for the substantial underrepresentation of minorities on juries in New York State. A white judge stated:

> **Selected [b]lack jurors are difficult to keep awake as they frequently hold two jobs, one [being] jury duty. The second job creates a 17-18 hour day . . . .**

Another white judge stated:

> **Frequently minority jurors ask to be excused for hardship reasons either financial or personal, i.e., young children. This frequently results in a minority defendant being tried by a jury with no minority members.**

One black judge agreed:

> **Sequestration of jurors may influence minorities more because of greater family responsibilities.**

Litigators reported that all- white juries are a frequent occurrence even in four of the five New York City boroughs. Overall, a large proportion of New York City litigators (25%) reported that cases involving minority litigants are "often/very often" tried before all-white juries; significantly more black (38%) and Hispanic (29%) than white (14%) or Asian-American (14%) litigators reported this phenomenon.

Outside New York City, all-white juries in cases with minority litigants are a regular occurrence. Overall, 65% of the litigators outside New York City reported that this happens "often/very often."

Litigators were also asked about the frequency with which a case involving a minority litigant is decided by a jury that is predominantly minority. Even among New York City litigators, only 30% of white, 23% of Hispanic, 17% of black, and 11% of Asian-American litigators reported that minority litigants "often/very often" are tried before predominantly minority juries -- despite the fact that Brooklyn is 51% minority, the Bronx is 66% minority and Manhattan has a minority population of 50%.

The pressures which may be brought to bear on minority litigants because of the prevalence of all-white juries are described in the following statement of a white litigator from outside New York City:

> **I recently represented a young black man who was indicted for murder and manslaughter as a result of a fight which occurred at [a] prison. This man strenuously**

protested his innocence of the charges and wanted very much to go to trial. If he exercised his right to a trial, however, he would be tried before a rural, conservative, all-white jury in a case in which two white corrections officers were prepared to give testimony which was directly contrary to the defendant's version of what had occurred in the fight. Faced with this reality, my client elected to accept a plea bargain and was sentenced to 2-4 years in state prison. Although it is not possible for me to say with certainty that my client would not have received a fair trial because of his race, I can say that his apprehension was not unwarranted.

The Selection Of Jurors In New York State

New York State does not have a uniform system for selecting potential jurors. Each county addresses differently the issue of identifying jurors to hear and decide cases. Some of the differences among the counties are clearly justified. For example, downstate counties need more jurors than upstate counties given the greater number of courts and trials. The increased demand for jurors, coupled with poor initial response rates to questionnaires and lower overall qualification rates, means that the smaller pool of downstate jurors serves more frequently and have longer terms of service than their counterparts in upstate counties.

On a statewide basis, the Judiciary Law provides the statutory framework for selecting jurors in each county. The jury selection system is supervised by a county jury board that appoints a commissioner of jurors who administrates the program. In counties within cities with populations exceeding one million, the county clerk serves as jury commissioner.

The Chief Administrator of the Uniform Court System, however, is ultimately responsible for approving procedures for randomly selecting, qualifying and calling prospective petit and grand jurors. In this regard, the Judiciary Law dictates the use of voter registration lists from which prospective jurors' names are to be drawn, but it also allows the Chief Administrator to specify any additional lists to be used as a supplement to voter registration rolls.

Accordingly, OCA recently computerized the three sources of prospective jurors for each of its counties by combining lists of registered voters, motor vehicle operators and people whose names appeared on the tax rolls. Some commissioners, as well as the Uniform Court System Jury System Management Advisory Committee, have criticized the OCA list because it is based on sources which may not include the economically disadvantaged, and thus exclude a disproportionate number of minorities.

Although one can ascertain the gender and age of prospective jurors from these lists, none of the three lists used indicates a person's race. This makes it impossible for jury commissioners to monitor and correct jury pools for racial imbalance.

In contrast, corrections for gender imbalance can be made, and at least one county makes this correction. In New York County, whenever random calling produces a percentile difference between genders greater than 60/40, the County Clerk's office overrides the random calling procedure to establish an outer limit to gender imbalance. No such "balancing" can be performed to correct for minority underrepresentation

because of the unavailability of race data on juror source lists.

Qualification

Commissioners of jurors in most counties send qualification questionnaires by first class mail to prospective jurors. None of the questionnaires requires respondents to disclose their race. Overall, 30% of the citizens who complete the questionnaire qualify for jury service, but response rates vary from 33% to 99% in different counties. The low statewide response to the call for jury duty may contribute to the underrepresentation of minorities on juries if disproportionately low numbers of minorities respond.

Jury commissioners identify prospective grand and petit jurors from the same lists of qualified jurors. The qualifications for grand jurors are identical to those for petit jurors. However, the commissioners may require prospective grand jurors to submit to being interviewed and fingerprinted as part of a background check, since grand jurors hear sensitive information. Although most counties rely upon a check of police records to uncover unreported felony convictions, New York County fingerprints prospective grand jurors.

The Voir Dire Process and the Use of Peremptory Challenges

Once a minority citizen is found to be qualified to serve as a juror, he or she may still be excluded on the basis of race. As one prospective juror noted:

> **If we blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us?**
>
> **Why bother to call us down to these courts and then overlook us like a bunch of naive or better yet ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in courthouse halls being made fools of.**

Notwithstanding recent court decisions which prohibit both criminal defense and prosecuting attorneys from excluding prospective jurors because of race, litigators report that some judges still uphold discriminatory use of peremptory challenges to exclude minorities from jury panels. (The Commission's hearings were held at a time when defense attorneys were not yet barred from using peremptory challenges in a racially discriminatory fashion. The following comments therefore focus on the perceived improper use of peremptory challenges by prosecutors.)

One white litigator in New York City stated:

> **Despite Batson, prosecutors usually exclude most or all black jurors from a trial of a black defendant expressing some non-racial grounds for the peremptory challenges.**

Another litigator complained of the "exercise of 8 or 9 peremptory challenges by [a] prosecutor against black voir dire persons in [a] panel that was 44% black." A white attorney, practicing outside New York City, recounted the following:

> **An ADA tried to use a peremptory challenge on the only black member of a jury panel, in a case where my client was black. I cited Batson v. Kentucky but the judge said he'd allow the challenge. The ADA withdrew the challenge after consulting with his superior, but the judge would have allowed it.**

The Commission also asked litigators whether they think the voir dire process is effective in exposing racial bias. Only 23% of the litigators questioned believe that "jurors on the whole respond honestly to voir dire questions about racial bias."

This finding is important because research shows that because of social pressure, people are least likely to respond honestly to questions about racial bias which are (1) posed by someone in authority and (2) posed in a group setting. Thirty-one percent of litigators said that the judge (a clear authority figure in the court) participates actively in the voir dire questioning, with an additional 3% reporting that the judge is the primary or sole questioner. Thirty-seven percent of the litigators reported that in their experience voir dire is always a group process. Again, given what is known about the way people tend to respond to social pressure, it is unlikely that racial bias can be discerned in such a setting.

One white attorney in New York City summarized dissatisfaction with the voir dire process as follows:

> **For the few defendants with the courage to go to trial, the system's mania for speed and "efficiency" often results in woefully inadequate jury selection, based on a false belief that the process is inordinately time consuming. As a result, attorneys have little to rely on in selecting jurors and thus often fall back on their own racial biases and prejudices in exercising peremptory challenges.**

The Importance Of Enhancing Minority Representation On Juries

One commentator has pointed out,

> **Nonrepresentation for any reason will probably affect the quality of jury decision making; it will certainly undermine representation of the community conscience, and it may serve to lessen public confidence in, and legitimacy of, the jury system.**

The ethnic make-up of a jury can have a significant effect on the deliberation process. A group of nonminority jurors will commonly view, and therefore discuss, a minority defendant differently, depending upon whether a minority is present in the jury room. According to one Hispanic litigator:

> **[W]hen trying cases, you need at least one minority on the jury . . . Otherwise the jury, when deliberating may say things like, "They all steal hubcaps" or "They all do this."**

This litigator's experience is consistent with the Commission's findings regarding the extent to which racist attitudes in the courtroom can influence the way in which jurors integrate information and make decisions. Studies reveal that, while displays of blatant racism are not common in today's courtrooms, jurors' racist attitudes, whether or not they are actually uttered aloud, frequently determine the outcome of cases involving minority defendants. Studies also show that hidden racial prejudices can distort a juror's perception of the evidence and events at trial. A white litigator outside New York City wrote:

> **I also worry about the jury composed of all [W]hites and <u>one single</u> minority member -- I worry that said individual will not have a truly equal 1/12th or 1/6th vote unless he or she is a very dominant-type personality, will "go**

with the flow" for whatever reasons, such as a feeling of isolation, and will, in effect, result in all-white jury with the appearance of racial mixing.

Judges and litigators agreed that representative juries are necessary for the proper and fair functioning of the legal system. However, minority judges attach a significantly greater importance to increasing minority representation on juries than do white judges. More than half (51%) of the minority judges queried rated increased representation as "very important," while only 17% of the white judges made comparable ratings. Still, 53% of the white judges rated increased representation as at least "important." The comparable figure for the minority judges was 81%.

When litigators were asked about the importance of increased minority participation on juries, 68% stated that it is "important/very important." By race, 36% of the white, 91% of the black, 83% of the Hispanic, and 56% of the Asian-American litigators in New York City gave this same response. Outside of New York City, 54% of the white, and 94% of the minority litigators also felt that increased minority representation on juries is "important/very important."

FINDINGS

1. Minorities are significantly underrepresented on many juries in the court system.

2. This underrepresentation contributes to public perceptions of unequal treatment of minorities by the courts.

3. There is reason to believe that minority underrepresentation affects jury outcomes in ways that disadvantage minority litigants.

4. The point or points at which minorities tend to be excluded from the jury selection process are not well understood, in part, because data concerning racial identity are not collected from potential jurors.

5. Just as OCA has no mechanism in place to monitor the racial representativeness of juror pools, it has no mechanism in place to correct juror pools with a disproportionately low number of minorities. This inability contrasts with OCA's ability to monitor juror pools for gender representativeness, an ability that has permitted New York County to introduce measures designed to ensure gender balance in juror pools.

6. The net effect is that the court system labors under a perception of inequality in jury selection without means to refute or remedy the situation. Nevertheless, the Commission has identified several practices which it believes require corrective steps.

7. OCA relies on just three lists -- operators of motor vehicles, registered voters and individuals to whom state income tax forms are mailed -- to compile its master juror source list. While the use of these lists individually and exclusively has been held by the courts not to discriminate against minorities, as a practical matter, they do not yield sufficient minority representation on jury pools. Commissioners of jurors already possess the discretion to develop additional procedures to ensure that juries will come from a fair cross section of the community, but such additional procedures are not widely used.

8. The Commission's review of the overall response rates of the general public to jury notices indicates that this is

another point at which minority/ nonminority disparities may arise. Overall response rates are very low, and differences in the response rate of minorities and nonminorities may result in an underrepresentation of minorities in juror pools. Practical and budgetary constraints prevent extensive reliance on judicial remedies to increase the jury notice response rate, but administrative steps are available and have been instituted in a number of counties to increase the response rate.

9. Despite case law prohibiting the practice, a perception exists among some litigators that the exercise of race-based peremptory challenges in criminal cases continues to be used to exclude minorities from juries.

10. In addition to being underrepresented on juries, there is reason to believe that minorities are disadvantaged as litigants and witnesses by the failure of the voir dire process to uncover racial bias among prospective jurors. Many litigators believe that questions about racial feelings are frequently answered dishonestly, and these perceptions are reinforced by social science research findings. Because of social pressure, prospective jurors may be less likely to respond honestly to questions about racial bias that are posed by someone in authority or in a group setting. Many litigators report that it is common for judges, who are clear authority figures in the court, to participate actively in voir dire questioning and for the questioning to be conducted in groups.

RECOMMENDATIONS

1. Additional lists (e.g. utility bills, library address lists, high school graduates lists) should be used to identify potential jurors in order to insure that minorities are included on master juror source lists in proportion to their numbers in the population.

2. The OCA should encourage appropriate entities to make public service announcements emphasizing the importance of jury service.

3. Jury commissioners should expand or adopt a practice which permits jurors to be "on call" by telephone to encourage jury service.

4. Commissioners of jurors should inquire about race in the questionnaires they send to identify citizens who qualify for jury duty. Data compiled from these questionnaires should be monitored to determine minority representation on the master juror source list. If minority representation falls below levels roughly proportionate to their numbers in the community, special initiatives should be undertaken to correct the imbalance.

5. Judges should exercise heightened scrutiny to ensure that peremptory challenges are not used improperly in the voir dire process.

6. Judges should be discouraged from engaging in group questioning of potential jurors regarding their racial feelings, and rather than doing it themselves, they should be encouraged to permit counsel to conduct this questioning.

N. Y. C. Public Hearings - Representatives of Indian Nations

Overview

> **The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.**
>
> **-- Cherokee Nation v. Georgia**

Because the Commission agrees with this sentiment, the full report includes a separate discussion of a number of issues Native Americans raised with the Commission. The Commission found this to be necessary because a clear line of demarcation exists between the goals of certain Native Americans and those of other minority groups. Although Native Americans share many problems with other disadvantaged minorities, those living on Indian lands have a unique set of concerns regarding the court system which requires separate discussion. Most of these special concerns involve questions of sovereignty.

Other minority groups typically seek greater participation in the institutions of mainstream society, including the courts and the legal profession. In contrast, Indian nations with lands in New York State seek, to varying degrees, just the opposite. Their goal is self-governance, separate and apart from both the federal and state governments, including the courts. There are, of course, Native Americans who do not share these goals, but their problems with the court system are similar to those of other minorities.

The Commission received considerable testimony from members of Indian nations, and representatives of their governments, regarding their experiences in the courts and the legal profession. The Commission also met with the Tribal Council of the Haudenosaunee, the native name for the Iroquois Confederacy. Finally, additional insight was gained from the responses of

Native American lawyers to the Commission's litigator's survey.

The Commission's full report details historical information needed to understand the concerns of Indian nations in New York State, and current information about their governments. The report also discusses judicial issues of particular concern to those nations.

Historical Background

European settlers landing in what is now New York State encountered highly developed confederacies of Indian nations. The models of government established by these confederacies were well documented and, according to some, they provided a fund of ideas from which the colonists drew as they developed their own political institutions.

The Iroquois Confederacy, originally comprised of five separate Indian nations, was established around 1000 A.D. under the Kaianerekowa -- the Great Law of Peace. Occupying territories from New England to the Mississippi River, this confederacy is generally regarded as the most important political unit in North America prior to the European settlement.

Despite the interaction in political ideas which occurred between the Indians and the settlers, there existed fundamental differences in their respective ways of living, and these differences guided the treaties and agreements they entered into with one another.

Frequently, these agreements were memorialized in wampum (beadwork). As one witness testified at the Commission hearing, this belt symbolized the Indians' understanding that "we can live together as brothers, going down different paths, but the key word is TOGETHER. Our paths do not cross...."

Example of wampum

Indian Nations And The State Of New York

[The] principal point of dispute between white and Indian historically has been land. The greatest legal gap between the two cultures has been the respective attitudes towards [the land]. . . To whites, land is a "commodity," while to Indians it is the "sacred and inalienable mother."

--Wilkinson and Volkman

The Native American population in New York State was counted at 43,987. Approximately 9,000 of this total resided on ten reservations. There was also a sizable urban population of Native Americans, particularly in New York City, where the 1980 census counted some 11,824.

There are six Indian nations in upstate New York -- the Mohawk, Oneida, Tuscarora, Onondaga, Seneca and Cayuga (collectively the Haudenosaunee). The Shinnecock and Poospatuck nations are located in Suffolk County. There are also a substantial number of Ramapo Indians living

in the Ramapo Mountains of Rockland and Orange Counties. However, the Ramapo are not recognized as an Indian nation by New York State or the federal government, although they do maintain a government-to-government relationship with New Jersey.

Generally, Indian nations in New York State hold "Indian title" to their land. This is different from most Indian lands in the United States, for which title is held by the federal government in trust. Thus, issues relating to "ownership" and rights of governance over Indian lands tend to be more keenly felt by Indian nations in New York than elsewhere.

Issues Involving New York Courts

Tribal Government Decisions and State Courts

Each of the Indian nations with lands in New York State has longstanding traditions of self-governance. Because they are recognized as nations by either the federal government, the state, or both, they have certain sovereign rights. The nations believe, however, that their right to govern their territories has been severely challenged in recent years by state court decisions involving the right of an Indian nation to remove or banish individuals from its land, and its right to regulate entrepreneurial activities on Indian reservations. The latter cases involved, among other things, the sale of tax-free gasoline and cigarettes.

It is the view of many of the nations' members that the most serious challenge to their sovereignty has arisen in connection with litigation over the operation of gambling casinos on Indian land. Gambling has presented a particularly serious problem because Indian governments feel that the casinos threaten their entire way of life. They have therefore enacted and enforced laws limiting or banning gambling. When affected entrepreneurs challenged the tribal governments' decisions, these governments perceived the state courts as not acknowledging their inherent right to make laws pertaining to their own territories.

Oaths Of Office

Native Americans, in testimony and written submissions, informed the Commission of their objection to the requirement that they pledge allegiance to the state or federal constitution as a prerequisite to holding some jobs. As sovereign peoples and, individually, as citizens of distinct nations, many Native Americans resent the fact that the state, by the imposition of oaths as a prerequisite for some employment, forces Native Americans to choose between allegiance to their nation and acceptance of jobs for which they would otherwise be fully competent. The latter choice often bears the penalty of social stigmatization within their communities.

The Indian Child Welfare Act

The Indian Child Welfare Act was designed to promote the stability of Indian families and clans. It provides, among other things, that the appropriate Indian nation be notified when an Indian child is before a state court in an involuntary proceeding. The Commission received complaints that New York courts are not following the procedures set out in the Act, in particular, the notice requirements. For example, a judge of the Surrogate's Court of the Seneca Nation commented that it was not until 1985 that the Act was recognized by the Chautauqua County Court, and between 1985 and 1987, the Seneca nation found itself intervening in cases in which they had not been officially notified by the courts.

Bail

Since Indian land is held by Indian nations collectively, rather than by individual members of the nation, a unique problem develops when a nation resident tries to secure bail. A defendant who resides on Onondaga territory, for example, cannot put up his or her land as collateral for bail, and many courts will accept only that collateral as a substitute for cash. Consequently, many Native American defendants are left in jail. The Onondaga Council of Chiefs has met with the District Attorney of Onondaga County in an effort to make alternative arrangements. The chiefs are willing to guarantee bail for Onondaga defendants, but the District Attorney has taken the position that only a judge can authorize an alternative arrangement.

Native Americans in the Legal Profession

According to the 1980 census, there were only thirty-five (35) Native American lawyers in New York State. There are no known Native Americans serving in the judiciary. Nationally, there are under 500 American Indians or Alaskan Natives enrolled in law school.

The dearth of Native American lawyers practicing in the state has doubly unfortunate consequences. First, a strong Native American presence is needed in the profession for the same reasons mentioned elsewhere in this report in reference to minority groups in general. In addition, however, the unique legal issues that arise in litigation involving members of Indian nations require attorneys who not only understand Native American concerns and have the confidence of Native American litigants, but who are also knowledgeable regarding Native American law and legal institutions.

FINDINGS

1. Native Americans of the Indian nations located in New York State, recognized by the federal and/or state government, have established governments and a long-standing tradition of self-governance.

2. The governments of these nations are concerned that their sovereignty be recognized, and, in accordance with that desire, they manifest varying degrees of willingness to participate in programs and activities sponsored by the state government.

3. Representatives of these nations believe that their right to govern Indian lands has been challenged in recent years by state court decisions.

4. Some Native Americans who came before the Commission are hesitant to take the oaths of office required for certain types of employment within the judicial system (as well as other professions). Based on their view of sovereignty, they fear that swearing allegiance to a "foreign" constitution may undermine their status as Indian-nation citizens.

5. Provisions of the Indian Child Welfare Act designed to protect the interests of Indian nations are not being uniformly honored by the courts.

6. Native Americans residing on Indian lands confront unique difficulties in meeting bail requirements because they do not hold individual title to the land they occupy. Representatives of at least one Indian government have sought unsuccessfully to have special arrangements recognized wherein the Indian Nation would guarantee payment of bail in case of default.

7. There is a marked shortage of Native American attorneys practicing in New York State and none serve as judges. There are also relatively few Native Americans enrolled in law schools, so the number of Native American attorneys is unlikely to increase significantly in the near future.

RECOMMENDATIONS

1. A formal commission should be established and provided with a broad mandate to study and develop ways to address issues of concern that arise between the state judicial system and Native Americans.

2. Educational materials and seminars should be developed for judges and other appropriate judicial personnel regarding the historical and legal bases of the sovereignty of Indian nations located in New York State.

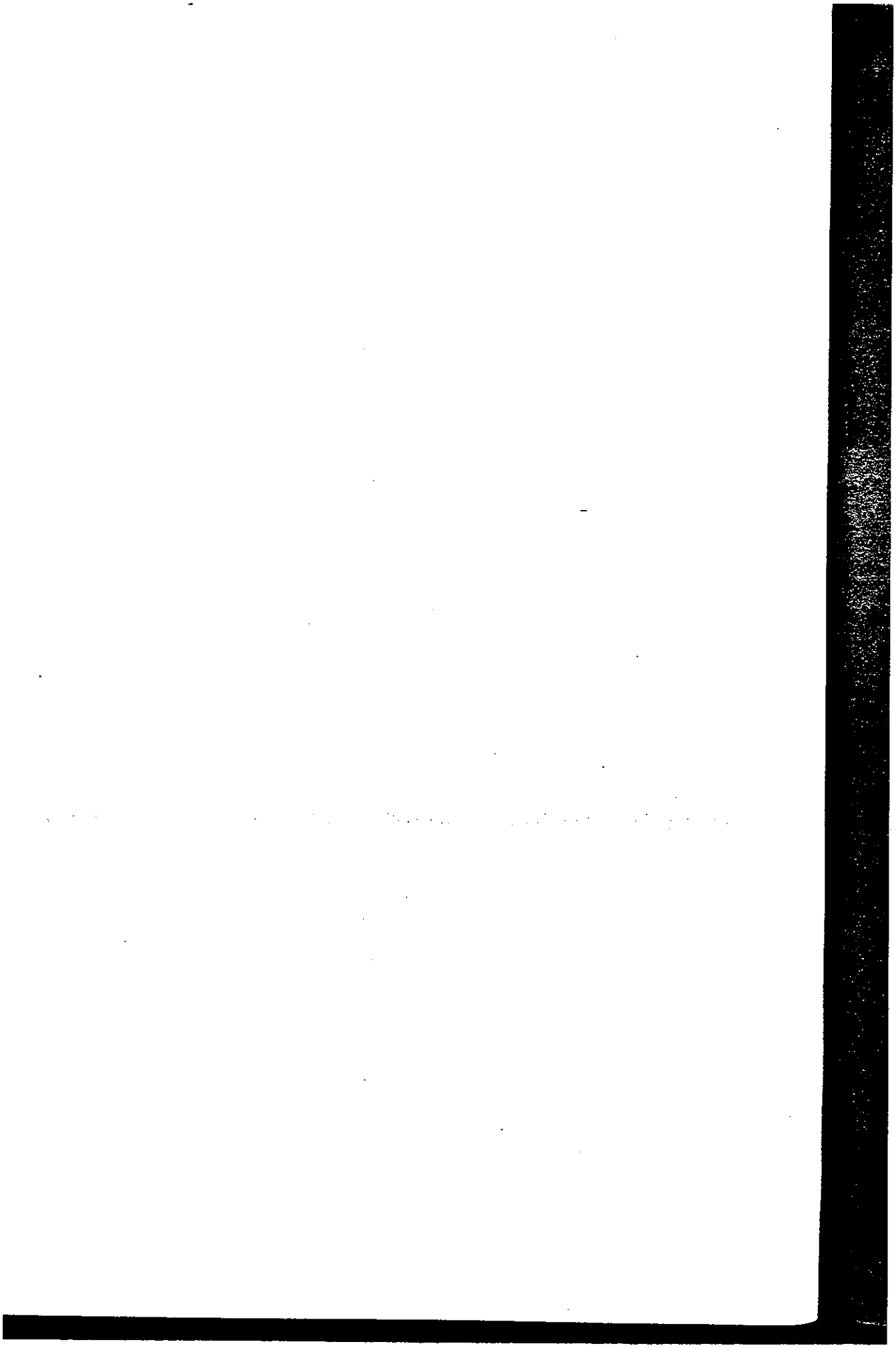
3. Alternative methods should be explored for increasing the employment of Native Americans within the court system, methods sensitive to concerns held by certain Native Americans regarding the taking of an oath of office.

4. The Chief Judge should notify all state court judges of the absolute necessity of abiding by all provisions of the Indian Child Welfare Act. Judicial seminars on the Act are also recommended. In addition, a system of monitoring custody proceedings involving Indian children should be established to ensure that there is full compliance with the requirements of the Act.

5. A proposal should be developed, in consultation with Indian nation governments, for bail alternatives for Indian nation residents. Once developed, this proposal should be circulated to judges and to the governments of the nations for their approval.

6. Concerted efforts should be undertaken to increase the number of Native American attorneys in the state. These efforts should include the recruitment and encouragement of high school and college level Native Americans to consider legal careers; and assisting Native Americans engaged in legal study to complete successfully the process leading to bar admission. Qualified Native American candidates for judicial appointments should be identified and recommended.

7. Proposals and guidelines should be formulated to permit attorneys and advocates certified to practice in Indian nation court systems to be called on by state court judges as "friends of the court" when matters of Indian law or custom may be involved in a case. The Commission believes that, where appropriate, the use of persons trained in Native American court systems is needed to ensure that the requisite expertise on Native American issues and concerns will be adequately presented in New York courts faced with specific Native American legal questions.



VOLUME III: LEGAL EDUCATION

Introduction

Despite the fact that a relatively large proportion of minority college graduates applies to law school, minority underrepresentation in every facet of the legal profession continues to be a serious problem.

The Commission is mindful of the significant differences in educational opportunities between many minority and nonminority students, which begin as early as preschool and continue even at the postgraduate level. These educational differences may impair the ability of minorities to compete with nonminorities for the increasingly limited number of opportunities which are available in higher education. There are possible cracks in the educational process before law school through which potential minority law students may be slipping.

This volume on legal education details the Commission's research into minority representation and experience in New York State's 15 law schools. The Commission's investigation included examination of: (1) the minority recruitment process and the ability of law schools to keep their minority students and faculty, (2) the extent to which minority issues are incorporated into law school curricula, (3) the extent to which minority students are integrated into law school activities, e.g., law review and moot court, and (4) the effectiveness of the assistance rendered to minority students in obtaining employment.

The Commission found that each of the state's law schools has established policies and practices with respect to minority students. However, some of these policies and practices are more effective than others. The Commission has incorporated the most effective of these programs into a model program designed to assist law schools in more successfully identifying, retaining and graduating minority students.

Recruitment, Enrollment And Retention Of Minority Students

Minority Applications

All but four of the law schools maintain data on the number of minority applications they receive. These data provide a mechanism for assessing the efficacy of the outreach strategies used. These data show that the number of minority applicants varies widely from law school to law school.

Prospective applicants typically lack important information about acceptance standards at particular law schools. Often, their grade point average (GPA's) and LSAT scores are high enough for them to gain admission to schools to which they have not applied. The presence of a "matching" program which would keep minorities properly informed about admissions standards at all law schools would facilitate the process of increasing minority applications.

Admissions Criteria

Many minorities score below nonminorities on the LSAT examination. However, the validity of the examination is open to question. Recognizing the limitations of LSAT scores and GPA's as measures of academic ability, most law schools supplement their admissions review processes by also considering other indicators of ability, such as evidence of

leadership potential and progressive academic improvement during the latter years of college. Other factors used as admissions criteria by some schools include employment experience, community service, a record of overcoming hardships (such as a disadvantaged economic background), and evidence of maturity, integrity, sound judgment, initiative and energy.

With respect to the debate over "special admissions," the Commission notes that law schools have never failed to find space to admit certain special applicants. There have been special admissions for faculty children; children or friends of alumni or alumnae (especially financially contributing alumni or alumnae); siblings of enrollees; as well as for students with political connections. The schools have simply assessed their need for these particular students and have facilitated their admission.

In the case of minority enrollment, some schools have identified the need to have a student body which is more reflective of the society which the students will ultimately serve. To obtain a diverse student body, these schools have simply added another "special admissions" category.

Minority Enrollment

The overall enrollment rates for most minority groups are substantially lower than enrollment rates for Whites. However, race/ethnic data were not available from five of the 15 schools studied, and only incomplete aggregated data on minorities were available from an additional three of the schools. Consequently, the Commission's conclusions regarding minority enrollment rates of particular minority groups are based on a sample of less than half of the law schools studied.

Among the schools with adequate data, some seem to have difficulty enrolling particular minority groups. The Commission specifically found that both Blacks and Hispanics have depressed enrollment rates at three of the seven schools for which data were provided. Blacks were also underenrolled at a fourth school; Hispanics were underenrolled at a fifth school. Similarly, Asian Americans have depressed enrollment rates at three of the schools. The enrollment rates for Native Americans are very low, given the fact that very small numbers of Native Americans apply to law school. Those that do apply are generally admitted.

At a majority of the law schools which have kept relevant data, the problem is not in the number of minorities being admitted to the schools (with the exception of Blacks) but in the number of minorities who apply. The data from New York State show that both minorities and nonminority applicants are admitted in proportions roughly equivalent to their relevant numbers in applicant pools. This conclusion must be viewed in light of the absence of data from five schools and incomplete data from an additional three.

More than half the schools do not have data which support or refute any conclusions about individual minority groups. Given the inadequacy of the available data, it can be concluded only tentatively that the problem lies less in the admissions criteria being used by the law schools than in the number of minorities applying to them.

It appears therefore that the way to increase minority representation in law schools is to increase the numbers of minorities who apply. The Commission suggests outreach and recruitment programs designed to stimulate minority interest in the law and to increase the number of minority applicants to specific schools.

Recruitment Practices

All of the law schools expressed a general interest in increasing minority enrollment. With regard to recruitment practices the Commission found that relatively few law schools involved minority students in all phases of the recruitment and acceptance process, despite the fact that all law schools had at least one minority student organization. Minority students viewed positively their inclusion in the recruitment and acceptance process.

The Commission further found that no school employed a staff member whose sole task was minority recruitment. This duty was usually assigned to an administrative officer, who, on occasion, was a minority person and who handled financial aid and other administrative tasks including minority student support. Support services for minority students might, therefore, have been interrupted or unavailable when that staff person was away from the institution.

Some law schools conduct programs at local high schools in order to stimulate an interest in the study of law. Some law schools sponsor minority information programs for prelaw advisors and minority college students. The minority public is also invited to these sessions through notices sent to civil service unions, paralegals and legal secretaries.

All law schools conduct visits to the campuses of colleges to recruit students, but only some law schools make a targeted effort (sometimes through undergraduate minority organizations) to reach minority students on the campuses they visit. Some law schools do not reach out for minority students.

Financial Aid For Minority Students

A number of state and federally funded programs provide higher education loans and grants to both Whites and minorities. Most schools have some form of financial assistance for which minority students are eligible.

All the admissions officers and minority students surveyed by the Commission agree, however, that there is inadequate financial support for minorities and that this deters minority enrollment.

Minority Student Retention and Support

Attrition rates for minority students range widely among the state's law schools. Minorities have attrition rates comparable to Whites at three of the fifteen schools but have considerably higher attrition rates at six schools. Minority enrollment at the other six schools is too low to draw any conclusions regarding attrition rates, but it is generally accepted that minority law students nationally have higher attrition rates than white students.

There has been much speculation about why minorities have such high law school attrition rates. One theory is that minorities suffer from insufficient development of their academic skills at the college level. Another theory is that the high attrition rates are due to lack of financial resources and psychological stress arising from feelings of inadequacy and isolation. Some law schools have adopted summer programs before the first year designed to improve performance and reduce stress.

Curriculum And Law School Activities

Curriculum

There is growing awareness that law curricula need to reflect diverse perspectives

and experiences. All courses need to be reviewed to insure "inclusiveness." For a number of reasons, such reviews have been rarely done at law schools in the state. Interviewees cited concerns of academic freedom or of potential alienation of students.

Law Clinics

Thirteen schools reported disproportionately high minority enrollment in at least one clinical program. A few schools plan targeted outreach to increase minority enrollment in clinics. These findings/developments parallel the finding that ethnic minorities comprise significant proportions of clinics' clients. Nevertheless, in no program are minority students in the majority of clinic enrollees. Yet no school has a formalized program to "sensitize" these predominantly white student groups to racially-founded differences between them and their clients. Thus, as with other aspects of curricula, schools need to review their clinical programs to better address race-relevant concerns.

Law Journal and Moot Court

The discussion of law school activities focuses on law review and moot court. Several schools have made concerted, affirmative efforts to diversify law review staffs. By contrast most schools make no targeted effort to increase minority participation in moot court programs.

Job Placement for Minorities

Schools vary in the extent to which they make special efforts to assist minority students with job placement.

Schools provided data on student placements in various types of law practices, ranging from large firms to public interest organizations. Placement in large firms was found to depend more on school attended than on race; nevertheless, even at the three schools placing the majority of their graduates in large firms, the placement rates for Blacks have been below the rate for Whites. Placement rates in government jobs showed the direct inverse of rates for placement at large firms.

Clerkship placements occupy a special status in the employment/placement/process. Faculty involvement in this area is particularly high. The impact of such involvement is not clear. However, most student interviewees spoke of a profound "distance" between faculty and minority students. Little outreach has been done but several faculty interviewees expressed enthusiasm at the idea of increasing or initiating faculty dialogues with minority student groups regarding clerkships.

Throughout the discussion of minority student placement much was said about employers generally taking a narrow view of "qualifications," rather than a broader view which takes account of indicia of potential. Some individual efforts have been made to encourage employers to assess such characteristics of job seekers, but the need for a systematic effort is clear.

Recruitment And Retention Of Minority Faculty

Minorities constitute 4.8% of the tenured law faculty in the state (21 out of 435), and 15.1% of the nontenured faculty (34 out of 225). However, these aggregate figures do not convey the degree of underrepresentation at particular schools. No law school has more than two black tenured professors. Four schools have two black tenured professors each. Six schools have one each, and five schools have none. Only six law schools have any Hispanic representation on their faculties at all. Only one law school has tenured Hispanic faculty.

Four law schools have tenured Asian-American faculty while an additional five have at least some Asian-American representation. No law school has any Native American representation on its faculty.

In 1989 there were a total of 93 minorities on New York State law school faculties. This figure represents 7.6% of all faculty positions at these schools. Minority representation on most faculties is minimal, and minority faculty are frequently burdened with extra assignments as counselors, tutors, liaisons, mentors and recruiters. All the schools surveyed favor diversity and, with the exception of one school which has already achieved a large minority representation, all schools express a desire to increase minority representation on their faculties.

Accordingly, some schools have increased their efforts to identify minority candidates for faculty appointment. These schools report increases in the number of offers made to candidates, and, unfortunately, a high rejection rate by candidates. Other schools have been unable even to develop a pool of potential candidates.

Currently, appointments committees and law school deans (the former generally charged with recruiting tenure-track faculty, the latter usually bearing responsibility for retaining part-time and adjunct faculty) continue to wrestle with reportedly competing issues of meritocracy and affirmative action.

A few schools emphasize scholarly writing as a hiring prerequisite for all faculty, but most emphasize not only writing but also interest in teaching and relevant professional experience. Nevertheless, a professor's "scholarly writing" still assumes great importance in hiring and tenure decisions. This emphasis may sometimes be used as a pretext for discrimination, as evidenced by cases in which plaintiffs have successfully challenged hiring and promotion decisions allegedly based on a lack of scholarship.

Significantly, during 1989 minorities were found to be disproportionately underrepresented among adjunct and part-time faculty: minorities represented only 6.8% of a pool of 558 part-time and adjunct instructors, while there was 15.8% minority representation among the 215 nontenured, tenure-track faculty. These data suggest, at least facially, that law schools are not achieving diversity in the adjunct professor pool commensurate with the number of minorities in the tenure track pool. Unfortunately, the adjunct professor pool is the larger pool, which means that the number of minority faculty members is very small, overall. In sum, most law schools are perceived as disproportionately exclusionary and unsupportive of prospective minority faculty.

FINDINGS

Recruitment, Acceptance and Enrollment of Minorities

1. Minority students participate in all stages of the recruitment and admissions process at only a few schools.

2. No school has a full-time minority recruitment director or coordinator, i.e., an individual whose sole responsibility is recruitment of minority students.

3. Some schools have implemented strategies to stimulate interest in the law among high-school students, college students and persons already in the work force.

4. Four schools maintain no data on the number of minority applicants and thus

are unable to measure systematically the effectiveness of outreach strategies; three schools maintain only aggregated data on minorities as a single category rather than from distinct groups.

5. At some schools, some applicants for admission (including some minority applicants) are reviewed separately from other candidates on the basis of factors in addition to LSAT and GPA scores that the schools consider helpful in determining whether the student will be able to succeed in law school.

6. There is general agreement that more money is needed and that lack of scholarship funds deters minority enrollment.

Minority Student Retention and Support

1. Eight schools provide academic orientation programs prior to the start of first-semester classes. These programs are generally open to all students who believe that they need additional assistance.

2. Most schools provide individual or small group tutorial assistance to minorities.

3. Some minority students consider tutorials unduly burdensome. Students universally condemn programs that delay tutorial assistance until after a student has fallen into academic difficulty (e.g., after a midterm examination or after first-semester final exams).

4. Student satisfaction seems greatest in schools which offer a maximum of academic support either before the start of school or early in the semester. Highly institutionalized, formal academic support systems in which professors participate seem to elicit the most enthusiastic student response.

5. Failure of faculty and administration to condemn swiftly and conclusively racist behavior contributes to minority students' sense of isolation and intimidation.

6. Minority retention rates vary markedly among the schools.

7. Academic performance is the central concern for minority students, most of whom see financial worries and social conflicts as onerous distractions from academic pursuits.

Curriculum and Law School Activities

1. Most schools have yet to recognize that all courses need to be reviewed to ensure historical accuracy, which would, by necessity, result in cultural inclusion.

2. Many minority students are troubled by the avoidance of any race-specific discussions or by a lack of acknowledgment of the different perspectives and life experiences that minorities bring to the study of law.

3. While schools have made few efforts to examine curricula from a minority perspective, there seems to be growing awareness, among students and faculty alike, that racial sensitivity should be part of a lawyer's competency and training.

4. Relatively few minorities are on law review/legal journals. At some schools this is because there are so few minorities in the school.

5. As of the summer of 1989, three schools had developed either an affirmative action program or a diversity

consideration for membership on at least one of the school's student-run scholarly journals.

Job Placement for Minorities

1. All schools promulgate an anti-discrimination policy to prospective employers.

2. Only three schools do not allow prescreening of applicants for on-campus interviews.

3. Many students -- minority and otherwise -- are precluded from gaining employment due to criteria such as academic performance and/or law school activities. Employers generally take a narrow view of "qualification" rather than a broader view.

4. Most, but not all, schools make some special efforts to assist minority students in job placement activities.

5. The greatest variability in job placement is not among races but among schools. Three schools place more than 60% of their graduates in firms with 50 or more lawyers; one school places more than 40% of its graduates in such firms, and the remaining 11 schools place less than 25% of their graduates in similarly sized firms. Thus, it is not that minorities at the majority of schools are not being placed in large firms. At most schools relatively few graduates enter large firms.

6. At all but two schools, placement rates in government jobs are higher for minorities than for Whites.

7. Many interviewees felt that minorities disproportionately choose public sector employment, not as their preferred field, but because of limited opportunities for minorities in the private sector.

8. Schools with the highest clerkship placement rates tend to place their minority and white graduates in clerkships at comparable rates. High minority clerkship placement rates at other schools tend to disguise the fact that those schools, having exceedingly small minority student bodies, achieve a high placement rate only by virtue of the small number involved.

Minority Representation on Faculties

1. During 1989 minorities were disproportionately underrepresented among adjunct and part-time faculty. Thus, schools are not achieving commensurate diversification among that group of instructors which constitutes the largest pool of instructors.

2. Paralleling law school competition for minority students, competition for faculty is affected by school reputation and environment, financing, a limited candidate pool, and applicant qualification.

RECOMMENDATION: A MODEL PROGRAM

A model program would be one that combines the best practice solutions developed at different schools. Such a program would have two overriding, key features:

(1) A mechanism which would ensure a systematic approach to minority issues so that all policies, activities, and initiatives at the law school are reviewed with an eye toward minority

input and a concern for minority impact.

(2) Ongoing and routine data collection and analysis regarding minority applications, acceptances, admissions, placement, and bar passage. Only through such systematic data collection and analyses can a law school conduct ongoing self-assessments regarding how well it is meeting its goal of improving minority education.

In addition to the above two overriding features, a model program would have the following components:

(1) Outreach to high schools, including visitation programs, big brother/sister programs, and special presentations to encourage minority student interest.

(2) Outreach to other audiences (e.g., paralegals) which have large minority populations.

(3) Use of Candidate Referral Service lists to contact all minorities who take the LSAT. Such mailings should include a brochure that is specific about the minority experience at the law school.

(4) Contacts with college advisory offices and minority student organizations, which make it clear that the law school is interested in recruiting minority students.

(5) Visits to historically black colleges and other colleges with high minority representation.

(6) Sponsoring of minority law forums to which accepted students are invited, as well as systematic outreach through telephone calls and mailings to encourage enrollment of those who have been accepted.

(7) Administrative support for minority student organizations to make it possible for them to be involved in all aspects of recruitment, admission and enrollment including making funds available for brochures, travel, telephone calls, receptions, other special events.

(8) Prelaw summer programs should be offered.

(9) Curriculum review that creates a climate in which all professors understand the importance of an "inclusive" curriculum. American law is, in central and crucial respects, a product of racial and ethnic conflict and an accomodation to racial and ethnic differences. Students should be taught about these matters because it is impossible to understand American law without exploring these issues. All faculty should receive assistance in developing materials that illuminate the effects of race and ethnicity upon legal decision-making and the effects of legal decisions upon racial and ethnic minorities. Some faculty may need assistance in understanding that race-blind discussions are often factually misleading, and may leave minorities feeling invisible or alienated. Other faculty may need assistance in becoming comfortable with race-conscious discussions. These issues should be the subject of faculty retreats, seminars or extended meetings.

(10) Review of law school programs to ensure that there are no

unjustifiable barriers to minority participation and that minority students are actively sought out for inclusion. Minority student organizations should receive timely information regarding openings and submission deadlines for all such programs and should do special mailings and hold special forums and workshops to encourage minority student participation and to provide substantive assistance where needed.

(11) Development, by the placement office, working with the office of minority affairs and with the minority student organizations, of a series of mechanisms and activities designed to assist minority students.

(12) Networking by faculty hiring committees with minority alumni, other minority professionals and minority organizations in order to identify potential law teachers. More assertive outreach will not only identify a wider pool of potential teachers but will also convey to the minority community the seriousness and sincerity of the effort. This in turn will eventually encourage more minority lawyers to apply for teaching positions. There should be a particular effort to increase the number of minorities in adjunct positions.

VOLUME IV: LEGAL PROFESSION, NONJUDICIAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS

VOLUME IV: LEGAL PROFESSION, NONJUDICIAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS

Introduction

This volume addresses the remaining aspects of the Commission's mandate. It focuses on minority bar examination pass rates, the opportunities and treatment of minority attorneys within the legal profession and myriad issues relating to the judiciary. Moreover, this volume describes issues relating to nonjudicial officers of the courts.

Once a student completes law school, he or she must satisfy one last requirement to become a full-fledged practitioner -- bar certification. Certification to practice in New York State is governed by the New York State Court of Appeals through the New York State Board of Law Examiners which administers the bar examination, and through the Appellate Divisions which assess candidate fitness and character to practice.

The Commission's compilation of bar examination pass rates for different minority groups from 1985-1988 constitutes the first such data for New York State. The numbers are sobering and should occasion much concern. In contrast, the Commission's examination of the fitness and character review process revealed little cause for concern.

In the chapter on minorities in the legal profession, the Commission reports the results of its survey of litigators regarding the opportunities and treatment afforded different minority groups. In addition, the chapter focuses on the representation of minorities in large law firms, the partners of which are the so-called "Brahmins" of the legal profession.

The chapter on the judiciary addresses the specific question of whether election or appointment results in greater minority representation on the bench, and considers certain aspects of the judicial environment which may have an impact on that representation.

The underrepresentation of minorities as judicial officers is matched by a documented underrepresentation of minorities as nonjudicial officers in certain job categories within the Unified Court System (UCS). This problem has already been addressed by the Commission in its interim report.

In its final report, the Commission finds that underrepresentation of minorities in certain job titles persists. So significant is the underrepresentation that the perception of the Unified Court System as "a white man's court" persists.

The chapter on the nonjudicial work force describes the Commission's investigation leading up to and following the issuance of its interim report. Specifically, it details the history of the UCS's equal employment opportunity (EEO) efforts and the issuance of the Commission's interim report and its aftermath, including the court's utilization analyses and its "Workforce Diversity Program."

Other chapters review UCS testing policies and practices as they relate to minority representation and discusses the nonjudicial work environment, and its impact on

minority nonjudicial employment. Finally, the report examines the "Court Officer Problem," and describes the UCS contracting process in the context of equal opportunity.

Overview

Graduates of law schools located in New York State experienced the following overall pass rates on the state's July bar examinations between 1985 and 1988:

Blacks	31.0%
Native Amer.	33.3%
Hispanics	40.9%
Asian Amer.	62.9%
Whites	73.1%

If the law school attrition rates of minority students, as discussed in the volume on legal education, represent a "leak" in the pipeline to the legal profession, then the failure of many minorities to pass the bar examination represents a rupture in that pipeline.

Minority failure rates, especially those for Blacks, Hispanics and Native Americans, support the widely held perception that minorities fail the bar examination in grossly disproportionate numbers. Although most law school graduates, including minorities, who take the New York State bar examination pass it, the area of most concern to this Commission is the "first-time" bar passage rate of minorities in this state.

In an attempt to determine why minorities have such a disproportionately high failure rate, the Commission reviewed the literature on disparities in minority/nonminority bar examination pass rates, surveyed minority litigators about their experiences with the bar examination, met with the New York State Board of Law Examiners and sought the advice of other persons with expertise in the area.

The Commission has identified no completely satisfactory explanation for the disparity that exists between minority and white pass rates. It is clear, however, that in light of existing minority failure rates, the legal profession must begin immediate implementation of programmatic changes.

Historical Background

Until the Commission undertook its own study on the subject, there existed only limited evidence that minorities fail the bar examination in numbers disproportionate to Whites.

In 1974, a group of black law school graduates challenged the New York State bar examination on grounds of racial bias. The group petitioned the New York Court of Appeals to appoint a commission to study the propriety of relying on the bar examination for professional certification. The petitioners alleged that the bar examination violated the equal protection clause of the 14th Amendment because it had an adverse impact upon black candidates and could not be shown to be "job-related." In support of their claim, they produced data showing that over a six-year period, the bar pass rate for black candidates in the Fourth Judicial Department (which includes Buffalo and Rochester) was 18%, while the overall pass rate was 71%.

The Court of Appeals did not appoint a commission as requested, but instead retained the services of a psychologist who concluded that validation of the examination was impossible using then current validation techniques. The Court also undertook a number of other activities, including meetings with representatives of the black community and minority members of law faculties; consultations with the New York State Board of Law Examiners; and communications with the petitioners and

various bar association committees. Based on its own investigation, the Court granted the petition to the extent that it undertook the activities summarized above, but it denied the petition in all other respects.

Minority Pass Rates

To determine the rates at which minorities pass the bar examination, the Commission surveyed all 15 law schools in the State of New York. These are the only institutions that maintain information on both race and bar passage for individual students. The data collected by the Commission is therefore based on 59% of all test-takers. The remaining test-takers attended law schools outside New York State, and their pass rates are unknown.

These data show that the pass rates of white applicants on the July examinations (73%) were more than twice that of black applicants (31%). They were also substantially greater than that of Hispanics (41%) and somewhat higher than the Asian-American pass rates (63%). The disparities were not as great for the February examinations, because white pass rates were lower in February than in July.

Additional support for the finding that Blacks and Hispanics fail the bar examination in disproportionately high numbers is provided by data from the Commission's survey of litigators. A majority of both white and minority litigators passed the bar examination on their first attempt, but the differences in the percentage of white and minority applicants who passed the examination on their first attempt are marked. Eighty-one percent of white litigators passed on their first attempt, but only 55% of Blacks, 52% of Hispanics and 67% of Asian Americans passed the examination the first time they took it.

Because of the controversy that exists concerning the validity of the bar examination, litigators were asked to rate the relevance of the bar examination to their practice as attorneys. They were also asked whether the bar examination is biased against minorities, and whether they found that their law school educations were useful for passing the bar examination.

Fifty-one percent of all respondents (48% of Whites, 56% of Blacks, 47% of Hispanics, and 54% of Asian Americans) rated the bar examination as irrelevant to their practice as attorneys.

Very few litigators (9%) feel that the bar examination is "considerably biased" against minorities. However, significantly more Blacks and Hispanics than Whites and Asian Americans expressed this opinion. Thus, only 4% of white and 5% of Asian-American, but 13% of black and 17% of Hispanic litigators, expressed this view. Conversely, 81% of white and 66% of Asian-American respondents rated the examination as "not at all biased." Only 31% of black and 43% of Hispanic respondents expressed this view.

Research In Other Jurisdictions

The bar pass rates obtained by the Commission are comparable to pass rates in other jurisdictions. Studies done in California provide the most comprehensive investigation of this issue to date. These studies generated bar pass data by race/ethnicity and tested various hypotheses that might explain differences in pass rates among groups. The most frequently cited finding of the California research was that LSAT and GPA scores, not race or ethnic background, are the variables which best predict differential performance on the bar examination.

These studies, however, are not without their critics. In particular, the studies' reliance on LSAT scores as a measure of academic ability has been criticized. Critics argue that the LSAT is itself a flawed measure, because it discriminates on the basis of both gender and race. Critics further contend that since the LSAT tests the same skills as the bar examination, it is not surprising that there is a correlation between the two.

Finally, the research has acknowledged its own failure to account for the effect of differences in socioeconomic status in explaining differential pass rates. Minorities are overrepresented in lower income groups, and numerous studies have shown that, irrespective of race, the academic proficiency of students from middle and upper economic backgrounds is significantly higher than that of students from lower economic households. Academic proficiency is a developed capacity. The enhanced academic opportunities enjoyed by individuals who grow up in middle and upper class families obviously gives them an advantage over individuals who grow up in economically disadvantaged families.

Proposals That The Bar Examination Be Abolished

Some critics suggest that the bar examination be abolished. They argue that the examination has not been systematically validated to determine if it is successful in identifying persons who are minimally competent to practice law. Furthermore, absent a clear showing of job relatedness, the critics argue that an examination which results in a disparate impact on minorities is indefensible.

After reviewing the alternatives available, the Commission concludes that the bar examination should not be abolished. Rather, it should be evaluated for cultural and economic bias and for job relatedness. One of the most persuasive arguments against abolition is that the examination tends to ensure that law schools are not graduating students who lack certain basic skills. The Commission acknowledges that the examination measures, at best, a subset of the skills needed by lawyers, and that there are substantive areas of practice, and important capacities needed by practicing attorneys, which are not tested at all. However, based on California's alternative testing models, it is not clear that minorities in New York would benefit from similar modifications of the examination.

It has also been suggested that graduation from law school be substituted for the bar examination as the precondition for admission to practice. However, the opponents of "diploma privilege" point out that states have no effective control over curricula at most law schools, and at many law schools, students are not required to engage in a concentrated and extended study of the law of the jurisdiction in which the student plans to practice.

Finally, it has been suggested that an apprenticeship program be substituted for the bar examination. However, admission in this manner could be highly subjective and arbitrary. Minorities would be less protected from bias under such a system than they are at present.

Special Admissions Programs

Given the studies which correlate low LSAT/GPA scores to bar failure, some critics believe that the most effective way to address low minority pass rates is to abolish special admissions programs at law schools. The Commission finds this solution to be unsupportable because many minorities who enter law school under special admissions programs do in fact succeed in law school and pass the bar examination.

Supplemental Bar Review Programs

Low minority bar pass rates warrant immediate attention. In this regard, the Commission favors the institutionalization and expansion of programs such as the program initiated by the Association of the Bar of the City of New York. Over ten years that program has successfully increased minority pass rates consistently above 30%, in ranges from 41% to 75%.

The program's success is especially impressive in light of the criteria for admission to the program. To be admitted, an applicant must have low LSAT and GPA scores, be a first generation college or professional school graduate and have an economically disadvantaged background. These criteria have resulted in a 99% minority enrollment.

Three aspects of the program appear to account for its success: individual counseling, group lectures on the bar examination and examination techniques, and the provision of financial support including free housing. The program focuses on improving essay-writing and test-taking skills rather than concentrating on substantive legal concepts. Students meet as a group one afternoon each week for six weeks prior to the bar examination and they review model answers to sample examination questions. Individual counseling sessions are mandatory. Students who miss more than two sessions are dropped from the program. Since 1978, with the exception of one year, a majority of program participants have passed the bar examination.

The Responsibility of Law Schools

The Commission believes that New York law schools must bear additional responsibilities in preparing their students for the bar examination. Historically, many New York law schools have taken the position that passing the bar examination is the student's responsibility alone and that they cannot devote school resources to that effort.

In light of the success of supplemental bar review programs such as the one described above, the Commission believes that additional efforts by law schools would make a substantial contribution to increasing minority bar pass rates. Law schools could create programs for graduating students whose LSAT scores and law school records suggest that they are likely to have difficulty in passing the bar examination. Such programs could provide special tutorial assistance to these students and help establish a continuing relationship with them that would last until they take the bar examination.

Racial Composition of The Board of Law Examiners

The Commission believes that aspects of the perception of racial bias regarding the bar examination would be alleviated if more minorities were employed as graders and as staff on the Board of Law Examiners. The Commission discovered that none of the nine contract graders or eight staff members of the Board is a member of a minority group. Only one of the 15 legal assistants employed by the Board is black, and he was selected by the one, recently appointed, minority member of the Board.

FINDINGS

1. Minorities are passing the New York State bar examination on the first try in exceedingly low numbers. Overall pass rates for graduates of New York State law schools between 1985 and 1988 for the July examinations were:

Blacks	31.0%
Native Amer.	33.3%
Hispanics	40.9%
Asian Amer.	62.9%
Whites	73.1%

2. The entire legal community -- law schools, private and public sector law entities, bar associations, as well as the New York State Board of Law Examiners -- has a stake in increasing minority pass rates.

3. Structured bar examination programs organized and run by nonprofit groups such as bar associations have been shown to increase minority pass rates.

4. The New York State bar examination has not been evaluated for cultural/ economic bias and job relatedness.

5. Minorities are not adequately represented among contract graders and staff of the New York State Board of Law Examiners.

RECOMMENDATIONS

1. The New York Board of Law Examiners should begin maintaining race data to determine minority pass rates, especially now that it is a participant in a national study on bar passage being conducted by the Law School Admissions Council.

2. The Commission recommends that law schools in New York State assume some responsibility for their students' passing the bar examination in New York State.

3. Schools should create a special tutorial program for graduating students who may be likely to have difficulty in passing the bar examination. The program should aim to create a relationship between the school and these students that will last until the bar examination is taken. An excellent model is the tutorial program conducted by the Association of the Bar of the City of New York as a supplement to regular bar review courses. The program focuses on improving essay-writing and test-taking skills rather than concentrating on substantive legal concepts.

4. The state and/or the legal profession should make financial resources available to eligible bar examination candidates so that they will not have to be employed while they study for the examination.

5. Applicants who fail the bar examination should be informed by the New York State Board of Law Examiners, at the time results are communicated, that repeat takers have been found to have an increased chance of passing.

6. The New York State Board of Law Examiners should have the bar examination evaluated for cultural and economic bias and for job relatedness.

7. The New York State Board of Law Examiners should adopt a more active program of hiring minority staff and recruiting minority board members.

Manhattan Supreme Court - Bench Conference with Attorneys

Photograph By Faye Ellman

Overview

The Commission's report examines minority access to, and experiences with, various types of legal practice; the treatment of minority attorneys in the courts; and minority integration into, and satisfaction with, the legal profession.

Representation and Distribution of Minorities in the Legal Profession

> **The problem is one of gross underrepresentation in terms of the people of color who are at the bar and who are practicing law.**
>
> -- Dean Haywood Burns

Minority representation in the legal profession lags far behind the representation of minorities in the general population. Although minorities accounted for 25% of the state's population in 1980, of the 62,032 lawyers in the state, only 2.7% were black, 1.6% were Hispanic, 0.7% were Asian-American, and only 0.06% were Native American. The other 96.1% were white.

Given the underrepresentation of minorities in the legal profession overall, their relative absence in the courts of New York State is not surprising. The Commission surveyed judges and litigators regarding their views about the importance of achieving greater representation of minority attorneys in the courts. Three quarters (76%) of all litigators stated that increasing the numerical representation of minority attorneys appearing in the courts is "important/very important."

A Native American litigator outside New York City reported that:

> **My clients have backgrounds of various ethnicity but are mostly black and Hispanic . . . . Sensitivity to socioeconomic and psychological dynamics is necessary in order for the system to work for my clients. This requires lawyers of the same ethnic background . . . . There are few minority litigators . . . . With far greater representation of minority litigators in the bar and on the bench, I expect age old misunderstandings and bias will eventually disappear . . . . Greater representation of minority litigators . . . will contribute towards the elimination of racial bias within the New York Unified Court System.**

A majority of white judges (55%) rated increased representation as "important" or "very important"; the comparable figure among minority judges was 96%.

Minority attorneys are not only underrepresented in the profession as a whole, they lack access to positions of prestige, power and high remuneration. A very small proportion of minority attorneys are involved in the most influential and lucrative areas of the law, particularly in large firm practice.

While there have been nominal increases for Hispanic attorneys, the representation of black attorneys in large firms has actually decreased somewhat since 1979. This decrease in minority representation occurred during a time of tremendous growth for large firms. On the other hand, representation of Asian Americans increased to the point at which it now exceeds the Asian-American representation in the attorney population. For all other minority groups, representation in firms continues to be below representation in the lawyer population.

Among partners in large firms, the underrepresentation of minorities is striking. In New York State, according to a 1987 survey, only 48 minority partners were reported out of 3,731 partners in large firms. A 1989 survey found 70 minorities among 4,086 partners. This marked underrepresentation of minorities in positions of prestige, especially among Blacks and Hispanics, undermines the ability of the legal profession to advocate minority concerns since, as one commentator has written:

> **Law is a profession in which not all the members have equal opportunities to influence change. Large corporate law firms produce an inordinate amount of the legal changes. This result is obviously true in corporate law, anti-trust and other areas involving large corporations, but the efforts of a small segment of these corporate lawyers have become increasingly important in environmental, civil rights and civil liberties areas. If blacks are to have a substantial influence on shaping legal strategies and policies in the future, they have to have access to the resources and authority of these law firms.**

The underrepresentation of Blacks and Hispanics in large law firms is, at least in part, a function of the process by which firms recruit and select new associates. In many large firms, this process works against minority applicants and fosters the perception of discrimination.

One of the key factors in the hiring process is where the firm decides to recruit its new employees. In fact, most large firm employers restrict recruitment to schools that are predominantly comprised of Whites. At one of the prominent minority law schools, Howard University, figures from the 1983-84 recruiting season indicated the extent to which such employers neglect minority institutions: of 1,211 law firms invited to recruit students, only 33 accepted.

A major deterrent to increased recruitment of minorities is the reliance firms place on certain hiring criteria which favor nonminorities. To the extent that legal employers rely on Law School Admission Test (LSAT) scores, they may exclude minorities from consideration. Indeed, the Law School Admission Council (LSAC), which developed the LSAT and administers it, specifically discourages its use for employment purposes.

Even when firm recruiters do find and interview minority candidates, the process used for screening and selection may be discriminatory. Many minority students believe that they are asked certain questions because of the interviewer's assumptions about their minority status. These assumptions tend to reflect stereotypical beliefs about cultural backgrounds -- for example, that minorities are disinterested in private or business practice and prefer to work in government or other public service. As one Hispanic litigator reported,

> **In my experiences, upon graduation from law school, I discovered that the larger law firms were more interested in your background and who you knew. This attitude would have a negative effect on those minorities who have not yet reached a higher social/ economic level.**

Many litigators commented on the dearth of employment opportunities afforded to minorities in the private sector. For example, a black litigator practicing outside New York City said:

> **The lack of opportunity for minorities in private practice in this area is stunning. The notion that minority lawyer[s] need anything other [than] opportunity in order to succeed sickens me (i.e., extra help programs in law firms, "Take-a-chance" hiring programs, etc.).**

A New York City Hispanic litigator stated:

> **Attorneys of color seem to be "pigeonholed" into . . . Legal Aid, legal services, and the public interest positions.**

A black litigator practicing outside New York City wrote:

> **Black law students have great difficulty obtaining job opportunities with white employers in Rochester. Particularly this is true of native Rochesterians. White employers in Rochester, when they do hire Blacks, will go outside the community for the Blacks they have rather than give job opportunities to native black Rochesterians. The state, federal and county government employers are worse, or just as bad on this score as are the private firms.**

Many minority litigators reported the need for better credentials than Whites. For example, an Asian-American litigator in New York City wrote:

> **I feel that . . . minority law student[s,] prior to having the opportunity to prove themselves in a job setting, [have] to have exceptional grades prior to being offered a job with a prominent, predominantly white law firm.**

A black litigator in New York City wrote:

> **As a minority practitioner, I am of the opinion that we are all classified as products of affirmative action programs and are constantly forced to defend and prove ourselves as attorneys both by the system and our nonminority colleagues.**

Thirty-nine percent of litigators agreed with the statement, "in order to be hired, minority lawyers have to have higher grade point averages and academic qualifications than nonminority lawyers." However, the perceptions of white and minority litigators differed dramatically. Thus, for example, 80% of the black, but only 7% of the white, litigators surveyed in New York City agreed with the above statement.

These data show that there is a large gap between the perceptions of white and of minority, particularly of black litigators in regard to hiring opportunities. Most black litigators believe that their credentials have to be extraordinary in order to be hired, while large numbers of white litigators feel that hiring standards are lowered for minority attorneys.

Legal Practice Environment

While it is well known that minorities are underrepresented in large law firms and on law school faculties, it is difficult to determine exactly where they are concentrated. It has been asserted that minorities are overrepresented in solo and small practices. However, the absence of race data on the New York State attorney registration form makes it impossible to demonstrate with absolute certainty that this is, in fact, the case.

Due to the exclusion of minority lawyers from large firms, minorities must therefore be concentrated in the less lucrative areas of the legal practice. Indeed, according to United States census data, the median income for minority attorneys is well below that of white attorneys.

Within private practice, the reportedly greater concentration of minorities in the smaller practice areas creates problems. Some small firms or solo practitioners have little opportunity to develop the skills sought by corporate or government agencies. These agencies tend to recruit from firms with more resources and whose members are known to them. These problems, which are endemic to small practices, are compounded for minorities who lack access to business connections and financial resources.

Minority attorneys may encounter professional barriers and social exclusion rooted deep within organizational environments. In a 1983 survey of minority lawyers by the Young Lawyers Division of the American Bar Association, 157 of 200 respondents, or 78.5%, reported that discrimination problems existed on the job.

The types of problems identified by minority lawyers included social isolation at work, diminished opportunity to meet clients, exclusion from social functions, stereotyping of incompetence, difficulty in obtaining advancement, lack of mentoring and lack of continuing legal education or training opportunities.

The problem encountered by minority attorneys in finding mentors is illustrative.

In response to the survey statement that "minority lawyers lack mentors," a majority of all minority litigators reported that they lack mentors. An Asian-American litigator in New York City commented:

> **I'm very disappointed with the legal system as it exists. It's very difficult to gain access to the established white firms, clubs, or government agencies .... It would be helpful to young minority lawyers if they are helped through some kind of mentor program.**

A black litigator in New York City wrote:

> **I have few if any contacts, no mentor, and no one to turn to in considering other avenues of law that may interest me or that may be interested in me.**

There was virtual unanimity among black litigators in New York City surveyed by the Commission that "minority lawyers have fewer opportunities for advancement." A black litigator in New York City wrote:

> **Simply stated, given my education, training, and experience, had I been white, treatment, deference, and opportunities would have been greater, or at least comparable to what I perceive to be accorded my white counterparts similarly situated.**

A white litigator outside New York City wrote:

> **I worked closely with a[n] Hispanic attorney [who] I feel was held to a higher standard because he was Hispanic resulting in poor performance by him partly because of . . . the unfair way in which he was treated and mocked by his coworkers in some cases.**

An Hispanic litigator in New York City wrote:

> **During my three years in the office, I know of only three [minority assistant] D.A.s who assumed supervisory positions. Two of those positions were, in my belief, created so that the office could claim that minorities are in supervisory roles.**

Treatment Of Minority Attorneys In The Courts

Responses of Litigators

The Commission's study of litigators provide the first compilation of empirical data on the courtroom experiences of minority litigators and on the extent to which they are accorded respect by judges, attorneys and courtroom personnel. Few items in the litigators' survey elicited more comments from respondents. For example, an Asian-American litigator in New York City wrote:

> **As an Asian American attorney born in the U.S., I am often offended by remarks from judges and white attorneys that I speak English without an accent. I am also told that I must be "unusual" because I am an Asian and [a] woman practicing law. The implication is that I must be a "freak."**

An Hispanic litigator in New York City commented:

> **Minority litigants [and] attorneys are generally treated with less respect by judges and court**

personnel. I am forever being asked if I am an attorney. . . . White attorneys frequently call me Maria, although my name is not Maria.

Perception that Minorities are Not Attorneys

Relatively small proportions of the white litigators, in or outside of New York City, were aware of the subtle disparate treatment that minority attorneys receive. Whereas 85% of black, 62% of Hispanic, and 44% of Asian-American litigators in New York City reported that "minority attorneys are more likely than white attorneys to be asked whether they are attorneys" "often/very often," only 24% of white litigators in New York City gave this response. Many minority attorneys provided examples.

One black litigator in New York City wrote:

> **Upon entering the courtroom, the white attorney is allowed to approach the judge's rail because [he/she, has a suit on[;] the assumption is that he/she is an attorney. The black attorney is stopped and questioned.**

Another black litigator in New York City wrote:

> **A young, black, female attorney answered a calendar call in the Surrogate's Court. As she approached the bench, the surrogate stated that only attorneys can answer the calendar. The statement was not made to any of the other 50 or 60 white attorneys present.**

Distrust of Minority Attorneys

Not surprisingly, 62% of black, 40% of Hispanic, and 25% of Asian-American litigators, as contrasted with 10% of white litigators in New York City, and 37% of minority, as contrasted with 3% of white litigators outside New York City, reported that minority litigators are "often/very often" more likely than white litigators to be required to pass through a screening device or to show identification.

A black litigator in New York City noted:

> **It matters not if I'm looking lawyer-like, with a suit and briefcase . . . . I'm stopped by court officers and police and searched. I'm challenged each and every time I sit in the attorney's area.**

Another black litigator in New York City wrote:

> **Young, black females are stopped at [the] courthouse entrance and ordered to either show ID and/or go through the detection device [and] have their handbag searched while young, white females, white males, and some black males are allowed to pass the devices not searched.**

Greater proportions of minority than white attorneys also reported that "minority attorneys are more likely than white attorneys to be questioned about their credentials" "often/very often."

An Hispanic litigator in New York City wrote:

> **The clerk's office in Supreme Court scrutinize[s] minority pleading[s] and**

legal documents [more] than those of their white counterparts.

An Asian-American litigator in New York City observed:

[There is] frequent questioning of attorney's credentials and knowledge of court procedure.

Lack of Respect Shown For Minority Attorneys

Greater proportions of minority than white lawyers also reported that "judges pay more attention or give more credibility to statements of white attorneys" and that "white attorneys get more respect and cooperation from other attorneys than do minority attorneys" "often/very often."

Regarding attention paid by judges, 57% of black, 33% of Hispanic, and 25% of Asian-American, as compared with 4% of white, litigators in New York City, and 34% of minority, as compared with 1% of white, litigators outside New York City reported preferential treatment for white over minority litigators "often/very often." Regarding respect from other attorneys, two thirds of black, 39% of Hispanic, and 28% of Asian-American, as compared to 7% of white, litigators in New York City, and 45% of minority, as compared to 2% of white, litigators outside New York City reported that "often/very often" greater professional courtesy is given to white attorneys.

A black litigator in New York City recalled:

When a minority attorney was addressing the court, the white attorney interrupted saying (using the attorney's first name) she is just frustrated, then the judge interrupts saying to the minority, ["]Let me hear what really happened,["] and turned to the white attorney and said, ["]Tell me what really happened.["]

A white litigator in New York City wrote:

Judges have often criticized the choice of words used by minority attorneys, [e.g., saying] "Please speak English."

An Asian-American litigator in New York City offered the following examples:

A judge in Brooklyn Civil Court would make racially and ethnically derogatory statements to minority attorneys. She once went on a diatribe about Chinese and laundries to a Chinese-American lawyer and in front of me she said (about black litigants in Housing Court), "They all bring their babies thinking that I'll be more sympathetic but who knows if the babies are theirs." ... [I]t is hard to assess whether the treatment is because one is a minority or because the person is in a bad mood. I once had a judge mark a case final against me when the other side asked for an adjournment. Although subjectively I believe it was because I am a minority attorney, I have not observed him enough to figure out if the reason was because he is prejudice[d].

Two thirds of black, 38% of Hispanic, and 25% of Asian-American, as contrasted with 5% of white, litigators in New York City, and 41% of minority, as contrasted with 5% of white, litigators outside New York City, reported that "court personnel are more respectful of white than of minority attorneys" "often/very often." A black litigator in New York City wrote:

A minority attorney received unfair treatment from a law clerk, who took it upon himself to berate and shout at her in the presence of the general assembly, switched a hearing date at the sole request of a white opponent and also failed to notify the minority attorney of the change.

Another black litigator in New York City recalled:

In criminal court in New York County I was grabbed from behind (in a chokehold) around the throat by a court officer who "assumed" that I was a defendant approaching too close to [a judge] who had motioned me to approach the bench. . . . I physically defended myself.

There is an enormous gap between the experiences of white and minority, and particularly of black, attorneys in terms of their perceptions of how minority attorneys are treated. Most white attorneys seem to be unaware of the second-class status accorded many of their minority colleagues. Moreover, with few exceptions, every survey item relating to preferential treatment of white attorneys was reported by a majority of black attorneys to take place "often/very often."

Responses of Judges

Relatively few white judges reported any experience with white attorneys receiving more respect and cooperation from other attorneys than do minority attorneys. In fact, 89% reported that this "never/rarely" happens. Minority judges, on the other hand, reported that preferential treatment of white attorneys by their colleagues happens with some frequency. In fact, 33% of minority judges reported that preferential treatment of white attorneys happens "sometimes," and another 31% reported that it happens "often/very often."

Greater proportions of minority (38%) than white (5%) judges also reported that courtroom personnel are more respectful to white attorneys either "sometimes" or "often/very often." And greater proportions of minority (41%) than white (12%) judges stated that preferential response of jurors to white attorneys happens "sometimes" or "often/very often."

Several judges commented on the treatment of minority attorneys and on the ways in which they have attempted to discourage it. One white judge recounted:

[An] Asian-American woman attorney [was] told by [her] male adversary that she should make tea for him. I pointed out [the] racist/sexist implication [and] asked the male (Italian-American) attorney how he'd feel about being asked to bring the pizza.

A black judge wrote:

[Yes, I have experienced bias] but not often is it blatant or obvious. In some instances, minority attorneys are made to wait for their cases an inordinate length of time, say in arraignment. . . . [I] simply inquire as to the delay and it is cured inoffensively.

Bar Association Membership

Membership in bar associations can promote the status of a minority attorney within the profession and increase professional contacts. Moreover, the decision to join an established (i.e., predominantly white) bar association may indicate the

extent to which a minority attorney feels included in the profession.

The history of minority participation in bar associations began with all but complete exclusion. In 1911, three Blacks were voted into membership of the ABA by the Association's Executive Committee. In 1912, upon discovery of these members' race, the Committee put to the entire membership the question of whether these three men should be allowed to continue as members. The immediate resolution was to thenceforth require that any future black applicant be so identified. Two years later it was resolved that all membership applications would identify the ethnicity of the applicant, a requirement not rescinded until 1943. In 1979, the ABA began actively to redress the historical exclusion of minority attorneys.

Despite increased efforts by majority bar associations to recruit minority members, minority bar associations continue to flourish: for example, the Asian American Bar Association of New York (established in 1989); the Metropolitan Black Bar Association (established in 1985); the National Hispanic Bar Association (established in 1985); the National Asian Pacific American Bar Association (established in 1989); and the American Indian Bar Association (established in 1976).

There are no significant differences in rates of membership in the New York State Bar Association (NYSBA). Overall, 55% of all the litigators surveyed belong to NYSBA. It is important to note that most respondents to the Commission's survey were identified through bar association lists. Study participants may tend to be "joiners" and therefore overstate the rates of membership among all litigators.

There are, however, significant differences in membership rates in local (city or county) associations. Overall, 52% of all respondents are members of at least one local established bar association. Higher proportions of litigators outside New York City (74% white, 64% minority) than litigators in New York City (43% black, 39% Hispanic, 41% Asian-American, and 48% white) are members of a local, established bar association.

This suggests that bar membership in local bar associations is less a function of race than of geography. Nevertheless, although litigators outside of New York City are more likely to be bar members than lawyers in New York City, white litigators in both locations are somewhat more likely to be members of local bar associations than are minorities.

Attorney Disciplinary Proceedings

A black litigator in New York City stated:

> **I believe the profession is more likely to initiate disciplinary action against a minority attorney who represents unpopular clients than it would if the attorney was white.**

Litigators were asked whether they know of any "attorneys whose professional behavior has been reviewed by a Grievance Committee or Disciplinary Committee of any of the Appellate Divisions of New York State." Those who answered "Yes" were asked to identify the numbers of minority and white lawyers known to them and whether it was their "belief that the race of the attorney affected the initiation or the outcome of any of the disciplinary proceedings."

Examination of the average number of white and minority attorneys who have been disciplined and were known to each group

shows that minority litigators, especially Blacks, know more disciplined attorneys than do Whites. More black litigators than any other group know minority attorneys who have been disciplined. Significantly more minority litigators outside New York City than white litigators outside New York City report knowing minority attorneys who have been disciplined. Black litigators in New York City and minority litigators outside New York City were far more likely to feel that attorney discipline was affected by race than were other litigators.

Many of the litigators surveyed commented on disciplinary proceedings. For example, a white litigator in New York City stated:

> **Black attorneys are more likely to be both challenged and charged.**

A minority litigator outside New York City commented:

> **Minority attorneys received disproportionate sanctions as compared to nonminority attorneys for similar or the same conduct.**

Access To Fiduciary Appointments

Fiduciary appointments present an opportunity for lucrative remuneration. Accordingly, litigators were asked whether they had "ever applied to be on a list from which judges make appointments to fee-generating positions" and if so, whether they had been appointed to a "fee generating position within the last two years" and whether "minority attorneys tend to be awarded the same fees as nonminority attorneys for similar work."

Higher proportions of Blacks in New York City and Whites and minorities outside New York City had applied to be fiduciaries. Among those who did apply, white litigators in New York City represented the smallest proportion of litigators who had been assigned a case in the past two years; 91% of black litigators in New York City who applied for a fiduciary appointment had been assigned a case, compared to 49% of white litigators in New York City.

Higher proportions of minorities than Whites felt that there is racial bias in the fees awarded minority attorneys. This response was particularly strong among minority attorneys outside of New York City.

Among those who did not apply, greater proportions of minority than of white attorneys were hindered by a lack of knowledge about how to apply. Approximately twice as many black, Hispanic, and Asian-American as white attorneys in New York City, and twice as many minority as white attorneys outside New York City, reported that they did not know how to apply. A black litigator in New York City wrote:

> **Nonminority attorneys and other attorneys who have contributed to the judges' campaigns get most, if not all of the decent appointments. The fees awarded these attorneys are always much greater than fees awarded to minorities.**

Another black litigator in New York City remarked:

> **The racial nature of the court system becomes most prevalent when the services and benefits are meekly given out to minorities. I have yet to be appointed to a fee generating case by a white judge.**

Relatively few litigators in any group have applied for a fiduciary appointment. Among those who have, most received an

assignment. There is no evidence that minorities are less likely to receive these assignments once they have applied. Most of those who have not applied for fiduciary appointments reported that they were not interested. There is a substantial number, however, particularly of minority litigators, who stated that they did not know how to apply. Due to the absence of race data on fiduciary assignments, it was not possible to determine the extent to which these findings are representative.

Job Satisfaction

As noted, those minorities who pass the bar examination and the certification process find themselves admitted to practice in a highly stratified profession. The jobs at the top of the legal profession "pyramid," the lucrative and powerful law firm partnerships and corporate counsel positions, are almost entirely held by Whites. Moreover, even within those areas of practice where minority attorneys are found in relatively greater numbers, the same racial stratification exists: the "power" positions -- higher supervisory and administrative positions, tend to be held by Whites.

It is no wonder, then, that minority litigators reported much higher rates of job dissatisfaction than did the white litigators surveyed. Forty-six percent of Blacks, 28% of Hispanics and 25% of Asian Americans in New York City, and 45% of minorities outside New York City, reported that they were "dissatisfied" or "very dissatisfied," compared to only 11% of Whites.

FINDINGS

1. Minority representation in the legal profession lags far behind the representation of minorities in the general population. In 1980 there were 62,032 lawyers in New York. Only 3,136 or 4.1% were minorities, although minorities at that time constituted 25% of the state's population.

2. There is widespread agreement among the majority of judges and litigators in every race/ethnic group, including Whites, surveyed by the Commission, that increased representation of minorities among lawyers appearing in New York State courts is important.

3. Most law firms/organizations have no systematic program for increasing their complement of minority attorneys. Moreover, there are myriad problems relating to hiring criteria and practices that impede minority hiring.

4. The larger firms in New York have lost whatever momentum they had in hiring and promoting minority attorneys. In 1987 in New York State, for example, of 3,731 partners in large firms, only 48 were minorities. In 1989 only 70 minorities were reported to hold partnerships among a total of 4,086 partners.

5. There is a large gap between the respective perceptions of white and minority, particularly black, litigators in relation to hiring opportunities. Most black litigators believe their credentials have to be extraordinary in order to be hired; by contrast, large numbers of white litigators believe that hiring standards are lowered for minority attorneys.

6. The absence of race and ethnic data on the New York State attorney registration form makes it impossible to determine the validity of the perception that minorities are overrepresented in particular types of practice (e.g., solo and government practice).

7. The majority of litigators in each minority group feels excluded from opportunities for advancement and that they lack mentors. Many feel that they receive less feedback about their work and that they are assigned less complex cases.

8. Many minority litigators believe that they are treated with less professional courtesy and respect in the courts than their white counterparts. They report that they are more likely to be asked whether they are attorneys, to be required to pass through screening devices and to be questioned about their credentials. Moreover, they are less likely to be accorded respect by judges, other attorneys, jurors and nonjudicial personnel. Many minority judges are also aware of the less than professional courtesy extended to minority litigators.

9. There has been a history of exclusion of minorities from membership in certain established bar associations. Some of these bar associations have made recent efforts to rectify the situation by establishing committees on minorities in the profession. The Commission's data show that minority litigators are joining these bar associations and participating in committees in the same proportions as Whites.

10. There is a perception among black litigators that minority attorneys are more likely than white attorneys to be disciplined by a grievance committee or disciplinary committee of the Appellate Divisions of New York State. Moreover, more black, in contrast to other minority, litigators reported knowing minority attorneys who had been disciplined. The absence of race data on disciplined attorneys makes it impossible to confirm these reports.

11. Relatively few litigators in any racial group have applied for a fiduciary appointment; among those who have, most received an assignment. The Commission has no evidence that minorities are less likely to receive assignments once they have applied. The absence of race data on fiduciary assignments, however, makes it impossible for the court system to monitor the access of minority attorneys to fiduciary appointments.

12. Minority litigators, especially Blacks, reported much higher rates of dissatisfaction with their opportunities in the legal profession than did white litigators.

RECOMMENDATIONS

1. Organizations which employ lawyers, e.g., law firms, corporations and government agencies, should adopt strategies to increase minority representation within their respective firms/organizations. The Commission recommends expansion of initiatives such as the PALS program in New York City, described in the full report, to facilitate access to this employment.

2. Legal employers should adopt structured outreach and recruitment to (a) increase their visibility in the minority legal communities through a structured outreach program; (b) consider, in making hiring decisions, a broader range of skills and predictors of success; and (c) create environments supportive to minorities.

3. (a) Information regarding attorney positions in both private industry and in government should be widely disseminated.

(b) Since minority law graduates are likely to continue, for some considerable time, to enter into or function in the profession as solo practitioners or members of small minority firms, law schools should consider adding courses to the curriculum which seek to inform and educate students about the managerial, business and ethical problems of solo or small firm practice.

4. Firms/organizations should increase the number of minority attorneys in their employ. They should review their interviewing processes to purge them of any techniques which may discourage minority applicants, and reevaluate their hiring criteria which would result in a more diverse work force. Firms should make direct and explicit statements that qualified minorities are actively desired as members of the firm so that minority candidates do not deselect themselves from firms with few minority attorneys. Firms/organizations should avoid reliance on hiring criteria, such as LSAT scores and grades.

5. Law firms should consult with minority partners and organizations composed of minority lawyers with respect to the hiring and employment practices of the firm.

6. Mentoring processes for minorities who are currently employed in firms/organizations should ensure that minorities are receiving as much support as their white counterparts in the competition for professional advancement.

7. The work environment of minority attorneys employed by government should be improved through a program that would include mentors, standardized evaluations, feedback, diversity training and a review of promotional practices to assure there is no operative bias against minorities ascending to supervisory roles.

Overview

There are some 1,129 judges sitting in the courts of the State of New York. Of that number, there are:

1,036	white judges
71	black judges
19	Hispanic judges
3	Asian-American judges
0	Native American judges

There is a widely held perception that minorities are underrepresented within the New York State judiciary. For nearly three hundred years, New York State has had little or no minority representation on the bench.

In its report on this subject, the Commission sought to determine whether the New York State judiciary continues, even 60 years after the first two minority judges were elected to sit in Harlem's Municipal Court, to suffer from gross minority underrepresentation. In so doing, the Commission examined whether either of the two procedures for filling judgeships -- election or appointment -- results in more minority judges on the bench.

Minority Representation In The Judiciary

The Commission concluded that minorities are underrepresented on the bench in many of our own state courts. Two distinct methods of measuring whether minorities are underrepresented in the judiciary were considered.

Qualified Attorneys

The first method of measuring minority representation in the judiciary was to consider whether minorities occupied a proportion of judgeships commensurate with the proportion of minorities in the group of lawyers qualified for the job.

The Commission conducted an analysis of 29 courts/jurisdictions in New York State and calculated the representation of each of the four minority populations.

For judges in courts of statewide jurisdiction, the relevant pool of qualified minority lawyers was comprised of all minority attorneys in the state. The relevant pool for the remaining courts was comprised of all minority lawyers from the particular counties within each district or jurisdiction.

The analysis revealed no significant disparity between the proportion of minority judges and the proportion of qualified minority lawyers. However, this conclusion is not very robust because the only data available for making this comparison is dated and overinclusive. To be eligible for most judgeships, an attorney must have been admitted to the bar for 10 or more years. However, the Commission was unable to find data permitting an enumeration of the state's attorney population by race and years since admission to the bar. Because all attorneys were counted in the data used by the Commission, rather than just those with 10 years' experience, the overall number of attorneys eligible for the judiciary is overstated.

Still another qualification must be noted in connection with these data. The number of white attorneys in the eligible pool may be overstated if fewer white than minority attorneys have an interest in becoming state court judges; and survey evidence tends to confirm that this is the case. Outside New York City, for example, 70% of the minority litigators surveyed expressed an interest in the judiciary while only 53% of the white litigators expressed such an interest.

General Population

The second approach was based on an analysis of whether the proportion of elected minority judges was significantly less than the proportion of minorities within the eligible voter population. From this perspective, there is substantial underrepresentation of minorities.

For example, in New York City, minorities hold a percentage of judgeships in the Supreme Court far below the proportion of minorities in the general population in four of the five counties studied. Minorities hold only 14% of the total of all city Civil Court judgeships, which is a figure below the minority proportion of the population in every one of the five counties in which elections to this position are held. No minorities are among the six surrogate judges who service the five counties of New York City.

Appointment v. Election

The Commission compared the two methods of judicial selection in New York State -- election and appointment -- to determine whether either process better ensures access to the judiciary for minority attorneys. The Commission has taken no position on whether more minority judges will be selected by the elective or appointive process. However, under either process, much more can be done to ensure a greater number of minority judges.

There is an absence of any clear evidence that either method is superior to the other. This may be due to the similarities of both methods. Both are "political." The appointment process, for example, is not immune to partisan political pressure. Even when judicial appointments are not subject to approval by a legislative body, an elected official with appointive authority can be powerfully affected by political considerations in picking candidates.

Conversely, it has been claimed that the judicial election process resembles the appointment process more than it does the traditional election of nonjudicial public officials. Leaders of political parties typically control the choice of judicial nominees, while the public merely ratifies the choices in the general election. This is particularly true of elections in New York City, where the nominee of the Democratic party is almost invariably elected because the vast majority of voters are registered Democrats.

An important question in comparing these two methods is whether either process produces judicial nominees of consistently higher caliber. This particular issue was not within the scope of the mandate given to the Commission. Consequently, the Commission makes no implicit or explicit judgment on this issue, although some Commissioners do have strong opinions in this regard. The Commission believes that all of its recommendations for increasing minority representation in the judiciary will maintain the current high quality of the bench.

The Value of a Racially Diverse Bench

While social science studies regarding the likely effect on judicial decision-making of increased minority presence on the bench are not conclusive, the Commission believes that minority judges definitely do make a difference. The paucity of minorities in authority positions perpetuates the view that minorities have but one place in society -- the lower rungs. The presence of minority judges dispels that myth.

Indeed, according to the Commission's surveys, a clear majority of both judges and litigators rated the importance of greater

representation of minorities as judges as "important/very important."

Greater representation of minorities on the bench increases the perception of a fair judiciary. In addition, an increase in the number of minority judges would provide minority youths with positive role models. It would also enhance the status of minority attorneys in the eyes of their clients, inasmuch as minority attorneys have reported, anecdotally, that clients retain, or have been advised by others to retain, nonminority attorneys. These clients believe that they will get better results in the legal system if their attorneys have "contacts" and personal influence that minority attorneys are thought to lack.

The lay perception that extra-judicial relationships control case outcomes may be exaggerated, but many minority attorneys, especially those outside of New York City where there are few or no minority judges, believe that this stereotype of powerlessness would be diminished if there were more minority judges.

Finally, minority judges enhance the prestige of all minority court participants, and their presence places a warranted "chill" on the expression of overt racist behavior.

Improvements in Both Processes

While the Commission does not believe that either process is demonstrably superior in generating minority candidates, it does believe that there are a number of improvements which can be made in both methods to generate greater numbers of minorities on the bench.

Such improvements include increasing the number of minorities on screening/ nominating committees; sensitizing participants in the appointment process to the need for a racially diverse bench; and including "cross-cultural competence" as a selection criterion for judges.

The Commission's survey of state judges shows that there is substantial disagreement between minority and white judges about whether judicial screening commissions are sufficiently sensitive to the need to include minority attorneys as candidates. Minority judges tend to believe that screening commissions are slow to consider minority attorneys as judicial material. White judges do not agree. This difference may be attributable to a very important difference in perspective between white and black judges -- minority judges are more likely than white judges to believe that racial and ethnic diversity on the court is "very important."

Diversity on Screening Panels

The Commission strongly urges that more minorities be included on screening committees. Increased minority presence on screening committees would help dispel the perception that the judicial selection process is within the province of an "all-white" club.

Presently, minorities are significantly underrepresented on judicial screening panels. For example, in the First Judicial Department, (which encompasses New York and Bronx Counties), it was not until the fall of 1989 that a minority person joined the eight members of the Judicial Screening Committee that advises the Governor on appointments to the Appellate Division and on the filling of Supreme Court vacancies. This was true despite New York County's larger concentration of minority attorneys than any county in the state and Bronx County's rank of third. There was a substantial pool of professionals from which screening panel members could have been recruited.

As of 1988, no minority attorneys were members of the Judicial Screening

Committee which performs the same function in the Third and Fourth Judicial Departments. No Asian Americans sat on the screening committee to advise the Mayor of the City of New York on appointments to the Family, Criminal and Civil Courts, although New York City has the largest concentration of Asian Americans in the state.

The absence of minorities on these committees perpetuates the view that access to the judiciary is controlled by a privileged white elite. Greater numbers of minorities on these committees would also aid in the recruitment of minority judicial candidates. Moreover, minority attorneys may discount their chances of becoming judges due to suspicions of racial discrimination fueled by the absence of minorities on the screening panels.

In contrast to official screening panels, most bar association committees evaluate the professional credentials of candidates only after they have been nominated for judicial office. The bar associations do not generate candidates or directly influence the initial choices. The ratings of the bar association screening committees may, however, have some impact on the final choice of voters or the appointing authority.

The Commission surveyed bar association committees in the fifteen counties with the highest proportions of minorities. Thirteen of the 27 committees (or approximately half) had no minority members.

Outreach Efforts

As indicated earlier, only the official screening commissions that function in the appointment process have the formal authority to suggest candidates. The Commission's survey of the chairpersons of these entities shows that candidates are brought to the attention of the screening committees through self-generated applications, notices in legal publications, personal recommendations of committee members and through notices sent to various organizations.

The Commission believes that solicitation of minority attorney organizations would increase minority applications; but the success of the other three means of generating minority candidates is likely to depend on whether minority attorneys trust the judicial selection process. Therefore, aggressive outreach to minority attorneys may be necessary to overcome the reservoir of distance and distrust that discourages them from applying for judicial appointment. Outreach to the Asian-American and Native American legal communities is of particular importance given the paucity of judges from these communities.

Litigators were asked whether they had ever wanted to be a judge and, if so, whether they had ever made this interest known to an appropriate nominating committee or authority. If they had not made their interest known, they were asked to report the reasons why. More than any other group, the Asian-American litigators surveyed believed that they had insufficient litigation experience, lacked access to positions from which judges are drawn, lacked sufficient academic credentials, lacked political and professional contacts and that racial minorities are unlikely to be appointed or elected.

In this context, it is important to note that over half of all litigators surveyed rated lack of political and professional contacts as a barrier to becoming a judge. A large proportion of litigators interested in the judiciary reported that they lacked these contacts. This finding supports the Commission's recommendation for broader minority representation on all judicial

screening panels as a way of ensuring that minority lawyers have access to the bench.

Racial and Ethnic Sensitivity: Screening and Training

Bar association screening committees have developed a number of criteria for the evaluation of candidates for the bench. These include knowledge of the law, litigation experience and the possession of a "judicial temperament." Only a very small percentage of these committees report that they place any weight upon racial or ethnic diversity in evaluating candidates. The different perspective that minority candidates may bring to the bench appears not to be valued, although it is possible that screening committees view increased minority representation on the bench as the exclusive responsibility of those who choose the candidates that the committees ultimately evaluate.

If screening committees do not view racial or ethnic diversity as an explicit goal, it is even more important that there is a careful and focused attempt to examine any racial or ethnic biases toward or in the candidates reviewed. Insofar as candidates are concerned, such an inquiry may be made when screening committees consider a candidate's judicial temperament. Committees should look for "objectivity" which would naturally preclude the making of arbitrary judgments based on race and ethnic background.

The Commission believes that examination for a candidate's objectivity ought to be a more explicit and extensive part of the review of candidates for the bench. Indeed, it might be useful for bar associations to develop, with professional guidance, interviewing techniques to uncover latent or covert prejudices. In addition to direct measurement of cross-cultural competence, selecting entities might also consider the indirect evidence provided by a candidate's history of service to minority communities.

A significant percentage of incumbent white and minority judges indicated that racial sensitivity training for judges is highly desirable. Racial sensitization could begin during the interview process when candidates for the bench are being evaluated. Candidates should learn very early that the capacity to understand persons from different racial backgrounds, and to treat them with even-handed dignity and respect, is as important as any other factor in determining the fitness of a candidate for judicial office.

Judicial Working Environment

The Commission next explored areas other than the filling of judgeships to identify problems related to race in the functioning of the judiciary. The Commission found agreement between minority and white judges regarding many problems in the courts, but did uncover some differences of opinion regarding their perceptions of and attitudes toward the work environment.

The Commission looked at the backgrounds of minority and white judges to see if this could account for their vastly divergent perceptions of aspects of their work environment. The Commission discovered that minority and white judges are remarkably similar in legal background. Only a small percentage of either group were members of large law firms (20 or more lawyers) prior to their appointment or election to judicial office (white 10% and minority 12%). Approximately half of each group (white 42% and minority 51%) had been in solo practice at some time during their professional careers. Similar proportions of each group had been prosecutors (white 31% and minorities 26%).

There were also no significant differences between the two groups in terms of service as elected officials, law clerks, legal secretaries or members of law school faculties. When in a law firm, the members of both groups had been partners in almost identical percentages (white 80% and minority 79%). Given these substantial similarities in background, the differing perceptions of white and minority judges of their work environment are particularly significant.

Fewer minority than white judges report that they are "very satisfied" with their judicial position, and a larger percentage of minority than white judges report that they are "dissatisfied" or "very dissatisfied."

The higher level of dissatisfaction among minority judges may be attributable to the differences between minority and white judges in their perceptions of whether race is a factor in the way judges are perceived by others in the court system. Three quarters of the white judges believe that racial considerations do not influence the behavior of persons appearing before or interacting with a judge, while only one quarter of the minority judges believe this.

A large proportion of minority judges believes that professionals and nonjudicial personnel in the court do not give the same degree of respect to minority and white judges. While only a small portion of judges express serious dissatisfaction, minority judges are disproportionately included in that group.

Only a small proportion of judges believe that case and calendar assignments are unfair, but minority judges were more likely than white judges to voice that complaint. There were no significant differences in perceptions of fair treatment in panel assignments between the few minority and white judges who have them.

The largest number of complaints, involve both the poor physical environment of the courts and the failure of others to discharge their duties properly or to act professionally. Other complaints concern large caseloads that make careful consideration of issues impossible, lack of staff and research resources, low salaries and neglect of merit in determining promotions.

Manhattan Criminal Court

It is difficult to assess the full implication of these results. However, the Commission believes it is necessary to address these problems in order to increase confidence in the system among minority judges.

FINDINGS

1. There is a perception that minorities are underrepresented in the state judiciary in comparison to the available pool of qualified attorneys. Minorities are underrepresented on the bench in many courts in comparison to their share of the overall population.

2. There is a particular need for more minority judges in upstate districts.

3. There is a pool of minority applicants for judgeships who have been rated as qualified but who have not been appointed.

4. By any measure, minorities are grossly underrepresented in supervisory and other high level administrative positions within the court system.

5. The Commission reached no conclusion as to whether the elective or appointive process of judicial selection is likely to produce more minority judges. However, as they presently function, both methods can be improved to insure adequate representation of minorities in the state judiciary.

6. Minorities are underrepresented on both bar association judicial screening panels and on official judicial screening and nominating panels, responsible to appointing authorities.

7. Judicial screening panels sponsored by bar associations have little or no control over the pool of potential judges they are asked to evaluate.

8. The great majority of bar association judicial screening panels give little or no weight to racial/ ethnic diversity of the judiciary in evaluating judicial candidates.

9. Individual cases are assigned to judges in either of two ways -- by random wheel selection or outside of a wheel. The great majority of both white and minority judges perceive the case assignment process to be fair, but a significant number of minority judges disagree. Their complaints include charges that high profile cases are not fairly assigned.

10. Minorities are underrepresented on the staff of the New York State Commission on Judicial Conduct and only one of the Commissioners thereon is a minority.

11. The Commission on Judicial Conduct does not have an internal statistical base for tracking types of complaints received as to those cases which remain confidential.

12. There is no centralization of information regarding the availability of quasi-judicial positions (e.g., referees), resulting in insufficient dissemination of such information. Thus, such positions remain largely unknown to the minority bar.

RECOMMENDATIONS

1. The Commission makes no recommendation about which method of judicial selection --appointive or electoral -- should be preferred.

   *[Commissioners Birnbaum, Vance, Suarez and Warner dissent from this recommendation for reasons explained in their letters appended to the report. Commissioners Vance and Birnbaum believe that a higher percentage of minority judges would be chosen for the judiciary through the appointment process. Commissioners Suarez and Warner believe the electoral process is

more responsive to the needs of the minority community.]

2. Appointed officials and political leaders have the power to and should achieve increased representation of minorities on the bench.

3. More minorities should be included on judicial nominating and screening panels. These panels should actively strive to inform all potentially qualified minority attorneys of judicial vacancies and encourage their interest and application. Persons screened should be examined for racial and ethnic biases and for cross-cultural sensitivity. A prior record of superior service to minority communities should be viewed as a positive factor in assessing a candidate's qualifications for judicial office.

4. A concerted effort should be made to sensitize all persons with responsibilities in the judicial selection process to the importance of greater racial and ethnic diversity in the state judiciary.

5. All judicial personnel should receive mandatory diversity training to enhance their cross-cultural competence.

6. Minority judges in New York City should be recruited, where feasible, for temporary service in upstate counties.

7. More minority judges should be appointed to supervisory and administrative positions within the judicial system.

8. Information regarding the availability of quasi-judicial positions should be routinely disseminated to the minority bar.

9. The Commission recommends the adoption of random selection of judges to preside over all criminal cases.

*[Commissioners Birnbaum, Figueroa, Nakano and Newton dissent from this recommendation for reasons stated in their dissent appended to the chapter in the full report. They believe that the Unified Court System should avoid any appearance that assignments of criminal cases are made outside the "wheel" for reasons that manifest racial bias against minority judges; and that the recommendation is overbroad, may have speedy trial implications for defendants and is based on a sparse record. They recommend, instead, that the criminal courts institute "wheels" from which Administrative Judges can assign judges, including minorities, to complex or pressworthy cases on a random basis.]

10. The New York State Commission on Judicial Conduct should enhance its recruitment of minority staff members, as well as commissioners.

11. The Commission on Judicial Conduct should give complaints of racial bias high priority and keep records of its investigations and disposition of charges in a manner permitting analysis of whether there were any patterns of racial or ethnic discrimination.

Manhattan Criminal Court

("Can you imagine how a black . . . feels the first time she goes into [court] and sees white clerks, white guards, white . . . correctional officers, white lawyers and white court judges? She immediately senses that they have all the power and we have none" -- Witness, Albany Hearings)

Overview

Citing the "overwhelmingly white complexion of the Unified Court System (UCS)" and the "aura of unfairness (thus projected) . . . because minorities seemed to be barred from within . . .," the Commission issued an Interim Report on July 12, 1989. In that report the Chief Judge was called upon to adopt an affirmative action plan including flexible goals and timetables for the hiring and promotion of minority nonjudicial personnel.

The Commission based its recommendation on data showing that minorities are significantly underrepresented in key administrative positions and as technicians in the UCS. Specifically, the Commission reported that the proportion of minorities among officials/administrators in the UCS in 1986 was only 3.4%. In contrast, minorities constituted 13.7% of the relevant New York State labor pool in 1980, the most recent year for which census data were available. In 1986, out of 244 positions, Blacks occupied nine, Asian Americans held one, and there were no Hispanics or Native Americans in these job categories. Moreover, in the seven years prior to 1986, minorities never held even

4% of these high-level jobs. In one year (1982) they fell below the 1% level.

In addition to being underrepresented in these high level positions, the Interim Report noted that minorities were also underrepresented as technicians. In 1986, minorities occupied only 3.8% of UCS technical positions, despite the fact that minorities comprised 20.1% of persons in the state with the requisite qualifications.

The Commission also noted the ineffectiveness of the Equal Employment Opportunity (EEO) office. This office had no access to or influence upon administrative judges (who could have significantly affected the hiring of more minorities), and it performed its limited recruiting and record keeping functions poorly.

The facts and circumstances surrounding the issuance of the Commission's Interim Report are so important that they warrant restatement here.

The Commission's Investigation

The Commission's charge included a mandate to "make recommendations which would fairly increase" minority representation in the UCS work force. This language demonstrates that the drafters of the mandate presumed from the outset that minorities were underrepresented in the nonjudicial work force. Indeed, statistical evidence existed to support this conclusion well before the Commission began its investigation.

To ascertain the exact dimensions of the problem of minority underrepresentation in the UCS work force, the Commission compared the number of minorities in particular Office of Court Administration (OCA) job categories with the available number of qualified minorities in similar jobs in the overall labor force. These comparisons showed that the OCA underutilized the available pool of qualified minorities in the state, and pinpointed the particular job categories where the underrepresentation occurs.

In the fall of 1988, the Commission asked the EEO office of the OCA for current statistics on the number of minorities in the UCS work force and the job categories occupied by them. After some 18 months had passed, the Commission learned that no effort had been made by OCA to commence the study.

In the meantime, the Commission held public hearings throughout New York State which provided firsthand information about how members of the nonjudicial work force view such matters as their opportunities for promotion and their everyday work environment.

These hearings furnished the Commission with useful data from persons both within and outside of the court system. The hearings also enabled the Commission to focus on specific areas of concern, including the lack of an affirmative action program within the UCS and the operation of the EEO office.

Affirmative Action In The UCS

As a result of the hearing testimony, the Commission began to understand why OCA had no functioning affirmative action plan in place. The Commission learned that in 1979 OCA did order a study of minority employment. Later that same year a draft affirmative action plan was developed by an independent consulting firm, but it was never adopted.

The Commission ultimately concluded that OCA failed to enact the plan primarily because of inattention. The plan was not, in

fact, examined and then dropped; it simply withered and died of neglect. As the then Chief Administrative Judge of the OCA put it, "I think that was a project that fell between the cracks."

The absence of an effective affirmative action plan has contributed to the continuing absence of minorities in higher level positions within the UCS. A 1989 examination of the 52 highest paid UCS employees in the officials/administrators category shows that there were only 4 Blacks, all in the lowest level officials/administrators positions. Consequently, minorities had been almost completely excluded from the policy making and technical levels of the UCS.

The Commission's Interim Recommendations

The Commission based its Interim Report on information it had gathered regarding widespread perceptions of racial and ethnic imbalances in the UCS nonjudicial work force. The Commission hoped that the Interim Report would spur OCA to undertake a utilization analysis and begin, finally, to remedy minority underrepresentation within the UCS.

Among its recommendations, the Commission proposed the immediate adoption of an affirmative action plan to rectify the underrepresentation of minorities as officials/administrators and technicians. The Commission also reminded OCA that a utilization analysis should remain a top priority, since without one an effective attack on racial imbalance would be difficult to carry out. The Commission specifically recommended that steps be taken to remedy racial imbalance, such as using "cross-cultural competence" as a criterion for employment.

With respect to the EEO office, the Commission concluded that its failure to maintain adequate employment data made it singularly ineffective. The Commission also found that the EEO office did not enjoy the confidence of a substantial segment of the minority employees of the UCS. The office was perceived as unreceptive to complaints of job discrimination and it had failed to secure the trust of the very minority employees it was created to serve.

Further, the Commission found that the inefficiency of the EEO office may not have been entirely within its own control. Apparently, the office was relegated to second class status among the administrators of the UCS, and its concerns were given low priority. Consequently, the Commission recommended that the EEO office's status and scope of authority be strengthened and that additional resources be made available to it. The Commission likewise stressed that the office be empowered to intervene in personnel decisions by making recommendations to insure compliance with an affirmative action plan.

The UCS 1989 Utilization Analysis

Prior to 1989, the last attempt to develop a utilization analysis to serve as the basis for an affirmative action plan occurred in 1979. As noted above, that attempt was abandoned. The 1989 UCS utilization analysis, undertaken at the request of the Commission, corroborated most of the findings of minority underrepresentation detailed in the Commission's Interim Report.

Statewide data from the analysis show that, overall, minorities are underrepresented by only 2 percentage points in comparison with the percentage of minorities in the state's labor force. However, this "moderate" underrepresentation masks a gross underrepresentation

f minorities in the higher paying, policy-
aking jobs within the UCS.

In addition to officials and
dministrators, minorities were also found to
e underrepresented as attorneys (entry-
vel), court officers, junior court analysts,
ourt reporters and court clerks. Moreover,
here minorities were found to be
verrepresented, that overrepresentation
nded to be in lower-paying, entry level,
onpromotional jobs such as office clerk,
pist and data entry clerk.

he OCA Task Force

The 1989 utilization analysis prompted
hief Judge Wachtler and Chief
dministrator Crosson to form a UCS Task
orce to remedy the racial and gender
nbalances existing within the UCS. The
al set for the Task Force was to develop
specific program which would increase
utreach, recruitment and hiring of
inorities for those specific job categories
here significant underrepresentation exists.

The Chief Judge asked the Commission
assist the Task Force, which it did in a
ries of meetings and a memorandum dated
ovember 16, 1989. Among other things,
e Commission suggested that a list of goals
d a timetable be established to guide
CA managers and that they be evaluated
their success in meeting these goals.
here underrepresentation is found to be
vere, managers should be required to
stify the hiring of a nonminority candidate
er a woman or member of a minority
oup.

he Task Force Recommendations -- The CS "Workforce Diversity Program"

The recommendations of the Task
orce were contained in a report entitled
Jnified Court System Workforce Diversity
rogram." On January 4, 1990, OCA announced that it would officially adopt the Task Force's recommendations as set forth in its report. Chief Judge Wachtler commented on the release of the "Diversity Program" as follows:

> **With this plan we reaffirm our unequivocal commitment to the principles of equal employment opportunity and to the goal of a truly diverse nonjudicial work force.**

The program recommended by the Task Force was innovative, comprehensive, and contained effective remedies for curing the underrepresentation of minorities in the UCS. It encompassed nearly all of the suggestions made by the Commission in its November 16th memo to the Chief Judge.

Specifically, the Task Force suggested that a committee be formed to oversee and facilitate the implementation of all recommendations approved by the Chief Judge. Local managers would be required to develop strategies, goals and timetables for affirmative action recruitment and hiring (in consultation with the EEO director) and submit them for final approval by the Chief Administrator; performance evaluations of all managers in the UCS (Chief Clerks, Executive Assistants, Unit Heads) would take into account their efforts in achieving designated goals and meeting timetables; existing geographical promotion units would be replaced by a statewide promotional unit; cultural sensitivity would become a goal of all employees of the UCS; and the EEO office would be restructured to permit an increase in compensation for its director (commensurate with the salaries of other directors in OCA) and a strengthening of its staffing.

Remaining Problem Areas

The Commission appreciates the timely efforts of the Task Force in formulating its comprehensive "Workforce Diversity Program." The Commission especially applauds the Task Force's support for the establishment of an implementation committee. Without such a committee, many mutually developed recommendations would go unimplemented.

There are, however, problem areas which the diversity plan fails to address adequately. The utilization analysis, for example, needs to be further refined. In its own analysis of data from the 1989 UCS Utilization Report, the Commission discerned areas of underrepresentation specific to given racial groups and judicial locations. The following represents a summary of these findings of statistically significant underrepresentation:

Court Officers:

- Black court officers in the Appellate Division First Department; Supreme Court Civil and Criminal Terms in the 1st Judicial District; Supreme Court in the 2nd Judicial District; Courts in the 9th, 10th, 11th and 12th Judicial Districts; New York City Civil, Criminal, and Family Courts.

- Hispanic court officers in Supreme Court Civil Term in the 1st Judicial District; Supreme Court in the 2nd Judicial District; Courts in the 10th and 11th Judicial Districts and the New York City Civil and Family Courts.

Court Reporters:

- Black court reporters in the 4th, 5th, 6th, 7th, 8th and 10th Judicial Districts.

Judges' Secretaries/Typists:

- Black secretaries and typists in District 11.

Protecting The Workforce Diversity Program From Legal Challenge

Despite the apparent limitations placed on remedies for employment discrimination by recent United States Supreme Court decisions, the Commission found no serious legal impediments to the voluntary adoption of an affirmative action plan by the UCS.

The Commission hearings revealed substantial evidence of past discrimination, and the utilization analysis demonstrated significant underemployment of minorities. The remedy proposed calls for precise action limited to correcting prior discrimination without unduly foreclosing employment opportunities for nonminorities. However, in light of uncertainty regarding the direction in which antidiscrimination law will move in coming years, caution should be exercised. The "Workforce Diversity Program" should be reviewed in light of recent affirmative action decisions and possible legislative changes. In particular, the following questions should be addressed by OCA in order to diminish the likelihood of a successful legal challenge to the plan's validity:

1. Are the Commission's findings of past discrimination sufficient to support the issuance of a plan, or must the UCS engage in its own review?

2. Are the remedies proposed for implementation sufficiently targeted so

that race-conscious remediation is appropriate?

3. Can criteria be employed which would increase opportunities for minorities without imposing race-specific goals?

CHAPTER FIVE: TESTING ALTERNATIVES

Overview

The present testing system used by the UCS to screen candidates for employment and promotion does not result in a diverse work force. Despite the comprehensiveness of the "Workforce Diversity Program," this is another issue remaining to be addressed.

The Commission continues to be concerned about the types of examinations used to assess job skills. It is unclear whether the examinations currently in use adequately measure a candidate's potential to perform the duties of the position for which he or she is being examined.

Participants in the Commission's focus sessions with nonjudicial employees of the UCS expressed the view that some tests are insufficiently job-related. This conclusion flows from the experiences of minority employees who had been performing certain jobs competently as provisionals, but who were unable to pass the examination for those very same jobs.

Evidence such as this strongly suggests that something is wrong with the nature and content of the examinations given. Accordingly, the Commission's full report reviews the history of certain UCS examinations and explores alternatives to current testing methods.

Current Testing Methods

A focus session participant observed:

> **There seems to be something wrong with an examination that is testing the job knowledge of someone who has been on the job for years and yet cannot pass the examination.**

In recent years, the UCS has reduced the number of jobs that lack objective hiring criteria and has devoted substantial resources to establishing a unit which validates its testing measures and experiments with testing alternatives.

Nevertheless, the agency still holds fast to the traditional method of testing -- pencil and paper. The failure of the UCS to recognize the limitations of this testing method has resulted in criticism of the examination for data entry personnel and, indeed, in one instance, litigation over its most significant entry level examination -- the examination for court officers.

The Court Officer Examination:

The importance of the court officer examination cannot be overstated. It constitutes the primary entry point for a nonjudicial career in the UCS. The salary, benefits and status associated with the position make it one of the most sought-after jobs in the system, one with very little turnover. Thus, it is not surprising that over 70,700 persons sat for the most recent court officer examination given in 1987.

The official results on minority pass rates of this examination are not yet available. However, if they are consistent with prior court officer examinations and more recent examinations given in analogous security positions (e.g., the New York City police officer and sergeants' examinations), minorities will fail disproportionately in comparison to white candidates.

The Commission's Interim Report detailed the history of the court officer examination administered in 1982. That examination had an admittedly adverse impact on minorities, but the UCS defended

ts validity notwithstanding its adverse mpact, and a federal court agreed that it was not impermissibly discriminatory.

Data Entry Examination:

Until 1986, data entry positions were illed through discretionary appointment. Those who were first employed in the posiion were former CETA workers, a program hat sought to provide job opportunities for ow income persons. Most of the individuals nitially hired in the position were black and Hispanic women.

The controversy surrounding the dministration and grading of the September .986 data entry examination remains alive to his date. The Commission received nformation about this examination from a umber of sources, including witnesses at ublic hearings, persons who had passed or ailed the examination, administrators who vere forced to lay off or relocate workers vho had failed the examination, and persons vho were involved in the administration of he examination.

The important point that emerged from hese sources is that many incumbents could ot pass the data entry examination despite heir many years of satisfactory performance n the job.

It is obvious that continued reliance on examinations which result in a predominately white work force will impede efforts to attain a culturally diverse work orce and further undermine the UCS's redibility in minority communities. The Commission hopes that the court system will ot continue to rely upon traditional pencil nd paper testing methods in making mployment decisions, especially since there re no impediments in the law to the UCS earching for and utilizing valid ways of creening candidates that have no disproporionately negative impact on minorities. Given the UCS's concern with justice and the appearance of justice, a significant effort should be directed to identifying and implementing these measures.

Findings and Recommendations of the National Testing Commission

> **No test can be wholly free of cultural bias, for as products of culture, tests are permeated with cultural implications in both form and content. We must stop pretending that any single standard test can illuminate equally well the talents, and help promote the learning, of people from dramatically different backgrounds.**
>
> --National Commission on Testing and Public Policy

It is imperative for the UCS to recognize the changing nature of the state's work force. The pool of white male workers will shrink over the next decade. Private industry is already developing strategies to address this trend. A pressing need exists to restructure substantially the UCS's methods of assessing qualifications to insure that screening methods are used that validly measure the relative potential of candidates from many different cultural backgrounds. The Commission's recommendation that alternative methods be developed for assessing the qualifications of candidates for employment and promotion in the nonjudicial work force is consistent with current thinking in the field of employee testing. To this end, the work of the National Commission on Testing and Public Policy, discussed in the full report, is of extreme importance to institutions like the UCS that are seeking to identify the proper balance between traditional and alternative forms of testing.

UCS's Use of Alternative Testing Methods

The sentiment behind the Testing Commission's philosophy was present in the UCS's adoption of the "assessment center" approach. The UCS should continue to review and develop assessment techniques that allow for the consideration of an individual's past performance and relevant experience. This approach recognizes the need to assess a wide range of information about a candidate in order to assess accurately the candidate's capacity to perform in a particular job. In this context, the Commission wishes particularly to underscore the importance of recognizing cross-cultural competence as a relevant hiring and promotion criterion.

Manhattan Criminal Courthouse - Court Officers Locker Room

Overview

Court officers present an especially horrible problem. Some officers are wonderful and treat all defendants equally. However, they are few and far between. Generally, of all court personnel, this group is the most openly hostile and racially biased in the court system. White defendants are treated with a modicum of deference. Minority defendants are treated like scum. Cursed and ordered about in a derisive tone and manner, white court officers revel in exercising their power over an individual who is basically helpless and at their mercy. In the seventeen years I have practiced law, I have seen numerous courtroom fights between minority defendants and white court officers. I no longer count these incidents, while the number of fights between white defendants and white court officers is limited, in my experience, to two, and in both of those cases, the defendants were drunk.

-- White Litigator from
New York City

In most instances, court officers are the first representatives of the court system to meet the public. Their conduct therefore establishes the tone for many of the public's perceptions of the court system.

By most accounts, the conduct of many court officers makes a negative impression. The Commission has determined that one reason for this impression is the underrepresentation of minorities as court officers.

Minority Underrepresentation

Blacks and, to a lesser extent, Hispanics, are severely underrepresented among court officers. These data are as follows:

- Out of 11 court officers in the Appellate Division, only 1 is black;
- Out of 71 in New York County Supreme Court, civil term, 13 are black and 2 are Hispanic;
- Out of 260 in New York County Supreme Court, criminal term, 50 are black, 19 are Hispanic and 2 are Asian-American;
- Out of 259 in Supreme Court, Kings County, 56 are black, 5 are Hispanic, and 2 are Asian-American;
- Out of 22 in Supreme Court, Richmond County, 1 is black and 2 are Hispanic;
- Out of 94 in the 9th Judicial District (Dutchess, Orange, Putnam, Rockland and Westchester), 6 are black and 2 are Hispanic;
- Out of 224 in Nassau County, 11 are black and 3 are Hispanic;
- Out of 233 in Suffolk County, 5 are black and 2 are Hispanic;
- Out of 196 in Supreme Court, Queens County, 28 are black, 10 are Hispanic, and 2 are Asian-American;
- Out of 178 in Supreme Court, Bronx County, 37 are black and 26 are Hispanic;
- Out of 163 in New York City Civil Court, 30 are black, 3 are Hispanic and 1 is Asian-American;
- Out of 549 in New York City Criminal Court, 106 are black and 43 are Hispanic;
- Out of 165 in New York City Family Court, 35 are black, 8 are Hispanic and 4 are Asian-American.

Moreover, in an effort to "professionalize" court security positions, the UCS created the Court Officer Security Program. The program included a laudable attempt to decrease reliance on standardized testing. Unfortunately, something went wrong.

The Commission heard testimony that a "deal" had been made between the courts and the union to devote a substantial number of the jobs to union candidates. Whether this is true or not, the Commission notes that minority groups were underrepresented among those appointed. For example, twelve Hispanics passed the written examination, but none survived the subjective evaluation process to receive an appointment. Four Asian Americans also passed the examination for this position, but none received an appointment after completing the subjective phase of the examination.

Given the strong relationship between minority underrepresentation and the frequency of undesirable treatment, the Commission's survey of litigators regarding their beliefs about the importance of greater numerical representation of minorities among court officers and other nonjudicial personnel in the courtroom, and of the training for nonjudicial personnel on cultural/racial sensitivity, is especially noteworthy.

Nearly two thirds of litigators reported that increasing the number of minority nonjudicial personnel is "important/very important." An Hispanic litigator practicing in New York City observed:

> **Court personnel need to be much more representative of the people serviced therein. Court officers who are Black and Hispanic need to be hired, especially in the Criminal Courts. It is embarrassing to think that a**

minority person can come into a court room (a foreign environment), see so many strange faces and expect them to feel like they will get a fair treatment under the law.

Manhattan Criminal Court - Holding Cell

("Please Don't Feed The Critters")

Strikingly, 71% of all litigators rated training of nonjudicial personnel on cultural/racial sensitivity as "important/very important." The majority of litigators in every group gave this rating: 60% of white, 89% of black, 85% of Hispanic, and 65% of Asian-American litigators in New York City, and 50% of white and 84% of minority litigators outside New York City.

Judges were asked to report their satisfaction with how the court room personnel interact with the public. Although 37% of white judges are "very satisfied," only 22% of minority judges are "very satisfied." Proportionately twice as many minority (15%) as white (8%) judges are "dissatisfied/very dissatisfied." Moreover, 87% of minority and 69% of white judges rated cultural/racial sensitivity training for nonjudicial personnel as "important/very important." A white judge offered the following comment:

Discrimination is based on the unfounded perception that one person is "better" than someone else. There is no litmus test for determining who is prejudiced but it does seem to me that those who have the broadest range of life experiences seem to be the least prejudiced and vice-versa. I see too many white court personnel who have had only one, narrow life experience with minorities and that is as defendants in criminal cases.... Training for nonjudicial personnel or cultural/racial sensitivity is a void that must be filled.

Given the level of complaints against court officers, efforts to increase minority representation and to institute cross-cultural sensitivity training must be treated as high priorities.

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Overview

Federal antidiscrimination law clearly protects state employees with respect to visible and concrete conditions of employment such as hiring, discharge, compensation and promotions. The U.S. Supreme Court has recently decided, however, that employees are also protected from being subjected to a hostile work environment, even when no tangible employment opportunity is lost.

The Commission found that the working conditions of some nonjudicial personnel involve racial and ethnic disparagement as well as conditions of favoritism which create suspicions of racial bias.

Segregated Locker Rooms

The following was the testimony in 1988 of a principal court clerk in the Supreme Court in Bronx County, Civil Division:

A. **I would like to now talk about Bronx County. . . . I was shocked to find out recently that they have separate locker rooms for court officers; black court officers have a locker room, Hispanic court officers have a locker room, and white court officers have another locker room.**

Q. **Hold it just a minnte. Let's start all over.**

Q. **Where are we now, in the Bronx?**

A. **I am in the Bronx, sir.**

Q. **And in what court are you speaking -- of what court are you speaking?**

A. **I'm talking about the Supreme Court, Bronx County, 851 Grand Concourse.**

Q. **In that city-operated court, the court officers, personnel -- nonjudicial personnel --have racially segregated locker rooms?**

A. **That's true. When I questioned it, I was told that that was not the policy of the court, that the court officers voluntarily segregated themselves into these various locker rooms.**

The segregated working conditions were corrected by the Administrative Judge when he was apprised of the situation. It would be naive to believe, however, that the Commission's discovery of the segregated locker rooms reflects only an isolated instance of explicit racial hostility. The fact that such a situation was tolerated by court officers without complaint to higher officials indicates the lack of racial and ethnic harmony that exists among such personnel.

Graffiti On Walls

Another example of offensive conditions reported to the Commission was graffiti which displays racial insults and was not promptly removed from halls, rest rooms and locker rooms.

One reason these problems exist may be that there is no mechanism in place whereby court administrators receive information about working conditions which insult particular racial or ethnic groups.

In addition, the lack of a complaint process for nonjudicial personnel results in conduct going unaddressed that would ordinarily result in public admonition or

suspension if engaged in by a judicial officer. It is no wonder, therefore, that segregated locker rooms and racial graffiti are found in areas frequented by court personnel.

Overview

There is virtually no participation by minority contractors in the Unified Court System. This is so because the court system is as unaware of minority contractors as minority contractors may be unaware of potential opportunities for them in the system.

The Contracting Process

To obtain information about UCS contracting procedures, Commission staff members met with OCA officers and administrators, and with administrative judges. In so doing, it was learned that there are, in fact, three regular methods used by OCA to obtain goods and services. If particular goods or services cannot be obtained by these regular methods, a new contract may be entered into with a new vendor. If the amount of the proposed contract is greater than $2,500, open, competitive bidding is required.

The UCS does not maintain any construction contracts. Space for courts and court-related facilities, if not state-owned, must be rented.

Court security is provided in various ways. The counties of Westchester, Bronx, New York, Queens, Kings, Richmond, Nassau and Suffolk all use uniformed UCS court officers to provide security. The remaining counties in the state are responsible for providing their own security, but OCA is obligated to reimburse them at the rate of their union contracts plus fringe benefits.

There is no existing OCA policy to require contractors to have a diverse work force. However, a provision in every standard OCA contract prohibits a contractor from discriminating on the basis of race, creed, color, gender, national origin, age, disability or marital status in the hiring of employees. This provision mirrors the requirement of the Human Rights Law.

Recently, the UCS has recognized the need to encourage minority participation in UCS contracts and has issued a policy statement and outreach plan.

NONJUDICIAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS

FINDINGS

1. Whites comprise 82% of the entire nonjudicial work force of 12,000 employees.

2. A draft Affirmative Action Plan developed for OCA for nonjudicial employees by an independent consulting firm in 1979 was not adopted by OCA because no one at OCA took the initiative to see that it was approved.

   *[Commissioner Nakano dissents from this finding. She believes that the draft plan was not implemented because there was a comprehensive change in job titles in the Uniform Court System subsequent to the drafting of the plan.]

3. The EEO office within the OCA has been relegated to a second class status and as a consequence, there has been a pronounced underrepresentation of minorities in many nonjudicial job categories, particularly within the critical policy-making categories.

4. In 1989, this Commission issued an Interim Report to Chief Judge Wachtler bringing to his attention the

underrepresentation of minorities in the nonjudicial work force, the lack of an affirmative action plan, and the second class status of the EEO office.

5. Following the issuance of this report, the Unified Court System prepared an analysis of the representation of minorities in the nonjudicial work force ("a utilization analysis"), which found acute underrepresentation of minorities in the official/administrator job category and underrepresentation within the judicial work force as a whole.

6. In 1989 Chief Judge Wachtler appointed a task force to remedy the racial imbalance found in this utilization analysis, and asked this Commission to assist the task force to develop a specific program to increase outreach, recruitment and hiring of minorities -- and women -- as part of a work force diversity program.

7. In December 1989 the Task Force issued its report with its recommendations for rectifying the underrepresentation of minorities -- and women -- disclosed in the utilization report.

8. The Commission adopts the findings and applauds the reform efforts of the Task Force and Chief Judge Wachtler in responding positively to the concerns of the Commission as set forth in its Interim Report, but believes there are still areas where the diversity plan and its implementation are incomplete, such as the underrepresentation of minorities as court officers.

9. There is no adequate mechanism for registering complaints regarding instances of racial and ethnic disparagement by members of the nonjudicial work force in the court system.

10. The present testing system in certain job titles is not producing a diverse work force.

11. There is a perception among some that notice of promotional and enhancement opportunities for nonjudicial personnel is not generally given to minorities.

12. An opportunity exists for increased minority participation in contracting with the UCS. A majority of administrative judges do not contract for any services and among the few who do directly contract for such things as data processing, equipment maintenance, security services, record storage and the like, none is specifically aware of contracts with any minority-owned businesses.

13. UCS contracting authorities are becoming more sensitive to the possibilities and need for increasing minority participation in court contracting.

RECOMMENDATIONS

1. The implementation commission recommended by this Commission should monitor the EEO efforts of the Unified Court System (among other things).

2. The judges within the Unified Court System should use their discretionary ability to hire employees to diversify their own work force, for example, in connection with the hiring of law clerks.

3. The Unified Court System should adopt a complaint system to deal with complaints of discrimination within the Unified Court System, and promulgate

and publicize a system of sanctions for this behavior.

4. The Unified Court System should continue to review and develop alternatives to testing in job classifications requiring testing and to allow for the consideration of an individual's past performance. Whether nonjudicial employees are selected on the basis of written examinations or on the basis of other measures, cross-cultural competence should be one of the skills for which candidates are tested.

5. The Unified Court System should monitor its testing system in job classifications requiring these tests on a continual basis to ensure that it is fair to all applicants and inclusive of all eligible minorities.

6. To the extent that the following measures have not already been adopted by the Unified Court System, the following procedures should be adhered to: job opportunities in the Unified Court System should be made available to all; notices of vacancies should be disseminated state-wide; all eligible employees for particular jobs should be notified; no job vacancy should be filled until the time for application has expired and, where appropriate, the closing date should be extended; a statement should accompany each notice that no informal choices will be made; and finally, the EEO unit of OCA should monitor this process.

7. Increasing and ensuring minority contracting opportunities should be made an integral part of the comprehensive UCS "Workforce Diversity Program" and a specific aspect of the EEO Director's job. This program sets forth a series of management initiatives aimed at broadening the pool of qualified candidates for positions in the court system. The goal of the Program is to achieve a truly diverse nonjudicial work force. The Program requires each judicial district, court or OCA office to appoint an EEO Staff Liaison to assist in conducting outreach and recruitment efforts to implement the Program.

8. To the extent the OCA Minority and Women-owned Business Enterprises policy does not so provide, the following should be adopted:

a) An information campaign should be instituted in minority business circles to apprise prospective bidders of contracting opportunities. Extensive use should be made of trade publications accessible to minority enterprises.

b) Diversity training should sensitize UCS contractors to the need for minority participation and encourage them to include minority businesses on lists of potential contractors when bids are being solicited.

c) Goals and timetables should be established, similar to those required under the "Workforce Diversity Program," including both annual and longer range goals based on the degree of underutilization of minority contractors. The EEO office should assist in providing information necessary to establish these goals and timetables. The EEO Director should gather statistics and other information providing evidence of past discrimination to justify a compelling interest in applying whatever remedies are deemed appropriate.

d) Executive Order No. 21 should be adopted. This articulates the state policy regarding the opportunity for full participation in our free enterprise system by traditionally, socially and economically disadvantaged persons, which is essential if we are to obtain equality and improve the functioning of our state economy. The order encourages the greatest possible participation of minority businesses in all state contracts and directs efforts to provide technical and management assistance to minority owned enterprises.

e) There should be monitoring of the diversity program of all subcontractors whether private or municipalities and a "best efforts" requirement to diversify when contracting for security outside the New York City area.

f) The OCA should identify and utilize minority-operated banks for monies received by UCS in the first instance.

g) Officials should seek out minority professionals for consultation and personnel services contracts.

h) OCA should actively solicit the participation of minority contractors in the construction of court facilities.

CONTRIBUTORS

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Anonymous
Association of the Bar of New York
Bethany Baptist Church
J. Truman Bidwell, Jr.
Bond, Schoenck & King
Brown & Wood
Cadwalader Wickersham & Taft
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*Steven Wolfe

*Donated in the name of Ambassador Franklin H. Williams

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Edna Wells Handy, Esq.,
Executive Director

Linda Chin, Esq.,
Counsel, 1988-1989

Monica Holmes, Ph.D.,
Research Director

David Klein, Esq.,
Counsel 1989-1991

George H. DeCou, Jr.,
Development Officer

Richard K. Farrell,
Research Assistant

Donna Cupid Weeks,
Executive Secretary

Iris Torres-Nieves,
Administrative
Assistant

Sue P. Fields,
Administrative Clerk

Lynette Brown,
Administrative Clerk

COVER
Phelps-Stokes Fund

EDITOR
Matthew Bender

LAYOUT
Edna Wells Handy

TYPESET
Sue P. Fields

PHOTOGRAPHY
Chester Higgins, Jr.

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