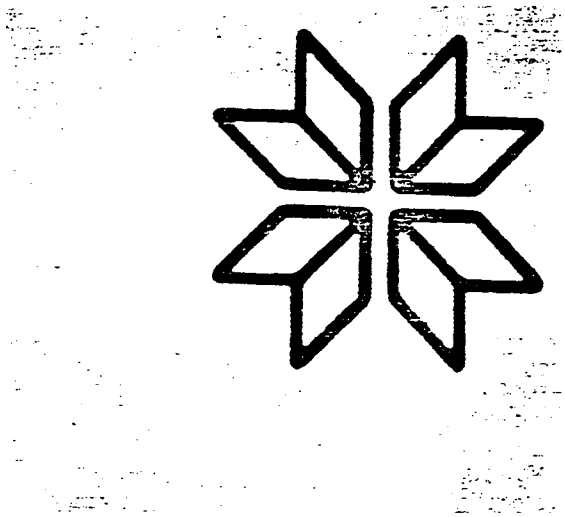
REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES



VOLUME FOUR
LEGAL PROFESSION, NONJUDICAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS
APRIL, 1991

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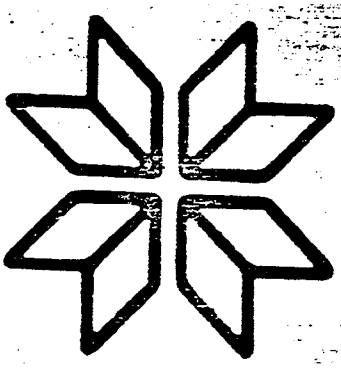

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APRIL, 1991

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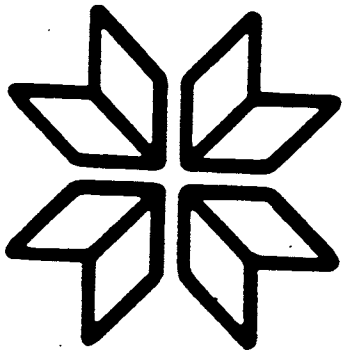

VOLUME FOUR
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INTRODUCTION

It has been shown that, statistically, minorities who graduate from law school fare worse than nonminorities on the New York State Bar Examination. In Chapter 1 of this volume, the Commission addresses aspects of the continuing debate on the effectiveness and validity of the bar examination as a measure of minimum competence to practice law. The Commission also presents findings of its own surveys and addresses policy questions relating to the examination itself.

Minority attorneys continue to lag far behind their nonminority colleagues in access to and integration into, as well as satisfaction with, the legal profession. Similarly, they find that a double standard exists in the treatment of attorneys in the courts--one standard for minorities and one for nonminorities. Chapter 2 discusses minority participation throughout the broad spectrum of the legal profession, including, but not limited, to distribution in various types of practice, recruitment and hiring, participation in bar associations and satisfaction with professional opportunities.

Minorities are grossly underrepresented on the bench in the courts of this state. Chapter 3 provides data to confirm this fact and discusses possible remedies to correct this problem. The chapter also critically reviews the judicial selection process in place and suggests possible improvements. The Commission also discusses aspects of the judicial work environment and presents data from surveys relating to the need for racial, cultural and ethnic sensitivity training for members of the judiciary.

The underrepresentation of minorities as judicial officers is matched by a documented absence of minorities as nonjudicial officers. This problem was addressed by the Commission in its Interim Report, which described the substantial underrepresentation of minorities in certain job categories within the Unified Court System (UCS).

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

Chapter 4 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 system's utilization analyses and its work force diversity program. Chapter 5 reviews UCS testing policies and practices as they relate to minority representation. Chapter 6 addresses what the Commission calls "the court officer problem." Chapters 7 and 8 discuss the nonjudicial work environment and its impact on minority nonjudicial employment, and describe the UCS contracting process in the context of equal opportunity, respectively. Findings and recommendations for Chapters 4-8 are grouped together at the end of this volume.

CHAPTER ONE

ADMISSION TO PRACTICE: THE BAR EXAMINATION

CHAPTER 1

ADMISSION TO PRACTICE: THE BAR EXAMINATION

Graduates of law schools located in New York State achieved the following average pass rates on the July administration of the State's bar examination between 1985 and 1988:[1]

Blacks	31.0%
Native Americans	33.3%
Hispanics	40.9%
Asian Americans	62.9%
Whites	73.1%

CHAPTER OVERVIEW

The above statistics show that upon graduation from law school large numbers of minorities face a serious obstacle to practice: passing the New York State bar examination. The New York State Board of Law Examiners, which administers the examination, does not maintain race data on bar passage, and no comprehensive research on minority bar passage has been undertaken in the state. The Commission therefore collected bar passage data from New York State law schools, surveyed litigators as to their own experiences with the bar examination and received testimony from concerned educators, employers and law students. Although most law school graduates, including minorities, who take the New York State bar examination pass it, the area of most importance to this Commission is the "first-time" bar passage rate of minorities in this state.

The effectiveness of the state's bar examination as a measure of minimum competence to practice law is a topic of continuing debate, especially in light of the low

[1] See Table IV.1.1, infra p. 7.

minority first-time pass rates. Some proponents of the examination believe it should be maintained notwithstanding the low pass rates, arguing that the examination is a valid measure of minimum competence that does not impermissibly discriminate against minorities. Some opponents would abolish the examination in its present form and replace it with a test of lawyering skills identified as essential to the practice of law (including research skills and counseling abilities).[2]

This chapter will address aspects of this debate. Section I discusses the Boddie Petition, a legal challenge by black petitioners to the validity of the New York State bar examination. Section II details the findings of the Commission's own surveys relating to the New York State bar examination as well as those from the states of California and Washington. Section III addresses a number of policy questions relating to the bar examination itself, including approaches intended to help those minority law graduates who need assistance.

I. HISTORICAL BACKGROUND

Until the Commission undertook its own study on the subject, there existed only anecdotal evidence in New York State that minorities fail the bar examination in numbers disproportionate to Whites. This perception was derived from two main sources: the experiences of minority test-takers and the impressions of educators and employers who received information about the success or failure of individual students and employees.

In 1974, a group of black law school graduates petitioned the Court of Appeals to appoint a commission to study the propriety of relying on the bar examination for

[2]For a sample of the arguments debated, see Putting the Bar Exam to the Test, N.Y. St. B.J., Oct. 1990, at 44.

professional certification.[3] In their petition they claimed, inter alia, that the bar examination violated the equal protection clause of the 14th Amendment because it had a discriminatory impact on black candidates[4] and could not be shown to be "job-related."

The Court of Appeals did not appoint a commission but retained the services of a psychologist to render an opinion regarding some of the factual claims raised in the petition. That expert, William E. Vandament, concluded that predictive or job-related validation of the examination was impossible with contemporary validation techniques.[5] Petitioners' experts severely criticized the Vandament report, and, based on their own experts' comments, petitioners called for abolition of the bar examination.

In addition to considering the memoranda and reports described above, the Court undertook a number of other activities before deciding the petition. These activities included: 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 the information it collected, the Court granted the petition to the extent it undertook the activities summarized above, but it denied the petition in all other respects.[6] Following the

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[3] A fuller description of the petition appears in the briefing paper on the bar examination which is included in vol. 5 of this report.

[4] In support of this claim, the petitioners produced data showing that over a six-year span, the bar pass rate for black candidates in the Fourth Judicial Department averaged close to 18%, while the overall pass rate was 72%. In the matter of Boddie, et al., Menorandum of Boddie Petitioners in Support of their Application 14 (N.Y. Ct. App. Nov. 20, 1975).

[5] Vandament, A Prospectus to Study the Bar Examination of New York State 3-6, 12 (1976).

[6] See In re Boddie (N.Y. Ct. App. Dec. 15, 1976) (order granting petition in part and denying petition in part).

recommendation of Vandament, however, the Court did adopt the Multistate Bar Examination (MBE) as a component of the state's bar examination.

II. DATA ON MINORITY PASS RATES

Many who attended the Commission's public hearings and meetings attested to the effects of delay of entry by some minorities to the profession due to the bar examination.[7] Accordingly, to determine minority pass rates, the Commission surveyed the 15 law schools in New York State, as they were the only institutions that had compiled information on both race and bar passage for individual students. The data presented in Table IV.1.1. are based on the experience of 59% of all test-takers. The remaining test-takers attended law schools outside of New York State, and their pass rates are unknown.

The average pass rate of white applicants on the July examination (73%) is more than twice that of black applicants (31%). It is also substantially greater than that of Hispanics (41%) and somewhat higher than the Asian-American pass rate (63%). The disparities are not as great for the February administration. See Table IV.1.1.

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[7]Dean Burns of the CUNY Law School testified regarding the difficulties CUNY graduates have encountered with the bar exam. See 3 New York State Judicial Commission on Minorities, New York City Public Hearing 573-84 (June 30, 1988) (testimony of Haywood Burns). Representatives of the Association of Legal Aid Attorneys and the Monroe County Public Defender told of the loss of minority staff due to their failure to pass the bar exam. See 5 id. at 923-24 (statement of John Yong, Association of Legal Aid Attorneys) (minority staff provided much-needed services to predominantly minority clients); New York State Judicial Commission on Minorities, Minutes of Public Meeting - June 3, 1989 7-8 (Rochester, Monroe County) (testimony of E. Scanlan, Monroe County Public Defender's Office). Numerous minority law graduates, some currently admitted to practice in the state, also told of their difficulties in passing the examination. See generally New York State Judicial Commission on Minorities, New York City Public Hearing (June 30, 1988).

Table IV.1.1.
Bar Pass Rates of New York State Law School Graduates
By Race and Month of Administration*
(1985-1988)

Race	Total	February Passing	Rate	Total	July Passing	Rate
White	2,875	1,481	50.5%	13,061	9,545	73.1%
Black	357	107	30.0%	678	210	31.0%
Hispanic	217	80	36.9%	492	201	40.9%
Asian	72	34	47.2%	245	154	62.9%
Nat.Amer.	9	2	22.2%	21	7	33.3%

* Not all schools provided data for every administration; data include both first-time and repeat test-takers.

The Commission also surveyed litigators with respect to their experiences with the bar examination. While the law school data reported in Table IV.1.1. are based only on New York State law school graduates and are limited to a four-year period, the data from the litigators' study are based on responses of law school graduates from all over the United States and include test-takers over many years. The results of this survey are summarized in Table IV.1.2.

Table IV.1.2.
Litigators' Reports of the Number of Attempts at Passing the New York State Bar Examination
(Numbers in parentheses are percentages)

Number of times took New York State Bar Exam	White	Black	Hispanic	Asian
1 time	233 (80.5)	98 (55.1)	75 (51.7)	51 (67.1)
2 times	37 (12.9)	51 (28.7)	42 (29.0)	14 (18.4)
3 - 7 times	19 (6.6)	29 (16.3)	28 (19.3)	11 (14.5)
Avg. number of attempts	1.29	1.67	1.75	1.53

A majority of both white and minority litigators passed the bar examination on thei first attempt -- 81% of white, 55% of black, 52% of Hispanic and 67% of Asian-Americai litigators. The difference between Whites, on the one hand, and Blacks and Hispanics, o the other hand, is statistically significant. It is important to note, however, that the averag number of bar pass efforts is less than two for all groups.

The data from the litigators' survey graphically demonstrate that the bar examinatio substantially delays entry into the profession for disparate proportions of black and Hispani candidates. Since, by definition, all respondents were attorneys duly admitted to the bar, th survey does not treat the issue whether the examination precludes entry to practic altogether.

Because of the controversy that exists concerning the validity of the bar examinatic as a measure of competence to practice law, litigators were asked to rate the relevance the bar examination to their practice as attorneys, whether their law school education w

useful for passing the bar examination, and whether the bar examination is biased against minorities.[8] These findings are presented in Table IV.1.3.

Table IV.1.3.
Litigators' Perceptions as to Relevance, Usefulness, and Bias of the Bar Examination
(Numbers In Parentheses Are Percentages)

	WHITE			BLACK			HISPANIC			ASIAN			TOTAL		
Relevance of bar exam to practice as an attorney.	Extr. Relevant	Relevant	Irrelevant	Extr. Relevant	Relevant	Irrelevant	Extr. Relevant	Relevant	Irrelevant	Extr. Relevant	Relevant	Irrelevant	Extr. Relevant	Relevant	Irrelevant
	25 (8.4)	128 (43.6)	140 (48.0)	12 (6.3)	71 (37.6)	106 (56.1)	8 (5.4)	71 (47.7)	70 (47.0)	6 (7.6)	30 (38.0)	43 (54.4)	51 (7.1)	300 (42.2)	359 (50.6)
Usefulness of law school education as preparation for bar exam.	Very Useful	Somewhat Useful	Not Useful	Very Useful	Somewhat Useful	Not Useful	Very Useful	Somewhat Useful	Not Useful	Very Useful	Somewhat Useful	Not Useful	Very Useful	Somewhat Useful	Not Useful
	144 (49.2)	122 (41.7)	27 (9.2)	74 (38.3)	93 (48.2)	26 (13.5)	59 (39.3)	61 (40.7)	30 (20.0)	24 (30.8)	45 (57.7)	9 (11.5)	301 (42.2)	321 (45.0)	92 (12.9)
Bias of examination against minorities.	Considerably Biased	Somewhat Biased	Not at all Biased	Considerably Biased	Somewhat Biased	Not at all Biased	Considerably Biased	Somewhat Biased	Not at all Biased	Considerably Biased	Somewhat Biased	Not at all Biased	Considerably Biased	Somewhat Biased	Not at all Biased
	9 (3.5)	41 (15.2)	218 (81.3)	23 (12.5)	104 (56.5)	57 (31.0)	25 (17.1)	58 (39.7)	63 (43.2)	4 (5.2)	22 (28.6)	51 (66.2)	61 (9.1)	225 (33.3)	389 (57.6)

Overall, 51% 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. The differences among the groups are not statistically significant. However, respondents who took the examination more than once were significantly more likely than those who took the examination only once to rate it as irrelevant to the practice of law.

[8] New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experience and Perceptions of Fairness and Sensitivity in the Courtroom 17 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From A Survey of New York State Litigators in vol. 5 of this report).

Thus, 43% of those who took the examination once, but 62% of those who took it twice, and 66% of those who took it three or more times, rated it as irrelevant. This relationship between number of attempts to pass the examination and the rating given to its relevancy holds for all groups. For example, Blacks and Whites who passed the bar on the first attempt were equally likely to rate the examination as relevant. Thus, rating the bar examination for relevance correlates with success in passing it, not with the race of the test-taker.

Relatively few respondents (13%) said that their law school education was "not at all useful" for passing the bar examination. Significantly more Hispanic (20%) than white (9%) litigators rated their law school education as not at all useful for bar passage, but the majority of litigators in all racial/ethnic groups divided their opinions between "very useful" and "somewhat useful." In all groups respondents who took the examination more than once were more likely than respondents who passed on the first attempt to rate their law school education as "not at all" useful.

Overall, very few litigators (9%) felt 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, while only 31% of black and 43% of Hispanic respondents expressed this view. Among Hispanics, but not among Blacks or Asian Americans, there is a strong relationship between multiple efforts to pass the exam and a tendency to rate it as biased against minorities. Thus, 43%

of Hispanic first-time passers, but 71% of those who required three or more attempts, rated the examination as "somewhat" or "considerably" biased. Among Blacks and Asian Americans, equal proportions of first-time passers and those requiring two or more attempts rated the examination as biased.

Studies from other jurisdictions have generally dismissed race as a significant factor in bar examination pass rate disparities. A study of California's July, 1973 examination found "no evidence that more minority applicants would be expected to pass the Bar than actually did pass."[9] A later study in Washington State, whose consultant asserted that bar examination questions "are clearly and unequivocally biased in favor of students from middle class Anglo backgrounds,"[10] requested that the examination "be modified so as to provide more emphasis on personal law subjects (e.g., torts, criminal law, constitutional law, creditor-debtor relations and family law); provide more time for answering questions; and involve a deductive approach whenever possible,"[11] but otherwise left that state's examination unmodified. More recently it has been observed that "'even carefully designed test instruments may include some degree of cultural bias that artificially lowers the tested performance of [black Americans] relative to [white Americans].'"[12]

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[9] Klein & McDermott, An Examination of Possible Item, Test, and Grader Bias in the California Bar Examination, 4 Black L.J. 553, 556 (1975). The researchers noted that the presence of cultural bias could be inferred from the finding that if a white candidate and a minority candidate had similar predictor scores (i.e., LSAT score, undergraduate GPA or law GPA) the white candidate would generally score higher on the bar examination. However, predictor scores were not -- and are not -- comparable. Id. at 555.

[10] J. Vasquez, Review of Sample Bar Exam and Law School Essay Examination Questions 4 (1977) (report prepared for the Washington State Bar Association Committee on Third World Students, Law Schools, and Bar Examinations).

[11] Washington State Bar Association Committee on Third World Students, Law Schools, and Bar Examinations 59 (Committee Report 1977).

[12] National Commission on Testing and Public Policy, From Gatekeeper to Gateway: Transforming Testing in America 13 (1990) (quoting an unidentified recent report of the National Research Council).

Most recent research on bar examination pass rate disparities emphasizes the connection between academic achievement, as primarily indicated by law school grade point average (GPA), and bar examination performance. Studies by Stephen Klein and Roger Bolus using California data found that race or ethnic background is not the variable which most efficiently predicts differential performance on the bar examination.[13] These studies found that: bar examination scores are very closely related to the applicant's law school grades and LSAT scores;[14] differences in pass rates can be predicted with 80% accuracy by using those measures; and adding information about the applicant's racial/ethnic background does not increase the accuracy of the prediction by even 1%.[15] The studies concluded that racial/ethnic background itself is therefore not the critical factor.[16]

Klein and Bolus also found little support for a number of other possible explanations of the differential pass rates of white and minority test-takers, including the hypotheses that minorities fail the bar examination because they are underrepresented in the more selective law schools; that white applicants possess superior testing skills uninfluenced by study in law school; that minority test-takers produced answers which were, substantively, as correct as those of their white counterparts but that these answers were produced in a different linguistic or writing style against which white graders discriminated; that minority test-takers may approach the examination with less confidence than Whites and, therefore, suffer from

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[13] See S. Klein & R. Bolus, Minority Group Performance on the California Bar Examination (1987). This research was sponsored by The Committee of Bar Examiners of the State of California.

[14] See L. Wightman & D. Muller, An Analysis of Differential Validity and Differential Prediction for Black, Mexican American, Hispanic, and White Law School Students (Law School Admission Council Research Report No. 90-03, 1990), and studies cited therein.

[15] S. Klein & R. Bolus, supra note 13, at 10-12.

[16] Id. at 3.

a greater tendency to "freeze" or be overly hesitant in choosing answers; and that the passing score for the bar examination has a disproportionate negative effect on minorities.[17]

The Klein and Bolus research is not without critics. In particular, the researchers' reliance on LSAT scores and law school GPA as measures of academic ability has been criticized.[18] It is argued that the LSAT is itself a flawed measure because it discriminates on the basis of both gender and race. It is also argued that the LSAT tests the same skills as the bar examination, and that it therefore is not surprising that there is a correlation between the two.[19]

The research has also been criticized because of the unavailability of data on economic status. Minorities are overrepresented in lower income groups and, irrespective of race, the academic proficiency of students from middle- and upper-class family backgrounds tends to be higher than that of students from lower socioeconomic 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. Klein and Bolus were unable to measure the effect of this factor.

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[17] Id. at 13-14.

[18] Emsellem, Racial and Ethnic Barriers to the Legal Profession: The Case Against the Bar Examination, N.Y. St. B.J., Apr. 1989, at 44.

[19] Assembly of the State of New York Committee on the Judiciary, Public Hearing on Qualifications For the Practice of Law in New York State, at 75 (Mar. 15, 1990) (testimony of Anthony E. Davis, Chairman, Committee on Legal Education and Admission to the Bar, Association of the Bar of the City of New York).

III. ISSUES RAISED BY MINORITY PASS RATES

A. Proposals that the Bar Examination be Abolished

Some critics suggest that the bar examination should be abolished.[20] 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. Furthermore, absent a clear showing of job-relatedness, the critics argue that an examination which results in a disparate impact on minorities is untenable.[21]

After reviewing the alternatives available, the Commission concludes that the bar examination should not be abolished but, rather, should be evaluated for cultural/economic bias and 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 basic legal skills. The American Bar Association, the National Conference of Bar Examiners and the Association of American Law Schools have stated the following purpose for bar examinations:

> The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory or experience.[22]

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[20] See, e.g., Rogers, Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests, 32 Howard L.J. 563, 622-25 (1989); The Minority Candidate and the Bar Examination, 5 Black L.J. 120, 128 (1977) (keynote introduction by Lennox S. Hinds, National Director National Conference of Black Lawyers).

[21] New York State Judicial Commission on Minorities, Albany Public Hearing 105-07 (Apr. 28, 1988) (testimony of Jerry Lee, Counsel to Deputy Speaker of the New York State Assembly, Arthur O. Eve).

[22] Code of Recommended Standards for Bar Examiners, reprinted in ABA Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States Fall, 1989 Law Schools and Bar Admission Requirements 72, 73-74 (1990).

The Commission is also not persuaded that the examination should be supplemented with clinical tests involving simulated legal problems. The Commission acknowledges that the examination measures only a subset of the skills needed by lawyers and that there are substantive areas of practice and important capacities needed by practicing attorneys that are not tested at all (e.g., client interviewing, oral and negotiation skills). However, the introduction of simulated clinical tests in California was found not to result in an improved bar examination pass rate for minorities, and such simulations are both time consuming and expensive to administer.[23] It is not clear, therefore, that minorities would benefit from such a modification 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. Wisconsin allows "diploma privileges," i.e., excluding graduates of the University of Wisconsin and Marquette University law schools from the requirement of taking the Wisconsin bar examination.[24] Administrators of the examination in Wisconsin apparently believe that the passage of a sufficient number of courses to graduate provides a more comprehensive test of a student's knowledge of the law and capacity to analyze problems than can be tested in a two-day bar examination. However, the opponents of "diploma privilege" point out that states have no effective control over curricula at most law schools. Moreover, the curricula at most law schools do not

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[23] See S. Klein & R. Bolus, supra note 13, at 7-8. See also Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 988 (1988) (plurality opinion). The United States Supreme Court has said that a plaintiff may suggest alternative tests to those which have an adverse impact on minorities, but that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."

[24] Minimum Requirements for Admission to Legal Practice in the United States, reprinted in ABA Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States Fall, 1989 Law Schools and Bar Admission Requirements 82 (1990).

Three aspects of the program appear to account for its success: individual counseling; group lectures on the bar examination and examination techniques; and financial support where necessary, 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 available. The student-teacher ratio is kept low (15-1). 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.[26]

D. The Responsibilities of Law Schools

The Commission believes that New York law schools should 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 academic resources to fulfilling that responsibility. In light of the success of supplemental bar review programs, such as the one described in the preceding subsection, the Commission believes that additional efforts by law schools could make a substantial contribution to increasing minority bar pass rates. For example, law schools could create special tutorial programs for graduating students who have expressed an interest in such a program. These programs could provide special tutorial

[26] Id.

assistance to students and establish a continuing relationship with them that would last until they take the bar examination.

E. Racial Composition of the Board of Law Examiners

The Commission believes that an aspect of the perception of bias regarding the bar examination would be alleviated to some extent if more minorities were employed as graders and as staff of the Board of Law Examiners. None of the nine contract graders and none of the eight staff members of the Board is a minority person.[27] 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.[28]

F. Maintenance of Race Passage Data

The Commission has recommended a number of methods intended to improve the overall bar passage rates for minorities. The success of these measures, however, cannot be monitored unless the New York State Board of Law Examiners begins to maintain race and other data to determine minority pass rates. This data should be kept, especially now that the State of New York is a participant in a national study on the bar passage rate being conducted by the Law School Admission Council.[29]

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[27] Telephone conversation between Commission counsel and Nancy Oppe, Deputy Executive Secretary, New York State Board of Law Examiners, Feb. 26, 1991.

[28] Id.

[29] See Letter from Hon. Henry Ramsey, Jr., Law School Admission Council to National Asian Pacific American Bar Association (Nov. 1, 1990) (describing the proposed Bar Passage Rate Study).

FINDINGS

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

Native Americans	33.3%
Blacks	31.0%
Hispanics	40.9%
Asian Americans	62.9%
Whites	73.1%

2. The entire legal community -- law schools, private and public sector law entities and 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 State 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 the passage of the bar examination in New York State by their

students. Historically, many New York law schools have taken the position th passing the bar examination is the student's responsibility alone and that they cann devote academic resources to fulfilling that responsibility.

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

4. Financial resources should be available to bar examination candidates wh demonstrate need so that they will not have to be employed while they study for th examination.

5. Applicants who fail the bar examination should be informed by the Board of La Examiners at the time their results are communicated that repeat takers have bee found to have an increased chance of passing.

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

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

CHAPTER TWO THE LEGAL PROFESSION

CHAPTER 2

THE LEGAL PROFESSION

CHAPTER OVERVIEW

This chapter is concerned with minority access to, and experiences in, various types of legal practice: the treatment of minority attorneys in the courts; and minority integration into, and satisfaction with, the legal profession. Although access to the legal profession has improved, in raw numbers, since the first national efforts to integrate legal education and employment began in the 1960s, the representation of minorities in the profession remains a fraction of their representation in the population. In addition, minority attorneys, save relatively few exceptions, "are overwhelmingly concentrated in the least lucrative and prestigious specialties, virtually absent from major law firms and corporate law departments."[1]

Limited progress in lessening the racial segregation of the legal profession was achieved under affirmative action, tuition and scholarship assistance, and minority-directed recruitment and preparation programs. However, recent trends indicate that such progress may have stagnated or reversed due to the changed political climate and funding restrictions of the 1980s. These problems are not unique to the legal profession but are endemic to society as a whole, and they have been magnified by related problems, such as the decline

[1] Jordan, Black Lawyers Cannot Be Relegated to a Professional Ghetto, 7 Black L.J. 57, 57 (1980).

of college enrollment by minorities and the decline of affirmative action programs (See, e

Regents of the University of California v. Bakke[2]).

Despite advances during the past two decades and the leading role played by the le community in breaking down many discriminatory structures, the legal profession has succeeded in providing equality of opportunity to all of its members. As the American Association's Task Force on Minorities in the Legal Profession observed in its 1986 rep such inequality "persists as an unwanted residue of history."[3]

With this background, the Commission presents the research on minorities in the l profession. Section I provides a discussion of the representation of minorities in profession as a whole and their distribution in various types of practice. Section II deals the recruiting and hiring practices of large firms and organizations. Section III focuse the legal practice environment. Section IV provides data on the treatment of min attorneys in the courts. Section V reviews minority participation in established bar as ations. Section VI discusses reports by minorities, especially Blacks, of disparate treat by grievance or disciplinary committees of the Appellate Divisions of New York State. tion VII describes access by minority attorneys to fiduciary appointments. Finally, Se VIII discusses the satisfaction of minority attorneys with their professional opportunit

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[2]438 U.S. 265 (1978).

[3]ABA Task Force on Minorities in the Legal Profession, Report 7, reprinted in 111 Reports of the ABA (177E) (1986) [hereinafter ABA Task Force].

I. 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.[4]

Minority representation in the legal profession lags far behind the representation of minorities in the general population. According to the 1980 United States Census, minorities comprised 20.3% of the population, but only 5.5% of the 501,834 lawyers in the United States. The 5.5% figure includes 2.7% black, 1.7% Hispanic, 0.7% Asian-American, and 0.2% Native American representation.[5] Census data for the state of New York reflect these figures. Although minorities represented 25% of the state's population in 1980, of the 62,032 lawyers in the State, 59,582 (96%) were white, 1,652 (2.7%) were black, 992 (1.6%) were Hispanic, 433 (0.7%) were Asian-American, and 35 (0.06%) were Native American.[6]

Table IV.2.1 provides data on the numbers and proportions of minority lawyers in New York, both statewide and in the 15 counties with the largest minority populations. Although all but one of these counties (Albany) had a population with more than 10% minorities, minority attorneys are underrepresented in all counties. In New York County, for example, where the minority population is 51%, the minority lawyer population is only 6%. Similarly, although minorities actually comprise the majority in the populations of both the Bronx and Kings Counties, minority lawyers are underrepresented. Outside New York

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[4] 3 New York State Judicial Commission on Minorities, New York City Public Hearing 569 (June 30, 1988) (testimony of Haywood Burns).

[5] 1980 Census of the Population, Detailed Occupation and Years of School Completed by Age, for the Civilian Labor Force by Sex, Race, and Spanish Origin: 1980 (Supplementary Report PC89-S1-8) 6.

[6] See Table IV.2.1 infra.

City, no county has more than 4% minority lawyers, and two counties have no mir lawyers even though minority populations in these counties range from 9% to 19%.

Table IV.2.1
Race Breakdown of Lawyer Population in 15 New York Counties (U.S Census, 1980)[7]
(Numbers in parentheses are percentages of total)

AREA	TOTAL	WHITE	BLACK	HISPANIC	ASIAN	NAT. AM.	OTHER
STATEWIDE	62,032	59,582 (96.%)	1,652 (2.7%)	992 (1.6%)	433 (0.7%)	35 (0.06%)	330 (0.53%)
ALBANY	1,651	1,617 (97.9%)	24 (1.5%)	8 (0.5%)	0 (.3%)	5 (0.03%)	5 (0.03%)
BRONX	1,399	1,140 (81.4%)	154 (11%)	127 (9%)	13 (0.9%)	0	92 (6.58%)
DUTCHESS	450	445 (98.8%)	0	2 (0.4%)	5 (1.1%)	0	0
ERIE	2,584	2,546 (98.5%)	22 (0.9%)	37 (1.4%)	0	0	16 (0.92%)
KINGS	5,233	4,914 (93.9%)	243 (4.6%)	121 (2.3%)	28 (0.6%)	0	48 (0.92%)
MONROE	1,830	1,758 (96%)	43 (2.3%)	5 (0.3%)	14 (0.8%)	0	15 (0.82%)
NASSAU	7,811	7,711 (98.7%)	37 (0.5%)	71 (0.9%)	50 (0.6%)	7 (0.09%)	6 (0.08%)
NEW YORK	17,892	17,053 (95.3%)	567 (3.2%)	272 (1.5%)	195 (1.1%)	8 (0.05%)	69 (0.38%)
ORANGE	370	370 (100%)	0	0	0	0	0
QUEENS	4,972	4,497 (90.4%)	309 (6.2%)	194 (3.9%)	84 (1.7%)	5 (0.1%)	44 (0.88%)
RICHMOND	925	899 (97.2%)	9 (1%)	11 (1.2%)	17 (1.8%)	0	0
ROCKLAND	1,051	1,014 (96.5%)	31 (2.9%)	11 (1.1%)	0	0	0
SUFFOLK	2,705	2,683 (99.2%)	10 (0.4%)	57 (2.1%)	7 (0.3%)	5 (0.18%)	0
SULLIVAN	112	112 (100%)	0	0	0	0	0
WESTCHESTER	6,989	6,823 (97.6%)	146 (2.1%)	50 (0.7%)	3 (0.04%)	0	17 (0.24%)

[7] 1980 Census of Population, Equal Employment Opportunity Profile Prepared by the New York State Data Center (on file with the Commission). "Total" represents persons. Other columns do not add up to the "total" figure because persons of "Spanish Origin" (labeled "Hispanic" in this table) may be of any race.

As discussed in Volume III (Legal Education), while affirmative action at so schools facilitated minority entry into the legal profession, even those gains were r Researchers estimate that from the 1970s through the first half of the 1980s, 4.5% t of new lawyers entering the profession were black or Hispanic, figures still well bel proportions of these groups in the general population.[8] Moreover, even this mode of improvement has not been sustained. Along with the demise of several financ programs which made legal education accessible to minorities, affirmative action su in the 1980s from "the popular myth that black progress has been so significant that f national concern is not necessary."[9]

Minority attorneys are not only underrepresented in the profession as a whole also lack access to positions of prestige, power, and high remuneration. A si proportion of minority than nonminority attorneys are involved in influential and luc areas of the law, particularly in large firm practice. Table IV.2.2 shows the representation of minorities in large law firms over the last ten years.

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[8]Holley & Kleven, Minorities and the Legal Profession: Current Platitudes, Current Barriers, Marshall L.J. 299, 302 (1987).

[9]Jordan, supra note 1, at 59.

Table IV.2.2
Minority Representation Among Lawyers at "Top" Firms, 1979 - 1987[10]

Year	Black	Hispanic	Asian Am. & Native Am.
1979	1.6%	*	*
1981	1.6%	0.50%	*
1982	2.9%	0.61%	*
1984	1.5%	0.65%	*
1985	1.5%	0.79%	0.9%
1987	1.6%	0.85%	*
1989	1.7%	1.0%	1.3%
NEW YORK			
1987	1.39%	0.97%	1.6%
1989	1.72%	1.18	2.06%

While there have been nominal increases for Hispanic attorneys, the representation of black attorneys in these firms has, after several years of decreases, only recently gone past the level of representation reported in 1979. This lack of progress occurred during a time of tremendous growth for large firms.[11] Representation of Asian Americans and Native Americans in firms has increased to the point at which it now exceeds Asian-American/NativeAmerican representation in the attorney population, but for Blacks and

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[10] Burke, 3700 Partners, 12 are Black, Nat'l L.J., July 2, 1979, at 1; Flaherty, Women & Minorities: The Gains, Nat'l L.J., Dec. 20, 1982, at 1; Sylvester, Women Gaining, Blacks Fall Back: Minorities in Firms, Nat'l. L.J., May 21, 1984, at 1; Stille, Little Room at the Top for Blacks, Hispanics, Nat'l L.J., Dec. 23, 1985, at 1; Weisenhaus, Still a Long Way to Go for Women, Minorities; White Males Dominate Firms, Nat'l L.J., Feb. 8, 1988, at 1; Weisenhaus, Women, Minority Lawyers Inching Along at Big Firms, N.Y.L.J., Feb. 8, 1988, at 1 [hereinafter Weisenhaus, Women, Minority Lawyers]; Jensen, Minorities Didn't Share in Firm Growth, Nat'l. L. J., Feb. 19, 1990, at 1.

1979 data gives results from 50 firms. 1981 & 1982 data gives results from 151 firms. 1984 data gives results from 92 firms. 1985 data gives results from 246 firms. 1987 data gives results from 247 firms. 1987 New York State data gives results from 50 firms; 1989 New York State data gives results from 49 firms. Direct comparisons between 1987 and 1989 data cannot be made, given that the list of firms providing 1987 data was not exactly duplicated in the 1989 survey.

The 1987 data from New York State reflects the observation by Weisenhaus, that "when measured against nationwide figures, the situation for [minority] lawyers in those categories here is dimmer than elsewhere in the nation." Weisenhaus, Women, Minority Lawyers, supra, at 1.

[11] See Jensen, supra note 10, at 28.

Hispanics representation continues at a lower rate than their representation in the law population.[12]

Among partners in large firms, the underrepresentation of minorities is striking. 1987 survey found only 48 minority partners among 3,731 at 50 firms in the state. A sim survey in 1989 showed 70 minority partners among a total of 4,086 partners at 49 large fi in the state. Results of both studies are tabulated in Table IV.2.3.

Table IV.2.3
Proportions of Lawyers in Large Firms in New York State[13]
(Numbers in parentheses are percentages)

	TOTALS	WHITE	BLACK	HIS-PANIC	ASIAN & NAT. AM.
PARTNERS					
1987	3,731	3,683 (98.7)	14 (.4)	14 (.4)	20 (.5)
1989	4,086	4,016 (98.3)	21 (.5)	18 (.4)	31 (.8)
ASSOCS.					
1987	9,495	9,023 (95.0)	170 (1.8)	114 (1.2)	188 (2.0)
1989	10,755	10,099 (93.9)	234 (2.2)	157 (1.5)	275 (2.6)
TOTAL					
1987	13,226	12,706 (96.1)	184 (1.4)	128 (1.0)	208 (1.6)
1989	14,841	14,115 (95.1)	255 (1.7)	175 (1.2)	306 (2.1)

This marked underrepresentation in positions of prestige, especially among E and Hispanics, is particularly important to the ability of the legal profession to adv minority concerns since:

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[12] See pp. 23-24, above.

[13] Data for 1987 are from Weisenhaus, Women, Minority Lawyers, supra note 10, at 1; data for 1989 ar from Jensen, Minorities Didn't Share in Firm Growth, supra note 10. As noted there, the two surveys present data from an identical list of firms.

Table IV.2.4
Litigators Stating that Greater Numerical Representation of Minorities Among Attorneys is "Important" or "Very Important"
(Numbers in parentheses are percentages of relevant cohort)

NEW YORK CITY				OUTSIDE N.Y.C.		TOTAL
White	Black	Hisp.	Asian	White	Min.	
71 (49.7)	128 (97.0)	121 (95.3)	57 (77)	81 (54.8)	95 (94.1)	533 (76.3)

Overall, slightly more than three quarters (76.3%) of all litigators surveyed stated increasing the numerical representation of minority attorneys appearing in the cou "important/very important." While there are significant differences between the propor of Whites and each of the minority groups in New York City, and between minorities Whites outside the city, the high proportions of all groups giving an "important" rating tc item is striking. More than 50% of all Whites reported that they think there shoul greater representation of minorities among attorneys. A Native American litigator ou New York City offered this observation:

> My clients have backgrounds of various ethnicity, but are mostly black and hispanic. . . . [S]ensitivity 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.[17]

[17] New York State Judicial Commission on Minorities, Responses to Questionnaire For Litigators in Ne State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity i Courtroom [hereinafter Litigators' Questionnaire].

A black litigator in New York City wrote:

> We are underrepresented in the court system as well as in the private sector. . . . There are few, if any, minority attorneys practicing before the Civil Supreme Court and particularly in the area of negligence and malpractice.[18]

A white litigator in New York City noted:

> I do not find an adequate number of minority lawyers in practice in the courts. However, I do not feel that this is . . . a court problem but a law school problem [in that they have] not admitted a sufficient number of minority students.[19]

Data from the Commission's survey of judges are provided in Table IV.2.5.

Table IV.2.5
Judges' Views as to the Importance of Greater Minority Representation Among Attorneys in the Courtroom
(Numbers in parentheses are percentages)

WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important
74 (14.3)	213 (41.0)	149 (28.7)	68 (16.0)	51 (75.0)	14 (20.6)	3 (4.4)	0 (0.0)	125 (21.3)	227 (38.7)	152 (25.9)	83 (14.1)

The difference between white and minority judges is statistically significant. Whereas 14% of white judges stated that greater representation of minorities among attorneys is "very important," 75% of minority judges made this rating. However, it is important to note that 41% of white judges stated that greater representation is "important." Thus, a majority of white judges (55%) rated increased representation as "important" or "very important"; the comparable figure among minority judges is 96%.

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[18] Id.

[19] Id.

II. RECRUITMENT AND HIRING PRACTICES

Most studies of the recruitment and hiring of lawyers have involved large law fir in other jurisdictions.[20] It is unclear whether findings from studies based on practices these large firms can be generalized to hiring and recruiting practices in governme agencies and small firms in New York.

The underrepresentation of Blacks and Hispanics in large law firms is at least, in pa a function of the process by which firms recruit and select new associates. In most lar firms, this process works against minority aspirants and fosters perceptions of discriminatic For example, the Bar Association of San Francisco found that among lawyers graduating the top 25% of their class, 94% of Blacks, compared to 47% of Whites, perceived d crimination in the hiring process at private firms.[21]

One of the key factors in determining who will be hired by a firm is where a fir decides to recruit its new employees. If firms do not visit law schools with high enrollmer of minority law students, they may eliminate opportunities for minorities:

> Many employers recruit at some law schools where minorities are relatively well represented [i.e., "national" law schools]. . . . However, two important sources of minority students are much less frequently visited by recruiters. In the Law Firm Survey [conducted by the ABA Task Force on Minorities in the Legal Profession], only 9 percent of the firms reported recruiting at any of the four predominantly Black law schools. Moreover, about three dozen ABA-approved law schools have 100 or more minority students. Although some of these schools have national reputations, others receive visits from nearby recruiters, but not from more distant employers.[22]

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[20] See, e.g., Philadelphia Bar Ass'n, Report of the Special Committee on Employment of Minorities in t Legal Profession (1988) [hereinafter Philadelphia Bar Ass'n Report]; Bar Ass'n of San Francisco, Minori Employment Survey: Final Report (1988) [hereinafter Bar Ass'n of San Francisco Report]; State Bar of Tex Professional Efficiency & Economic Research Comm., 1987 Membership Survey (1987).

[21] Bar Ass'n of San Francisco Report, supra note 20, at 15.

[22] ABA Task Force, supra note 3, at 27 (citations omitted).

At one of the prominent minority law schools, Howard University, figures from the 1983-84 recruiting season indicate the extent to which such employers neglect minority institutions: of 1,211 law firms invited to recruit students, only 33 accepted.[23]

These findings suggest that employers' failure to hire qualified minorities may be a function of their own failure to recruit minorities where they are located. Firms which regularly hire and promote minority attorneys recognize that expansion of the methods by which attorneys are hired is essential to a successful minority recruitment program.[24]

A major deterrent to recruitment of minorities is the reliance 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 Admissions Council (LSAC), which developed the LSAT and administers it, specifically discourages its use for employment purposes:

> The LSAT was designed to serve admissions functions only. It has not been validated for any other purpose. LSAT performance is subject to misunderstanding and misuse in other contexts, as in the making of an employment decision about an individual who has completed most or all law school work. These considerations suggest that LSAT scores should not be included on a law school transcript, nor routinely supplied to inquiring employers.[25]

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[23] ABA Task Force on Minorities in the Legal Profession, Compendium of the Hearings on Minorities in the Legal Profession 137 (Feb. 13-14, 1985) (Detroit).

[24] See Silas, Business Reasons to Hire Minority Lawyers, 70 A.B.A.J. 52, 56-57 (Apr. 1984).

[25] Law School Admission Council, Cautionary Policies Concerning the Use of the LSAT and LSDAS (revised 1985). It should also be noted that even if LSAT score data were valid for any other purpose, their use in employment decisions would still be unreliable, since the Buckley Amendment prohibits law schools or anyone with access to scores from providing them. Thus there is no guarantee that employment decisions in favor of candidates with higher LSAT scores do not actually favor people who misrepresent their scores. See University of Pittsburgh Law School Placement Office, Interviews: Selected Sore Subjects (undated), reprinted in Ass'n of the Bar of the City of New York, Minority Lawyer Recruitment and Hiring, 43 Rec. A. B. C. N. Y. 922, 929 (June 1988).

As discussed in Volume III (Legal Education), on average, Blacks, Hispanics and Na Americans score less well on the LSAT (which was designed to predict first-year law sc grades) and achieve lower grades in the first year of law school. However, grades improve for these minority groups after the first year.[26]

Some believe that objective hiring criteria -- LSAT scores, grade point averages, law review status -- are applied more rigorously to minorities than to Whites. W minority candidates in the top tenth of a graduating class at a prestigious law school, part larly ones who serve on law review, will be considered for positions as associates in m law firms, minorities lacking these traditional credentials are less likely to be considered t their white counterparts with similar average backgrounds.[27] Thus, minority law stud may find themselves in double jeopardy: they may be subjected to criteria which w against them and they may be held to a standard higher than their nonminority counterpa

Even when firm recruiters do find and interview minority candidates, the process u for screening and selection may be discriminatory. As the Committee on Minorities in Profession of the Association of the Bar of the City of New York recently reported:

> Many minority student applicants believe they are asked certain questions because of their minority status. As a result, some minority applicants may be offended and react negatively to these questions. In the context of the job interview, this can be unsettling and interfere with an interviewee's ability to demonstrate his or her qualifications. It can also interfere with the interviewer's ability to evaluate the interviewee fairly. It may even lead to the interviewee's disinterest in pursuing the opportunity and an adverse long-term

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[26] See Powers, Differential trends in law grades of minority and nonminority law students, 76 Journa Educational Psychology 488 (1984) (examining 23 large, ABA-approved law schools). See also Hathaway, Mythical Meritocracy of Law School Admissions, 34 J. Legal Educ. 86 (1984) (examining students at Colu University school of law).

[27] See Dávila, The Underrepresentation of Hispanic Attorneys in Corporate Law Firms, 39 Stan. L. Rev. 1 1413 (1987).

perception of the firm, despite the fact that the questions were asked innocently, without realizing how they were likely to be received.[28]

Among the assumptions expressed in some interviews were stereotyped beliefs about cultural backgrounds: that minorities are uninterested in private or business practice and prefer to work in government or other public service. As one Hispanic litigator reported to the Commission.

> 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.[29]

Another phenomenon which, in the absence of an assertive minority outreach program, deters minority law students from seeking interviews with majority-dominated firms is "mutual deselection." Essentially, minorities often do not apply to firms with few (or no) minority attorneys because they may not believe that such an effort would be worthwhile.[30]

> [Forty-four percent] of the minority lawyers who responded to the [Philadelphia Bar Association] Attorney Survey reported that they had never had an interview with a large firm. . . . Of that group, 56% indicated that they had no interest in large firms and 16% felt that they had no chance of employment. Although firms will object to the suggestion that they discriminate in the hiring process, the Survey revealed that 37% of the respondents who were interviewed by Philadelphia area employers perceived that they had been discriminated against in the interviewing process. . . . In all, a total of 72% of the respondents who did not interview with large law firms did not do so because of their own perceptions about the value of such an effort.[31]

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[28] See Ass'n of the Bar of the City of New York, Minority Lawyer Recruitment and Hiring, 43 Rec. A. B. C. N. Y. 922, 925 (June 1988); see also ABA Task Force, supra note 3, at 28, which found that "[m]inorities perceive many interviewers as insensitive to their concerns, from questions about why they are not seeking a civil rights job to inquiries about their parental background and employment. To interviewers, such questions may seem innocuous, but minorities find them offensive."

[29] Litigators' Questionnaire, supra note 17.

[30] Cray, Blacks and Browns in Blue-Chip Firms, 4 Cal. Law. 35, 36-37 (Oct. 1984).

[31] Philadelphia Bar Ass'n Report, supra note 20, at 24-25 (citations omitted).

Thus the fact that a firm does not regularly hire minority lawyers may deter minority lawy from applying.

Finally, some firms are reported to be unwilling to employ minorities "because concern about adverse client reaction."[32] These firms may either project biases of so members onto their clients or believe that client contact with a minority attorney wo cause them to lose business.

The Commission asked litigators a series of questions regarding the recruitm efforts of the organizations in which they work.[33] Of the 740 litigators in the study, worked in organizations/firms rather than in solo practice; those working organizations/firms were asked to provide information about the types of recruitment their organizations/firms conduct in order to increase the numbers of minority law working in those entities.[34] These findings are presented in Table IV.2.6.

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[32] Id. at 32.

[33] Blank Litigators' Questionnaire, supra note 16, at 2.

[34] Id.

Table IV.2.6
Litigators' Reports Regarding Recruitment Efforts of Organizations/Firms Targeted to Minorities
(Numbers in parentheses are percentages)

	NEW YORK CITY				OUTSIDE NYC		
	White (N=76)	Black (N=73)	Hisp. (N=77)	Asian (N=41)	White & non. (N=22, [illegible]=65)		[illegible] (N=[illegible])
Outreach to minority student organizations at majority law schools	33 (43.6)	33 (45.2)	38 (49.4)	11 (26.8)	3 ([illegible])	8 ([illegible])	[illegible] ([illegible])
Participation in minority-sponsored job fairs	20 (26.1)	34 (46.6)	23 (29.9)	7 (17.1)	9 ([illegible])	10 ([illegible])	[illegible] ([illegible])
Minority summer internships	21 (27.3)	31 (42.5)	20 (26)	4 (9.8)	7 ([illegible])	12 ([illegible])	[illegible] ([illegible])
Interviews at minority law schools	17 (22.4)	14 (19.2)	13 (16.9)	4 (9.8)	4 ([illegible])	2 ([illegible])	[illegible] ([illegible])
Advertisements in minority media	3 (3.3)	11 (15.1)	10 (13)	1 (2.4)	5 ([illegible])	7 ([illegible])	[illegible] ([illegible])
Other recruitment efforts	12 (15.8)	5 (6.8)	15 (19.5)	3 (7.3)	2 ([illegible])	12 ([illegible])	[illegible] ([illegible])
Any of the above recruitment efforts	48 (62.9)	53 (64.9)	50 (64.9)	17 (41.5)	22 ([illegible])	26 ([illegible])	[illegible] ([illegible])

Overall, only 52% of litigators reported that their organizations [illegible] of minority recruitment strategy. On average, all groups reported that their organizations engage in less than one of the types of recruitment strategies about which they were queried. The activity reported by the largest number of litigators was outreach to minority student organizations at traditional law schools. Overall, one third of litigators reported that their organizations engage in such activity. Similar proportions of white (44%), [illegible] and Hispanic (49%) litigators in New York City reported such activity; somewhat lower proportions of Asian Americans (27%) and all litigators outside New York [illegible] 5%] and minority [12%]) reported such targeted outreach.

Participation in minority-sponsored job fairs was the second most common activity -- overall, one fourth of litigators said that their organizations participate in such fairs. A relatively high proportion of black New York City litigators (47%) reported such activity; relatively low proportions of persons in organizations outside New York City reported any such participation.

Significantly more black litigators in New York City (43%) than any other litigators reported that their organizations sponsor minority summer internships. Much lower proportions of litigators in other groups, ranging from 9% of white litigators outside New York City to 27% of white litigators in New York City, reported such activity.

Interviews at minority law schools were cited by very few attorneys as a recruitment strategy. White and black litigators in New York City had the highest proportions reporting such interviews; significantly lower proportions of Asian Americans in New York City and of all litigators outside New York City reported any such recruitment effort at historically black law schools.

Advertisements in minority media were reported by only 9% of all litigators. Twelve percent of litigators reported that their organizations engage in other types of recruitment activities, including "word of mouth," contacts with leaders in the minority community, outreach to minority organizations (e.g., minority bar associations, NAACP), and outreach to judges and law firms. It can be concluded that most organizations/firms do not make systematic, sustained efforts to recruit minority lawyers.

Many litigators commented on the dearth of employment opportunities afforded minorities. 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.[35]

A New York City Hispanic litigator stated:

> Attorneys of color seem to be "pigeonholed" into. . . Legal Aid, legal services, and the public interest positions.[36]

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 hire 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.[37]

Litigators in organizations/firms were asked to agree or disagree with two statements dealing with minority hiring.[38] These findings are provided in Table IV.2.7.

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[35] Litigators' Questionnaire, supra note 17.

[36] Id.

[37] Id.

[38] Blank Litigators' Questionnaire, supra note 16, at 3.

Table IV.2.7
Litigators' Agreement Regarding Experiences With Hiring Practices in Law Firms/Organizations
(Numbers in parentheses are percentages)

ITEM	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
In order to be hired, minority lawyers have to have higher grade point averages and academic qualifications than nonminority lawyers.	5 (7.1)	60 (80)	34 (43.1)	16 (34.8)	5 (6.5)	35 (56.4)	154 (38.6)
Minority lawyers are sometimes given hiring preference over academically better qualified nonminority lawyers.	27 (45.4)	12 (16.2)	21 (28)	13 (29.5)	33 (54.5)	10 (16.9)	116 (31.1)

Overall, 39% of litigators agreed with the statement, "[i]n order to be hired, minority lawyers have to have higher grade point averages and academic qualifications than nonminority lawyers." There were significant differences in the proportions of white and minority litigators agreeing with this proposition. Thus, for example, at the extremes, only 7% of white, but 80% of black, litigators in New York City agreed. Each of the minority groups had a significantly different response from each of the white groups; the black response was also significantly different from the Hispanic and Asian-American response.

Many minority litigators commented on their experiences of having to have better credentials than white litigators in their organizations. 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.[39]

[39] Litigators Questionnaire, supra note 17.

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.[40]

Thirty-one percent of all respondents agreed with the statement, "[m]inority lawyers are sometimes given hiring preference over academically better qualified nonminority lawyers."[41] Significantly greater proportions of white (45% in New York City, 55% outside New York City) than black (16%), Hispanic (28%), and Asian-American (30%) litigators in New York City, and minority litigators outside New York City (17%), agreed with this statement.

From these data it can be seen that there is a large gap in the perceptions of white and minority, particularly black, litigators in relation to hiring opportunities. Most black litigators feel their credentials have to be extraordinary in order to be hired; large numbers of white litigators feel that hiring standards are lowered for minority attorneys.

III. LEGAL PRACTICE ENVIRONMENT

Due to the exclusion of minority lawyers from large firms, minorities are concentrated in less lucrative areas of practice. Median income for minority attorneys is well below that of white attorneys, according to United States census data. This may be attributable to the concentration of greater proportions of minorities in government agencies or other public service areas of practice, although data on the distribution of attorneys in different areas of practice do not exist. The 1988 study by the Bar Association of San Francisco found that

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[40] Id.

[41] Blank Litigators' Questionnaire, supra note 16, at 3.

income and status differences persist even when the data are controlled for rank in l school graduating class and rank of law school.[42]

Within private practice, the reportedly greater concentration of minorities in small practices creates problems. To a great extent, a small firm or solo practitioner has lit opportunity to develop the skills sought by corporate or government agencies contracting f private services,[43] since these agencies tend to prefer firms with more resources and whc members are known to them. These problems, which are endemic to small practices, a often compounded for minorities who lack access to business connections and financ capital.[44] One of the first long-term consulting arrangements to alleviate this problem w initiated only recently, between a large majority firm and a small minority firm in Seattle

Minority attorneys may encounter professional barriers and social exclusion root in organizational environments. A 1983 survey of minority lawyers by the Young Lawye Division of the American Bar Association reported that 157 of 200 (78.5%) responde

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[42] See Bar Ass'n of San Francisco Report, supra note 20, at 24.

[43] ABA, Flying Solo and General Practice 5-6 (National Conference to Promote Minority Involvement in Legal Profession May 19-21 1988) [hereinafter Flying Solo].

[44] See Jones, The Legal Profession: Can Minorities Succeed?, 12 T. Marshall L.J. 347, 357 (1987).

[45] See Wiehl, Black Law Firm Forms Unusual Alliance, N.Y. Times, Apr. 7, 1989, at B5, col. 3. The fi of Karr Tuttle Campbell (a large, predominantly white firm) and Brown Mathews (a five-member, all black fi are collaborating "[t]o improve opportunities for minority lawyers to serve major clients." Evans/Kraft B Public Relations, The Collaborative Relationship Between Karr Tuttle Campbell and Brown Mathews 1 (Mar. 1989) (press release).

The goals of this collaboration are:

> To enhance the ability of Brown Mathews to attract and retain a top caliber clientele. To provide Brown Mathews attorneys an opportunity to develop consulting relationships with Karr Tuttle Campbell attorneys possessing experience and expertise that will benefit Brown Mathews clients. To interact and exchange information in areas of common interest to Brown Mathews and Karr Tuttle Campbell attorneys and their clients. To provide opportunities for attorneys at the two firms to jointly deliver legal services to their respective clientele as a means of enhancing Brown Mathews' corporate law experience and expertise. To jointly attract and retain corporate, private and public sector clients not currently served by either firm.

Id. at 1-2.

believed that major discrimination problems existed on the job, while 38 respondents (19%) believed that minor discrimination existed. Thus, 195 of 200 respondents, or 97.5%, identified problems of discrimination.[46]

The types of problems identified by minority lawyers include complaints of social isolation at work;[47] a diminished opportunity to meet clients and exclusion from social functions;[48] stereotyping of incompetence and difficulty in advancement;[49] lack of mentoring;[50] and lack of continuing legal education or training opportunities.

Litigators were asked a series of questions regarding employment environments.[51] The data are provided in Table IV.2.8.

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[46] See Luney, Minorities in the Legal Profession, 70 A.B.A.J. 58, 60 (Apr. 1984).

[47] See Dávila, supra note 27, at 1415.

[48] ABA Task Force, supra note 3, at 35.

[49] Dávila, supra note 27, at 1423; Philadelphia Bar Ass'n Report, supra note 20, at 42-47.

[50] ABA Task Force, supra note 3, at 35.

[51] Blank Litigators' Questionnaire, supra note 16, at 3.

Table IV.2.8
Litigators' Agreement Regarding Experiences of Attorneys in Law Firms/Organizations
(Numbers in parentheses are percentages)

ITEM	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
Minority lawyers have fewer opportunities than white lawyers to participate in continuing education or training opportunities.	0 (0)	23 (31.5)	20 (25)	8 (17.4)	2 (3.2)	15 (24.2)	68 (17)
Minority lawyers are less likely to be included in social events.	4 (5.1)	51 (69)	22 (26.2)	13 (26.5)	10 (13.7)	27 (40.9)	127 (30.2)
Minority lawyers lack mentors.	20 (29.4)	67 (82.7)	58 (65.2)	24 (50)	19 (31.9)	45 (67.1)	233 (56.3)
Minority lawyers receive less feedback about their work because nonminority lawyers are uncomfortable criticizing them.	13 (19.3)	30 (42.9)	25 (33.8)	16 (33.4)	20 (33.3)	22 (35.5)	126 (32.9)
Minority lawyers tend to be assigned more limited, less complex cases.	4 (5.9)	47 (64.3)	37 (46.9)	16 (32)	3 (4.7)	29 (45.3)	136 (33.8)
Minority lawyers have fewer opportunities for advancement.	11 (15.1)	73 (90.1)	51 (59.3)	25 (58.2)	16 (21.7)	48 (70.6)	224 (52.5)
A minority lawyer in the organization is less likely than a white lawyer with comparable experience to make partner/supervisor.	17 (27.2)	65 (90.3)	49 (67.2)	22 (59.4)	14 (26.3)	39 (69.7)	206 (58.4)

Only 17% of litigators overall agreed with the statement that "minority lawyers h fewer opportunities than white lawyers to participate in continuing education or trai opportunities." The majority of lawyers in all groups disagreed with this statem Nevertheless, there were significant differences between minority and white litigators in York City; thus, whereas no white litigators agreed with this statement, 31% of black, of Hispanic, and 17% of Asian-American litigators agreed. Similarly, 3% of white litig outside New York City, in contrast to 24% of minority litigators outside New York

agreed with this statement. Some litigators commented on the lack of continuing education and training opportunities for minority attorneys. For example, a black litigator outside New York City wrote:

> Minorities cannot acquire experience when they are consistently denied job opportunities based on racial considerations. An effort must be made to hire minorities who are otherwise qualified based on education and training. Any lack of experience should be made up by an accelerated on-the-job training program.[52]

Another black litigator practicing outside New York City commented:

> Minority attorneys do not have the broad range of options available to nonminority attorneys for professional development and advancement.[53]

An Hispanic litigator in New York City wrote:

> Minority attorneys for the most part may not have a business background. The lack of a role model forces the young attorney to learn as he goes. Professional isolation creates a difficult environment for law practice.[54]

Overall, nearly one third (30%) of litigators agreed with the statement that "minority lawyers are less likely to be included in social events." Again, there were significant differences between the perceptions of white and minority, particularly black, litigators. Thus, only 5% of white litigators in New York City, and 14% of white litigators outside New York City agreed, but 69% of black, 26% of Hispanic, and 27% of Asian-American litigators in New York City, and 41% of minority litigators outside New York City agreed.

There were also significant differences in the proportions of litigators who agreed with the statement that "minority lawyers lack mentors." Thirty percent of white, but 83% of

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[52] Litigators' Questionnaire, supra note 17.

[53] Id.

[54] Id.

black and 65% of Hispanic litigators in New York City agreed.[54] Fifty percent of Asian-American litigators agreed with this statement. Outside New York City, more than twice as many minority (67%) as white (32%) litigators agreed with the statement. The 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.[55]

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.[56]

One program that has attempted to respond to the needs of black and Hispanic students is the Practicing Attorneys for Law Students (PALS) program in New York City.[57] This program matches such students in New York area law schools with practicing attorneys who volunteer to serve as mentors for the students. Other attorneys make themselves available through PALS to act as advisors and to answer student questions. The program also sponsors panel discussions, workshops, and receptions where students can meet practicing attorneys and obtain information about legal practice and career development.

Overall 33% of attorneys agreed with the statement that "minority lawyers receive less feedback about their work because nonminority lawyers are uncomfortable criticizing them."

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[55] Id.

[56] Id.

[57] The PALS program at present does not conduct significant outreach to Asian-American law students. This academic year, for example, some half dozen Asian-American students are enrolled in PALS. Thus, the Asian American Bar Association of New York created its own student mentoring program in 1990. Telephone interview with Chin Choon Fong, Asian American Bar Association of New York (Nov. 15, 1990).

Approximately one third of Hispanic (34%) and Asian-American (33%) litigators in New York City, and white (33%) and minority (36%) litigators outside New York City, agreed with this statement. The only significant difference was between the proportions of black (43%) and white (19%) litigators in New York City who agreed with the statement.

Thirty-four percent of litigators agreed with the statement that "minority lawyers tend to be assigned more limited, less complex cases." There were significant differences among groups. Whereas 6% of Whites in New York City and 5% of Whites outside New York City agreed with the statement, 64% of Blacks, 47% of Hispanics, 32% of Asian Americans in New York City, and 45% of minorities outside of New York City agreed. An Hispanic litigator in New York City charged that:

> There is. . . much discrimination against minority attorneys in law firms; e.g. in hiring practices and in case assignments.[58]

A Native American litigator in New York City commented on

> [t]he inability to tap into the traditional or more successful systems for obtaining substantial cases or to break down those systems in favor of a more equitable merit oriented approach.[59]

Overall, 53% agreed with the statement that "minority lawyers have fewer opportunities for advancement." Again, there were significant differences among groups. Thus, only 15% of white, but 90% of black, litigators in New York City agreed with this statement. Differences among other groups were less extreme: 60% of Hispanic, 58% of Asian-American, and 71% of minority litigators outside New York City agreed. The majority of litigators in each minority group were in accord with the statement. Interestingly, more

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[58] Litigators' Questionnaire, supra note 17.

[59] Id.

than one in five (22%) Whites outside New York City agreed with this statement. A blac 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.[60]

A white litigator outside New York City wrote:

> I worked closely with a[n] Hispanic attorney that 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.[61]

There were also significant differences in the proportions of Whites and minorit agreeing with the statement, "[a] minority lawyer in the organization is less likely thar white lawyer with comparable experience to make partner/supervisor." More than c quarter of Whites in New York City (27%) and outside New York City (26%) agreed w this statement. Ninety percent of Blacks, 67% of Hispanics, and 60% of Asian Americ in New York City, and 70% of minorities outside New York City, agreed. Again, i noteworthy that the majority of litigators in each minority group expressed this view. 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.[62]

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[60] Id.

[61] Id.

[62] Id.

lack litigator outside New York City wrote:

> Due to racial bias, regardless of qualifications, minority attorneys have little access to corporate, partnership, and other visible and lucrative positions. This is even true in government.[63]

It is significant that the majority of litigators in each of the minority groups reported they lack opportunities for advancement. Given the relatively lower proportions of an-American than black or Hispanic litigators agreeing with most items in the survey, the eement of the majority of Asian Americans with these items is striking.

TREATMENT OF MINORITY ATTORNEYS IN THE COURTS

The Commission's study of litigators provides the first empirical findings about the rtroom experiences of minority litigators and the extent to which they are accorded pect by judges, attorneys and courtroom personnel. Few items in the Commission's vey of litigators elicited more comments from respondents. For example, a litigator in w 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 Asian and [a] woman practicing law. The implication is that I must be a "freak."[64]

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.[65]

[63] Id.
[64] Id.
[65] Id.

A black litigator outside New York City observed that he:

> [o]verheard [a] judge refer to [a] minority male attorney as the boy.[66]

Another black litigator practicing in New York City recalled:

> In criminal court in N.Y. 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 [the judge], who had motioned to me to approach the bench. . . . I physically defended myself. . . .[67]

A series of eleven items was asked about possible preferential treatment of wh litigators in the courts.[68] The findings are provided in Table IV.2.9.

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[66] Id.

[67] Id.

[68] Litigators were asked how frequently such preferential treatment occurs ("never," 0%; "rarely," 1 "sometimes," 6-25%; "often," 26-50%; and "very often," 51-100%). Blank Litigators' Questionnaire, supra 16, at 4-10.

Table IV.2.9
Litigators' Views on the Treatment of Minority Attorneys in the Courts
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
Minority attorneys more likely to be asked if they are attorneys	29 (23.6)	33 (27.3)	60 (49.1)	112 (84.8)	11 (8.3)	9 (6.8)	78 (62.4)	23 (18.4)	24 (19.2)	32 (43.8)	16 (21.9)	25 (34.2)	13 (11.4)	26 (23.5)	72 (65.1)	59 (63.4)	14 (15.1)	20 (21.5)	323 (49.1)	123 (18.8)	210 (32.0)
Minority attorneys more likely to be required to pass through a screening device or to show identification than white attorneys	11 (9.7)	12 (11.5)	86 (78.8)	80 (62.0)	22 (17.1)	27 (20.9)	49 (40.2)	28 (23.0)	45 (36.9)	17 (25.0)	13 (19.1)	38 (55.9)	3 (2.6)	11 (12.0)	81 (85.3)	32 (36.8)	7 (8.0)	48 (55.2)	191 (31.3)	94 (15.4)	325 (53.3)
Minority attorneys more likely to be questioned about their credentials	11 (10.2)	21 (18.9)	79 (70.9)	96 (72.7)	20 (15.2)	16 (12.1)	63 (52.1)	26 (21.5)	32 (26.4)	20 (28.2)	18 (25.4)	33 (46.5)	4 (4.0)	10 (9.0)	92 (87.1)	39 (42.4)	18 (19.6)	35 (38.0)	234 (36.9)	113 (17.8)	287 (45.3)
Judges pay more attention or give more credibility to statements of white attorneys than to those of minority attorneys	6 (4.4)	30 (23.1)	93 (72.5)	75 (57.3)	35 (26.7)	21 (16.0)	40 (32.8)	46 (37.7)	36 (29.5)	18 (25.0)	20 (27.8)	34 (47.2)	2 (1.4)	10 (8.8)	106 (89.8)	33 (34.0)	31 (32.0)	33 (34.0)	173 (25.9)	172 (25.7)	324 (48.4)
White attorneys get more respect and cooperation from other attorneys than do minority attorneys	9 (6.9)	35 (27.4)	85 (65.7)	86 (65.6)	35 (26.7)	10 (7.6)	48 (39.3)	41 (33.6)	33 (27.0)	20 (28.2)	30 (42.3)	21 (29.6)	3 (2.3)	32 (25.6)	88 (72.0)	43 (45.3)	27 (28.4)	25 (26.3)	209 (31.1)	200 (29.8)	262 (39.1)

Table IV.2.9 (Continued)
Litigators' Views on the Treatment of Minority Attorneys in the Courts
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never	Very Often/ Often	Some-times	Rare-ly/ Never
White jurors respond more favorably to white attorneys	21 (23.7)	36 (40.4)	32 (35.9)	58 (57.4)	33 (32.7)	10 (9.9)	40 (46.0)	32 (36.8)	15 (17.2)	12 (32.4)	17 (45.9)	8 (21.6)	10 (14.2)	28 (39.0)	34 (46.8)	39 (57.4)	16 (23.5)	13 (19.1)	180 (39.7)	162 (35.7)	112 (24.6)
Minority jurors respond more favorably to white attorneys	5 (5.4)	24 (27.7)	58 (66.9)	24 (23.8)	44 (43.6)	33 (32.7)	13 (14.9)	32 (36.8)	42 (48.3)	5 (13.9)	19 (52.8)	12 (33.3)	3 (4.2)	11 (16.7)	54 (79.2)	15 (24.6)	23 (37.7)	23 (37.7)	65 (14.7)	153 (34.9)	222 (50.5)
Court officers offer assistance to white attorneys	56 (41.8)	53 (39.5)	25 (18.7)	75 (58.1)	43 (33.3)	11 (8.5)	52 (42.6)	53 (43.4)	17 (13.9)	24 (34.8)	30 (43.5)	15 (21.7)	71 (51.1)	41 (29.3)	27 (19.6)	53 (60.9)	22 (25.3)	12 (13.8)	330 (48.7)	241 (35.5)	107 (15.8)
Court officers offer assistance to minority attorneys	49 (39.6)	48 (38.4)	28 (22.1)	29 (22.3)	76 (58.5)	25 (19.2)	27 (22.0)	69 (56.1)	27 (22.0)	20 (28.2)	35 (49.3)	16 (22.5)	58 (46.5)	46 (37.1)	20 (16.4)	37 (39.4)	32 (34.0)	25 (26.6)	220 (33.0)	306 (45.9)	141 (21.1)
Court officers call cases of white attorneys ahead of cases of minority attorneys	2 (1.8)	11 (8.5)	116 (89.7)	41 (34.5)	35 (29.4)	43 (36.1)	23 (19.5)	33 (28.0)	62 (52.5)	5 (7.6)	9 (13.6)	52 (78.8)	2 (1.6)	2 (1.4)	120 (97.1)	15 (16.9)	16 (18.0)	58 (65.2)	88 (13.7)	106 (16.4)	451 (69.9)
Court personnel are more respectful of white attorneys than of minority attorneys	6 (4.7)	36 (26.9)	91 (68.5)	86 (66.2)	19 (14.6)	25 (19.2)	48 (37.8)	40 (31.5)	39 (30.7)	18 (25.4)	24 (33.8)	29 (40.8)	6 (5.1)	19 (14.9)	101 (80.0)	39 (41.1)	21 (22.1)	35 (36.8)	204 (29.8)	159 (23.2)	320 (46.9)

Examination of all the items showed that relatively small proportions of white litigators in or outside New York City, as compared to minority litigators, were aware of the kinds of subtle disparate treatment represented by these items. Thus, for example, 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. Similarly, 11% of white, as compared to 63% of minority, litigators outside New York City reported this response. It is hardly surprising that minority attorneys would be more aware of disparaging treatment than would white attorneys. In the first place, the behavior is directed toward minorities. Whites may not have the opportunity to observe it. In the second place, even if a white attorney is in the vicinity when such an interaction occurs, he or she may simply not notice the interaction or process its meaning. Many minority attorneys provided examples of these incidents. For example, a 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.[69]

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.[70]

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[69] Litigators' Questionnaire, supra note 17.

[70] Id.

A black litigator outside New York City wrote:

> District Court of Hempstead is a minority attorney's nightmare, c [--] clerical staff, court officers, district attorneys, and judges. turning down cash-carrying clients whose cases are pending in parts of that courthouse because the success of the case is hinde having a black attorney and because I would have to charge then myself in that courthouse since I know that the disrespect I w close to unbearable. I've been an attorney for ten year encountered and handled all types of insensitivities with unyieldir in this court, I leave cursing or crying. Something must be don

An Hispanic litigator in New York City remarked:

> [I'm] primarily dissatisfied and frustrated with litigation. I'm tired only hispanic woman in court and find the entire judicial syste exceptions, hostile to minority representatives as well as our clie

Similar disparities occurred with regard to all the professional trea

62% of black, 40% of Hispanic, and 25% of Asian-American litigators

10% of white litigators in New York City, and 37% of minority, in cont

litigators outside New York City, reported that minority litigators are mc

litigators to be required to pass through a screening device or to

"often/very often." A black litigator in New York City charged:

> It matters not if I'm looking lawyer-like, with a suit and briefca stopped by court officers and police and searched. I'm challeng every time I sit in the attorney's area.[73]

Another black litigator in New York City wrote:

> Young black females are stopped at [the] courthouse entrance to either show an ID and/or go through the detection device [and

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[71] Id.

[72] Id.

[73] Id.

handbag searched while young white females, white males, and some black males are allowed to pass the devices unsearched.[74]

More minority than white attorneys also reported that "minority attorneys are more likely than white attorneys to be questioned about their credentials" "often/very often." Thus, 73% of black, 52% of Hispanic, and 28% of Asian-American, as compared to 10% of white, litigators in New York City, and 42% of minority, as compared to 4% of white, litigators outside New York City gave this response. Comments by litigators included the following. 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.[75]

An Asian-American litigator in New York City observed:

> [There is] frequent questioning of attorney's knowledge of court procedure and credentials.[76]

More 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 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,

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[74] Id.

[75] Id.

[76] Id.

litigators in New York City, and 45% of minority, as compared to 2% of white, l outside New York City reported greater professional courtesy for white attorney "often/very often." A black litigator in New York City recalled:

> When a minority attorney was addressing the court, the white attorne interrupted saying (using the attorney's first name) she is just frustrated, the the judge interrupts saying to the minority, let me hear what really happene and turned to the white attorney and said tell me what really happened.[77]

A white litigator in New York City wrote:

> Judges have often criticized the choice of words used by minority attorney [e.g., saying] "Please speak English."[78]

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

> A judge in Brooklyn Civil Court would make racially and ethnically derogato statements to minority attorneys. She once went on a diatribe about Chine and laundries to a Chinese-American lawyer and in front of me she sa (about black litigants in Housing Court), "They all bring their babies thinki that I'll be more sympathetic but who knows if the babies are theirs." . . . [is hard to assess whether the treatment is because one is a minority because the person is in a bad mood. I once had a judge mark a case fir against me when the other side asked for an adjournment. Althou subjectively I believe it was because I am a minority attorney, I have n observed him enough to figure out if the reason was because he prejudice[d].[79]

Overall, 40% of litigators reported that white jurors respond more favorabl attorneys "often/ very often"; 15% of all litigators made the same report conce response of minority jurors to white attorneys. More than twice as many black reported that white jurors respond more favorably to white litigators (57%) as rep minority jurors respond more favorably to white litigators (24%) "often/very often

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[77] Id.

[78] Id.

[79] Id.; emphasis in original.

Hispanic litigators 46% reported favoritism toward white attorneys by white jurors, as contrasted with 15% reporting favoritism by minority jurors, "often/very often." Among Asian Americans, nearly one third (32%) reported a more favorable response toward white litigators by white jurors, and 14% reported a favorable response by minority jurors, "often/very often."

White litigators in New York City were less likely to report a more favorable response by white jurors (24%) than any of the minority groups in New York City but still perceived that a preferential response occurs more frequently among white than among minority (5%) jurors. The comparable response among white litigators outside New York City was 14% reporting a preferential response to white attorneys by white jurors and 4% by minority jurors "often/very often." Among minority litigators the comparable percentages were 57% for white jurors and 25% for minority jurors.

Similar proportions of white litigators both in and outside New York City reported that court personnel offer assistance to both white and minority litigants "often/very often." Thus, reports by white litigators in New York City of frequent assistance to white attorneys (42%) and to minority attorneys (40%) paralleled the proportions of white litigators outside New York City reporting frequent assistance to both white attorneys (51%) and to minority attorneys (47%). Similarly, Asian-American litigators in New York City reported equally frequent assistance to both white (35%) and to minority attorneys (28%).

By contrast, Blacks and Hispanics in New York City, and minorities outside New York City, reported frequent assistance to white attorneys (58%, 43%, and 61% respectively,

in much higher proportions than they reported frequent assistance to minority

(22%, 22%, and 39% respectively). An Hispanic litigator in New York City wro

> I discern one disadvantage at the "personnel-with-authority" level/superviso level at the clerks' offices of the different courts. Sometimes, these peop know the procedural and technical rules better than many judges. These fol are not generally friendly or helpful, and this is especially true as to minori lawyers. . . . I would like to see a friendlier, more cooperative attitude fro the different court clerks.[80]

An Asian-American litigator in New York City wrote:

> I am disturbed that certain attorneys and/or firms (all white, male attorne or firms) are permitted to sit at the front of the courtroom, by virtue of the familiarity with the court personnel, to answer the calendar and argue the cases, while the rest of us have to sit in the general public seating sectio There seems to be a club in all the courts . . . of the attorneys who a insiders or have favored status. As far as I can tell, no women or minoritie are part of this club.[81]

A black litigator in New York City told this story:

> I went to the clerk's office, Supreme Court Criminal Term, to examine a fil and to photocopy information from the file. I was accompanied by a whit male court officer to whom I had previously shown my Dept. of Correctio Attorney I.D. and who introduced me as an attorney to the two clerks (blac males) behind the window. The court officer left the room, and the two clerk refused to allow me to see the file and said that if I were really the attorne I would have gotten the information in question previously. They called in white, female clerk who was abusive in tone of voice and attitude. An argu ment ensued. I said that as an attorney I had every right to see the file. A that point her attitude changed completely, she became very pleasant an invited me to come behind the counter, to be seated and to examine the file She said there was no way she could have known initially that I was an attor ney. I said that the two other clerks knew and should have informed her Both clerks began to "back each other up," saying that they doubted I wa really an attorney and thought I had been "running a scam."[82]

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[80] Id.

[81] Id.

[82] Id.

Relatively fewer white (2%) and Asian-American (8%) litigators responded that rt officers call cases of white attorneys ahead of cases of minority attorneys" "often/very ı," compared to the responses of black (35%) and Hispanic (20%) litigators in New ‹ City; few minority (17%) and white (2%) litigators outside New York City reported preferential treatment of white attorneys as a common event.

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

> 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.[83]

ther black litigator in New York City wrote:

> [C]ourt officers in busy courtrooms are put under tremendous pressure by equally busy attorneys to call their case. Many times the court officer does not have the authority he appears to have and is in fact just doing the judge's bidding. For a particular reason or for no particular reason a judge may direct the court officer to hold a particular case. So the attorney will wait thinking he has been slighted by the court officer who is just following instructions. To complicate matters, there are the needs of the corrections officers in the back, who might be pressing the judge and the court officer to have the jail cases called first so that they can ship the prisoners back at the noon break. In short, the fact that a minority attorney is treated unfairly by a court officer may have nothing to do with either the attorney's race or with the court officer's racial attitude.[84]

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[83] Id.

[84] Id.

Again, there was an enormous gap between the experiences of white and mino particularly black, attorneys in the treatment of minority attorneys. Most white attor seemed to be unaware of the second-class status accorded many of their minority colleag The extent of minority, particularly black, experiences of not being given equal statu professionals in the courts was striking. With few exceptions, every item positing prefere treatment of white attorneys was reported by a majority of black attorneys to take p "often/very often."

Judges were also asked to rate the frequency with which "white attorneys get r respect and cooperation from other attorneys than do minority attorneys"; "court perso are more respectful of white attorneys than of minority attorneys"; and "jurors respond r favorably to white attorneys than to minority attorneys."[85] These findings are provide Table IV.2.10.

[85] Judges were asked how frequently preferential treatment occurred ("never," 0%; "rarely," 1-5%; times," 6-25%; "often," 26-50%; and "very often," 51-100%). Blank Judges' Questionnaire, supra note 16, 14.

Table IV.2.10

Judges' Views Regarding Treatment of Minority Attorneys in Court

(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly	Often/ Very Often	Some-times	Never/ Rare-ly
White attorneys get more respect and cooperation from other attorneys than do minority attorneys.	4 (.9)	44 (9.3)	400 (89.3)	20 (31.3)	21 (32.8)	23 (35.9)	24 (4.7)	65 (12.7)	423 (82.6)
Court personnel are more respectful of white attorneys than of minority attorneys.	4 (.8)	21 (4.3)	465 (94.9)	9 (14.1)	15 (23.4)	40 (62.5)	13 (2.3)	36 (6.5)	505 (91.2)
Jurors respond more favorably to white attorneys than to minority attorneys.	6 (1.6)	40 (10.8)	326 (87.6)	7 (14.3)	13 (26.5)	29 (59.2)	13 (3.1)	53 (12.6)	355 (84.3)

Relatively few white judges reported any experience with white attorneys receiving more respect and cooperation from other attorneys than do minority attorneys; 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 nearly one third (31%) reported that it happens "often/very often." The difference between white and minority judges was statistically significant.

More white (95%) than minority (63%) judges stated that courtroom personnel "never/rarely" act more respectfully toward white attorneys than toward minority attorneys. More minority (23%) than white (4%) judges reported that courtroom personnel are more respectful to white attorneys "sometimes"; fourteen percent of minority judges, but only 1% of white judges, reported that such behavior occurs "often/very often." The difference between white and minority judges, in terms of their experience with the differential

treatment of white and minority attorneys by courtroom personnel, was statistically significant.

There was a significant difference between white and minority judges in their reports of how frequently jurors respond more positively to white attorneys than to minority attorneys. Whereas 88% of white judges stated that juror response to a white attorney is "never/rarely" better than to a minority attorney, only 59% of minority judges reported that such preferential response "never/rarely" happens. Twelve percent of white judges, but 41% of minority judges, stated that such preferential response to white attorneys happens "sometimes" or "often/very often."

No significant differences were found on any of the three items in Table IV.2.10 between judges who preside over either exclusively criminal or exclusively civil courts. There were significant differences when the judges were grouped according to the proportion of minority residents in their counties. Judges in counties with large minority populations reported significantly higher frequencies of both white attorneys and court personnel cooperating more with white than with minority litigators and of jurors reacting more favorably to white than to minority litigators. Within the pool of New York City judges, those who serve on "ghetto courts" (New York City Criminal Court, Civil Court, Housing Court and Family Court) did not respond significantly differently than did other New York City judges on any of these items.

Several judges commented on the problematic treatment of minority attorneys and how they (the judges) seek to resolve it. A 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.[86]

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 arraignments. . . . [I] simply inquire as to the delay and it is cured inoffensively.[87]

V. BAR ASSOCIATION MEMBERSHIP

Membership in bar associations can promote the status of a minority attorney in the profession and increase professional contacts. Moreover, the decision to join an established bar association (i.e., predominantly white membership) 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 American Bar Association (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.[88] The immediate resolution was to thenceforth require that any future black applicant be so identified.[89] Two years later it

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[86] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State re Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom.

[87] Id.

[88] Special Report of the Executive Committee Concerning the Vote by the Committee to Elect Messrs. William B. Lewis, Butler H. Wilson, and William R. Morris to Membership in the Association, and the Rescission Thereof (Aug. 12, 1912), reprinted in 39 Reports of the American Bar Association 93 (1912). The report noted that it was then "the settled practice of the Association . . . to elect only white men as members thereof." Id. at 95.

[89] See 37 Reports of the American Bar Association 13-16 (1912). Having learned of the controversy caused by his membership, one of the three Black members (Mr. Morris of Minnesota) resigned the very next day. See id. at 28-29.

applicant,[90] a requirement not rescinded until 1943.[91] In 1979, the ABA began actively to redress the historical exclusion of minority attorneys.[92]

The National Bar Association was formed to represent the interests of black attorneys in 1925 in response to such exclusion on the national level.[93] In New York State, the Harlem Lawyers Association was formed in 1929, the Bedford-Stuyvesant Lawyers Association was founded in 1932 (the two later merged to form the Metropolitan Black Bar Association), and the Chinese Lawyers Association was incorporated in the midsixties in response to exclusion on the state and local levels.[94]

Both the New York State Bar Association (NYSBA) and the Association of the Bar of the City of New York (the "City bar") have since formed committees on minorities in the profession. The state committee has actively pursued expansion of employment opportunities for minorities through an internship program, which places minority students enrolled in law schools in the state with law firms and law departments, and through participation in minority job fairs. It has also sought out minority lawyers for membership and participation in NYSBA and recently sponsored a legislative and electoral law workshop

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[90] 39 Reports of the American Bar Association 61-65 (1914).

[91] 68 Reports of the American Bar Association 109-110, 168. At least one of the three original black members, William H. Lewis of Massachusetts, was still on the ABA membership roles at the time. Id. at 650.

[92] In 1979, the ABA's Minorities in the Profession Committee was formed; in 1983 the Task Force on Minorities in the Profession was formed. The ABA Task Force began a concerted effort to gather information, seek testimony, and propose changes consistent with the interests of minority lawyers. In 1986, the Commission on Opportunities for Minorities in the Profession was appointed to implement the Task Force's proposals. With regard to the past exclusion of minorities, the Task Force report criticized the Association for its long history of inaction in reaching out to minority lawyers. See ABA Task Force, supra note 3.

[93] See G. Segal, Blacks in the Law 18-19 (1983).

[94] New York State Bar Association Committee on Minorities in the Profession, The New York State Directory of Minority Bar Associations (1988).

for minorities that attracted several hundred participants.[95] It is also the long-standing policy of the NYSBA that NYSBA functions be restricted to locales that do not discriminate.[96]

The City bar committee has also established as one of its principal goals increasing the number of minorities in the profession. It has sponsored an employment workshop for the hiring and managing partners of New York's 100 largest law firms and has collaborated with other groups in placing minority interns, developing a minority law firm project for corporate clients, and providing management assistance to small minority law firms.

Despite increased efforts by established bar associations to recruit minority members, minority bar associations continue to flourish. A partial list of associations dedicated to the minority attorney includes the Asian American Bar Association of New York (established 1989), the Metropolitan Black Bar Association (established 1985), the National Hispanic Bar Association (established 1985), the National Asian Pacific American Bar Association (established 1989), and the American Indian Bar Association (established 1976).

The Commission asked litigators about their membership in the NYSBA and in any established city or county bar association; except for minority bar associations and those with a clear ethnic minority orientation, all were considered to be established or majority (white) bar groups.[97] The question is whether there is a difference between white and minority

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[95] See id. at 2-3.

[96] See letter of July 28, 1989 from L. Beth Krueger, Liaison of the NYSBA Committee on Minorities in the Profession, to Commission staff (reproducing text of resolutions and motions adopted by the NYSBA to this effect) (on file with the Commission).

[97] Blank Litigators' Questionnaire, supra note 16, at 15-16.

litigators in their frequency of membership in established bar associations. These findings are presented in Table IV.2.11.

Table IV.2.11
Litigators' Reports of
Membership in Majority Bar Associations
(Numbers in parentheses are percentages)

	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
New York State Bar Association	79 (54.1)	64 (47.8)	68 (52.3)	41 (55.4)	100 (64.9)	55 (53.9)	407 (55)
Local Bar Associations	70 (47.9)	58 (43.3)	50 (38.5)	30 (40.5)	114 (74.0)	65 (63.7)	388 (52.4)

There were no significant differences in rates of membership in NYSBA. Overall, 55% of all study litigators belong to NYSBA. It is important to note that most respondents were identified through various bar association lists and, therefore, study participants may tend to be "joiners" and may thus overstate the rates of membership. There were, however, significant differences in membership rates in local (city or county) associations. Overall, 52% of all respondents are members of at least one local majority 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 majority bar association. This suggests that bar membership in local bar associations is less a function of race than of geography. Nevertheless, although lawyers outside New York City were more likely to be bar members than lawyers in New York City, white lawyers in both locations were somewhat more likely to be members of local bar associations than were minorities. A black litigator in New York City wrote:

> control the destinies of many lawyers to the point of determining who will practice law and who will not practice law if a complaint is made against a lawyer. The Association's membership practices to a great degree prohibit many lawyers from becoming members. Its membership fees are reminiscent of the "old poll tax" that existed in the South before [it] was declared unconstitutional by the Supreme Court. There must be a reorganization of the Association of the Bar of the City of New York to attract a diversity of members including minorities, women, and other lawyers confined to a certain economic level by our socioeconomic structure. . . . This diversity is also necessary in order to bring to the Association different attitudes, different thinking, and a broader understanding of the many problems all lawyers encounter on a daily basis.[98]

Respondents who were members of any established bar association were asked whether they were members of any established bar association committees and, if so, to identify the committees of the associations in which they were active participants. Those not belonging to any committees were asked to identify the reasons for nonparticipation.[99] There were no race differences in the extent of participation on bar association committees. Rather, the only difference was in geographic location. Significantly more litigators outside New York City (both white and minority) than litigators in New York City were members of committees of established bar associations. On the average, litigators outside New York City also belonged to a greater number of committees than litigators in New York City. These differences may reflect either different styles of doing legal business in communities outside New York City or the need for professional networking in areas where minorities are geographically dispersed. The most common reasons for not participating on committees among all litigators concerned the lack of time and interest. Very few persons reported that

[98] Litigators' Questionnaire, supra note 17.

[99] Black Litigators' Questionnaire, supra note 16, at 15.

they do not participate because of feelings of discomfort on a committee dominated by Whites or that they applied but were not accepted for committee membership.

VI. 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.[100]

Litigators were asked whether they knew 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."[101] 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 . . . ."[102] These data are provided in Table IV.2.12.

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[100] Litigators' Questionnaire, supra note 17.

[101] Blank Litigators' Questionnaire, supra note 16, at 14.

[102] Id.

Table IV.2.12
Litigators' Reports of Experiences with Attorney Discipline Committees
(Numbers in parentheses are percentages)[103]

ITEM	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Minor.	
Litigators who know attorneys who have been disciplined	91 (63.0)	78 (60.5)	49 (38.9)	26 (35.1)	116 (76.5)	71 (70.3)	432 (59.4)
Average percentage of disciplined attorneys who are minorities.	6.6	72.7	61.0	41.7	7.2	43.1	33.1
Average number of white disciplined attorneys Known.	2.59	1.57	1.24	3.70	4.44	4.65	3.11
Average number of minority disciplined attorneys known.	.18	5.43	2.14	2.30	.27	2.32	1.79
Yes, race affected discipline.	5 (5.5)	39 (50.6)	9 (18.0)	3 (11.5)	1 (.7)	25 (35.7)	82 (19.2)

Significantly fewer Hispanic and Asian-American litigators than those in any other group knew any disciplined attorney. This may be partially explained by the fact that Hispanic and Asian-American litigators had the lowest average number of years in practice since passing the bar examination, and thus their network of professional acquaintances may be smaller. Significantly more white and minority litigators outside New York City knew at least one attorney who had been disciplined. Whites in and outside New York City reported that, on the average, 7% of the attorneys they know who have been disciplined were minorities. Nearly three quarters (73%) of the disciplined attorneys known to black litigators and 61% of the disciplined attorneys known to Hispanic litigators were minority. These

[103] The numbers in the first and fifth items represent litigators who responded affirmatively to the questionnaire items. The percentages given are affirmative responses as a percentage of all responses by the relevant cohort. Thus, for example, 91 white litigators in New York City reported knowing disciplined attorneys, representing 63.0% of the 145 white litigators in New York City providing any response.

differences in the proportions of disciplined minorities known to white attorneys and to black and Hispanic litigators can probably be attributed to the fact that white litigators are more likely to know white attorneys, while minority litigators are more likely to know minority attorneys.

Examination of the average numbers of white and minority disciplined attorneys known to each group showed that minority litigators, especially Blacks, knew more disciplined attorneys than did Whites. More black litigators than any other group knew minority attorneys who had been disciplined. Significantly more minority litigators outside New York City than white litigators outside New York City reported knowing minority attorneys who had 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. It should be pointed out that white litigators reported very small proportions of minority attorneys being disciplined; therefore, it is hardly surprising that very few thought the proceedings had anything to do with race. Many litigators 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."[104] A minority litigator outside New York City commented: "Minority attorneys received disproportionate sanctions as compared to nonminority attorneys for similar or the same conduct."[105]

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[104] Litigators' Questionnaire, supra, note 17.

[105] Id.

The absence of systematically maintained race data by attorney grievance and disciplinary committees made it impossible to study this phenomenon any further.

VII. ACCESS TO FIDUCIARY APPOINTMENTS

Fiduciary appointments present the 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"; 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."[106] These findings are presented in Table IV.2.13.

[106] Blank Litigators' Questionnaire, supra note 16, at 13.

Table IV.2.13
Litigators' Reports of
Participation in Fiduciary Appointments
(Numbers in parentheses are percentages)

ITEM	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
Yes, applied	19 (14.7)	33 (27.7)	15 (13.2)	5 (7.7)	38 (31.1)	32 (37.6)	141 (22.3)
Yes, assigned case in last two years.	9 (48.8)	30 (90.9)	12 (80.0)	3 (60.0)	29 (77.4)	21 (65.6)	104 (73.7)
Yes, race bias in fees awarded.	3 (15.8)	5 (15.2)	4 (26.7)	1 (20.0)	6 (15.8)	17 (53.1)	37 (26.2)
No, did not apply.	108 (85.3)	86 (72.3)	99 (86.8)	60 (92.3)	84 (68.9)	53 (62.4)	491 (77.7)
No, don't know where to apply.	26 (24.1)	35 (40.7)	45 (45.5)	24 (40.0)	15 (17.9)	18 (34.0)	163 (33.2)
Not interested.	75 (69.4)	36 (41.9)	43 (43.4)	33 (55.0)	60 (71.4)	30 (56.6)	278 (56.6)
No, because the likelihood of getting any cases is so small.	7 (6.5)	15 (17.4)	11 (11.1)	3 (5.0)	9 (10.7)	5 (9.4)	50 (10.2)

Higher proportions of Blacks (28%) in New York City and Whites (31%) and minorities outside New York City (38%) than Whites (15%), Hispanics (13%), or Asian Americans (8%) in New York City, had ever 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; ninety-one percent 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 was racial bias in the fees awarded minority attorneys; this response was particularly strong among minority attorneys outside New York City.

Among those who did not apply, greater proportions of minority than of white attorneys were hindered by a lack of knowledge as to how to apply. In fact, 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 do not know how to apply. A black litigator in New York City wrote:

> Nonminority attorneys and other attorneys who have contributed to the judge's campaign get most, if not all of the decent appointments. The fees awarded these attorneys are always much greater than fees awarded to minorities.[107]

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.[108]

Relatively few litigators in any group have applied for a fiduciary appointment; among those who have, most received an assignment. This is no evidence that minorities were less likely to receive such assignments once they had applied. Most of those who had not applied for fiduciary appointments reported that they were not interested. There is a substantial number, however, particularly among minority litigators, who stated that they do 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.

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[107] Litigators' Questionnaire, supra note 17.

[108] Id.

VIII. SATISFACTION WITH PROFESSIONAL OPPORTUNITIES

Litigators were asked, "How satisfied are you with your professional opportunities a an attorney?" ("very satisfied," "satisfied," "dissatisfied," or "very dissatisfied").[109] Thos who checked either of the last two responses were asked to state the source(s) of thei dissatisfaction. Minorities, and Blacks in particular, were much les. satisfied with thei professional opportunities than were Whites. Blacks, Hispanics, and minorities outside Nev York City were all significantly more dissatisfied than were Whites both in and outside Nev York City. Only 10% of Whites in New York City and 12% of White. outside New Yor City, as compared to 46% of Blacks, 28% of Hispanics, 28% of Asian Americans, and 45% of minorities outside New York City, reported that they were "dissatisfied" or "very dissatisfied."

The written reasons for dissatisfaction were categorized. Two categories emerged that were substantially larger than the others: the first was lack of job mobility and advancement opportunities, attributed both to racial discrimination and to the respondent's current employment; the second was lack of initial job offers or referral work because of racial discrimination. These data are provided in Table IV.2.14.

[109] Blank Litigators' Questionnaire, supra note 16, at 16.

Table IV.2.14
Litigators' Reasons for Dissatisfaction with
Professional Opportunities
(Numbers in parentheses are percentages)

ITEM	NEW YORK CITY				OUTSIDE NYC		TOTAL
	White	Black	Hisp.	Asian	White	Min.	
Lack of job mobility and advancement opportunities	6 (40.0)	28 (45.2)	12 (33.3)	4 (20.0)	5 (27.8)	22 (47.8)	76 (38.8)
Lack of job offers/referral work due to racial discrimination	0 (0.0)	6 (9.7)	7 (19.4)	4 (20.0)	1 (5.6)	12 (26.1)	30 (15.3)
BASE: Dissatisfied attorneys	15	62	36	20	18	46	196

Not surprisingly, given the definition of the category, significantly fewer Whites in both groups stated racial work-discrimination reasons than did members of the other groups. More minorities outside New York City than any other group reported lack of referrals due to racial discrimination. This probably reflects a difference in the professional environments for minorities in the city and outside it: those outside New York City find themselves immersed to a much greater degree in the predominantly white professional culture and consequently have fewer opportunities for referral business from other minorities--and they perceive that white firms will not send clients to a minority attorney. Similarly, to the extent that minority attorneys are more likely to attract minority rather than white clients, the smaller minority populations outside New York City limit their minority attorneys' client pool.

Comments provided by litigators on their job satisfaction can be grouped into several major categories. The first set of comments suggests that public interest law and

government employment have become "ghettoized"; minority attorneys enter those fields because of lack of access to positions in large law firms or corporation. Once in, even lateral mobility into other specializations is difficult. A black litigator in New York City explained:

> A significant amount of minority attorneys are relegated to government service. Several judges are not tolerant of the actions of some government agencies. As a result, minority attorneys are constantly bearing the brunt of this intolerance. We are treated disrespectfully and unfavorably. . . . If the legal doors of opportunity are not open to everyone, then some of us will have to take the unfavorable positions. Representing unfavorable clients and legal stances in court is burdensome, add "skin color" to this and it becomes unbearable.[110]

Moreover, an Asian-American litigator in New York City reported:

> I think the legal profession is becoming increasingly specialized, so that one tends to become "pigeonholed" early on--for example, myself as a litigator--and it becomes harder and harder to be considered for positions in other areas of the law.[111]

Some litigators cite a general lack of professional opportunities as a cause of their career dissatisfaction. A black litigator outside New York City remarked:

> Black attorneys are perceived to be out of place in civil court proceedings. There is a perception that black attorneys are just criminal lawyers.[112]

A black litigator outside New York City stated:

> Certain types of companies do not even consider African-American lawyers to handle their legal work [-- s]pecifically insurance companies, banks, and title companies in Westchester County.[113]

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[110] Litigators' Questionnaire, supra note 17.

[111] Id.

[112] Id.

[113] Id.

Other litigators in private practice pointed out that not only are Whites more likely to prefer the legal services of white attorneys, but minority litigants, especially when they have big cases, seek out white attorneys. A black litigator in New York City recalled:

> A white attorney referred two white clients to me. They made an appointment [but] upon seeing me, they excused themselves and never came back.[114]

Another black litigator in New York City wrote:

> Minority clients show as much disrespect for minority attorneys as the larger society by taking their business to white attorney[s].[115]

A black litigator outside New York City wrote:

> There exist approximately 60 minority attorneys in the Buffalo area. Approximately 48 are agency attorneys. The remainder are private practitioners. . . . None of us are given the opportunity to provide services for large corporations as even the small white firms are given some exposure. Other than poor inadequate clientele who are assigned counsel by the courts, we see very little white trade. On the other hand, black clients are the main staple for many area white firms.[116]

An Hispanic litigator in New York City added:

> The community I serve can only barely support its professionals in that the economies of Black and Hispanic areas are continually depressed, and members do not generally have the resources to invest in paying fees, costs, etc., of litigation.[117]

A black litigator in New York City noted:

> [a l]ack of major retainer clients that would cover yearly overhead. Minority attorneys are generally paid less.[118]

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[114] Id.

[115] Id.

[116] Id.

[117] Id.

[118] Id.

A black Asian-American litigator in New York City wrote:

> Job search[es] in private firms yielded few opportunities, and those jobs offered were [for] low pay with little if any opportunity for advancement.[119]

An Hispanic litigator in New York City stated:

> Professional opportunities to obtain a higher salary are highly unavailable to Hispanic women in private practice who are litigators. Intellectually, I am satisfied with the legal profession. It is both challenging and diverse.[120]

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[119] Id.

[120] Id.

DINGS

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.

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

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.

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 the large firms, only 48 were minorities. In 1989, only 70 minorities were partners out of a total of 4,086.

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 that they are 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 are more likely to be asked whether they are attorneys, to be required to pass through a screening device 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

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.

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.

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

RECOMMENDATIONS

1. Organizations that 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 to facilitate access to 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 private industry and in all branches of 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 that 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 firms. They should review their interviewing processes to purge them of any techniques that may discourage minority applicants and should reevaluate their hiring criteria to consider cross-cultural competence as a favorable qualification. These firms should make direct and explicit statements that qualified minorities are actively desired as members of the firms so that minority candidates do not "deselect" themselves from firms with few minority attorneys. Firms/organizations should avoid reliance on LSAT scores and grades as hiring criteria.

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

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

7. The work environment of minority litigation 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

ensure that there is no operative bias against minorities ascending to supervisory roles.

CHAPTER THREE THE JUDICIARY

CHAPTER 3

THE JUDICIARY

> A court system cannot do justice if it itself is an instrument of injustice. Minorities remain significantly underrepresented [in an] overwhelmingly white . . . judicial network.[1]

CHAPTER OVERVIEW

At Commission hearings, a fairly uniform perception was reported by a significant number of witnesses that there is a need for more minority judges. One of the Commission's specific mandates was to evaluate the methods currently used to select judges and recommend ways to increase minority representation in the state's judiciary. To carry out this mandate, the Commission (a) surveyed judges, administrative judges, and litigators; (b) collected data from the Office of Court Administration (OCA) on the racial/ethnic composition of the state judiciary; (c) obtained information from bar association and political party judicial screening committees regarding their composition and role in the judicial selection process; and (d) surveyed all official judicial screening and nominating committees for appointing authorities regarding their composition and activities.

Section I of this chapter provides data on minority representation in the state judiciary and discusses the ways in which increased minority representation would benefit the judicial process. Section II discusses the process by which New York State judges are selected and suggests improvements that could be made in the process to increase the number of minorities appointed and elected. Section III identifies several aspects of the judicial work environment that may adversely affect minority judges. Section IV summarizes

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[1] New York State Judicial Commission on Minorities, New York City Public Hearing 166 (June 29, 1988) (statement of Elizabeth Holtzman, then Kings County District Attorney) [hereinafter New York City Hearing].

the Commission's findings of its surveys relating to the need for racial, cultural and ethnic sensitivity training for members of the judiciary.

I. MINORITY REPRESENTATION IN THE JUDICIARY

A. Minority Judges in the State Judiciary

Of the 1,129 judges sitting in the courts of the State of New York in 1989, fewer than 9% were members of minority groups. Blacks accounted for only 6.3% of state judges, Hispanics another 1.7%, and Asian Americans just 0.26%. There were no Native American judges.[2]

OCA provides data on the race/ethnicity of judges for different types of courts in the state system. Minority representation varies dramatically. Excluding the Court of Appeals, minority representation is greatest on courts of original jurisdiction (State Supreme Court, the Court of Claims (Part B), Family Court, Surrogate's Court, and New York City Civil and Criminal Courts). Minorities account for about 9% of judges sitting in these courts. In contrast, minorities account for only 4% of judges sitting in courts of limited jurisdiction (City Courts, District Courts, Town Courts, and Village Courts).[3]

In determining whether minorities are underrepresented in the judiciary, it is important first to determine what population or group is to be used for comparison purposes. Some commissioners would compare minority representation in the judiciary to minority representation in the general population. Other commissioners believe a

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[2] OCA, Judges in the System (1989) (printout provided by OCA on Jan. 2, 1990) [hereinafter Judges in the System].

[3] Id.

comparison can only be made based on the number of minority attorneys eligible to be considered for judgeships.

The first comparison (based on minority representation in the overall population) reveals underrepresentation of minorities in some courts in the state. With regard to elective judgeships, this underrepresentation raises arguable legal questions. Although the federal Voting Rights Act does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population,"[4] a sharp disparity along these lines, if accompanied by other evidence that minorities are being purposefully and systematically frustrated in electing officials of their choice, would arguably support a finding of discrimination. Such an analysis focuses on the rights of minority voters in judicial elections and not the rights of lawyer-applicants for judicial positions. Thus, a claim that minorities are discriminatorily excluded from elected judicial office would not be constrained by observations regarding the size of the pool of eligible minority attorneys. While the mechanics of the elective system are beyond the Commission's mandate, the Commission's inquiries support at least the assertion that minorities are underrepresented in the judiciary relative to minority representation in the general population.

A comparison of minorities in the judiciary and in the general population of New York City illustrates this point. Minorities hold judgeships in the Supreme Court in percentages below their proportion in the general population in each of the five counties of New York City.[5] Minorities hold only 10.7% of all Civil Court judgeships in New York

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[4] 42 U.S.C.A. § 1973 (West Supp. 1990)

[5] See Table IV.3.1., infra.

City.[6] This figure is below the minority proportion of the population in every one of the five counties in which elections to this position are held. There are no minorities among the six surrogate judges who sit in the five counties of New York City.[7]

Table IV.3.1 shows the extent to which minorities are generally underrepresented among state supreme court judges sitting in New York City. The data show that minorities are underrepresented in comparison to their share of the population in each of the city's five boroughs.

Table IV.3.1
Proportion of Minorities on the New York State Supreme Court and in the General Population of New York City by County[8]
(Numbers in parentheses are percentages)

County	Minority % Of Total Pop	Judges	
		Minorities	White
Bronx	66	9 (41)	13 (59)
Kings	51.4	9 (18)	40 (83)
New York	50	20 (36)	36 (64)
Queens	38	3 (6)	44 (94)
Richmond	13.5	0	2 (100)

The representativeness of the New York State judiciary can also be evaluated by comparing the number of minority judges with the number of minority attorneys. The Commission made this comparison for 29 courts/jurisdictions for each minority group.

[6] See Judges in the System, supra note 2.

[7] Id.

[8] See Judges in the System, supra note 2; minority % of total population based on 1980 census data.

Ideally, such an analysis should be based on the number of minority attorneys with the requisite experience to serve as judges.[9] Unfortunately, the only data available on the racial and ethnic composition of the New York bar are derived from the 1980 census. The information is therefore dated. It is also based on county of residence rather than county of practice, and it includes no information regarding the number of years an attorney has been in practice. Because all attorneys are counted rather than just those with 10 years' experience, the number of attorneys eligible for the judiciary is overstated. Nevertheless, these data provide the only available estimate of the racial and ethnic composition of the pool of attorneys available for appointment or election to the judiciary in New York State.

An analysis of these data reveals no statistically significant disparities between the proportion of minority judges and the proportion of minority lawyers in any jurisdiction. There is, however, a qualification that must be noted in connection with these results. The number of white attorneys in the "eligible" pool may be somewhat overstated if white attorneys have a greater number of alternative opportunities available to them, e.g., law firm partnerships, general counsel positions, teaching positions, and governmental supervisory positions.

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[9] N.Y. Const. art. VI, § 20 requires ten years of experience for the Court of Appeals, the Supreme Court and the Court of Claims. Five years of experience or such greater number of years as the legislature may determine are required for the County Court, Surrogate Court, Family Court, Court of the City of New York, city courts outside the City of New York, and district court. Qualifications and restrictions for district courts, town courts, village courts and city courts outside the City of New York, other than the above provisions, shall be determined by the legislature with the provision that training and education be provided for town and village court judges not admitted to practice law. The Civil Court Act § 110(i) requires five years as a member of the bar and two years of active practice for the Housing Court.

Data from the Commission's survey of litigators suggest that this may be the case. In response to the question, "Have you ever wanted to be a judge?"[10] 40.8% of white litigators in New York City answered affirmatively, in comparison to 47.7% of black, 49.6% of Hispanic, and 47.2% of Asian-American litigators. However, these differences are not statistically significant. In contrast, outside New York City 52.7% of white litigators answered affirmatively in comparison to 70% of minority litigators, a difference that is statistically significant.[11]

Regardless of the type of comparison made, it is important to note that the appointment and election of substantial numbers of minority judges is a relatively recent phenomenon. An analysis of data from the Commission's survey of judges shows that more than twice as many minorities were appointed or elected to the bench during the six-year period from 1983 to 1988 as during the previous nine-year period from 1974 to 1982. Minorities also had a larger percentage of the total appointments/elections during the years 1983-1988 in comparison to the years 1974-1982. Table IV.3.2 illustrates these points.

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[10] New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 13 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From a Survey of New York State Litigators in vol. 5 of this report) [hereinafter Blank Litigators' Questionnaire].

[11] New York State Judicial Commission on Minorities, Report of Findings From A Survey of New York State Litigators 48-49, app. B at 5 (1990) (Tables 14 & B-14) (vol. 5 of this report).

Table IV.3.2
Judges' Reports as to When They First Became Judges
(Numbers in parentheses are percentages)

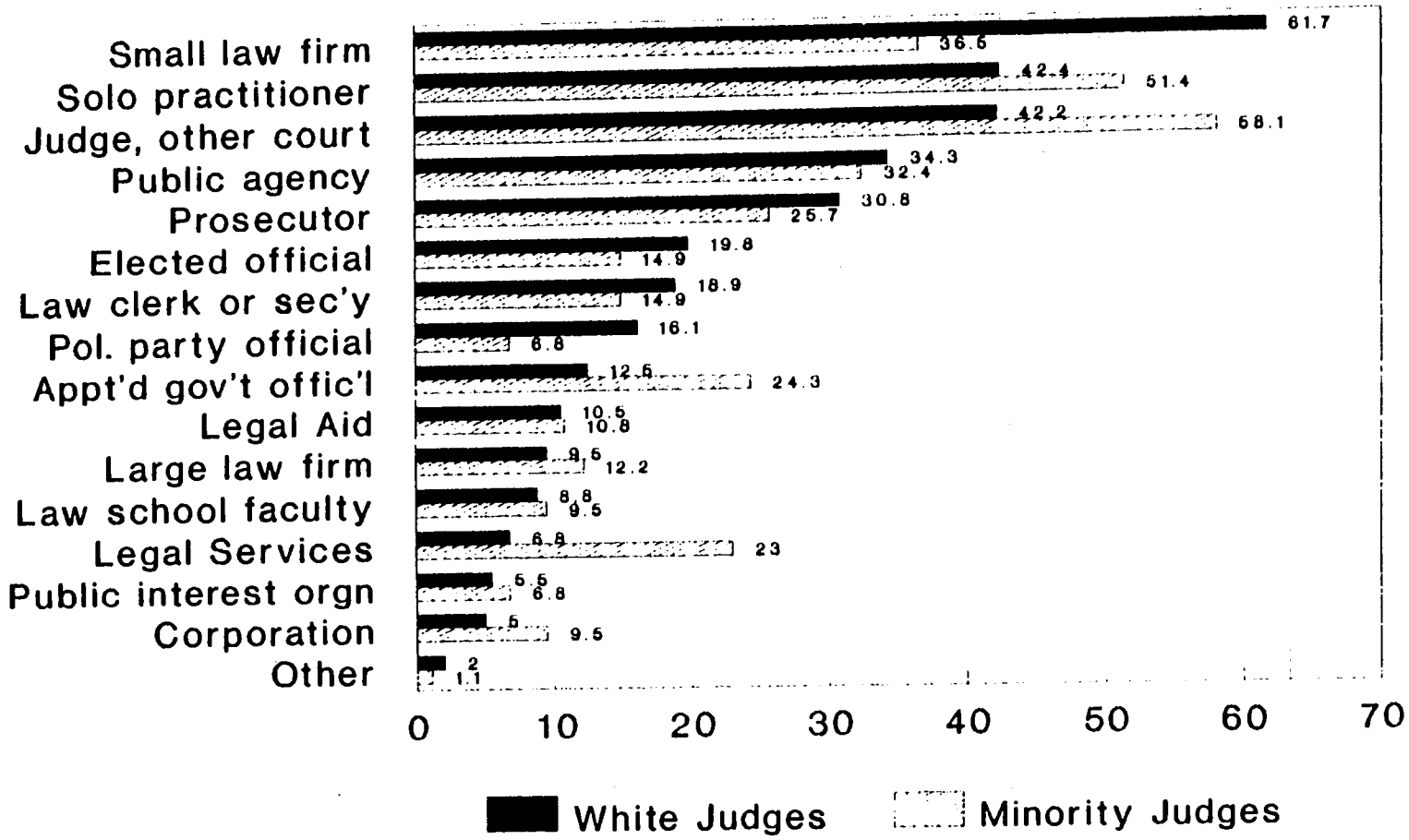
	White	Minor.
1974-79	130 (95.6)	6 (4.4)
1980-82	65 (92.3)	7 (9.7)
1983-85	108 (87.8)	15 (12.2)
1986-88	101 (87.8)	14 (12.2)

B. Paths to the Bench

In an effort to discover the differences, if any, between the minority and White career paths to the judiciary, judges were asked to provide information on all the positions which they held prior to their current judicial position (Figure 1), and on the position they held immediately prior to election or appointment to their first judicial position (Figure 2).[12]

[12] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 2-3 (undated) (reproduced as Appendix A to the Report of Findings From a Statewide Survey of the New York State Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire].

Figure 1: Percent of Judges Who Have Held the Following Positions at any Point Prior to Current Judicial Position

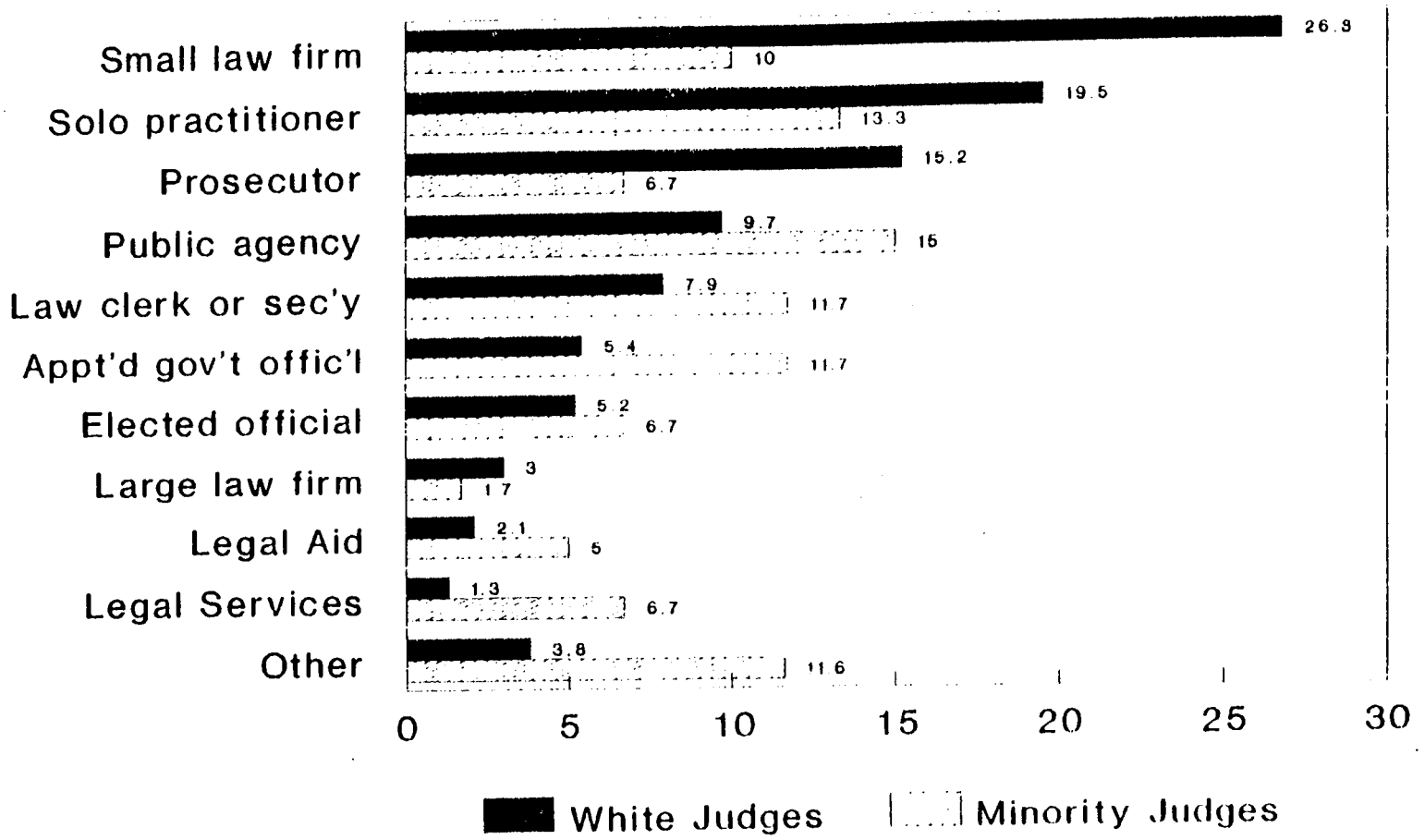


(Figures are percent of total sample)

As Figure 1 shows, significantly more minority judges (23%) than white judges (6.8%) have spent some time as legal services attorneys. Also, nearly twice as many minority judges (24.3%) as white judges (12.5%) have served as appointed government officials (e.g., commissioners of various state and local agencies). More minority judges (58.1%) than white judges (42.2%) have been judges or justices on a court other than the one on which they are currently sitting. More white judges (61.7%) than minority judges (36.5%) have been in law firms with fewer than twenty lawyers. Among those in such law firms, the majority of both white judges (80%) and minority judges (79%) were partners. There are no other significant differences between white and minority judges in the positions they have held prior to their election or appointment to the bench.

Large proportions of both white judges (42.4%) and minority judges (51.4%) have been in solo practice. Approximately one third of the judges in both groups have worked as counsel for a public agency. Substantially more judges in both groups have been prosecutors (30.8% of Whites and 25.7% of minorities) than legal aid attorneys (about 11% of both groups). Relatively few in either group have been in law firms with more than 20 lawyers (9.5% of Whites and 12.2% of minorities). Among these, similar proportions were partners (33% of Whites and 25% of minorities).

Figure 2: Primary Position Held Immediately Prior to First Judicial Appointment or Election



(Figures are percent of total sample)

The data presented in Figure 2 show that the largest single group of white judges (26.8%) worked in law firms with fewer than 20 lawyers immediately prior to their first judicial appointment/election. Only 10% of minority judges held such positions. This difference is statistically significant. Nearly half of the white judges (49.3%), but only 25% of minority judges, came to the bench from private practice (law firms or solo practice). A greater proportion of minority judges (6.7%) than white judges (1.3%) came to the bench directly from a legal services job.

The widely-held perception that minorities have to wait longer than Whites to reach the bench appears not to be true in New York State. In fact, the state's minority judges have, on average, become judges slightly sooner in their legal careers than their white counterparts. On average, white judges were attorneys for 19.4 years before they achieved their first judicial position; minority judges were attorneys for an average of 17.4 years. This difference is statistically significant. The number of years judges spent as attorneys before becoming judges was also analyzed for two separate time periods, 1969-1972 and 1986-1988, in order to determine whether older minority attorneys had to wait longer to ascend to the bench. No significant differences were found within race/ethnicity categories or for the whole sample in the number of years between bar passage and first judicial position for the two time periods. For example, judges who attained their first judicial position in 1986-1988 took 18.60 years to reach the bench, while those beginning their judicial careers in 1969-1972 took 18.05 years.

There is overall agreement among white and minority judges that certain assets pport entry into the judiciary.[13]

Table IV.3.3
Judges' Ratings of the Importance of Certain Assets for Becoming a Judge
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Very Important	Somewhat Impor.	Not Important	Very Important	Somewhat Impor.	Not Important	Very Important	Somewhat Impor.	Not Important
Political Ties	306 (58.2)	182 (34.6)	38 (7.2)	50 (66.7)	21 (28.0)	4 (5.3)	356 (59.2)	203 (33.8)	42 (7.0)
Access to Positions	199 (42.3)	226 (48.0)	46 (9.8)	37 (54.4)	27 (39.7)	4 (5.9)	236 (43.8)	253 (46.9)	50 (9.3)
Professional Ties	158 (30.4)	288 (55.5)	73 (14.1)	33 (45.2)	32 (43.8)	8 (11.0)	191 (32.3)	320 (54.1)	81 (13.7)
Law School Success	29 (5.7)	193 (37.6)	291 (56.7)	6 (8.1)	22 (29.7)	46 (62.2)	35 (6.0)	215 (36.6)	337 (57.4)

Data in Table IV.3.3 show that both white and minority judges perceive political ties, access to positions from which judges are drawn, and professional ties to be important in becoming a judge. However, more minority than white judges perceive these assets to be "very important" rather than just "somewhat important." In contrast, neither white nor minority judges view law school success as a particularly important asset. Given the importance attached to these assets for becoming a judge, it is clear that the issue of

[13] Id. at 10.

increasing minority access to the judiciary cannot be separated from the issue of increasi minority access to other positions of influence and prestige within the profession.

C. The Value of a Racially Diverse Bench

The Commission examined studies of case outcomes to determine whether minori judges handle certain types of cases or certain types of litigants differently from their whi counterparts. No consistent pattern is apparent from these research findings.

One study published in 1978 found that little difference existed in the conviction rat and sentencing patterns of black versus white judges. Both groups sentenced bla defendants more harshly than white defendants, with black judges handing out margina harsher sentences than white judges for both black and white defendants. The study fou that the effect of "individual behavioral differences are larger than those associated wi race."[14] An earlier study found no differences in civil rights cases but found that a certa group of black appointees to the courts of appeals were significantly more likely to suppc the claims of defendants and prisoners in criminal cases than their white counterparts Finally, the most recent study reviewed by the Commission concluded that although "bla judges are more likely than white judges to send white defendants to prison," the reason that "black judges tend to treat black and white defendants alike, while white judges a more severe with blacks, compared with white defendants."[16] This study also found th once a decision to incarcerate was made in similar cases by black and white judges, "bla

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[14]Uhlman, Black Elite Decision Making: The Case of Trial Judges, 22 Amer. J. Pol. Sci. 884, 889, 891 (1978).

[15]Gottschall, Carter's judicial appointments: the influence of affirmative action and merit selection voting on the U.S. Courts of Appeals, 67 Judicature 165, 172 (1983).

[16]Welch, Combs & Gruhl, Do Black Judges Make a Difference?, 32 Amer. J. Pol. Sci. 126, 132-33 (1988).

judges may slightly favor defendants of their own race when determining the overall harshness of the sentence, while white judges probably do not do so."[17] The researchers conclude that "[w]hile the impact of black judges is . . . somewhat mixed, in the crucial decision to incarcerate, having more black judges . . . increases equality of treatment."[18]

These research findings do not provide a firm enough basis for the Commission to reach a conclusion regarding the likely effect on judicial decision-making of increased minority presence on the bench. However, there are other important reasons for increasing the number of minority judges. Perceptions of fairness would be strengthened, and minority communities would enjoy a greater sense of inclusion in positions of influence and decision-making in the justice system. Moreover, an increase in the number of minority judges would provide minority youth with positive role models, and it would also enhance the status of minority attorneys in the eyes of their clients.

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[17] Id. at 133-34.

[18] Id. at 126.

The Commission's surveys of judges and litigators confirms the importance of increasing the number of minorities as judges in the courts of this state. Both groups of respondents were asked to rate the importance of increasing numerical representation of minorities in the judiciary.[19] The findings are presented in Tables IV.3.4 and IV.3.5.

Table IV.3.4
Judges' Ratings Regarding Importance of Greater Minority Representation on the Bench
(Numbers in parentheses are percentages)

WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
Very Impor-tant	Impor-tant	Some-what Impor.	Unim-por-tant	Very Impor-tant	Impor-tant	Some-what Impor.	Unim-por-tant	Very Impor-tant	Impor-tant	Some-what Impor.	Unim-por-tant
65 (12.5)	209 (40.0)	184 (35.2)	64 (12.3)	59 (86.8)	8 (11.8)	1 (1.5)	0 (0)	124 (21.0)	217 (36.8)	185 (31.4)	64 (10.8)

[19] Blank Judges' Questionnaire, supra note 12, at 16; Blank Litigators' Questionnaire, supra note 10, at 12.

Table IV.3.5
Litigators' Ratings Regarding Importance of Minorities in the Judiciary
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.
Importance of greater numerical representation of minorities on the bench.	44 (30.3)	38 (26.2)	63 (43.4)	0	2 (1.5)	130 (98.5)	0	9 (7.0)	120 (93.0)	2 (2.7)	9 (12.2)	63 (85.2)	25 (16.6)	49 (32.7)	76 (50.7)	3 (3.0)	2 (2.0)	96 (95.1)	73 (10.1)	108 (14.9)	547 (75.0)

The differences between white and minority judges shown in Table IV.3.4 are highly significant. Whereas 87% of minority judges rated greater representation of minorities as "very important," only 13% of white judges gave this rating. However, again, it is important to note that 53% of white judges rated greater minority representation as "important" or "very important."

Table IV.3.5 shows that three quarters of all litigators rated greater minority representation on the bench as "important/very important." There were significant differences among groups. Ninety-nine percent of black, 93% of Hispanic, 85% of Asian-American, and 43% of white litigators in New York City, and 51% of white, and 95% of minority, litigators outside New York City rated such an increase in minority representation as "important/very important." Differences between both groups of white litigators and all minorities are significant; the difference between black and Asian-American litigators is also significant.

Litigators offered numerous comments concerning the importance of greater minority representation on the bench, especially in upstate courts. An Hispanic litigator practicing outside New York City commented:

> It is difficult to have racial fairness in our court system when there is a lack of minority (Hispanic, Black, Asian, etc.) judges. In this district, there are only two (2) minority judges, [neither of whom is] Hispanic. . . . Minority litigants who must appear in court lack any insight or understanding of the system. They have no role models. A better balance must be reached before we can really state that there is racial fairness in our judicial system.[20]

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[20] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

Another Hispanic litigator, in New York City, wrote:

> An increase in the numbers of minority judges, attorneys, and court personnel is needed to address the reality and perception of racism in the court system.[21]

From the numerous comments of the litigators, as sampled below, it can be concluded that greater minority representation on the bench 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.

An Hispanic litigator practicing both in and outside New York City wrote:

> Large clients (especially corporate) do not consider minority controlled firms, particularly small firms, for legal representation. Even minority operated businesses tend to resist retaining minority attorneys.[22]

A black litigator in New York City remarked:

> Many Blacks use Black lawyers on small cases. They use white lawyers on their more important cases. I have no white clients.[23]

A black litigator in New York City wrote:

> 85% of all minorities still go to white attorneys. This limits our client pool and of course finances! The lack of respect accorded minority attorneys makes it extremely frustrating at times to settle good cases, try cases, etc.[24]

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[21] Id.

[22] Id.

[23] Id.

[24] Id.

A black litigator outside New York City wrote:

> In this area approximately 75 to 80% of the minority population seek white attorneys. Approximately 95 to 99% of the white population also seek white attorneys.[25]

This opinion was stated by an Hispanic litigator in New York City who wrote:

> There are too many "old boy networks" that do not allow access to minority attorneys.[26]

A black litigator in New York City wrote:

> I personally have not encountered race discrimination (with the exception of continuously identifying myself as an attorney and not a court reporter), although I may certainly have had it work against me. The overwhelming reality is that the legal system in N[ew] Y[ork] is a white, male club and all others survive as best they can. I've been lucky, so far.[27]

An Asian-American litigator in New York City commented:

> On the whole, I believe that the court system reflects society in that there is racism and prejudiced feelings anywhere. The issue is whether such attitudes impair a minority attorney's ability to practice in his/her chosen profession. In my three years of experience, I have not felt as though there were limitations on my career or ability to practice beyond the reality that this is a white-male dominated society and profession. I have learned to work with the skills and tools I have been given and acquired through my education to make the best of existing conditions.[28]

A black litigator outside New York City remarked:

> The New York State Unified Court System cannot achieve anything close to racial fairness so long as its decision and policy making bodies continue to be dominated by nonminorities.[29]

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[25] Id.

[26] Id.

[27] Id.

[28] Id.

[29] Id.

The lay perception that extra-judicial relationships control case outcomes may be exaggerated, but many minority attorneys, especially those outside 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.

II. THE SELECTION OF JUDGES

A. Appointment versus Election

In New York State, judges are selected by either an elective or an appointive process, depending upon the court and the nature of the vacancy. Judges in the state's highest court, the Court of Appeals, are appointed by the Governor from a list of names submitted by the New York State Commission on Judicial Nomination and are subject to confirmation by the Senate. Judges in the Appellate Divisions of the Supreme Court -- the state's intermediate appellate courts -- are appointed by the Governor from judges of the Supreme Court.

Other appointed positions are: (1) judgeships in the Court of Claims, which are filled by the Governor from names submitted by the state judicial screening committee, subject to confirmation by the Senate; (2) judgeships in the New York City Family Court and Criminal Court, which are filled by the Mayor from a list of three names submitted by the Mayor's Committee on the Judiciary; and (3) judgeships in the New York City Housing Court, which are filled by the administrative judge of the Civil Court.

Other judges are elected in partisan elections. These include judges in the Supreme Court (the trial court of general jurisdiction in New York State), County Courts, Surrogate's Court, New York City Civil Court, Family Courts outside New York City, District Courts,

and City Courts outside New York City. Intra-term vacancies for all of these courts are filled by executive appointment.

The relative merits of appointment and election as methods for selecting judges has been the subject of considerable debate.[30] This is also true of the more specific question of whether appointment or election is likely to result in a greater number of minority judges being chosen.

Proponents of election sometimes urge that in election districts with a substantial minority electorate, district and county leaders are more likely to be responsive to minority status in selecting party nominees than are appointing officials.[31] As one black New York City judge commented:

> [I]n order to be appointed, apparently you have to know somebody, such as the [G]overnor or the [M]ayor, and we're not the kinds of people who frolic in the [G]overnor's mansion or Gracie Mansion. We're not generally social friends of the people who have the power to make appointments, but we are a little friendlier, at least, with district leaders and people in our own neighborhoods who run the political clubs, and we have a better chance, it seems to me, through the elective process than we do through the appointive process.[32]

It is further argued that the election route is preferable because minorities can demand representation proportionate to their share of the electorate, rather than being limited by their narrower representation in the legal profession. Judicial elections tend to have low

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[30] For the position that election is preferable, see Benjamin, An Argument in Favor of Electing Judges, N.Y.L.J., Sept. 19, 1977, at 1, col. 2. For the range of arguments in favor of appointment, see Berg, Green, Schmidhauser & Schneider, The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems, 28 West Pol. Q. 263 (1975).

[31] For example, a recent newspaper article reports: "In choosing [judicial] nominees, top Democrats can solidify their positions by taking suggestions from friendly district leaders and ethnic and racial groups." The article goes on to report the "balancing" of judicial nominations between ethnic and racial groups. Lynn, 13 Justices Nominated, As Leaders Rule Roost, N.Y. Times, Sept. 26, 1989, at B2, col. 5.

[32] 3 New York City Hearing, supra note 1, 27, 3, at 654-55 (June 30, 1988) (testimony of Hon. Bruce Wright, New York City Civil Court).

turnouts, but studies show that Blacks, for example, tend to vote in higher numbers than usual when a candidate is black.[33] Given the fact that the minority population is growing in New York State, it is argued that the election process will produce increased numbers of minority judges in the future.[34]

Proponents of the appointment process argue that low minority representation among registered voters renders appointment the only viable option for increasing minority judicial representation in some jurisdictions, e.g., statewide judicial seats. This view is supported by a 1985 study by the Fund for Modern Courts. In comparing the two processes, the report concluded: Women and minorities have a better chance of attaining judgeships through an appointive process, either executive appointment or merit selection, than through an elective process, either partisan or nonpartisan.[35] This study was criticized, however, in a 1987 article which pointed out that variations among selection systems are extremely small, and the report does not indicate whether the differences are statistically significant.[36] The report was further criticized for failing to control for regional variations in its data (e.g., between the Northeast and South) which may be responsible for variations in judges' characteristics to a greater extent than the method of selection.[37] When this factor is taken

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[33] See Atkins, DeZee & Eckert, State Supreme Court Elections: The Significance of Racial Cues, 12 Am. Pol. Q. 211 (1984) (comparison of voter turnout in 1976 Florida Supreme Court elections in precincts with and without black candidates).

[34] See Coalition of Concerned Black Americans, A Preliminary Report of the Experiences of the Minority Judiciary in the City of New York, 18 How. L.J. 495, 506 (1975) (discussion of effect on minority representation of judicial elections and appointments).

[35] Fund for Modern Courts, Inc., The Success of Women and Minorities In Achieving Judicial Office: The Selection Process 65 (1985).

[36] Glick & Emmert, Selection systems and judicial characteristics: the recruitment of state supreme court judges, 70 Judicature 228, 230 (1987).

[37] Id. at 230.

into account it was claimed, with certain exceptions, that "the method of selection makes very little difference."[38] Nevertheless, the conclusions of the Fund for Modern Courts study were recently endorsed by the Feerick Commission.[39]

The absence of clear evidence that one method of selecting judges is superior to the other in increasing the number of minorities on the bench may reflect important similarities in the two processes. The appointment method is hardly immune to political considerations. 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 choosing candidates, or in selecting one from among several recommended by a nominating committee or commission. Moreover, a disproportionate number of appointive judicial positions in New York State are located in New York City,[40] where minorities are most heavily concentrated and, arguably, exercise the greatest informal political influence. Six Hispanics and five Blacks currently serve by appointment on the Court of Claims (Part B) sitting primarily in New York City, while no minority currently sits on the Court of Claims (Part A), which handles claims against the state and is located in Albany.[41]

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[38] Id. at 230 n.11.

[39] See New York State Commission on Government Integrity, Becoming a Judge: Report on the Failings Judicial Elections in New York State 45-60 (1988) (John D. Feerick, Chairman).

[40] Judges are appointed to the Appellate Divisions of the Supreme Court, two of which are located in t city; appointments are also made to the Appellate Terms of the Supreme Court of the First and Second Departmer and to the New York City Housing Parts of New York City Civil Court, New York City Family Court, and New Yo City Criminal Court. Significantly, these last three are described as "ghetto courts" and a disproportionately used by minorities. See volume 1 of this report.

[41] 1990 New York Lawyers Diary and Manual 70-71 (1989); a telephone conversation with the princi secretary to the presiding judge of the Court of Claims served to supplement these statistics. It should noted that the figures may be subject to modification since judges sit at assignments, subject to const change, throughout New York State.

Furthermore, the judicial election process resembles the appointment process in certain respects. Political leaders exercise substantial control over the choice of judicial nominees in primary elections, and their selections may be relatively assured of election. This is particularly true of elections in areas like New York City where the nominees of one party are almost invariably elected. Also, most party leaders have established screening committees comprised of lawyers and representatives of civic groups to create at least the impression of a merit-based selection process.[42]

B. Judicial Screening and Nominating Commissions and Committees

Various screening and/or nominating commissions and committees play an important role in the judicial selection process. The Commission's survey of judges provided useful data on the performance of these bodies, and the Commission also surveyed the committees directly to gain information about their composition and activities.

The Commission's survey of judges asked for ratings of the various commissions and committees in New York State that screen or nominate potential judges for appointive or elective positions.[43] Judges were asked their opinion of the quality of the assessments provided by these bodies of the legal knowledge, litigation experience, and judicial temperament of judicial candidates and of how well these bodies perform in recommending candidates who would contribute to the racial and ethnic diversity of the judiciary. Data from this survey are reported in Table IV.3.6.

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[42] A recent news article reports, however, that in most cases "the county leaders' wishes are the screening committee's commands." See Lynn, 13 Justices Nominated, As Leaders Rule Roost, N.Y. Times, Sept. 26, 1989, at B2, col. 5.

[43] Blank Judges' Questionnaire, supra note 12, at 6-9.

Table IV.3.6
Judges' Ratings of Various Screening Commissions/Committees for the Judiciary
(Numbers in parentheses are percentages)

	KNOWLEDGE OF THE LAW				LITIGATION EXPERIENCE				RACIAL/ETHNIC DIVERSITY				JUDICIAL TEMPERAMENT			
	POORLY		WELL		POORLY		WELL		POORLY		WELL		POORLY		WELL	
	White	Min.	White	Min.	White	Min.	White	Min.	White	Min.	White	Min.	White	Min.	White	Min.
NYS Commission on Judicial Nominations for Governor's appointments to Ct. of Appeals	42 (15.4)	4 (9.5)	230 (84.6)	38 (90.5)	48 (21.8)	7 (18.9)	172 (78.2)	30 (81.1)	32 (16.3)	22 (57.9)	164 (83.7)	16 (42.1)	33 (15.3)	5 (13.9)	182 (84.7)	31 (86.1)
Statewide Judicial Screening Committee for Governor's appointments to Ct. of Claims	85 (35.6)	11 (26.2)	154 (64.4)	31 (73.8)	66 (32.8)	11 (30.6)	135 (67.2)	25 (69.4)	37 (22.7)	22 (62.9)	126 (97.3)	13 (37.1)	62 (31.6)	11 (32.4)	134 (68.4)	23 (67.6)
Departmental Judicial Screening Committees for Governor's appointments to Appellate Div. of Supreme Ct. & for vacancies on Supreme Ct.	6 (22.2)	4 (9.3)	210 (77.8)	39 (90.7)	43 (18.9)	4 (10.8)	184 (81.1)	33 (89.2)	42 (21.4)	21 (53.8)	154 (78.6)	18 (46.2)	54 (22.7)	5 (13.5)	184 (77.3)	32 (86.5)
County Judicial Screening Committees for Governor's appointments to Family Ct. outside NYC, County Ct. & Surrogate's Ct.	43 (24.2)	5 (22.7)	135 (75.8)	17 (77.3)	41 (24.6)	5 (25.0)	126 (75.4)	15 (75.0)	29 (24.2)	18 (81.8)	91 (75.8)	4 (18.2)	49 (31.8)	11 (52.4)	105 (68.2)	10 (47.6)
Mayor's Committee on Judiciary for Mayor's appointments to Family Ct. or Criminal Ct. or for vacancies on NYC Civil Ct.	47 (22.9)	20 (36.4)	158 (77.1)	35 (63.6)	36 (20.0)	16 (30.8)	144 (80.0)	36 (69.2)	17 (9.7)	30 (57.7)	159 (90.3)	22 (42.3)	47 (25.5)	19 (35.8)	137 (74.5)	34 (64.2)
Housing Ct. Advisory Committee and/or OCA Chief Administrative Judge appointments to NYC Housing Court	28 (36.4)	8 (22.9)	49 (63.6)	27 (77.1)	28 (38.4)	9 (26.5)	45 (61.6)	25 (73.5)	9 (12.3)	16 (47.1)	64 (87.7)	18 (52.9)	26 (38.8)	11 (34.4)	41 (61.2)	21 (65.6)
Political party organizations in determining slates for elective office	244 (53.9)	40 (63.5)	209 (46.1)	23 (36.5)	221 (55.1)	37 (62.7)	180 (44.9)	22 (37.3)	110 (31.7)	31 (50.8)	237 (68.3)	30 (49.2)	200 (52.8)	37 (64.9)	179 (47.2)	20 (35.1)

Large numbers of judges did not provide ratings for most of the commissions or committees that advise appointing authorities due to their lack of knowledge regarding these bodies. Political party organizations were rated by a much larger proportion of judges. Several conclusions of a general character can be drawn from the responses received. First, the judicial candidates proposed or approved by commissions or committees that advise appointing authorities were perceived by both white and minority judges to be of higher quality than those endorsed by political party organizations. Second, except for their views of the performance of these bodies in contributing to the achievement of greater racial/ethnic diversity in the judiciary, the views of white and minority judges were quite similar. Third, with regard to the latter issue, white judges approved of the performance of the bodies they rated in much higher numbers than did their minority counterparts. Only the Housing Court Advisory Committee received a favorable rating from a majority of minority judges in terms of its history of making recommendations that lead to racial and ethnic diversity on the bench.

In addition to its survey of judges, the Commission conducted a survey of judicial screening committee chairs in the fifteen counties of New York State with the highest proportions of minorities. The survey focused on the role played by the committees in the judicial selection process, particularly as regards their contribution to the achievement of a racially and ethnically diverse judiciary.[44] As Table IV.3.7 shows, eighteen of the committees screen candidates for elective judicial positions, seven screen candidates for both elective and

[44]Of the 31 screening committees surveyed, 29 responded. Of these, 12 were county bar association committees; 9 were women's bar association committees; 5 were minority bar association committees; and the other three were committees of the state bar association, the state trial lawyers association, and of a political party organization respectively.

appointive positions, and two screen candidates only for appointive positions. If the two committees sponsored by minority bar associations are excepted, only 7.8% of the committee members are minorities, and almost half of the committees have no minority members at all.

Table IV.3.7
Data on Judicial Screening Committees in the Fifteen Counties

Screening Committee Parent Organization	Screens for Elec. or Appt. positions	Number of Committee Members	Number of Minorities on Committee	Percent of Minority on Committee
1) Albany County Bar Ass'n	both	9	0	0%
2) Ass'n of the Bar of the City of New York	both	28	4	14%
3) Bronx Democratic Committee	elective	10	4	40%
4) Capital Dist. Women's Bar Ass'n	elective	7	1	14%
5) Dutchess County Bar Ass'n	both	3	0	0%
6) Erie County Bar Ass'n	elective	29	3	10%
7) Greater Rochester Ass'n for Women Attorneys	elective	13	1	7.7%
8) Metropolitan Black Bar Ass'n	both	12	12	100%
9) Mid-Hudson Women's Bar Ass'n	elective	4	0	0%
10) Minority Bar Ass'n of Western New York	elective	8	8	100%
11) Monroe County Bar Ass'n	both	31	2	6.5%
12) Nassau County Bar Ass'n	elective	20	0	0%
13) Nassau Women's Bar Ass'n	elective	12	0	0%
14) New York State Bar Ass'n	appointive	23	2	8.7%
15) New York Trial Lawyers Ass'n	elective	10	3	30%
16) New York State Women's Bar Ass'n	appointive	19	(1-2)	5-11%
17) Orange County Bar Ass'n	elective	7	0	0%
18) Puerto Rican Bar Ass'n	elective	n/a	n/a	n/a
19) Richmond County Bar Ass'n	both	15	1	6.7%
20) Rockland County Bar Ass'n	elective	11	0	0%
21) Rockland County Women's Bar Ass'n	elective	5	0	0%
22) Suffolk County Bar Ass'n	both	12	0	0%
23) Sullivan County Bar Ass'n	elective	0*	0*	0*
24) Westchester Bar Ass'n	elective	10	0	0%
25) Westchester Women's Bar Ass'n	elective	9	0	0%
26) Women's Bar Ass'n, N.Y. Chapter	elective	9	0	0%
27) Women's Bar Ass'n of Orange and Sullivan Counties	elective	5	1	20%

* : Committee not standing at present.
n/a : Not applicable.

Respondents were asked about the weight their own committee attaches to each of a series of criteria in evaluating judicial candidates or applicants. The responses are provided in Table IV.3.8 below.

Table IV.3.8
Ratings by Bar Association Screening Committee Chairs Regarding the Weight Accorded Various Judicial Qualification Criteria
(Numbers in parentheses are percentages)

	Very Great Weight	Great Weight	Some Weight	No Weight
Knowledge of law (N-23)	13 (56.5)	8 (34.8)	2 (8.7)	0
Litigation Experience (N-23)	4 (17.4)	10 (43.5)	7 (30.4)	2 (8.7)
Other experiences in the practice of law (N-23)	2 (8.7)	12 (52.2)	8 (34.8)	1 (4.3)
Racial/ethnic diversity of the judiciary (N-22)	1 (4.5)	2 (9.1)	8 (36.4)	11 (50)
Judicial temperament (N-23)	14 (60.9)	8 (34.8)	1 (4.3)	0
Managerial skills (N-23)	0	7 (30.4)	11 (47.8)	5 (21.7)
Other (N-9)	3 (33.3)	5 (55.6)	1 (11.1)	0

Half of the respondents indicated that their committees gave no weight at all to racial/ethnic diversity in evaluating candidates. Only 13.6% gave "great" or "very great" weight to that factor. An individual's ability to add racial/ethnic diversity to the judiciary is perceived to be the least important of the enumerated evaluation criteria. Evidently, most committees do not regard this capacity as a significantly positive credential, even if the committee supports diversity in the abstract or is concerned that candidates be sensitive to racial issues. Explanatory comments provided by respondents on their questionnaires

suggest that screeners are hesitant to consider criteria that fall outside the traditional understanding of judicial competence.[45]

A majority of the committees review only candidates for elective positions, and almost all of these respondents emphasized that rather than "screening" or "selecting" candidates, they merely evaluate already nominated candidates.[46] Entering the process only after political parties have nominated candidates for election, these committees neither propose nor select candidates. As a result, their assessments -- which are usually delivered as ratings rather than as recommendations -- are used almost exclusively for campaign purposes by the candidates.[47] The important point is that these committees have no influence over the pool of potential judges that they review and, therefore, do not have any influence over the racial/ethnic diversity of those considered for the judiciary.[48]

Frustration over the lack of influence exercised by judicial screening committees in the selection process was evident in some of the survey responses.[49] In an effort to assume a more substantive role in the selection process, some respondents reported attempts to advance their participation to an earlier point in the selection process. One committee is currently trying to implement a plan involving a pre-nomination role that will include the power to disqualify candidates.[50] Two other committees report that political parties have

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[45] New York State Judicial Commission on Minorities, Responses to Questionnaire for Chairpersons of Judicial Screening Committees.

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

agreed to take their assessments into account even though they occur after the nominations.[51]

The amount of time and resources devoted by judicial screening committees to the screening process varies widely. Moreover, the committees' responses show a wide range in the information kept by them regarding the numbers and proportions of candidates screened, recommended and ultimately selected. Table IV.3.9 summarizes the numbers and proportions of candidates screened, recommended and ultimately selected, as reported by these committees.

Among respondents, the most active committee by a wide margin is the Association of the Bar of the City of New York's Judiciary Committee. It screened 164 potential judges in 1988 for both elective and appointive positions. Of those screened, 127 were recommended and 81 were appointed or nominated. Thirty-five of those screened, 24 of those recommended, and 18 of those nominated or appointed were minorities. It is also interesting to note that this committee was the only one reporting a higher number of minority appointments/nominations than white appointments/nominations.

Five other committees each reviewed between 20 and 30 judicial candidates in 1988-89. Eleven committees each reviewed between 5 and 15 candidates, while five committees each reviewed fewer than five candidates. A number of committees reported themselves as generally or currently inactive.[52]

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[51] Id.

[52] Id.

Table IV.3.9
Summary of Screening Committee Activities
(Numbers in parentheses are percentages)

Screening Committee Parent Organization	Number Screened		Number Recommended		Number Nominated, Appointed		Ratio of Recommended: Screened		Ratio of Nominated, Appointed: Recommended	
	White	Min.	White	Min.	White	Min.	White	Min.	White	Min.
Association of the Bar of the City of New York	129 (79)	35 (21)	103 (81)	24 (19)	13 (42)	18 (58)	(80)	(69)	(13)	(75)
Suffolk County Bar Association	30 (100)	(0) (0)	29 (100)	(0) (0)	29 (100)	(0) (0)	(97)	--	(100)	--
New York State Trial Lawyers Association (approximate)	18 (72)	7 (28)	n/a	7	3 (75)	1 (25)	"maj"	(100)	--	(14)
Metropolitan Black Bar Association (data for 2 years)	29 (64)	16 (36)	n/a	16 n/a	"unk"	16 n/a	"90%"	(100)	--	(100)
Nassau Women's Bar Association (approximate)	20 (100)	0 (0)	20 (100)	0 (0)	19 (100)	0 (0)	(100)	--	(95)	--
Nassau County Bar Association (approximate)	20 (100)	0 (0)	20 (100)	0 (0)	*	0 (0)	(100)	--	--	--
Westchester County Bar Association (data for 5 years)	56-66 (93-94)	4 (6-7)	52-62 (94-95)	3 (5-6)	51-61 (93-94)	4 (7-6)	(93-4)	(75)	(98)	(133)
Westchester Women's Bar Association	12 (92)	1 (8)	11 (92)	1 (8)	*	*	(92)	(100)	--	--
Greater Rochester Association for Women Attorneys	13 (100)	0 (0)	12 (100)	0 (0)	"unk"	0 (0)	(92)	--	--	--
Rockland Women's Bar Association (data for 2 years)	20 (87)	3 (13)	12 (86)	2 (14)	*	3	(60)	(67)	(100)	(150)
Monroe County Bar Association	11 (100)	0 (0)	8 (100)	0 (0)	"unk"	0	(73)	(0)	--	--
Erie County Bar Association	10 (90)	1 (10)	n/a	n/a	n/a	n/a	--	--	--	--
Minority Bar Association of Western New York (data for 2 years)	0 (0)	20 (100)	--------"don't recommend, just rate"* -------							
Orange County Bar Association (data for 5 years)	37 (92)	3 (8)	37 (95)	2 (5)	"unk"	2	(100)	(67)	--	(100)
Richmond County Bar Association (data for 4 years; approximate)	30 (100)	0 (0)	"most"	0 (0)	50/50 nom. "few" appt.		--	--	--	--
Women's Bar Association New York (county) Chapter	5 (71)	2 (29)	4 (67)	2 (33)	4 (67)	2 (33)	(80)	(100)	(100)	(100)
Bronx Independent Democratic Committee (approximate)	6 per sess (avg)	"no records"	"almost all"	"no records"	*	"no records"	--	--	--	--
Capital District Women's Bar Association	4 (100)	0 (0)	4 (100)	0 (0)	*	0 (0)	(100)	--	--	--
Rockland County Bar Association (data for 5 years; approximate)	19 (95)	1 (5)	19 (95)	1 (5)	19 (95)	1 (5)	(100)	(100)	(100)	(100)
Women's Bar of Orange and Sullivan Counties, (data for 4 years)	9 (90) aprx	1 (10)	9 (90)	1 (10)	1-2 (50-67)	1 (50-33)	(100)	(100)	(11-22)	(100)
Dutchess County Bar Association (data for 5 years)	12 (0)	0 (100)	12 (100)	0 (0)	12	0	(100)	--	(100)	--
Mid-Hudson Women's Bar Association	2 (100)	0 (0)	2 (100)	0 (0)	2 (100)	0 (0)	(100)	--	(100)	--

* : Respondent did not specify number, noting that committee screens after nomination.
unk: Respondent stated number unknown.
n/a: Not available.

A glimpse of the role played by political party screening committees in the selection process was provided by the Puerto Rican Bar Association. It does not operate an independent screening committee, but representatives of the Puerto Rican Bar are invited to participate in the Democratic Party Supreme and Civil Court Screening Committees.[53] It was reported that of 65 potential candidates considered by the Manhattan Democratic Party Supreme and Civil Court Screening Committee, only 12 were recommended and 6 nominated. Eleven of those screened were members of minority groups, 7 of those were recommended, and 3 of those were nominated. While not offering an opportunity for direct comparison with the activities of bar association screening committees, this information is suggestive of the greater decision-making role that party screening committees exercise in the selection process due to the fact that they act before nomination occurs.

State and city judicial nominating and screening commissions and committees, unlike those sponsored by bar associations or political organizations, are official bodies empowered to select or nominate judicial candidates. For example, the New York State Constitution was amended in 1977 to create the Commission on Judicial Nomination to evaluate the qualifications of candidates for appointment by the Governor to the Court of Appeals. The Commission on Judicial Nomination consists of twelve members of whom four are appointed by the Governor, four by the Chief Judge of the Court of Appeals, and four by the political leadership of the New York State Senate and Assembly.[54]

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[53] Id.

[54] N.Y. S. Const. art. VI, § 2 c.d.

Screening committees were subsequently created by the Governor in each of the state's four judicial departments to generate a pool from which the Governor could make appointments to the Appellate Division of the Supreme Court and to fill vacancies on the Supreme Court. Screening committees also exist for judicial appointments to the Court of Claims by the Governor, to various New York City courts by the Mayor of New York, and to New York City Housing Court by administrative judges.[55]

The data in Table IV.3.10 show significant disparities in the representation of minorities on different screening committees, as of 1988-89. Three of the four Appellate Division screening committees had no minority members, including the screening committee for the First Department. In contrast, minorities occupied 27% of the positions on the Mayor's Committee on the Judiciary in New York City and 29% of the positions on the Housing Court Advisory Council.

[55] N.Y. Comp. Codes R. & Regs. tit. 9, § 4.9 (1983).

Table IV.3.10
Composition of Judicial Screening Committees[56]
(Numbers in parentheses are percentages)

COMMITTEES	WHITE	BLACK	HISP.	ASIAN	NATIVE AMER.
Commission on Judicial Nomination for Governor's appointments to the Court of Appeals	10 (83)	1 (8)	1 (8)	0	0
Statewide Judicial Screening Committee for Governor's appointments to the Court of Claims	11 (87.5)	1 (12.5)	0	0	0
First Department Judicial Screening Committee for Governor's appointments to the Appellate Division of the Supreme Court and for vacancies on the Supreme Court	8 (100)	0	0	0	0
Second Department Judicial Screening Committee for Governor's appointments to the Appellate Division of the Supreme Court and for vacancies on the Supreme Court	7 (78)	1 (11)	1 (11)	0	0
Third Department Judicial Screening Committee for Governor's appointments to the Appellate Division of the Supreme Court and for vacancies on the Supreme Court	8 (100)	0	0	0	0
Fourth Department Judicial Screening Committee for Governor's appointments to the Appellate Division of the Supreme Court and for vacancies on the Supreme Court	9 (100)	0	0	0	0
Mayor's Committee on the Judiciary for Mayor's appointments to Family Court or Criminal Court or for vacancies on the Civil Court in NYC	19 (73.0)	3 (11.5)	4 (15.4)	0	0
Housing Court Advisory Council	10 (71.0)	3 (21.0)	1 (7.0)	0	0

The data in Table IV.3.11 show the ethnic/racial composition of persons screened, recommended, and appointed by each committee. The data are incomplete, but significant disparities appear to exist among screening committees in the numbers of minority

[56] New York State Judicial Commission on Minorities, Responses to Questionnaire for Chairperson of Judicial Nominating/Screening Committees/Commissions.

candidates screened and recommended for appointment and in the numbers actually appointed. There is no clear pattern in these figures.

In the First Department, minority candidates accounted for 21% of those screened and 20% of those recommended for appointment, but only one of the fifteen minority candidates recommended for appointment was actually appointed. In the Second Department, relatively fewer minority candidates were screened and recommended for appointment (4% of the total), but a higher percentage of the minority candidates recommended for appointment were actually appointed (3 of 8 minority candidates). Minority candidates accounted for 11% of those screened by the Mayor's Committee on the Judiciary but 16% of those recommended for appointment and 18% of those actually appointed. Finally, minority candidates accounted for 12% of those screened by the Housing Court Advisory Council but 32% of those recommended for appointment and 34% of those actually appointed.[57]

[57] Id.

Table IV.3.11
Ethnic Composition of Persons Screened, Recommended, and Appointed[58]

(Numbers in parentheses are percentages)

COMMITTEES	WHITE	BLACK	HISPANIC	ASIAN	NAT. AMER.
Commission on Judicial Nomination					
Screened	N/A*	N/A	N/A	N/A	N/A
Recommended	N/A	N/A	N/A	N/A	N/A
Appointed	9 (90)	1 (10)	0	0	0
Appointed: Screened	--	--	--	--	--
Appointed: Recommended	--	--	--	--	--
Statewide Judicial Screening Committee					
Screened	2				
Recommended	2				
Appointed	N/A				
Appointed: Screened					
Appointed: Recommended					
First Department					
Screened	104 (78.8)	23 (17.4)	5 (3.8)	0	0
Recommended	59 (79.7)	12 (16.2)	3 (4.0)	0	0
Appointed	13 (92.9)	1 (7.1)	0	0	0
Appointed: Screened	(12.5)	(4.3)	0	0	0
Appointed: Recommended	(22.1)	(8.3)	0	0	0
Second Department					
Screened	294 (95.8)	7 (2.3)	6 (2.0)	0	0
Recommended	197 (96.1)	6 (2.9)	2 (4.0)	0	0
Appointed	59 (95.1)	3 (4.8)	0	0	0
Appointed: Screened	(20.0)	(42.9)	0	0	0
Appointed: Recommended	(29.9)	(50.0)	0	0	0
Third Department					
Screened	apprx 100	0	0	0	0
Recommended	apprx 25	0	0	0	0
Appointed	apprx 25	0	0	0	0
Appointed: Screened	(25.0)	0	0	0	0
Appointed: Recommended	(100.0)	0	0	0	0
Fourth Department					
Screened					
Recommended					
Appointed					
Appointed: Screened					
Appointed: Recommended					
Mayor's Committee on the Judiciary					
Screened	814 (89.3)	68 (7.5)	27 (3.0)	3 (.3)	0
Recommended	225 (84.6)	31 (11.7)	9 (4.0)	1 (.4)	0
Appointed	143 (82.2)	21 (12.1)	9 (5.2)	1 (1.1)	0
Appointed: Screened	(17.6)	(30.9)	(33.3)	(33.3)	0
Appointed: Recommended	(63.6)	(67.7)	(100.0)	(33.3)	0
Housing Court Advisory Council					
Screened	426 (87.7)	43 (8.8)	14 (2.9)	3 (.6)	0
Recommended	41 (68.3)	13 (21.7)	5 (8.3)	1 (1.7)	0
Appointed	19 (65.5)	6 (20.7)	3 (10.3)	1 (3.4)	0
Appointed: Screened	(4.5)	(14.0)	(21.4)	(33.0)	
Appointed: Recommended	(46.3)	(46.2)	(60.0)	(33.0)	

* N/A - Not Available

[58] Id.

C. Improvements in the Judicial Selection Processes

While the Commission does not believe that either the elective or appointive judicial selection process is demonstrably superior in generating minority candidates in all circumstances, it does believe that there are improvements that can be implemented in both procedures to generate greater numbers of minority candidates. Such improvements include sensitizing participants in the appointment process to the need for a racially diverse bench, increasing the number of minorities on screening/nominating committees, and including "cross-cultural competence" as a selection criterion for judges.

First, participants in the judicial selection process need to be sensitized to the importance of achieving a more diverse judiciary. This need is demonstrated by the relatively low level of minority representation on these committees and the relatively low priority assigned by the committees to considerations of diversity in evaluating judicial candidates.

Second, the Commission believes that steps should be taken to increase minority representation on judicial screening and nominating committees. An increased minority presence would help dispel perceptions that the judicial selection process is the province of an "all-white" club. The absence of minorities on these committees perpetuates the view that access to the judiciary is controlled by a privileged white elite. Just as minority litigants may view the lack of minority officials in the courtroom as evidence of a biased judicial process, so too minority attorneys may view the lack of minorities on judicial screening committees as evidence of a biased selection process.

The presence of greater numbers of minorities on these committees would also aid in the recruitment of minority judicial candidates. The circle of acquaintances of minority committee members is likely to include a greater number of potential minority candidates than is true of white committee members. Questionnaires completed by the chairs of judicial screening committees verify that candidates quite often came to the attention of screening committees through self-generated applications, notices in legal publications, personal recommendations of committee members, and notices sent to various organizations. An increased minority presence on judicial screening committees would be likely to increase the number of minority candidates coming to the attention of the committees by these various means.

Minorities may discount their chances of becoming judges out of fear of racial or ethnic discrimination fueled by the absence of minorities on the screening panels. They may be less likely than their white counterparts to send an unsolicited application to a screening committee or to respond to general advertisements. Also, minority attorneys (particularly those with ten or more years of practice) are likely to have been solo practitioners or to have worked in law firms with other minority attorneys and thus may not have had close professional or social relationships with white members of the screening committees.[59] For all of these reasons, screening committees need to establish more personalized contact with minority attorneys in order to overcome their distrust of, and unfamiliarity with, the judicial selection process.

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[59] See supra Figure 1.

Third, the Commission believes that cross-cultural competence should be recognized as an appropriate selection criterion in evaluating candidates for judicial appointment or election.

III. JUDICIAL WORKING ENVIRONMENT

The Commission considered issues other than the judicial selection process in exploring the relationship between race or ethnic background and the functioning of the judiciary. In this context, significant differences in the perceptions of minority and white judges regarding their work environment became apparent.

A. Satisfaction With Court of Appointment or Election and Assignments

Judges were asked about their satisfaction with their court of appointment/election (87% of white and 89% of minority judges were sitting on their "own" courts), with case assignments, calendar part assignments, and panel assignments.[60] Satisfaction data are presented in Table IV.3.12.

[60] Blank Judges' Questionnaire, supra note 12, at 3.

Table IV.3.12
Satisfaction with Court of Appointment/Election and Assignments
(Numbers in parentheses are percentages)

		White Judges	Minority Judges	Total Judges
Satisfied/Very Satisfied		534 (97.4)	67 (90.5)	601 (96.6)
Dissatisfied/Very Dissatisfied		14 (2.6)	7 (9.5)	21 (3.4)
Satisfied with Fairness Case Assignments	Yes	410 (96.2)	51 (87.9)	461 (95.2)
	No	16 (3.8)	7 (12.1)	23 (4.8)
Satisfied with Fairness Calendar Part Assignments	Yes	244 (94.2)	34 (82.9)	278 (92.7)
	No	15 (5.8)	7 (17.1)	22 (7.3)
Satisfied with Fairness Panel Assignments	Yes	68 (97.1)	13 (81.2)	81 (94.2)
	No	2 (2.9)	3 (18.8)	5 (5.8)

Although the great majority of both white and minority judges reported that they are satisfied with their court (97.4% and 90.5% respectively), the differences between the two groups are statistically significant. Whereas 9.5% of minority judges are "dissatisfied/very dissatisfied" with their experience on the court on which they are sitting, only 2.6% of white judges are similarly dissatisfied. The actual number of dissatisfied minority judges is, however, very small.

Dissatisfied judges were asked to explain the sources of their dissatisfaction. Some judges reported dissatisfaction due to the size of their case loads, which they feel prevents them from giving adequate consideration to each case. Some expressed dissatisfaction with the level of support staff and research resources made available to them. A few judges cited

low salaries and the lack of merit promotions as sources of dissatisfaction. Finally, among those who expressed dissatisfaction, the largest number cited poor working conditions, including poor physical environment, and problematic behavior on the part of those with whom they must work (e.g., unfair administrative judges, incompetent colleagues, attorneys who come late or ill-prepared, and clerks and court officers who are unhelpful or incompetent). Complaints of unfair treatment were registered by both minority and white judges. An Hispanic judge complained:

> Unlike any other judge in my court, I was assigned to do intake only for almost two years upon my appointment to the . . . [b]ench. I was given this assignment even though I had more trial experience and more graduate education and training than most of my colleagues. Only the conversion to IAS made a trial part available to me.[61]

A white judge wrote of her dissatisfaction in the following terms:

> No credit [is] given (judicial achievement, etc.) for recognized commitment to participation in anti-racist or affirmative action projects (or daily conduct in courtroom in a non-racist, respectful fashion). Caring about these issues, insisting on their inclusion in programs, etc., reaching out in employment opportunities or exemplary personal behavior are not part of the coin of the realm.[62]

B. Case Assignments

Most cases are assigned to judges through use of an impartial lottery system. However, the majority of administrative judges surveyed by the Commission (13 out of 19) reported that there are times when case assignments are made other than through an impartial process.[63] The reasons for nonuse of the "wheel" vary. Most exceptions are due

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[61] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[62] Id.

[63] New York State Judicial Commission on Minorities, Responses to Questionnaire for Administrative Judges [hereinafter Administrative Judges' Questionnaire].

to the existence of special parts which handle all cases of a particular type. For example, all New York City Supreme Court Criminal Term narcotics cases are removed from the wheel. A few administrative judges also reported nonuse of the wheel for administrative reasons having to do with illness of an Individual Assignment System (IAS) judge, calendar congestion, or disqualification of an IAS judge. Counties with only one judge do not, of course, use a wheel. Finally, New York City Civil Court does not use the IAS system at all, and New York County Supreme Court Civil Term reports that it reassigns "complex" cases.

The Commission's survey of nonsupervisory judges inquired whether the judges feel that case assignments, calendar part assignments and panel assignments, are fairly made.[64] These findings are reported in the last three sections of Table IV.3.12 above. There are significant differences in the assessment of minority and white judges regarding the fairness of case assignments. Although a large majority of both white and minority judges are satisfied with the fairness of case assignments, 12% of minority, but only 4% of white judges are dissatisfied with the fairness. Judges dissatisfied with case assignments feel that "some judges are overworked while others are idle" and that case assignments are made through "internal politics."

Significantly more minority judges also felt that calendar part assignments are unfair (17% of minority judges compared to 6% of white judges). Among those who expressed dissatisfaction, the primary reasons were the existence of unequal workloads and the assignment of newsworthy cases to judges who have "connections." Other complaints included claims that "the least desirable assignments fall to women and [B]lacks during

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[64] Blank Judges' Questionnaire, supra note 12, at 4-5.

emergencies"; that "assignments are inappropriately based on computer production record rather than on efficiency and sensitivity"; that "the 'weaker' judges who cannot complete an AP calendar part in an assigned time period get more assignments to jury parts"; that "there should be no special parts (e.g., homicide part)"; that "acting Supreme Court judges get the worst assignments"; that "DA's have too much input into the selection of trial judges"; and that "sensational cases are assigned to friends."[65]

Relatively few judges had panel assignments. Among the few judges who had panel assignments (70 white and 16 minority), there were no significant differences in the proportions who felt that such assignments are fairly made. Among the judges who felt that panel assignments are unfair, most felt that assignments to the panels should be made on a rotating basis.

C. Treatment of Judges by Others

Judges were asked to rate the extent to which they feel that the race of a judge affects how she/he is treated by other judges, by attorneys, and by courtroom personnel.[66] These findings are presented in Table IV.3.13.

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[65] Judges' Questionnaire, supra note 61.

[66] Blank Judges' Questionnaire, supra note 12, at 10-11.

Table IV.3.13
Judges' Ratings of the Extent to which the Treatment of Judges and Courtroom Personnel Is Affected by Racial/Ethnic Differences
(Numbers in parentheses are percentages)

	WHITE JUDGES			MINORITY JUDGES			TOTAL JUDGES		
	Not at all	Some-what	Great-ly	Not at all	Some-what	Great-ly	Not at all	Some-what	Great-ly
Treatment of judges by other judges is affected	462 (85.6)	72 (13.3)	6 (1.1)	20 (26.7)	47 (62.7)	8 (10.7)	482 (78.4)	119 (19.3)	14 (2.3)
Treatment of judges by attorneys is affected	417 (77.8)	109 (20.3)	10 (1.9)	18 (24.0)	43 (57.3)	14 (18.7)	435 (71.2)	152 (24.9)	24 (3.9)
Treatment of judges by courtroom personnel is affected	442 (84.2)	79 (15.0)	4 (.8)	27 (37.0)	37 (50.7)	9 (12.3)	469 (78.4)	116 (19.4)	13 (2.2)

Minority judges were more likely than white judges to feel that a judge's race adversely affects the professional treatment of the judge by others. Thus, 19% of minority, but only 2% of white judges felt that a judge's race "greatly" affects the treatment he or she receives by attorneys. Of the judges surveyed 78% of white, but only 24% of minority judges said that race does "not at all" adversely affect how judges are treated by attorneys.

Whereas 11% of minority judges reported that a judge's race "greatly" affects how he or she is treated by other judges, only 1% of white judges gave such a response. Of the judges surveyed 86% of white, but only 27% of minority judges said that a judge's race does "not at all" adversely affect the treatment of the judge by his or her judicial colleagues.

Finally, 12% of minority and 1% of white judges reported that a judge's race "greatly" impacts on how he or she is treated by courtroom personnel. Among white judges, 84% reported that race has no impact; but only 37% of minority judges gave this rating.

Overall, a significant number of minority judges feel that a judge's race at least "somewhat" affects how they are treated by attorneys, by their colleagues on the bench, and by courtroom personnel. Moreover, they believe that their race adversely affects their treatment by attorneys to a greater extent than it affects their treatment by their colleagues. In their view, their treatment by courtroom personnel is least affected by race. White judges, on the other hand, generally feel that treatment of judges by others is "not at all" affected by race.

D. Disciplinary Proceedings

The Commission tried to determine whether a factual basis exists for the perception that minority judges are disciplined more often than similarly situated white judges. Unfortunately, the information needed to answer this question is not available. The Commission on Judicial Conduct does not maintain race information as to the parties to a complaint; nor does it identify complaints involving allegations of racial discrimination. Moreover, the cloak of confidentiality mandated by the Judiciary Law permits public disclosure of only those matters resulting in the imposition of sanctions.[67] Thus, of the 10,680 complaints received by the Commission on Judicial Conduct from 1975 through the end of 1988, all but 58 remain confidential.[68] Under these circumstances, the Commission on Minorities was unable to draw any conclusions regarding the validity of perceptions of disparate treatment in this area.

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[67] N.Y. Jud. Law art. 2-A, § 45 (McKinney Supp. 1991).

[68] 1988 New York State Commission on Judicial Conduct, Annual Report 261.

There is an evident need, however, for the Commission on Judicial Conduct to achieve racial diversification of both its Commissioners and staff. There is only one minority judge among the seven serving as Commissioners. The Commission has a total of 37 staff.[69] Of this total, 31 responded to a questionnaire requesting demographic information. All but three of the 31 respondents to the questionnaire identified themselves as Caucasian.[70] Thus, the employment pattern at the Commission on Judicial Conduct reveals problems similar to those found in the court system generally.[71] A staff that is approximately 90% white cannot be viewed as adequately representative.

E. Minorities in Supervisory Positions

> The dearth of minorities on the bench is only part of the problem. Of equal concern is their concentration in positions of relatively low authority throughout the court system.[72]

There are at present only two minorities in supervisory administrative positions within the state judiciary. This lack of minority representation in positions of authority within the court system aggravates the problems noted throughout this chapter, but particularly those relating to perceptions of disparate treatment in judicial working conditions.

IV. THE IMPORTANCE OF CROSS-CULTURAL SENSITIVITY TRAINING FOR JUDGES

Because of the numerous complaints regarding judges' insensitive treatment of minority litigants, witnesses and attorneys, described in the chapters on Perception, Court

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[69] Letter from Gerald Stern to Hon. Franklin H. Williams (Dec. 27, 1989) (Gerald Stern is Administrator of the Commission on Judicial Conduct).

[70] Id.

[71] See ch. 4 on Nonjudicial Officers, Employees, and Contractors, infra.

[72] 1 New York City Hearing, supra note 1, 27, 3, at 167 (statement of Elizabeth Holtzman, Kings County District Attorney).

Facilities, Treatment and Utilization, and The Legal Profession, the Commission asked both judges and litigators to rate the importance of training judges on cultural/racial sensitivity.[73] The findings of the judges' survey are presented in Table IV.3.14.

Table IV.3.14
Judges' Ratings as to the Importance of Training on Cross-Cultural Sensitivity for Judges
(Numbers in parentheses are percentages)

WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
Very Important	Important	Somewhat Impor.	Unimportant	Very Important	Important	Somewhat Impor.	Unimportant	Very Important	Important	Somewhat Impor.	Unimportant
143 (27.4)	220 (42.1)	114 (21.8)	45 (8.6)	47 (68.1)	13 (18.8)	5 (7.2)	4 (5.8)	190 (32.1)	233 (39.4)	119 (20.1)	49 (8.3)

Seventy-two percent of all judges rated cross-cultural sensitivity training as "important/very important." There is a highly significant difference between minority and white judges on this issue. Whereas 68% of minority judges felt that such training is "very important," only 27% of white judges gave this rating. However, 70% of white judges rated such training as either "very important or "important."

Seventy-seven percent of all litigators also rated sensitivity training for judges as "important/very important." The findings of the litigators' survey are presented in Table IV.3.15.

[73] Blank Judges' Questionnaire, supra note 12, at 10-11; Blank Litigators' Questionnaire, supra note 10, at 12.

Table IV.3.15
Litigators' Ratings as to the Importance of Sensitivity Training for Judges
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.	Not Impor.	Some-what Impor.	Very Impor./ Impor.
Importance of training for judges on cultural/racial sensitivity.	14 (9.8)	42 (29.1)	88 (61.1)	5 (3.8)	3 (2.3)	123 (93.9)	1 (.8)	15 (11.7)	112 (87.6)	1 (1.4)	13 (17.6)	60 (81.0)	23 (15.5)	44 (29.3)	83 (55.3)	1 (1.0)	5 (5.0)	95 (94.1)	45 (6.2)	122 (16.7)	560 (77.1)

As shown in Table IV.3.15, the majority of litigators in all groups rated sensitivity training for judges as "important/very important": 61% of white, 94% of black, 88% of Hispanic, and 81% of Asian-American litigators in New York City, and 55% of white, and 94% of minority litigators outside New York City. Black litigators in New York City and minority litigators outside New York City both were significantly more likely to attach importance to this issue than were Asian-American and white litigators (both in and outside New York City). Additionally, Hispanic litigators felt sensitivity training to be more important than white litigators in New York City. But the important finding is that the majority of litigators in all groups see a need for sensitivity training.

The following two comments by litigators point to the need for a culturally sensitive judiciary: A white litigator practicing in New York City recalled a case:

> [The judge] is in a part where he gets only murder cases. He was sent a case (one of the few) where a white cop was indicted for assaulting several minority people. Throughout the trial, the Judge--who is normally precise--somehow got "confused" and kept referring to the victims as the "defendants" and the defendant was never called that, but was always referred to by His title, "Officer" Doe. This "confusion" was contrived and apparently "worked": the cop was acquitted.
>
> This is but one example. I think the recent attacks by the [United States] [S]upreme [C]ourt on affirmative action, the posture of the federal government and attacks on gains of the civil rights of the 60's, have had an effect on the court[s]. Insensitivity, unequal treatment and outright racism all too often prevail.[74]

Moreover, a Native-American litigator outside New York City commented:

> [S]ensitivity to socioeconomic and psychological dynamics is necessary in order for the system to work for my clients. This requires . . . judges who can

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[74] Litigators' Questionnaire, supra note 20.

understand and respond appropriately and effectively to the needs and concerns of all litigants, including those of minority descent.[75]

[75] Id.

FINDINGS

1. There is a perception that minorities are underrepresented in the state judiciary in comparison to the available pool of qualified attorneys. Moreover, minorities are underrepresented on the bench 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 were rated as qualified but who were not appointed.
4. By any measure, minorities are grossly underrepresented in supervisory and other high level administrative positions within the judiciary.
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 faulted for failing 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 as to which method of judicial selection --appointive or electoral--should be preferred.

[Commissioners Vance, Birnbaum, Suarez and Warner dissent from this recommendation for reasons explained in their statements appended to this chapter. 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 achieving 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 this Chapter. 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; that the recommendation is overbroad and may have speedy trial implications for defendants; and that it 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 press-worthy 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 a 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.

DISSENT OF COMMISSIONER
CYRUS VANCE

Among the mandates given to the New York State Judicial Commission on Minorities was a charge to evaluate "methods currently employed for the selection of judges . . . and to make recommendations which would increase the representation of minority judges." My fellow Commission members have voted to take no position on this issue; I respectfully dissent.

How to increase the number of minority judges is a problem that has been wrestled with for many years. To help answer that question, the Fund for Modern Courts, Inc., a nonprofit research and educational organization which I formerly chaired, conducted a study which surveyed the success of women and minorities in achieving judicial office in the full-time appellate and trial courts in the fifty states and the federal judiciary and correlated those results with the method used to select judges.[1]

Modern Courts' study found that the success of minorities and women in achieving judicial office depends in large measure upon the method of selection. A higher percentage of minorities and women were chosen through an appointive system (executive appointment (17.9%) or merit selection (17.1%)) than any elective system, whether judicial election (11.7%), partisan election (11.2%), non-partisan election (9.4%) or legislative election (6.9%).[2]

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[1] See Fund for Modern Courts, Inc., The Success of Women and Minorities In Achieving Judicial Office: The Selection Process (1985).

[2] Id. at 65.

Modern Courts' conclusions have been scrutinized by numerous academics and politicians, and they have been cited in published works over 100 times. The study's basic conclusion remains unchallenged: minorities have a better chance of attaining judgeships in state courts through an appointive process than through an elective process.

I believe that New York should replace the present elective system for selecting all principal trial court judges -- really a system of appointment by party bosses, not a decision by the voters -- with a merit selection system, i.e., nomination by a broadly-based, bipartisan nominating commission composed of lawyers and laypersons, who seek out the best candidates and propose a limited number of names for each judicial vacancy, followed by appointment by an elected chief executive from that limited list.

Merit selection is the best way to ensure that courts of our state reflect the population they serve, while maintaining a commitment to judicial excellence.

DISSENT OF COMMISSIONER SHEILA BIRNBAUM

Commissioner Sheila Birnbaum joins Commissioner Cyrus Vance in his dissent.

DISSENT OF COMMISSIONER
ANTHONY SUAREZ

The debate as to the preferable system of Judicial Selection has left many of the Commissioners on different ends of this question.

First, the alternative to the process of electing judges is the so called "merit selection" of judges. Typically, this "merit selection" process is conducted by a panel of attorneys who are law school professors, Wall Street lawyers, etc. who are appointed to the panel by various political organizations. Addressing the question of whether or not there is more merit in those selected by these panels than those elected, I would point out to you that those who come out of the panel are as politically connected to the members of the panel as are the elected judges to the district leaders who assist in their election. In other words, for individuals to come out of the panels, they must be politically connected to those who would carry their application through the panel system. To illustrate that the panels are no more concerned with merit than is the election system, I need only point to various examples in recent history that illustrate this fact. You may note that only this past year Judge Stephen Crane was nominated as the Democratic Party's candidate to the Supreme Court despite the fact that he did not come out of the screening panel. A careful analysis of this appointment will show you the ludicrousness of the thought that the panel system is based more on merit than it is on politics.

The New York County Democratic Committee is committed to the principle that no candidate shall be named as the party candidate unless he has passed and been qualified by their merit screening panel. In previous years, Judge Crane had applied for selection by the

Screening Committee and had been passed and reported out of the committee as a qualified judge. Note that the panel itself does not nominate the candidate but the panel selects three qualified candidates for each position available. That is, if there are three vacancies, the panel will report out nine names. This particular year there was only one vacancy. Judge Crane, if reported out as one of the three qualified judges, would then present himself at the Judicial Convention where the party would then decide which of the three candidates would be its candidate. It was well known and widely reported that Judge Crane was the favorite of the county political leader, Denny Farrel. The panel did not report Judge Crane out of committee as being among the most qualified for the job. This was done despite the fact that he had been previously reported out as qualified by several previous panels. Denny Farrel, thereafter, took Judge Crane to the Judicial Convention as his candidate and had him nominated as the candidate of the party, despite the decision of the screening panel. The panel was playing politics itself, by excluding Judge Crane as one of the three reportable candidates, so as to prohibit him from being selected by the party, and instead forcing the hand of the Democratic Party to nominate one of the other three, whom the panel felt should be one of the candidates. If Judge Crane was qualified before, why was he not qualified now? The fact that the political leader was able to circumvent the process to appoint the individual that he wanted is proof that these panels are merely there to act as a screening process for the political leaders who will make the decision themselves and never take it to the population.

Another good example of the screening committee was with respect to the Court of Appeals. The Governor appoints a panel to screen and recommend names to the Governor

for appointment to the Court of Appeals. (They too are supposed to depend on the qualifications, a merit process.) When Governor Cuomo was seeking to appoint a woman to the Court of Appeals, and it was well known that it was his desire to do so (that being a campaign pledge), the opportunity arose with the retirement of a judge from the Court of Appeals. When Governor Cuomo requested names from his panel. Judith Kaye was not reported out as qualified to the Governor. Judith Kaye, of course, had not been on the bench prior to this moment and the panel felt she was not as qualified as others, which is why they did not report her out. Governor Cuomo, being dissatisfied with the results, rejected the entire list and informed the panel that they must come up with a more varied list for his selection. On this new list Judge Judith Kaye was reported out, and eventually appointed to the Court of Appeals.

An analysis of this selection process will once again show that the panels will report out anyone who is ultimately sought by the appointing authority, because, ultimately, the appointing authority selects them to be on this panel. Further proof that the merit selection process is in fact a farce could be demonstrated by the case I witnessed while I personally sat on the Supreme Court Judicial Screening Panel and Judge Carmen Ciparick, then an Acting Supreme Court Judge, applied to be screened by the Democratic Party Judicial Screening Committee. In that particular year there were five vacancies, and the Judicial Screening Committee was, therefore, undertaking the task of reporting out fifteen individuals who could then go to the Judicial Convention. Five of the fifteen would be selected for the candidacy by the Democratic party convention of delegates. There were sixty candidates applying, all of whom were sitting judges, except for one who was the chief of the appeals

bureau of the Legal Aid Society. Many of the judges had previously applied and had already been selected or been reported out. It was Carmen Ciparick's first year, and I was sitting on the panel as a representative of the Puerto Rican Bar Association. Obviously, it was in the interest of the Puerto Rican Bar Association to promote the candidacy of a "qualified Hispanic" to the bench. However, in that particular year there was also an interest that women should be appointed to the bench. That competing interest between Hispanics and women resulted in a very strange report by the Committee. Instead of reporting out fifteen names, as was our regular mandate, the panel reported out only thirteen names because Judge Ciparick was both a woman and an Hispanic. Unbeknownst to me, on the day of the voting for which of the candidates should be reported out, there was a blackout in lower Manhattan. I was informed by a secretary of the Panel Director that the meeting had been canceled. Some time later in the evening I was called at home and informed that members had met at the home of the Panel Administrator and were voting and that I, therefore, should submit my selections in order of preference to the panel by telephone. The next day I was informed that Carmen Ciparick had been placed under thirteen but above fifteen on the list. If we had reported fifteen names, she would have gone to the Judicial Convention. Being both Hispanic and a woman, she, therefore, had the best chance of coming out of the Convention as the candidate. The politicians on the panel, realizing her strategic advantage, decided to report out only thirteen names rather than fifteen, although we had sixty qualified candidates, in order to preclude Ciparick from getting to the Convention unimpeded by the competitive factor of a female Hispanic being available for selection.

Another example of how the merit selection process does not provide better qualified judges, or that in fact the merit selection process is not dependent on merit but rather on the political whims of the very powerful, is the case of our Court of Claims Part A judges. Currently there is no minority sitting as a Court of Claims Part A judge. Court of Claims Part B judges are judges of limited jurisdiction who only hear criminal cases; these judges sit as Acting Supreme Court Justices. The effect of appointing Court of Claims Part B judges is to prevent adding more Supreme Court Justices who are elected by the people. If you believe that the selection of judges to the Court of Claims is based on merit and not based on political whims, then you must examine newspaper accounts and the statistical numbers available to you. Why are all minority Court of Claims judges only Part B judges, judges with limited jurisdiction? Why is it that when the legislature was looking to add more Part B Court of Claims judges last year, the debate centered not on whether the money was available for the judges or the qualifications of the judges, but rather whether or not the Republican Party got a chance to nominate its fair share of judges? The concern was not focused on the qualifications or the merit of the judges, but on their political affiliations. More to the point, we could even examine Mario Cuomo's objections to the Republicans' demands. It was reported in New York newspapers that Governor Cuomo objected to the Republican Party being allowed to name judges. In other words, he did not object to naming a number of "Republicans," but rather to the fact that the Party wanted to name them. Therefore, Governor Cuomo was ready to accept the principle that a "qualification of a judge be his political affiliations."

As a side note, I would add that the whole question of appointing Court of Claims judges to act as Supreme Court Justices to hear criminal cases is probably a violation of the Voting Rights Act. This position with its responsibilities should properly be held by a Supreme Court judge who is voted for by the People. These judges are needed in the City of New York. Therefore, based on recent electoral history, over 70% of these judges would be minorities in counties with a large minority electorate. As a result, the appointment system of Court of Claims Part B justices effectively prevents minority communities from voting for those positions as Supreme Court Judges.

In further examining the merit selection process one should look at the panels themselves. Typically, these panels are composed of corporate lawyers, professors of law and deans of law schools. Those sitting on the panels are not representative of the members of the communities who most use the court. These individuals have their own standards of what is "qualified." The standard is very important. I would note that the Commission has looked into the questions of "cross cultural competence" as being important to the selection of judges which "a merit panel may never understand." That is the case of the Hon. Irma Santaella with reference to litigation that was presented before her. Some time in 1988, the City of New York was seeking to evict dozens of small grocery store "bodega" owners from buildings that were not properly zoned for commercial use. These small store owners had paid thousands of dollars "under the table" to the landlords in order to obtain the right to lease the premises and establish a store. The City was seeking to evict them for its own purposes, undermining the huge investment these small store owners had made in their businesses. Because of the number of litigants and the size of the case it was divided in two

arts, Judge Wallace Cotton received half of the litigated matters and Judge Irma Santaella received the other half. Judge Wallace Cotton, having no problems with his decision on the law, promptly evicted all the store owners at the request of the City. Judge Santaella, who had an affinity with the community and who knew of the background of this community (having had a husband who was an accountant for small businessmen and being intimately aware of the needs of the community), saw the injustice that was being perpetrated upon these small store owners. She wrote a decision which, in essence, prohibited the City from evicting the store owners, and required the City to appeal. The City did appeal and won a reversal of her decision, thereby resulting in the eviction of the other bodega owners. However, in the process of the appeal, nearly two years elapsed and the store owners were allowed to stay in their stores to try to recoup their investment while the litigation proceeded. (Unfortunately, Judge Santaella received a tremendous amount of criticism for her decision from the "white bar" and even from the Appellate Division for her innovative construction of the law.) This type of sensitive "equity" decision is "cross cultural sensitivity" and I doubt that a blue ribbon panel of law school professors and deans and corporate lawyers would understand or even take into consideration such a factor.

A criticism of the political selection of judges has been that the selection of candidates is done behind a closed door by political leaders, and in fact the public does not get a chance to decide who would be their candidates. First, I would note that the merit selection process, as I above indicated, is no better and in fact is worse. At least the political leaders who make the decision of who should be on the ballot are themselves elected by the population and, therefore, are responsible to the population. That is, Denny Farrel is more

Farrel is more likely to be rejected by the population of Manhattan for not appointing minority judges, than is the Governor subject to recall or to rejection because he is not appointing minority judges. The higher up you go in the process of giving the power, the less likely it is to be responsive to the people in the street. Furthermore, simply because the people of the City of New York choose to be of the Democratic Party does not mean that the population is not selecting its judges. Candidates are in fact free to seek the nomination of the Republican or Conservative Party.

Since the selective method does not require the panel member to be responsive to the community, they make their decision solely to appease the appointing authority or their own political agenda.

We must admit that this urge for "merit selection" has arisen now that minority communities have learned the election law and have formulated political organizations--this seems very suspect. Now that we have learned the rules they change the game.

DISSENT OF COMMISSIONER
IVAN WARNER

The black and Hispanic communities view the agitation in recent years for the appointment of all New York judges as miraculously coinciding with the comparatively large increase in the number of black and Hispanic judges in recent years through the electoral process. In these communities the perception is a reality.

It should be noted that in the courts where judges are appointed, minority judges are appointed only in those communities where they are already electable, while in the areas where minority judges are not electable, there are no minority appointments. It, therefore, seems that appointment has not broken new ground and has not succeeded in appointing minorities to the bench in communities which cannot elect minority judges.

Racism, real and perceived, and institutional discrimination informs the opinion that the movement to take away the people's democratic rights reflects a calculated campaign to change the rules in the middle of the game, and to eliminate the legitimate exercise of power over the judiciary by minorities and poor people in this state.

It will be seen as renunciation of the total American purpose, which is the freedom of the people to rule themselves through the power of the ballot, and to put into office, including the bench, officials so chosen.

Our justice system is under increasingly heavy attack by minority and other disaffected groups in our society, and it is challenged daily as basically unfair to all those who are unable to participate fully in the economic and political life of the community. It is the studied opinion of the vast majority of the minority community that the proponents of the appointment of judges have little in common with the needs and aspirations of poor people.

Again, the perception, "as soon as we learn the rules they change them." "Why now, when we have begun to achieve some of the political influence we have so rightfully earned." It is perceived that the appointment power sought will enable outsiders to hand-pick the judges of the future; and to insist upon judges who reflect their social and political outlook.

It is further perceived that minority judges would be few in number and that those who emerge would not have compassion for or strong ties with the people of the central cities and would be less vigorous in their defense of the Constitution and human rights.

The questions are repeatedly asked: Are we so eager in this state to credit the perception of minorities that as soon as the rules are learned they are changed? Will we completely ignore the necessity of maintaining the delicate balance between the three branches of government? Are we so eager to throw the carefully laid out system of checks and balances into complete disarray, if the judiciary of this state is to be appointed and thus controlled by the executive branch? The independence of the judiciary will be thus seriously compromised if not totally destroyed. Consider the fact that the three top politicians in the state -- running as they do for reelection every two or four years, appoint a majority of the members of the screening committee which in turn will recommend judicial appointees to the executive.

Note carefully, that even if the screening committees shed all traces of political affiliation of whatever persuasion and look only "on high" for inspiration as to the candidates they should select, there still remains the problem of conflicts of interest or possible conflicts of interest among the members of the screening committees who have daily business in the courts.

Will there continue to be underrepresentation or complete exclusion of minorities on screening committees?

We are urged to believe that out of this political scenario there somehow emerges a nonpolitical, nonpartisan, race neutral, meritoriously selected judiciary. Our judiciary, selected by the wise, the virtuous and the well born and bred, but never by the people who will have no choice in the matter.

To believe that the appointment of judges removes any element of politics from their selection is to delude one's self and to overlook the practical realities of life. It is a reasonable assumption that the choice of persons for the position will be influenced in some measure by the political philosophy of the appointing powers.

This brand of politics will not be out in the open, in political parties where all people can participate, regulated and governed by the election laws under the overall supervision of the legislature, but will, instead, be conducted behind the closed doors of the elite.

DISSENT OF COMMISSIONERS SHEILA BIRNBAUM, NICHOLAS FIGUEROA, SERENE K. NAKANO AND JUANITA BING NEWTON

We concur with the view that the Unified Court System (UCS) should avoid any appearance that assignments of criminal cases are made outside of the so-called "wheel" for improper reasons, including reasons that manifest racial bias against minority judges. The recommendation that the UCS adopt a common "wheel" for the random selection of judges in all criminal cases ignores, however, certain important practical considerations and may have an adverse impact on the speedy trial rights of defendants. Moreover, it is based on the complaints of racial bias of at most three judges to the Commission's survey. We therefore respectfully dissent from the recommendation, and propose, instead, that the criminal courts institute "wheels" from which Administrative Judges can assign judges, including minorities, to complex or press-worthy cases on a random basis.

Assignment of Criminal Cases In the First Judicial District

The method of assignment of criminal cases in the First Judicial District presents a vivid example of how complex the issue of random assignment is. The Individual Assignment System (IAS)[1] initially recommended in 1985 that "[s]ome relatively few cases unquestionably require extraordinary judicial resources and time to proceed toward a final

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[1] See Review Committee on the Individual Assignment System, Report to the Chief Judge and Chief Administrative Judge of the Review Committee on the Individual Assignment System (Feb. 1988) (presents caseload activity data on criminal and civil case processing under the IAS and makes recommendations for system operations); Review Committee on the Individual Assignment System, Report to the Chief Judge and Chief Administrative Judge of the Review Committee on 1986 Individual Assignment System Operations (Feb. 1987) (presents findings and caseload activity data on criminal and civil case processing under the IAS during 1986 and recommends modifications); Committee Designated to Plan Implementation of an Individual Assignment System for the New York State Unified Court System, Report to Chief Judge Sol Wachtler and Chief Administrative Judge Joseph W. Bellacosa (Sept. 3, 1985) (provides a general statement of recommended operating principles of the IAS); Hon. Peter J. McQuillan, Plan to Implement an Individual Assignment System for Supreme Court, First Judicial District, Criminal Branch (1985) [hereinafter McQuilllan Plan].

disposition"[2] and the random assignment of unusually complex and lengthy cases to certain judges designated by the Administrative Judge through a "P (protracted litigation) wheel."[3]

According to Hon. Peter J. McQuillan, an initial proponent of the complex "wheel" and an Administrative Judge in the First Judicial District, that system of assignment was not implemented. However, he states, significant modifications to the 1985 plan have been, and continue to be, necessary for two primary reasons: the sheer rise in cases since that time and the increasing inadequacy of detainment and arraignment facilities to accommodate the burgeoning case load.[4] Several administrative decisions, therefore, have been made to meet these exigencies.

In the First Judicial District, a special part known as an "N Part" has been established to handle large numbers of narcotics cases, which represent approximately half of the case load.[5] Judges are selected for these positions based not only on factors such as length of experience, but also on their experience and fairness in taking pleas.[6] Inasmuch as "N Part" jurisdiction includes felony dispositions, it cannot be said that the selection of more experienced New York City Criminal Court judges, who handle misdemeanors, is unreasonable.

Moreover, in order to maximize the availability of judges to preside over trials, persons known as case "expediters" monitor the availability of judges and courtrooms in

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[2] McQuillan Plan, supra note 1, at 10.

[3] Id. at 10-12.

[4] Telephone interview with Hon. Peter J. McQuillan (Apr. 10, 1990) [hereinafter McQuillan Interview].

[5] Id.

[6] Telephone interview with Hon. Robert G. M. Keating (Nov. 5, 1990).

felony cases. As soon as a judge is determined to be available, he or she is assigned a trial.[7] Such an assignment, albeit outside the "wheel," not only fosters judicial economy, but, more importantly, promotes the statutory and constitutional speedy trial rights of defendants. Were there to be true assignment of such cases through a random "wheel," the disposition of such felony trials, in a court such as the Supreme Court, Criminal Term in New York City, which dealt with some 54,000 felony filings in 1989,[8] would be severely impaired.

Finally, the Administrative Judge in the First Judicial District has assigned complex or press-worthy cases outside the IAS plan (and its important modifications described above) in only three notable situations.[9] The seven-defendant case involving the death of a white Utah tourist, was assigned to an Hispanic judge, Hon. Edwin Torres, because of his special qualifications. This case is complex (inasmuch as it involves an unusual number of defendants), and has commanded considerable attention by the news media. Moreover, the assignment was made outside the random "wheel."[10] Another such assignment involved the trial of Senator Manfred Ohrenstein and several other defendants, all of whom were members of the Democratic Party and accused of committing crimes in connection with Democratic candidacies. The Ohrenstein case was assigned to Justice Harold J. Rothwax, who had publicly stated that he would not seek the endorsement of the Democratic Party.[11] A third such assignment outside the random "wheel" involved the "Central Park Jogger"

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[7] Id.

[8] See 1989 Wachtler, The State of the Judiciary 4.

[9] McQuillan Interview, supra note 4; Telephone interview with Hon. Peter J. McQuillan (Nov. 5, 1990) [hereinafter McQuillan Interview 2].

[10] McQuillan Interview 2, supra note 9.

[11] McQuillan Interview, supra note 4.

trials, which were assigned to Hon. Thomas B. Galligan. According to the Administrative Judge, the "Central Park Jogger" case, which involved seven defendants, was deemed to be unusually large, and Justice Galligan was believed to possess the requisite expertise.

We note further that Hon. Thaddeus E. Owens, a black judge in the Second Judicial District, was assigned outside the "wheel" to preside over the widely publicized trials of multiple defendants in the death of Yusuf Hawkins. The assignment of Justice Owens was made after consideration of his expertise, in a manner similar to the assignment to Justice Galligan of the "Central Park Jogger" trials.

The Commission's Data

The data leading to the Commission's broad recommendation were the following: First, 12 % of minority judges, as contrasted with 4 % of white judges, felt that case assignments were unfairly made. Second, 17 % of minority judges, in contrast with 6% of white judges, believed that calendar assignments were unfair.

Our own examination of the variety of comments made by judges who reported dissatisfaction with case and calendar assignments, however, reveals that only two judges of a pool of 23 and three judges of a pool of 22, respectively, reported a racially discriminatory impact as a result of the present manner of case and calendar assignments. Only three additional judges reported nonracially motivated favoritism in such assignments. These are relatively few complaints on which to premise an overwhelming change to the assignment system, which is being monitored on a continuing basis by experienced administrators.

CHAPTER FOUR THE NONJUDICIAL WORK FORCE

Conclusion

In sum, there is a continuing need to adjust the manner in which assignment of criminal cases is made in order to accommodate both the burgeoning work for judges and the promotion of important rights for criminal defendants. On-going modifications of the assignment system -- such as the institution of a random "wheel" for complex or press-worthy cases which we propose -- should take into account both the appearance of racial bias and favoritism. The recommendation of the majority that there should be a wholesale change to assignments in criminal cases, however, is overbroad, based on a sparse record, and may well impede the justice system.

CHAPTER 4

THE NONJUDICIAL WORK FORCE

CHAPTER OVERVIEW

The language of the Commission's mandate, to "mak[e] recommendations which would fairly increase"[1] minority representation in the Unified Court System (UCS) work force, assumed minority underrepresentation in the nonjudicial work force. The statistical evidence, which existed well before the Commission began its investigation, supports this conclusion.

As of June, 1989, Whites comprised a disproportionate 80.1%[2] of the court system's entire nonjudicial work force at a time when minority groups constituted a steadily growing share of both the state's population and its labor force. It has been estimated that by the year 2000, minorities will constitute approximately one third of New York State's total population.[3] Minorities already comprise more than half of New York City's entire labor force.[4] Yet analysts at the United States Labor Department expect the City to suffer a severe skilled labor shortage in coming years due to the occupational disparities that exist between Whites and minorities. These demographic changes highlight the challenge facing the court system not only to improve its equal employment opportunity (EEO) performance, but also

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[1] 1988 S. Wachtler, State of the Judiciary 22.

[2] Unified Court System, Workforce Diversity Program, app. at 3 (Dec. 1989) [hereinafter Workforce Diversity Program].

[3] New York State in the Year 2000 at 85 (J. Mumpower & W. Ilchman eds. 1988).

[4] See Governor's Advisory Committee for Black Affairs, Improving the Labor Market Status of Black New Yorkers: Policy and Program Recommendations at 6 (1988) (reporting that as of 1987, Blacks and Hispanics constituted 29% and 21% of the New York City labor force. If one factors in the growing Asian population, the total exceeds 50%.

to reach out to minority groups in recruiting and training efforts, which is absolutely necessary if an adequately skilled work force is to be maintained.

During the course of its investigation of minority representation in the nonjudicial work force, the Commission engaged in two data analyses. Both analyses found substantial underrepresentation of minorities in certain jobs.

The first analysis, which the Commission set forth in its Interim Report, focused on minority underrepresentation among officials and administrators. The Commission reported that although minorities constituted 13.73% of the New York State work force according to the 1980 census, the proportion of minorities among officials and administrators in the UCS in 1986 was only 3.4%.[5] In 1986, "out of 244 [officials and administrator] positions Blacks occupied nine positions; only one Asian [American] held the position of an administrator/official and there were no Hispanics or Native Americans in that job category. Moreover, in the seven years prior to 1986, minorities never occupied as much as 4% of these high-level jobs, and indeed, in one year (1982) they fell below the 1% level."[6]

In addition to these high-level positions, the Interim Report noted that minorities are also grossly underrepresented as technicians. In 1986, "minorities occupied only 3.8% of technical positions, despite the fact that minorities comprised 20.12% of persons in the state with the requisite qualifications."[7]

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[5] New York State Judicial Commission on Minorities, Interim Report 8 (July, 1989) [hereinafter Interim Report].

[6] Id. at 8-9.

[7] Id. at 9-10.

The second analysis, which the Commission details here, also finds significant minority underrepresentation in some job categories. This chapter 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 efforts, the Interim Report itself, and the aftermath of the report's issuance, including the court's utilization analyses and its Workforce Diversity Program.

I. THE NEED FOR A UTILIZATION ANALYSIS

Before the Commission could make recommendations concerning the recruitment of minorities for the nonjudicial work force, it needed to compare 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. Such comparisons would determine whether OCA underutilized the available pool of qualified minorities in the state and identify the particular job categories where underrepresentation occurred.

In the fall of 1988, the Commission asked the EEO office of OCA for current statistics on the number of minorities in the UCS work force and the job categories they occupy. After some delay, the Commission was told that the most recent data available were for the year 1986 and that it would be months before statistics could be compiled for the 1987 fiscal year.[8] The Commission then requested that OCA furnish it with a utilization analysis for the UCS work force.[9] Such an analysis entailed a study of all job titles in the UCS, classifying them into job categories, determining the number of minorities and women

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[8] Memorandum from Matthew T. Crosson to Edna Wells Handy (June 23, 1989).

[9] Interim Report, supra note 5, at 11. A utilization analysis would compare the court system's actual percentage of minorities employed in each job category with their availability in the labor pool outside of the UCS.

in each, and then comparing them with the number of available minorities in the state labor force. Such a comparison would identify the OCA job categories in which minorities are underrepresented. Although a utilization analysis is an extremely useful management device, such a study had never been undertaken by OCA.[10]

While the request for a utilization analysis was pending, hearings on minorities in the UCS were held, which enabled the Commission to learn how members of the nonjudicial work force viewed their opportunities for promotion and their daily work environment. These hearings furnished the Commission with useful data from persons within and outside the court system and assisted the Commission in formulating issues of concern to minorities to be investigated, such as OCA's puzzling failure to institute an affirmative action program within the UCS, and the operation of the EEO office.[11]

II. AFFIRMATIVE ACTION IN THE UCS

The information initially derived from hearing testimony was instructive on the question of why OCA had no functional affirmative action plan in place. Apparently, a draft affirmative action plan had been developed, but was later abandoned.[12] The Commission attempted to ascertain whether the plan was abandoned due to apathy on the part of the officials in charge or whether valid questions existed as to the plan's potential for success. Specifically, the Commission wanted to determine whether the failure to promote the plan

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[10] Id.

[11] New York State Judicial Commission on Minorities, Open Meeting 53, 55 (Dec. 16, 1988) (New York City) (testimony of Hon. Herbert B. Evans).

[12] Id.

was due to any conscious or unconscious bias on the part of the policy-makers responsible for developing it.

The Commission learned that in 1979, OCA ordered a study of minority employment, and that later that same year, had received a draft affirmative action plan developed by its independent consulting firm.[13] The proposed plan was reviewed by the appropriate OCA officials, including the then Chief Administrative Judge, and the then Director of the EEO office.[14]

In its effort to learn why the plan was abandoned, the Commission heard testimony from Asal Lesser, an independent consultant specializing in minority employment, whose firm was retained in March 1979 by OCA to study the feasibility of implementing an affirmative action plan for the court system.[15] After conducting extensive research, the firm submitted a draft version of a proposed affirmative action plan in late 1979. According to Lesser's testimony, the plan was submitted to OCA in 1979, but it failed thereafter to attract sponsorship.[16]

Judge Herbert Evans, Chief Administrative Judge from 1979 to 1983, testified that he received a copy of the 1979 draft version of Lesser's affirmative action plan, but that neither he nor anyone else, to his knowledge, had ever actually approved the plan.[17] In Judge Evans' opinion, the principal reason for the plan's failure to gain approval was that

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[13] Id. at 11-12 (testimony of Asal Lesser).

[14] Id. at 48-53 (testimony of Hon. Herbert B. Evans).

[15] Id. at 11-12 (testimony of Asal Lesser).

[16] Id. at 19, 24-25, 29, 35-36.

[17] Id. at 49-50, 53, 55 (testimony of Hon. Herbert B. Evans).

questions existed as to the statistical evidence upon which it was based.[18] Even so, Judge Evans believed that agreement existed within OCA that "it was a draft that we could live with and could adopt, and that we in house could correct the statistics, clean up the report and promulgate it."[19] When asked whether that had been done, he responded that it had not: "I think that was a project that fell between the cracks."[20]

The testimony of Asal Lesser tended to support Judge Evans' conclusion that the statistical bases for the draft plan's conclusions were flawed,[21] yet no attempt was made to resuscitate the plan or to draw up a new one.[22] An effort that might have led to the adoption of an affirmative action plan for the court system was therefore allowed to languish. It appears that OCA failed to enact an affirmative action program primarily because of inattention.

The absence of an effective affirmative action plan may have contributed to the present paucity of minorities in higher level positions within the UCS. Examination of a 1989 list of the 52 highest-paid UCS employees in the official and administrator category shows that there were only 4 Blacks, all in the lowest level administrator/officer positions.[23]

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[18] Id. at 52-53.

[19] Id. at 53.

[20] Id.

[21] Id. at 25-28, 32-33 (testimony of Asal Lesser).

[22] Id. at 33-36; Id. at 55 (testimony of Hon. Herbert B. Evans).

[23] Listing of Selected OCA Employees Based on Payroll Information as of June 21, 1989. In descending order the 4 Blacks were ranked as follows: 28th, Mgr. of Tech. Serv.; 36th, Dir. of EEO Office; 40th, Asst. Dep. Counsel; 46th, Prin. Law Clerk. The only other minority listed was an Asian-American, ranked 19th, Dep. Dir. Court Oper. Serv.

Consequently, minorities have been almost completely excluded from the policy-making and technical levels of the UCS.

III. THE COMMISSION'S INTERIM RECOMMENDATIONS

The Commission based its Interim Report on the factual information it had gathered and the almost pervasive perception of racial and ethnic imbalances in the UCS nonjudicial work force. Among its recommendations, the Commission proposed the immediate adoption of an affirmative action plan to rectify the severe underrepresentation of minorities at the official and administrative levels.[24] It also reminded OCA that a utilization analysis should remain a top priority. The Commission specifically recommended that steps be taken to remedy racial imbalance, such as using "cross-cultural competence" as a criterion for employment.[25]

The Commission also concluded that the EEO office had failed to maintain adequate employment data[26] and 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 being unreceptive to complaints of job discrimination[27]--that complaints alleging discrimination have been either treated with skepticism or completely ignored by the EEO office. In other

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[24] Interim Report, supra note 5, at 17-19.

[25] Id. at 17.

[26] As already mentioned, the Commission submitted a request to the EEO office in the fall of 1988 for employment statistics for 1987. By July 12, 1989, these figures had still not been provided. The EEO office even had difficulty producing figures for 1986, despite the fact that it is required under Federal law to file an annual statistical breakdown of the race and gender of the OCA work force by job category. See 29 U.S.C. § 709(c); 29 C.F.R. § 1602.

[27] 1 New York State Judicial Commission on Minorities, New York City Public Hearing, 12 (June 29, 1988) (testimony of Hon. William Davis) [hereinafter New York City Hearing].

words, the office had failed to secure the trust of the very minority employees it was created to serve.

A primary task of an EEO office is to recruit significant numbers of qualified minorities for promotional opportunities. Yet disturbing examples of neglect in the work of the office were discovered by the Commission. It was learned, for example, that only 15.8% of eligible Blacks, as contrasted with 22.9% of eligible Whites, submitted applications to take the court officers 1987 promotion examination.[28] In this instance, the EEO office could easily have alerted minorities to the chance for promotion because the targeted group was incumbent employees and was therefore accessible to the office. By not doing so, the EEO office failed in one of its principal tasks.

A mitigating factor was the Commission's finding 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 administrative functions of UCS; its concerns were given low priority; and its objectives were never clearly delineated by senior staff.[29]

Throughout its tenure, the EEO office followed an ineffective course which resulted in an inexcusable underrepresentation of minorities in many nonjudicial job categories, particularly within the critical policy-making categories. 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.[30] The Commission likewise stressed that the

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[28]Letter from Phil Ferrara to Linda Chin (Jan. 11, 1989).

[29]Interim Report, supra note 5, at 11-14.

[30]Interim Report, supra note 5, at 19.

office be empowered to intervene in personnel decisions by making recommendations to ensure compliance with an affirmative action plan.[31]

IV. THE UCS 1989 UTILIZATION ANALYSIS

In 1989, the UCS completed the utilization analysis undertaken at the request of the Commission. Their analysis corroborated most of the findings of underrepresentation detailed in the Commission's Interim Report.[32]

Statewide data from the analysis show that minorities are underrepresented by only 2 percentage points in comparison with the percentage of minorities in the State's labor force.[33] However, this "moderate" underrepresentation masks a gross underrepresentation of minorities in higher-paying, policy-making jobs within the UCS. The utilization analysis indicated that, at most, 3.3% of the officials and administrators in the UCS are minorities, while the total New York State minority official and managerial participation rate is 12%.[34]

In addition to officials and administrators, minorities were also found to be underrepresented as attorneys (entry-level), court officers, junior court analysts, court reporters and court clerks. Moreover, where minorities were found to be overrepresented, that overrepresentation tended to be in the lower-paying entry level, nonpromotional jobs such as office clerk, typists and data entry clerks.[35]

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[31] Id.

[32] Although the work force utilization analysis by the OCA also included women, the Commission discusses only data concerning minorities.

[33] Office of Court Administration, Report on the Participation of Minorities and Women in the Nonjudicial Workforce of the New York State Unified Court System 201 (Oct. 1989).

[34] Id. at 14, 16.

[35] Id.

V. THE OCA TASK FORCE

The findings of the 1989 utilization analysis prompted Chief Judge Sol Wachtler and Chief Administrator Matthew Crosson to form a task force to remedy the racial and gender imbalance which existed within the UCS.[36] The goal set for the Task Force was to develop a specific program which would increase outreach, recruitment and hiring of minorities for those specific job categories where significant underrepresentation existed.[37] The program underlying this policy was called the "Workforce Diversity Program" and the Task Force submitted the Workforce Diversity Program report with recommendations to the Chief Judge in December, 1989.

The Deputy Chief Administrator (OCA) asked the Commission to assist the Task Force and indicated that the Task Force would welcome the Commission's recommendations regarding the redress of minority underrepresentation in the UCS.[38] Following an initial meeting with the Task Force, the Commission prepared a memorandum dated November 16, 1989, outlining its proposed recommendations to the Task Force.[39] Among other recommendations, the Commission suggested that a list of goals and a timetable be established to guide OCA managers and that they be evaluated on their success in meeting

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[36]The Task Force consisted of: Hon. Robert J. Sise, Deputy Chief Administrative Judge for the Courts Outside New York City; Hon. Milton L. Williams, Deputy Chief Administrative Judge for the New York City Courts; Jonathan Lippman, Esq., Deputy Chief Administrator for Management Support; and Hon. Kathryn McDonald, Administrative Judge of the New York City Family Court, who was also the Chair of the Committee to Implement the Recommendations of the Task Force on Women in the Courts. Unified Court System, Workforce Diversity Program 1 (Dec. 1989).

[37]Id.

[38]Letter from Jonathan Lippman to Edna Wells Handy (Oct. 18, 1989).

[39]Memorandum from Hon. Franklin H. Williams & Hon. Nicholas Figueroa to Hon. Sol Wachtler (Nov. 16, 1989).

these goals.[40] In the case of a nonminority recommendation for appointment where underrepresentation was found, hiring authorities would be required to justify the hiring.[41]

VI. THE TASK FORCE RECOMMENDATIONS - THE UCS WORKFORCE DIVERSITY PROGRAM

The recommendations of the Task Force were contained in a report entitled "Unified Court System Workforce Diversity Program." 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 princip[les] of equal employment opportunity and to the goal of a truly diverse nonjudicial work force.[42]

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 memorandum to the Chief Judge. To ensure the implementation of the Commission's recommendations, the Task Force suggested that the Implementation Committee on the Nonjudicial Workforce Diversity Program be formed to oversee and facilitate the implementation of all recommendations approved by the Chief Judge.[43]

The implementation committee's mandate, as set forth by the Task Force, is:

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[40] Id. at 6-7.

[41] Id. at 4.

[42] New York State Office of Court Administration, Press Release 1 (Jan. 4, 1990).

[43] Workforce Diversity Program, supra note 2, at 8.

(1) to advise the Chief Judge and the Chief Administrator on implementation of the nonjudicial workforce diversity program as established; (2) to make recommendations to the Chief Judge and Chief Administrator as part of the ongoing work force diversity effort; (3) to act as an advocacy group for minority employee interests to ensure continued work force diversity within the court system; and (4) to keep abreast of professional and legal issues affecting minority employees and to assess their impact on the court system.[44]

The committee is to include judges and members of the nonjudicial work force within the Unified Court System, members of the bar, and others from outside the court system.[45]

a. Establishment of Goals and Timetables: Because the UCS's local managers are the front line officers in the struggle against racial imbalance, the Task Force invested responsibility for implementation with the local managers. Under the Diversity Program, local managers are required to develop general strategies, goals and timetables for recruitment and hiring (in consultation with the EEO director) and submit them for final approval by the Chief Administrator.[46] These measures are to be applied to the specific job categories in each judicial district and court in New York State where minority underrepresentation exists. The Office of Court Administration itself is to rectify the racial imbalance that exists within its own central office.

b. Performance Evaluations Based on Goals: Consistent with fixing responsibility on local managers, the performance evaluations of all managers in the UCS (chief clerks,

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[44] Id. at 8-9.

[45] Id. at 9.

[46] Id. at 14-17.

executive assistants, unit heads) are to take into account their efforts in achieving designated goals and timetables.[47] Where a candidate belonging to a nonprotected class is to be hired for a position in which minorities are underrepresented, a report to the Chief Administrator setting forth the efforts undertaken by the local manager to recruit a minority candidate for the position will be required.[48]

c. Consolidation of Regional Promotion Lists: To ensure uniformity in employment opportunity, existing geographic promotional units will be replaced by a state-wide promotional unit.[49] The Task Force felt that the existing promotional lists limited the hiring and upward mobility of minorities and women because they restricted and isolated the qualified labor force.[50] There will be one list for each position and a corresponding examination to allow statewide canvassing for all vacancies. There will now likewise be statewide recruitment for exempt and noncompetitive positions.

d. Cultural Sensitivity Training: Enhancing cultural sensitivity is a goal of all employees of the UCS. Training programs stressing cultural sensitivity is mandatory for security personnel and others interacting with members of the public.[51] Attendance at cultural sensitivity seminars is mandatory for all managerial positions within the UCS.[52]

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[47] Id. at 16.

[48] Id. at 15.

[49] Id. at 28. Geographical promotional units were established as part of the 1979 Classification Plan. "Promotional unit lists include all candidates passing the examination who have current permanent status within the promotional unit. In practice, the Personnel Office generates a certification list containing the names of individuals on the promotional unit list and, if necessary, the names of eligibles from the general promotion list who have indicated to the OCA Personnel Office a willingness to work in a geographic area other than their own promotional unit." Id. at 25.

[50] Id.

[51] Id. at 18-19.

[52] Id. at 19.

e. Organizational Strengthening of the EEO Office: The Task Force recognized that the UCS's commitment to diversity must be reflected in its EEO office. It therefore recommended, among other things, that the EEO office be restructured to permit an increase in compensation for its director and that the office's staffing be strengthened.[53] The recommendations pertaining to the EEO office were specific and covered every facet of its operation.[54]

f. Other Recommendations: Other recommendations made by the Task Force include the selection of minorities possessing supervisory and management potential for entry into a training program in managerial skills; establishment of a statewide automated employment hot line to provide information on UCS employment opportunities and examination announcements; implementation of the UCS's newly developed EEO computer capability, with enhanced emphasis on the completeness and accuracy of EEO data collection and verification; and frequent updating of the utilization analysis report for the purpose of monitoring the court system's progress in creating a more diverse nonjudicial work force.[55] This updating process would become particularly crucial after publication of the data from the 1990 census.

VII. STRATEGIES FOR PARTICULAR JOB GROUPS AND LOCATIONS

The job category of officials and administrators includes persons with responsibility for establishing and supervising the implementation of policy within the UCS. Access to

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[53] Id. at 10.

[54] In addition to the previously mentioned Implementation Committee, the Task Force also recommended the creation of an EEO Action Group whose function would be "to integrate the application of the work force diversity program into all areas of human resources management and operations management on a statewide basis." Id. at 13.

[55] Id. at 5, 21-24, 76-79.

such positions is of crucial importance to minorities, but, at present, minorities are significantly underrepresented in this job category, especially in upstate judicial districts.[56] The fact that 70% of these policy-making positions are located in judicial districts outside New York City[57] means that the underrepresentation in these positions poses a particular challenge. Generally, underrepresentation exists in many court agency operations, including the following specific job groups: chief clerks and deputy chief clerks; commissioners of jurors; county clerks and deputies.[58] Underutilization was also found to extend to OCA's management support job categories, consisting of some 50 positions, evenly distributed between upstate and New York City.[59]

The principal strategies recommended to deal with the underrepresentation of minorities in the officials and administrators job categories include:

- Broadening perceptions: Notice of vacancies in the officials and administrators job category should not be limited to employees working within the particular court where the vacancy occurs.[60] The best qualified candidate should be sought regardless of the candidate's present job location.
- Employee selection: Unstructured interviews should be replaced with structured interviews and objective rating criteria to ensure that each interview

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[56] Statewide, minorities held only 3.3% of such positions compared with statewide availability of 12%, as determined by the 1980 census. Office of Court Administration, Report on the Participation of Minorities and Women in the Nonjudicial Workforce of the New York State Unified Court System 14, 16 (Oct. 1989).

[57] Id. at 17.

[58] Id. at 11-12.

[59] New York State Judicial Commission on Minorities, An Assessment of Report on the Participation of Minorities and Women in the Nonjudicial Workforce of the New York State Unified Court System 14 (Oct. 1989).

[60] Workforce Diversity Program, supra note 2, at 36.

centers on the managerial and technical skills required for success in the job.[61] Minorities and women should be included on interview panels.[62] Efforts taken to identify and hire qualified minority candidates should be regularly reported.[63]

VIII. 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 of an implementation committee without which many of our mutually developed recommendations would remain unimplemented. The progress achieved thus far by the Task Force was summarized by Chief Judge Wachtler in his State of the Judiciary 1990 message (the relevant portion is appended to the end of this chapter).[64] The Commission supports Judge Wachtler's assessment of the Task Force's eventual goal; equal treatment and equal opportunity within a truly diverse nonjudicial work force, which understands the necessity of a multicultural environment.[65] There are, however, problem areas that the diversity plan fails adequately to address.

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 under-

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[61] Id. at 35.

[62] Id. at 36.

[63] Id.

[64] S. Wachtler, The State of the Judiciary 1990, 64-68 (1990), reprinted infra at pp. 184-187.

[65] Id. at 67-68.

representation specific to given racial groups and judicial locations. These data on under-representation are reported in Table IV.4.1.

Table IV.4.1
Race/Ethnicity Of Nonjudicial Employees By Judicial District/Court*
(Numbers in parentheses are percentages)

	COURT OFFICERS				COURT & CHIEF CLERKS **					COURT AIDES				COURT REPORTERS					COURT ASSISTANTS				COURT INTERPRETERS			
	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A
Court of Appeals	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Court of Claims	0	0	0	0	9 (100)	0	0	0	0	3 (100)	0	0	0	19 (100)	0	0	0	0	1 (100)	0	0	0	0	0	0	0
Appellate Division 1st Dept.	10 (91)	*** 1 (9)	0	0	33 (90)	3 (8)	1 (2)	0	0	0	0	0	0	0	0	0	0	0	6 (75)	2 (25)	0	0	0	0	0	0
Appellate Division 2nd Dept.	6 (86)	1 (14)	0	0	29 (94)	2 (6)	0	0	0	1 (100)	0	0	0	0	0	0	0	0	6 (74)	1 (13)	1 (13)	0	0	0	0	0
Appellate Division 3rd Dept.	0	0	0	0	4 (100)	0	0	0	0	0	0	0	0	0	0	0	0	0	4 (100)	0	0	0	0	0	0	0
Appellate Division 4th Dept.	2 (100)	0	0	0	4 (100)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

* Source: Nonjudicial data provided by OCA, September, 1989; disparate impact analyses are based on outside availability data provided by OCA as part of the utilizat analyses conducted by OCA.

** No analysis for adverse impact due to lack of OCA outside availability data.

*** Significant disparities at the P=<.05 level of significance. Availability data for court officers are based on data on sheriffs, police, and corrections; if there a significant disparity in relation to any one of these groups, the disparity is reported as significant.

**** No analysis for adverse impact because the category includes many diverse jobs.

Table IV.4.1 Continued

	LAW CLERKS/ SECRETARIES				LAW ASSISTANTS				REFEREES HEARING EXAMINERS				OFFICE ASSISTANTS				JUDGES' SECRETARIES/TYPISTS				STENOGRAPHERS TYPISTS/CLERICALS					OTHER ****				
	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	NA	W	B	H	A	NA
Court of Appeals	15 (100)	0	0	0	12 (86)	2 (14)	0	0	0	0	0	0	1 (100)	0	0	0	7 (87)	1 (13)	0	0	24 (96)	1 (4)	0	0	0	88 (91)	9 (9)	0	0	0
Court of Claims	18 (100)	0	0	0	1 (100)	0	0	0	0	0	0	0	13 (86)	1 (7)	0	1 (7)	17 (94)	0	1 (6)	0	20 (100)	0	0	0	0	19 (90)	2 (10)	0	0	0
Appellate Division 1st Dept.	10 (77)	3 (23)	0	0	36 (90)	2 (5)	2 (5)	0	0	0	0	0	5 (62)	2 (25)	1 (13)	0	12 (86)	1 (7)	1 (7)	0	19 (56)	9 (26)	6 (18)	0	0	69 (85)	7 (9)	5 (6)	0	0
Appellate Division 2nd Dept.	14 (93)	1 (7)	0	0	57 (95)	3 (5)	0	0	0	0	0	0	7 (70)	2 (20)	1 (10)	0	17 (89)	2 (11)	0	0	70 (72)	18 (19)	7 (7)	2 (2)	0	111 (90)	8 (6)	4 (3)	1 (1)	0
Appellate Division 3rd Dept.	9 (100)	0	0	0	15 (100)	0	0	0	0	0	0	0	5 (100)	0	0	0	9 (100)	1 (3)	0	0	18 (100)	0	0	0	0	35 (97)	0	1 (3)	0	0
Appellate Division 4th Dept.	10 (100)	0	0	0	14 (100)	0	0	0	0	0	0	0	0	0	0	0	8 (80)	1 (10)	0	1 (10)	25 (93)	2 (7)	0	0	0	46 (98)	0	0	0	1 (2)

Table IV.4.1 Continued

	COURT OFFICERS				COURT & CHIEF CLERKS **					COURT AIDES				COURT REPORTERS					COURT ASSISTANTS				COURT INTERPRETERS			
	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A
Judicial District 1: New York County Supreme Court Civil Term	56 (79)	*** 13 (18)	*** 2 (3)	0	97 (78)	25 (20)	3 (2)	0	0	2 (50)	1 (25)	1 (25)	0	57 (85)	9 (13)	0	1 (1)	0	0	0	0	0	0	0	4 (100)	0
Judicial District 1: New York County Supreme Court Criminal Term	189 (73)	*** 50 (19)	19 (7)	2 (1)	73 (74)	22 (22)	4 (4)	0	0	0	1 (50)	1 (50)	0	60 (85)	10 (14)	0	0	0	0	0	0	0	1 (8)	0	12 (92)	0
Judicial District 2: Supreme Court Kings County	196 (76)	*** 56 (22)	*** 5 (2)	2 (1)	148 (83)	27 (15)	3 (2)	1 (1)	0	6 (67)	2 (22)	1 (11)	0	83 (86)	14 (14)	0	0	0	0	1 (100)	0	0	1 (8)	0	12 (92)	0
Judicial District 2: Supreme Court Richmond County	19 (86)	*** 1 (5)	2 (9)	0	15 (100)	0	0	0	0	0	0	0	0	8 (100)	0	0	0	0	0	0	0	0	0	0	0	0
Judicial District 3: Albany, Columbia, Greene, Schoharie, Sullivan, Rensselaer	1 (100)	0	0	0	18 (95)	1 (5)	0	0	0	1 (100)	0	0	0	37 (100)	0	0	0	0	10 (100)	0	0	0	0	0	0	0
Judicial District 4: Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, Schenectady Saratoga, St. Lawrence Warren & Washington	7 (100)	0	0	0	7 (100)	0	0	0	0	0	0	0	0	31 (100)	*** 0	0	0	0	9 (100)	0	0	0	0	0	0	0
Judicial District 5: Herkimer, Jefferson, Lewis, Oneida, Onondaga, & Oswego	0	0	0	0	27 (90)	2 (7)	0	0	1 (3)	0	0	0	0	54 (98)	*** 0	1 (2)	0	0	15 (100)	0	0	0	0	0	0	0
Judicial District 6: Broome, Chenango, Chemung, Cortland, Delaware Madison, Otsego, Schuyler, Tioga, & Tompkins	1 (100)	0	0	0	4 (100)	0	0	0	0	0	0	0	0	29 (100)	*** 0	0	0	0	7 (100)	0	0	0	0	0	0	0
Judicial District 7: Cayuga, Livingston, Monroe, Ontario, Seneca Steuben, Wayne & Yates	0	0	0	0	14 (100)	0	0	0	0	0	2 (100)	0	0	60 (100)	*** 0	0	0	0	44 (98)	0	1 (2)	0	0	0	3 (100)	0

Table IV.4.1 Continued

	LAW CLERKS/ SECRETARIES				LAW ASSISTANTS				REFEREES HEARING EXAMINERS				OFFICE ASSISTANTS				JUDGES' SECRETARIES/TYPISTS				STENOGRAPHERS TYPISTS/CLERICALS					**** OTHER			
	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	NA	W	B	H	A
Judicial District 1: New York County Supreme Court Civil Term	29 (71)	12 (29)	0	0	36 (90)	2 (5)	2 (5)	0	7 (100)	0	0	0	2 (50)	2 (50)	0	0	23 (64)	9 (25)	4 (11)	0	10 (43)	8 (35)	4 (17)	1 (4)	0	6 (43)	6 (43)	1 (7)	1 (7)
Judicial District 1: New York County Supreme Court Criminal Term	12 (80)	3 (20)	0	0	4 (100)	0	0	0	0	0	0	0	4 (40)	5 (50)	1 (10)	0	10 (48)	9 (43)	2 (10)	0	8 (43)	7 (37)	2 (11)	2 (11)	0	6 (32)	11 (58)	2 (11)	0
Judicial District 2: Supreme Court Kings County	47 (92)	4 (8)	0	0	26 (93)	2 (7)	0	0	0	0	0	0	4 (29)	8 (57)	2 (14)	0	44 (88)	4 (8)	2 (4)	0	20 (51)	16 (41)	3 (8)	0	0	11 (73)	2 (13)	1 (7)	1 (7)
Judicial District 2: Supreme Court Richmond County	1 (100)	0	0	0	2 (100)	0	0	0	0	0	0	0	0	0	0	0	2 (100)	0	0	0	4 (100)	0	0	0	0	5 (100)	0	0	0
Judicial District 3: Albany, Columbia, Greene, Schoharie, Sullivan & Rensselaer	14 (100)	0	0	0	4 (100)	0	0	0	0	0	0	0	28 (100)	0	0	0	31 (97)	1 (3)	0	0	61 (100)	0	0	0	0	104 (100)	0	0	0
Judicial District 4: Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, Schenectady Saratoga, St. Lawrence, Warren & Washington	11 (100)	0	0	0	14 (100)	0	0	0	0	0	0	0	8 (100)	0	0	0	37 (100)	0	0	0	71 (100)	0	0	0	0	103 (99)	1 (1)	0	0
Judicial District 5: Herkimer, Jefferson, Lewis, Oneida, Onondaga, & Oswego	23 (100)	0	0	0	9 (100)	0	0	0	0	0	0	0	26 (93)	2 (7)	0	0	44 (98)	1 (2)	0	0	108 (92)	8 (7)	0	0	1 (1)	95 (100)	0	0	0
Judicial District 6: Broome, Chenango, Chemung, Cortland, Delaware Madison, Otsego, Schuyler, Tioga & Tompkins	11 (100)	0	0	0	12 (100)	0	0	0	0	0	0	0	16 (100)	0	0	0	31 (100)	0	0	0	76 (100)	0	0	0	0	82 (100)	0	0	0
Judicial District 7: Cayuga, Livingston, Monroe, Ontario, Seneca Steuben, Wayne & Yates	26 (100)	0	0	0	6 (86)	1 (14)	0	0	0	0	0	0	53 (93)	4 (7)	0	0	44 (98)	1 (2)	0	0	51 (89)	4 (7)	1 (2)	0	1 (2)	74 (93)	5 (6)	0	1 (1)

Table IV.4.1 Continued

	COURT OFFICERS					COURT & CHIEF CLERKS **					COURT AIDES				COURT REPORTERS					COURT ASSISTANTS				COURT INTERPRETERS			
	W	B	H	A	NA	W	B	H	A	NA	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A
Judicial District 8: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans & Wyoming	1 (100)	0	0	0	0	64 (96)	2 (3)	0	0	1 (1)	1 (100)	0	0	0	73 (97)	*** 1 (1)	0	0	1 (1)	19 (90)	2 (10)	0	0	0	0	0	0
Judicial District 9: Dutchess, Orange, Putnam, Rockland & Westchester	86 (92)	*** 6 (6)	2 (2)	0	0	79 (86)	8 (9)	5 (5)	0	0	1 (100)	0	0	0	82 (90)	9 (10)	0	0	0	16 (67)	6 (25)	2 (8)	0	0	0	0	0
Judicial District 10: Nassau County	210 (94)	*** 11 (5)	*** 3 (1)	0	0	134 (98)	3 (2)	0	0	0	4 (67)	2 (33)	0	0	82 (95)	*** 3 (3)	1 (1)	0	0	22 (100)	0	0	0	0	0	0	0
Judicial District 10: Suffolk County	226 (97)	*** 5 (2)	*** 2 (1)	0	1 (<1)	144 (97)	2 (1)	2 (1)	0	0	1 (100)	0	0	0	81 (99)	*** 1 (1)	0	0	0	32 (94)	2 (6)	0	0	2 (67)	0	1 (33)	0
Judicial District 11: Supreme Court Queens County	156 (80)	*** 28 (14)	*** 10 (5)	2 (1)	0	133 (63)	16 (31)	2 (4)	1 (2)	0	2 (67)	1 (33)	0	0	60 (86)	10 (14)	0	0	0	0	0	1 (100)	0	1 (50)	0	1 (50)	0
Judicial District 12: Supreme Court Bronx County	115 (65)	*** 37 (21)	26 (15)	0	0	77 (70)	25 (23)	8 (7)	0	0	0	2 (67)	1 (33)	0	54 (86)	8 (13)	1 (2)	0	0	2 (50)	2 (50)	0	0	2 (20)	0	8 (80)	0
New York City Civil Court	129 (79)	*** 30 (18)	*** 3 (2)	1 (1)	0	132 (73)	38 (21)	7 (4)	3 (2)	0	3 (50)	3 (50)	0	0	52 (84)	10 (16)	0	0	0	28 (64)	14 (32)	2 (5)	0	2 (11)	0	17 (89)	0
New York City Criminal Court	400 (73)	*** 106 (19)	43 (8)	0	0	178 (74)	52 (22)	10 (4)	0	0	2 (35)	5 (63)	1 (13)	0	77 (69)	33 (29)	2 (2)	0	0	27 (60)	13 (29)	4 (9)	1 (2)	4 (10)	3 (8)	32 (80)	1 (3)
New York City Family Court	118 (72)	*** 35 (21)	*** 8 (5)	4 (2)	0	63 (55)	38 (33)	12 (11)	1 (1)	0 0	1 (20)	2 (40)	2 (40)	0	30 (68)	12 (27)	2 (5)	0	0	36 (56)	25 (39)	3 (5)	0	4 (14)	0	25 (6)	0

Table IV.4. ...ontinued

	LAW CLERKS/ SECRETARIES				LAW ASSISTANTS					REFEREES HEARING EXAMINERS				OFFICE ASSISTANTS					JUDGES' SECRETARIES/TYPISTS				STENOGRAPHERS TYPISTS CLERICALS					OTHER ****				
	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A	NA	W	B	H	A	W	B	H	A	NA	W	B	H	A	NA
Judicial District 8: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans & Wyoming	34 (100)	0	0	0	16 (84)	2 (11)	1 (5)	0	0	1 (100)	0	0	0	68 (97)	2 (3)	0	0	0	55 (96)	2 (4)	0	0	106 (95)	6 (5)	0	0	0	108 (95)	6 (5)	1 (1)	0	1 (1)
Judicial District 9: Dutchess, Orange, Putnam, Rockland & Westchester	45 (100)	0	0	0	20 (100)	0	0	0	0	1 (100)	0	0	0	74 (83)	11 (12)	3 (3)	1 (1)	0	60 (92)	3 (5)	2 (3)	0	101 (89)	10 (9)	3 (3)	0	0	89 (92)	6 (6)	2 (2)	0	0
Judicial District 10: Nassau County	42 (100)	0	0	0	29 (97)	1 (3)	0	0	0	0	0	0	0	50 (83)	9 (15)	0	1 (2)	0	59 (98)	1 (2)	0	0	168 (82)	23 (11)	7 (4)	6 (3)	0	70 (91)	5 (6)	0	2 (3)	0
Judicial District 10: Suffolk County	36 (100)	0	0	0	27 (100)	0	0	0	0	1 (100)	0	0	0	61 (92)	4 (6)	0	0	1 (2)	50 (98)	1 (2)	0	0	147 (88)	11 (7)	5 (3)	0	4 (2)	75 (93)	5 (6)	1 (1)	0	0
Judicial District 11: Supreme Court Queens County	43 (91)	4 (9)	0	0	17 (100)	0	0	0	0	0	0	0	0	9 (82)	1 (9)	1 (9)	0	0	44 (94)	*** 3 (6)	0	0	13 (54)	8 (33)	3 (13)	0	0	11 (73)	3 (20)	1 (7)	0	0
Judicial District 12: Bronx County	16 (73)	3 (14)	3 (14)	0	14 (100)	0	0	0	0	2 (100)	0	0	0	0	5 (71)	2 (29)	0	0	12 (55)	4 (18)	6 (27)	0	5 (24)	13 (62)	3 (14)	0	0	6 (50)	5 (42)	1 (8)	0	0
New York City Civil Court	0	0	0	0	129 (82)	21 (13)	4 (3)	2 (1)	1 (1)	0	0	0	0	43 (49)	36 (41)	7 (8)	1 (1)	0	1 (100)	0	0	0	25 (34)	39 (53)	7 (10)	2 (3)	0	17 (71)	4 (17)	2 (8)	1 (4)	0
New York City Criminal Court	0	0	0	0	65 (96)	2 (3)	0	1 (1)	0	0	0	0	0	39 (28)	84 (60)	14 (10)	2 (1)	0	1 (100)	0	0	0	15 (20)	51 (68)	9 (12)	0	0	15 (52)	10 (34)	4 (14)	0	0
New York City Family Court	0	0	0	0	29 (74)	5 (13)	3 (8)	2 (5)	0	0	0	0	0	11 (24)	29 (64)	5 (11)	0	0	1 (100)	0	0	0	12 (24)	31 (62)	6 (12)	1 (2)	0	21 (62)	7 (21)	6 (18)	0	0

Table IV.4.1 Continued

	COURT OFFICERS				COURT & CHIEF CLERKS **				COURT AIDES				COURT REPORTERS				COURT ASSISTANTS				COURT INTERPRETERS			
	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A
Surrogates Court Bronx County	1 (50)	1 (50)	0	0	6 (75)	1 (13)	1 (13)	0	1 (17)	2 (33)	3 (50)	0	1 (100)	0	0	0	0	0	0	0	0	0	0	0
Surrogates Court Kings County	0	0	0	0	9 (100)	0	0	0	10 (83)	2 (17)	0	0	3 (100)	0	0	0	5 (100)	0	0	0	0	0	0	0
Surrogates Court New York County	1 (50)	1 (50)	0	0	9 (75)	3 (25)	0	0	2 (33)	3 (50)	1 (17)	0	2 (67)	1 (33)	0	0	0	0	0	0	0	0	0	0
Surrogates Court New York County	0	2 (100)	0	0	14 (58)	9 (38)	0	1 (4)	4 (57)	2 (29)	1 (14)	0	2 (66)	1 (33)	0	0	0	0	0	0	0	0	0	0
Surrogates Court Queens County	0	0	0	0	7 (88)	0	1 (13)	0	2 (40)	1 (20)	1 (20)	1 (20)	2 (100)	0	0	0	2 (100)	0	0	0	0	0	0	0
Surrogates Court Richmond County	0	0	0	0	2 (100)	0	0	0	0	0	2 (100)	0	1 (100)	0	0	0	0	0	0	0	0	0	0	0

Table IV.4.1 Continued

	LAW CLERKS/ SECRETARIES				LAW ASSISTANTS				REFEREES HEARING EXAMINERS				OFFICE ASSISTANTS				JUDGES' SECRETARIES/TYPISTS				STENOGRAPHERS TYPISTS/CLERICALS				OTHER ****			
	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A	W	B	H	A
Surrogates Court Bronx County	1 (100)	0	0	0	2 (100)	0	0	0	1 (50)	1 (50)	0	0	0	0	2 100)	0	1 (100)	0	0	0	2 (40)	0	2 (40)	1 (20)	3 (33)	4 (44)	2 (22)	0
Surrogates Court Kings County	1 (100)	0	0	0	3 (100)	0	0	0	4 (100)	0	0	0	3 (60)	1 (20)	1 (20)	0	1 (100)	0	0	0	1 (33)	2 (67)	0	0	9 (64)	5 (36)	0	0
Surrogates Court New York County	2 (100)	0	0	0	5 (100)	0	0	0	3 (100)	0	0	0	5 (31)	6 (38)	5 (31)	0	1 (50)	1 (50)	0	0	2 (50)	2 (50)	0	0	11 (55)	8 (40)	0	1 (5)
Surrogates Court New York County	2	0	0	0	6	0	0	0	3	0	0	0	8	4	4	0	2	0	0	0	2	3	0	0	5	2	0	0
Surrogates Court Queens County	1 (100)	0	0	0	2 (100)	0	0	0	2 (100)	0	0	0	3 (50)	3 (50)	0	0	1 (100)	0	0	0	2 (67)	1 (33)	0	0	6 (55)	4 (36)	1 (9)	0
Surrogates Court Richmond County	1 (100)	0	0	0	1 (100)	0	0	0	1 (100)	0	0	0	2 (100)	0	0	0	0	0	0	0	2 (100)	0	0	0	4 (80)	0	1 (20)	0

The following represents a summary of these findings of statistically significant under-representation:

Court Officers:

- Black Court Officers in the Appellate Department First Division; 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 the 11th District.

IX. 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 legal impediments to the voluntary adoption of an affirmative action plan by the UCS.[66] The remedy proposed calls for precise remediation, limited to correcting prior discrimination without unduly foreclosing employment opportunities for nonminority candidates.

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[66] Interim Report, supra note 5, at 15.

However, in light of the uncertainty regarding the direction in which anti-discrimination law will move, caution should be exercised. The Workforce Diversity Plan should be reviewed in light of recent affirmative action decisions.[67] In particular, the following questions should be addressed by OCA 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?[68]

APPENDIX: CHIEF JUDGE WACTHLER'S REPORT ON IMPLEMENTATION OF THE WORKFORCE DIVERSITY PROGRAM

The following pages reprint Chief Judge Wachtler's report on implementation of the Workforce Diversity Program in 1990, as presented in State of the Judiciary 1990.

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[67] See Interim Report, supra note 5, at 25 note 29 (listing cases).

[68] Findings and Recommendations for chapters 4 through 8 appear at pages 215-219, infra.

The Workforce Diversity Program: In January, 1988, I established the New York State Judicial Commission on Minorities, an 18-member body, intended to advise Chief Administrator Crosson and myself on ways in which the Unified Court System can more effectively achieve fair and equal treatment for all in the courts of New York State, by examining the treatment accorded minority lawyers, court personnel, judges, and litigants within the court system. The Commission . . . was headed initially by Franklin H. Williams, former Ambassador to Ghana. As a result of Ambassador Williams' untimely and tragic death [in 1990], James C. Goodale, an attorney from New York City and former Vice Chairman of the Commission, assumed the Commission's leadership in its remaining days. Joining Mr. Goodale on the Commission are men and women of experience and accomplishment, with proven records in civil rights, in government, in their professional disciplines and, in the legal profession.

In 1989, following a request by the Commission, the Office of Court Administration completed a report on the Participation of Minorities in the Non-judicial Workforce of the New York State Unified Court System. The report was a comprehensive availability utilization analysis designed to compare the court system's current employment of minorities and women in specific job groups, with the percentages of available minorities and women in the relevant labor force who had the requisite skills and job-related qualifications.

As we reported [in 1989], the result of the analysis revealed that the rates of participation by minorities and women in the Unified Court System workforce in many of the specific job groups paralleled or exceeded their availability in the qualified and relevant labor markets. The report clearly identified, however, particular job groups in which minorities and women were underrepresented. With the report's findings as a basis, a group consisting of Deputy Chief Administrative Judges Robert J. Sise and Milton L. Williams, Deputy Chief Administrator for Management Support Jonathan Lippman, and New York City Family Court Administrative Judge Kathryn McDonald, who is Chair of the New York Judicial Committee on Women in the Courts, was appointed to prepare a plan which would permit the court system to move forward with affirmative steps to give life to the court system's firm commitment to principles of equal employment opportunity.

The result of that group's work was the Workforce Diversity Program issued by Chief Administrator Crosson and I in January of [1990]. The program, which has been formally adopted for the court system, consists of a series of management initiatives aimed at broadening the pool of candidates both in general and for specific job groups with a demonstrated underrepresentation of minorities and women. The initiatives contained in the program are aimed at identifying minority and women candidates from outside the court system, and at developing current employees, including minorities and women, for promotional opportunities within the court system.

Women's Participation in the Unified Court System			
Occupational Groups	% of UCS Workforce (Oct 1990)	% Women Employed by Occupational Group in the UCS	
		June 1989	October 1990
All Employees	100.0%	52.2%	53.7%
Office Clerical	26.4%	91.1%	91.0%
Court Security Series (NYC, LI & Westchester)	19.4%	16.0%	16.7%
Court Clerks (Trial level-all titles)	13.3%	33.4%	36.5%
Attorneys	10.9%	35.5%	38.9%
Court Reporters (Ct. Reporters & Sr. Ct. Reporters)	8.7%	57.1%	62.1%
Officials & Administrators	4.4%	49.0%	47.0%
Court Assistants	3.1%	72.8%	73.9%
Analysts (Ct. Budget, Personnel, & Mgt.)	2.1%	56.6%	58.4%
Court Interpreters	1.2%	65.9%	62.3%
Data Processing (Syst. Analysts, Prog. & Operators)	0.5%	29.1%	28.6%
Other Occupational Groups & Positions	9.9%	56.8%	56.1%

Implementation of the Workforce Diversity Program was begun by establishing hiring and promotional goals and time tables for each judicial district outside of New York City, for each court and county clerk's office within New York City, and for the Office of Court Administration. The goals and time tables were developed through a cooperative process with the local court and agency managers who would have responsibility for implementing them. Local minority and women's participation in the courts was compared with geographically relevant minority and women's availability data. And comparisons of current actual minority and

Minority Participation in the Unified Court System			
Occupational Groups	**% of UCS Workforce (Oct 1990)**	**% Minorities Employed by Occupational Group in the UCS**	
		June 1989	**October 1990**
All Employees	100.0%	19.9%	21.1%
Office Clerical	26.4%	26.9%	28.6%
Court Security Series (NYC, LI & Westchester)	19.4%	21.5%	21.0%
Court Clerks (Trial level-all titles)	13.3%	18.5%	19.8%
Attorneys	10.9%	7.9%	8.2%
Court Reporters (Ct. Reporters & Sr. Ct. Reporters)	8.7%	11.6%	12.6%
Officials & Administrators	4.4%	3.3%	4.3%
Court Assistants	3.1%	23.8%	26.9%
Analysts (Ct. Budget, Personnel, & Mgt.)	2.1%	23.1%	22.7%
Court Interpreters	1.2%	87.9%	85.6%
Data Processing (Syst. Analysts, Prog. & Operators)	0.5%	8.9%	9.5%
Other Occupational Groups & Positions	9.9%	18.6%	23.1%

women's participation with availability in the general labor force led to job specific hiring and promotional goals. Time-tables for each of the goals were established based on turnover statistics for the job in that location over the last several years. This process insured that the goals and time tables established for each location and agency throughout the court system were practicable.

The responsibility for meeting these goals and time tables was explicitly placed upon executive managers throughout the court system - executive assistants, chief clerks, county clerks, and OCA unit directors. Each manager's

success in meeting goals and timetables is now part of his or her annual performance evaluation. To assist them in the outreach and recruitment effort, each manager has designated a liaison to the Diversity Program, and funding has been requested from the Legislature to establish these diversity liaison positions on a permanent basis.

To address the problem of underrepresentation of minorities and women in the higher-ranking non-judicial positions within the court system, the Workforce Diversity Program required inclusion of at least one minority and one woman on the interview panels established for those positions, the use of structured interviews to insure objective, job-related interviews, and the submission of a statement of recruitment of hiring efforts by managers when filling positions included in the local hiring goals and timetables.

Additionally, the Workforce Diversity Program called for development of preparatory material for competitive examinations that have been identified as leading to higher-level jobs in the court system. Materials for that purpose were developed and distributed statewide this year for the Court Assistant examination, and videotape study materials for the Court Clerk and Senior Court Clerk examinations scheduled for the spring of 1991 are currently being prepared.

The court system also had eliminated geographical promotion units for trial-level courts and for the Office of Court Administration in favor of a single statewide promotional unit. We anticipate that this change will allow job candidates seeking to come into the court system, as well as current employees, a greater choice of job opportunities throughout the State.

To encourage minority and female candidates to apply for future employment in the court system, we have created several mentoring and internship programs. Working with the Association of Black Shorthand Reporters, we developed a Court Reporter Student Mentor Program that matches advanced court reporting students with Senior Court Reporters to develop the students' confidence and sense of professionalism. Additionally, we have begun a variety of college-level management mentoring programs. And this past summer, we conducted the firs centralized, paid legal internship program, in which about 50 law students participated in five locations throughout the State.

Finally, because the Workforce Diversity Program recognizes that the court system must do more than simply pay attention to how job vacancies are filled, we have implemented a comprehensive Cultural Diversity Training Program. The first stage of this unique program, which was developed with the assistance of outside consultants, was completed during the fall. Within the next few months, all court personnel will participate in a workshop on working in a multi-cultural environment. Additionally, court personnel who deal extensively with the public will participate in a second workshop on effective delivery of public service in a multi-cultural environment. Both programs have been incorporated into the curriculum of the Court Officer Training Academy, and will be included in all orientation courses for new employees. The executive and mid-level managers within the court system have already participated in seminars on managing within a diverse workforce, and that training will be continued on an in-service basis.

A great deal has been accomplished since January of this year when the Workforce Diversity Program was issued. We have more to do. The Workforce Diversity Program and its implementation give life to a fundamental policy of New York's court system: equal treatment and equal opportunity within a truly diverse non-judicial workforce.

DISSENT OF COMMISSIONER SERENE K. NAKANO

I respectfully dissent from the finding of the majority that the Office of Court Administration (OCA) did not adopt a 1979 draft affirmative action plan for nonjudicial employees because "no one at OCA took the initiative to see that it was approved." The Commission reached a similar conclusion in its 1989 Interim Report. Information before the Commission, however, has been made more complete since that report was issued. Thus, the present finding both distorts the full record and fails adequately to address the innovative measures that have since been implemented.

According to the Draft OCA Affirmative Action Plan itself, prepared in cooperation with EEO Compliance Services, Inc., a consulting firm:

> [i]n May, 1979, the overall job structure for the State was reclassified so as to place all jobs within one of 10 occupational series. In some cases new job titles were assigned; in some cases the titles were earmarked for deletion when the incumbent leaves the post. Also, changes were made in the Juris Class for many jobs. The work force listing on which this Affirmative Action Program is based was derived from an April 1979 payroll, prior to the Reclassification. Therefore, all of the analyses have been made using the old job titles.[1]

Asal Lesser, president of EEO Compliance Services, Inc., testified before this Commission and confirmed that: "There was a reclassification of the various jobs in 1979. . . . That part of [the 1979 draft plan] would be held over."[2]

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[1]Office of Court Administration, Affirmative Action Plan 14 (Apr. 1979) (Draft) (emphasis added).

[2]New York State Judicial Commission on Minorities, Open Meeting 19 (Dec. 16, 1988) (New York City) (testimony of Asal Lesser).

My own review of the 1979 OCA reclassification plan indicates that numerous changes were made in job titles and responsibilities.[3] Understandably, therefore, the 1979 draft affirmative action plan, which preceded the reclassification, was not implemented.

Moreover, some 30 of the 33 recommendations listed in the 1979 draft affirmative action plan -- recommendations that did not depend upon job titles and responsibilities as a means of setting flexible goals and timetables to enhance the hiring of minority nonjudicial employees -- were in fact implemented by OCA. A full description of these is included in the Appendix to the Commission's report.[4]

As the Commission's late Chair, Hon. Franklin H. Williams, makes plain in his Letter of Transmittal of this report to the Chief Judge, the Workforce Diversity Program implemented as a result of the 1989 utilization analysis has "established New York as the standard-bearer for affirmative action at its best."[5] Indeed, OCA has since instituted a comprehensive program to train all court personnel to work in a multi-cultural environment.[6] These were most important accomplishments of both the Commission and OCA. Adhering to factual inaccuracies in the history of this important joint effort is therefore misplaced.

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[3] See New York State Office of Court Administration, Classification Structure for Nonjudicial Positions in the Unified Court System (May 28, 1979) (providing for new titles and classifications).

[4] Letter and Memorandum from Matthew T. Crosson to Hon. Franklin H. Williams (July 20, 1989).

[5] Letter from Hon. Franklin H. Williams to Hon. Sol Wachtler (May 16, 1990).

[6] 1990 S. Wachtler, The State of the Judiciary 67.

CHAPTER FIVE TESTING ALTERNATIVES

CHAPTER 5

TESTING ALTERNATIVES

The present testing system used by the UCS has not resulted in a diverse work force. Despite the comprehensiveness of the Workforce Diversity Program, this is another issue that remains to be addressed. The Commission is concerned about the type of examinations used to assess the qualifications of potential employees and of current employees seeking promotion. 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[1] with nonjudicial employees of the UCS expressed the view that some tests are insufficiently job-related. This conclusion followed from the experiences of minority employees who had been performing certain jobs competently as provisionals, but were unable to pass the examination for those very same jobs. As one OCA employee observed, "[t]here seems to be something wrong with an exam that is testing the job knowledge of someone who has been on the job for years and yet cannot pass the exam."[2] It was also reported that after examinations were given, certain questions were later eliminated with concomitant changes in examination scores.[3] OCA has since indicated that some questions were eliminated because they had been found not to be job-related, thereby raising the issue of the job-relatedness of other testing measures being

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[1]Two focus sessions were conducted by the Commission with OCA employees, including minority group members, chosen because of their years of experience in the system.

[2]Meeting of the Advisory Committee Mar. 30, 1989 (internal memorandum on file).

[3]Id. This assertion is contested by OCA. See infra note 11 for result of informal conference between Commission counsel and Philip Ferrara, Mgr., Selection & Placement for OCA (Mar. 5, 1991) [hereinafter Ferrara].

used.[4] Accordingly, the Commission has reviewed the history of certain UCS examinations and explored alternatives to current testing methods.

I. CURRENT TESTING METHODS

In recent years, the UCS has reduced the number of jobs lacking objective hiring criteria, and has devoted substantial resources to establishing a unit which validates its testing measures and which has experimented with testing alternatives.[5] Nevertheless, the agency still holds fast to the traditional method of testing. The failure of the UCS to recognize the limitations of this testing method has resulted in criticism and, indeed, litigation over its most significant entry-level examinations -- the examinations for court officers.[6]

a. 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 and one with very low turnover. Thus, it is little wonder that over 70,723 persons sat for the court officer examination given on November 22, 1986.[7] The Commission does not know whether "disparate impact" analyses have been conducted with respect to this examination. However, if they are consistent with prior court officer examinations and more recent examinations given in analogous security positions

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[4] Ferrara, supra note 3.

[5] Id. The assessment center approach to testing began in fall 1987 for the screening of new court security titles, spec., associate principal court officers I & II.

[6] Cuesta v. State of New York Office of Court Administration, 657 F. Supp. 1084 (S.D.N.Y. 1987), aff'd 888 F. 2d 125 (2d Cir. 1989).

[7] Ferrara, supra note 3. Of the 120,665 applicants, 70,723 sat for the exam, and 23,965 passed. Id.

(e.g., the New York City sergeants and police officer examinations), minorities will fail disproportionately in comparison to white candidates.[8]

The Commission's Interim Report detailed the history of the court officer examination administered in 1977. Although the examination had an adverse impact on minorities, the UCS defended its validity notwithstanding its adverse impact, and a federal court agreed that it was not impermissibly discriminatory.[9] The Commission hopes that history will not repeat itself, but fears that it will so long as the UCS relies solely on traditional testing methods in making employment decisions.

b. Data Entry Examination: Up until 1986, the data entry position was filled through discretionary appointment.[10] Among those who were first employed in the position were former clients of CETA, a program that sought to provide job opportunities for low income persons. Most of the individuals initially hired in the position were black and Hispanic women. In its effort to standardize job entry, the UCS began to test for this position. The test employed required candidates to keypunch information onto computer cards.[11]

The controversy surrounding the administration and grading of the 1986 data entry examination remains alive to this date. The Commission received information about this

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[8] Ferrara, supra note 3.

[9] Cuesta v. State of New York Office of Court Administration, supra note 6.

[10] OCA has described these pre-1986 appointments as "off the street" appointments, without formal testing or screening. See Ferrara, supra note 3.

[11] Ferrara, supra note 3. The 1986 examination was essentially of two parts: a keyboard test (75%); and a written test (25%). The latter part consisted of two sub-tests: name/number checking and filing. The filing test was subsequently dropped because "[it] was not working properly . . . [there was] a problem with directions . . . [it] did not differentiate between high and low scores. [It had] no effect on pass/fail rate." Id.

examination from a number of sources, including witnesses at public hearings and persons who had passed or failed the examination. The important message that emerged from these sources is that incumbents could not pass data entry examinations despite their many years of satisfactory performance on 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 force and further undermine the UCS's credibility in minority communities. There are no impediments in the law to the UCS searching for and utilizing valid ways of screening candidates that have no disproportionate impact on minorities, and given the UCS's concern with justice and the appearance of justice, a significant effort should be directed to identifying and implementing such measures.[12]

II. 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.[13]

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 employment testing. The limitations of traditional measures of competency are now widely acknowledged, and efforts

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[12] According to OCA, minorities currently occupy 61.5% of all data entry clerk positions statewide and that the figure is well in excess of 75% in New York City. Ferrara, supra note 3.

[13] National Commission on Testing and Public Policy, From Gatekeeper to Gateway: transforming testing in America 32 (1990).

are being made to create more accurate measures of the capabilities of a culturally diverse applicant pool. To this end, the work of the National Commission on Testing and Public Policy is important to institutions like the UCS that are seeking to identify the proper balance between traditional and alternative forms of testing. Among the relevant findings of the Testing Commission are the following:

> **Tests may mislead as indicators of performance.** Test scores are at best an estimate of someone's knowledge or ability, and can be affected by numerous outside factors. Inevitably, some who could perform successfully will "fail" tests and thus risk being misclassified and erroneously denied opportunity.[14]
>
> **Testing can result in unfairness.** All tests are to some extent culturally dependent; society has not yet been able to extend educational opportunities to all -- hence the score gap between minority and majority groups.[15]
>
> * * *
>
> Not only black Americans, but also Hispanics, American Indians, native Pacific Islanders, some Asian Americans, and other minorities, tend to score significantly lower than their majority peers on many tests. These group differences are large and fairly consistent on tests ranging from kindergarten entry tests to tests used in elementary and secondary schools, and from college and post-college admissions tests to vocational aptitude and employment tests.[16]

Relevant recommendations of the National Commission on Testing and Public Policy include the following:

> 1. Testing policies and practices must be reoriented to promote the development of all human talent.
>
> * * *

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[14] Id. at ix.

[15] Id.

[16] Id. at 11.

2. Testing programs should be redirected from overreliance on multiple-choice tests towards alternative forms of assessment.

* * *

3. Test scores should be used only when they clearly differentiate on the basis of characteristics relevant to the opportunities being allocated.

* * *

4. The more test scores disproportionately deny opportunities to minorities, the greater the need is to show that the tests measure characteristics relevant to the opportunities being allocated.

* * *

5. Test scores are imperfect measures and should not be used alone to make important decisions about individuals, groups or institutions; in the allocation of opportunities, individual's past performance and relevant experience must also be considered.

* * *

6. More efficient and effective assessment strategies are needed to hold institutions accountable.

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7. The enterprise of testing must be subjected to greater public accountability.[17]

III. 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. UCS should continue to review and develop assessment techniques that allow for the consideration of an individual's past performance and relevant experience. Such an approach recognizes the need to assess a wide range of information about a candidate in order to assess accurately the candidate's capacity to

[17] Id. at x-xi.

perform in a particular job. In this context, the Commission underscores the importance of recognizing cross-cultural competence as a relevant hiring and promotion criteria. This qualification can be objectively assessed on the basis of evidence that an individual -- because of heritage, background, education or experience -- has demonstrated successful relationships with people of cultures different from the dominant culture.

The Commission's Interim Report noted the underrepresentation of minority employees in positions such as court security officers, that involve daily contact with a culturally diverse public.[18] The attitudes and behavior of these employees determine, in large measure, how the public perceives the court system. The Commission recommended that the UCS make cross-cultural competence a necessary qualification for employment in such positions.

More generally, the UCS must recognize the changing nature of the state's work force.[19] The pool of white male workers will shrink over the next decade. Private industry is already developing strategies to address this trend. Similarly, a pressing need exists substantially to restructure the UCS's methods of assessing qualifications to ensure that screening methods are used that validly measure the relative potential of candidates from many different cultural backgrounds. Alternatives to traditional tests include the use of,

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[18] New York State Judicial Commission on Minorities, Interim Report 3 (July 1989).

[19] See ch. 4 The Nonjudicial Work Force, infra pp. 157-158.

among others, work sample tasks,[20] biodata forms[21] and assessment centers.[22] All of these techniques have been used successfully in other arenas. Zone scoring of traditional tests has also been upheld as a valid means of increasing minority representation.[23]

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[20]For example, an examinee can be asked to perform a task or set of tasks directly related to the job in question.

[21]Biodata questionnaires assess job applicants on the basis of their personal biographical history. Various items of information pertaining to an individual's personal history are given mathematical weights to produce a score for each applicant.

[22]The assessment center approach attempts to predict future performance based upon an objective assessment of the individual's behavior in situational exercises involving problem-solving and role-playing.

[23]With zone scoring, all raw scores in a particular range are assigned a single zone score. For example, all raw scores of 88.0 to 89.9 might be assigned a zone score of 89. The New York Court of Appeals has ruled that this technique does not per se violate art. V, § 6 of the New York State Constitution. McGowan v. Burstein, 71 N.Y.2d 729, 525 N.E.2d 710, 530 N.Y.S.2d 64 (1988).

CHAPTER SIX THE COURT OFFICER PROBLEM

CHAPTER 6

THE COURT OFFICER PROBLEM

> 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.[1]

Because, in many instances, court officers are the first representatives of the court system to meet the public, their conduct establishes many of the negative perceptions concerning the fairness of the court system, discussed in the chapter entitled "Perception, Court Facilities, Treatment and Utilization of the Courts" of this report. Moreover, as discussed in the chapter entitled "The Legal Profession," the Commission learned that court officers are often rude and insensitive to minority litigators.

The relation between minority underrepresentation and the perception of bias is clear. Therefore, the Commission concludes that more can be done to rectify the court officer problem. First, measures should be taken to cure the severe underrepresentation of Blacks and, to a lesser extent, Hispanics, among court officers.[2]

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[1] New York State Judicial Commission on Minorities, Responses to Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom [hereinafter Litigators' Questionnaire].

[2] See ch. 4, The Nonjudicial Work force, infra pp. 172-180.

- 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 Counties), 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.

Second, testing methods should be improved as discussed in Chapter 5. In an effort to "professionalize" the court security position, the UCS created the Court Officer Security Program.[3] The process put in place included an attempt to decrease reliance on standardized testing.[4] However, something clearly 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.[5] Whether this is true or not, the Commission notes that minority groups were underrepresented among those appointed. If the process were operating equitably, and the race/ethnic distribution of appointees reflected the race/ethnic distribution of applicants, approximately eight Blacks, two Hispanics and one Asian American would have been appointed.[6] Despite the fact that the requisite number of Blacks, Hispanics and Asian Americans passed the test and the assessment center process with ratings of "highly qualified," no Hispanics or Asian Americans, and only five Blacks were appointed.[7]

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[3]State of New York Unified Court System, Managing the Courts: Management and Productivity Initiatives of the Unified Court System 1985-1990 66-67 (1990).

[4]Informal meeting by Commission counsel with John Perno, Court Security Services, Feb. 26, 1991 (the attempt to decrease reliance on standardized testing is reflected in the institution of training in the following areas: gender bias; cultural diversity; dealing with the public; interpersonal community relations; infectious disease; conflict resolution).

[5]See 1 New York State Judicial Commission on Minorities, New York City Public Hearing 125 (June 29, 1988) (testimony of Wilfred Trotman, President, Tribune Society, regarding "old-boy network within the court system"), 4 id. at 742 (June 30, 1988) (testimony of Senior Court Officer Joaquin Quinones that "[s]ome of the things that happened were officers were discouraged; it's all fixed, you can't get the job").

[6]Holmes, New York State Judicial Commission on Minorities, Interim Summary Relevant to Sub-Committee 2: Nonjudicial Officers of the Court, 10-12 (Aug. 12, 1988).

[7]Memorandum from Phil Ferrara (Mgr. Selection & Placement, OCA) to Linda Chin, Jan. 11, 1989.

Third, in view of the large numbers of both judges and litigators who believe that cross-cultural sensitivity training is important, a program to sensitize court officers should be applauded.

The Commission asked litigators and judges questions regarding their beliefs as to whether minorities are underrepresented among nonjudicial personnel and the importance of cultural/racial sensitivity training. Judges were also asked to describe their satisfaction as to the competence of nonjudicial personnel and their interaction with the public.

Litigators were asked to rate the importance of "greater numerical representation of minorities among nonjudicial personnel in the courtroom" and of "the training for nonjudicial personnel on cultural/racial sensitivity."[8] Ratings were "very important," "important," "somewhat important," and "not important." These data are provided in Table IV.6.1.

[8] New York State Judicial Commission on Minorities, Questionnaire for Litigators in New York State on Issues Relating to Professional Experiences and Perceptions of Fairness and Sensitivity in the Courtroom 12 (Mar. 16, 1989) (reproduced as Appendix A to the Report of Findings From A Survey of New York State Litigators in vol. 5 of this report).

Table IV.6.1.
Litigators' Ratings as to the Importance of Greater Representation of Minorities and Sensitivity Training for Nonjudicial Personnel
(Numbers in parentheses are percentages)

	NEW YORK CITY												OUTSIDE NYC						TOTAL		
	WHITE			BLACK			HISPANIC			ASIAN			WHITE			MINORITY					
	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor	Very Impor/ Impor	Some-what Impor	Not Impor
Importance of greater minority representation among nonjudicial personnel.	51 (35.5)	45 (31.5)	47 (33.0)	119 (90.2)	13 (9.8)	0	99 (76.8)	28 (21.7)	2 (1.6)	48 (64.9)	17 (23.0)	9 (12.2)	62 (41.5)	53 (35.6)	34 (22.9)	91 (90.1)	7 (6.9)	3 (3.0)	470 (64.5)	164 (22.4)	96 (13.1)
Importance of training non-judicial personnel on cultural/racial sensitivity.	86 (59.7)	41 (28.9)	17 (11.5)	117 (89.3)	8 (6.1)	6 (4.6)	109 (84.5)	16 (12.4)	4 (3.1)	48 (64.8)	23 (31.1)	3 (4.1)	75 (49.6)	46 (30.7)	29 (19.7)	85 (84.2)	13 (12.9)	3 (3.0)	519 (71.3)	147 (20.2)	62 (8.5)

Overall, nearly two thirds (65%) of litigators stated that increasing the number of minority personnel is "important/very important." Thirty-six percent of white, 90% of black, 77% of Hispanic, and 65% of Asian-American litigators in New York City, and 42% of white, and 90% of minority, litigators outside New York City, rated increased minority representation as "important/very important." Significantly more Asian-American and Hispanic than white litigators gave "importance" ratings to this issue; the response of Blacks in New York City and minorities outside New York City was significantly different from the white and Asian-American response. It is apparent that this is an issue of considerable importance to minority litigators. Although the Asian-American response is often milder than the black response, it is noteworthy that nearly two thirds of Asian-American litigators rated this issue as "important/very important."

Litigators expressed opinions pertaining to the minority representation among nonjudicial personnel. An Hispanic litigator in New York City stated:

> 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 fair treatment under the law.[9]

Seventy-one percent of all litigators rated training for nonjudicial personnel on cultural/racial sensitivity as "important" or "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.

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[9] Litigators' Questionnaire, supra note 1.

Judges were asked to rate their satisfaction with their nonjudicial personnel in terms of competence, dedication, and quality of interaction with the public.[10] These findings are provided in Table IV.6.2.

Table IV.6.2
Judges' Ratings as to Satisfaction with the Competence, Dedication and Interaction with the Public of Nonjudicial Personnel
(Numbers in parentheses are percentages)

	WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
	Very Satis-fied	Satis-fied	Dis-satis-fied	Very Dissat isfied	Very Satis-fied	Satis-fied	Dis-satis-fied	Very Dissat isfied	Very Satis-fied	Satis-fied	Dis-satis-fied	Very Dissat isfied
Competence	260 (47.2)	263 (47.7)	26 (4.7)	2 (0.4)	26 (35.1)	43 (58.1)	5 (6.8)	0 (0.0)	286 (45.8)	306 (49.0)	31 (5.0)	2 (0.3)
Dedication	226 (41.0)	269 (48.8)	50 (9.1)	6 (1.1)	18 (24.7)	47 (64.4)	7 (9.6)	1 (1.4)	244 (39.1)	316 (50.6)	57 (9.1)	7 (1.1)
Interaction with the public	200 (36.8)	301 (55.3)	41 (7.5)	2 (0.4)	16 (22.2)	45 (62.5)	9 (12.5)	2 (2.8)	216 (35.1)	346 (56.2)	50 (8.1)	4 (0.6)

There were no differences between white and minority judges in terms of their satisfaction with the competence of nonjudicial personnel. The large majority of both white and minority judges were either "very satisfied" or "satisfied" (95% of white and 93% of minority judges).

There was a significant difference in the degree of satisfaction expressed by white and minority judges as to the dedication of courtroom personnel. Whereas only 25% of minority judges were "very satisfied.", 41% of white judges were "very satisfied." However, relatively

[10] New York State Judicial Commission on Minorities, Questionnaire for Judges in New York State on Issues Relating to Judicial Selection and Perceptions of Fairness and Sensitivity in the Courtroom 11 (undated) reproduced as Appendix A to the Report of Findings From A Statewide Survey of the New York Judiciary in vol. 5 of this report) [hereinafter Blank Judges' Questionnaire]

few judges in either group were "dissatisfied" or "very dissatisfied" (4% white; 11% minority).

There was also a significant difference in judges' satisfaction with how courtroom personnel interact with the public. Whereas 37% of white judges were "very satisfied," only 22% of minority judges were "very satisfied." Moreover, nearly twice as many minority (15%) as white (8%) judges were "dissatisfied" or "very dissatisfied." Despite these differences, the great majority of both white and minority judges were "satisfied" or "very satisfied" (92% white; 85% minority).

Among New York City judges, those who presided over "ghetto courts" (Family Court, Criminal Court, Civil Court, and Housing Court) were significantly less satisfied with the quality of interaction with the public by nonjudicial personnel than other judges. Almost one in five (18%) judges in New York City "ghetto courts" were "dissatisfied" or "very dissatisfied" with the nonjudicial personnel's interaction with the public; the comparable figure for other New York City judges was only 8%. There were no significant differences on these items between judges who presided over exclusively criminal or civil courts. One white judge expressed dissatisfaction as follows:

> The present term rotation of court officers and six month rotation of court clerks and law assistants makes it quite impossible to create the team play that should pervade Housing Court. The Housing Judges have no say over those selections. The Housing Judges have no "personal staff," though a law assistant position was created about four years ago that greatly increased the capacity to do a competent job. At present I have a more than perfect court clerk and law assistant. The prior six months the court clerk was incompetent and gruff. The court officers are a totally mixed bag. Yes, they presently provide security (I never had an "incident" in my courtroom) but for the most part they do not perceive that they are there to assist the public. If underlying

their job is help to the public and I think it should be, I'm distressed and dissatisfied . . . .[11]

Judges were also asked to rate the importance of training for nonjudicial personnel on cultural and racial sensitivity.[12] These data are provided in Table IV.6.3.

Table IV.6.3.
Judges' Ratings as to the Importance of Training Nonjudicial Personnel on Cultural/Racial Sensitivity
(Numbers in parentheses are percentages)

WHITE JUDGES				MINORITY JUDGES				TOTAL JUDGES			
Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important	Very Important	Important	Somewhat Impor.	Not Important
150 (28.8)	207 (39.7)	124 (23.8)	40 (7.7)	47 (67.1)	14 (20.0)	8 (11.4)	1 (1.4)	197 (33.3)	221 (37.4)	132 (22.3)	41 (6.9)

The difference between white and minority judges was statistically significant and striking. Sixty-seven percent of minority judges and 29% of white judges rated such training as "very important." It is noteworthy, however, that 40% of white judges rated such training as "important," so that overall more than two thirds (69%) of white judges gave "important" or "very important" as their response. Among minority judges, 87% rated such training as "important" or "very important." It is interesting to note that judges' ratings of the importance of training for nonjudicial personnel were very similar to their ratings of the importance of such training for judges, as discussed in Chapter 3. Very similar proportions

[11] New York State Judicial Commission on Minorities, Responses to Questionnaire for Judges in New York State on Issues Relating to Perception of Fairness and Sensitivity in the Courtroom [hereinafter Judges' Questionnaire].

[12] Blank Judges' Questionnaire, supra note 10, at 16.

of both white and minority judges endorsed the importance of training for both judicial and nonjudicial personnel.

The need for training of court personnel was summarized by one white judge as follows:

> 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. The minority judges and lawyers they see are dismissed as exceptions to the rule. Training for nonjudicial personnel on cultural/racial sensitivity is a void that must be filled.[13]

[13] Judges' Questionnaire, supra note 11.

CHAPTER SEVEN THE NONJUDICIAL WORK ENVIRONMENT

CHAPTER 7

THE NONJUDICIAL WORK ENVIRONMENT

Federal antidiscrimination law clearly protects state employees with respect to visible and concrete conditions of employment such as hiring, discharge, compensation and promotions.[1] The United States Supreme Court has also decided, however, that employees are protected from being subjected to a "hostile work environment" even when there is no "'economic' or 'tangible' discrimination." [2] The Commission found that the working conditions of some nonjudicial personnel involved racial and ethnic disparagement and conditions of favoritism which could create suspicions of racial bias.

The following was the testimony in 1988 of a principal court clerk in the Supreme Court in Bronx County, Civil Division:[3]

> 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 minute. Let's start all over. 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.

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[1] 42 U.S.C.A. § 2000e-2 (West 1981).

[2] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64-65 (1986).

[3] 1 New York State Judicial Commission on Minorities, New York City Public Hearing 119 (June 29, 1988) (testimony of James Morton, principal court clerk, Sup. Ct., Bronx County, Civil Division) [hereinafter New York City Hearing].

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 Administrative Judge acted to correct the segregated working conditions when he was apprised of the situation.[4]

It would be naive, however, to believe that the segregated locker rooms discovered by the Commission reflect only an isolated instance of explicit racial hostility. The fact that such a situation was tolerated by court officers without complaint to higher officials is indicative of the lack of racial and ethnic harmony that exists among such personnel. Another example of offensive conditions reported to the Commission concerned graffiti displaying racial insults which is not promptly removed from halls, rest rooms and locker rooms.[5]

One reason that such problems exist may be the absence of a mechanism whereby court administrators can receive information about and take action to correct working conditions which insult particular racial or ethnic groups. Such absence of a complaint process for nonjudicial personnel creates a situation in which conduct that would result in the public admonishment or suspension of a judicial officer goes unaddressed if committed by a court officer. It is no wonder that segregated locker rooms and racial graffiti are found in places court officers frequent.

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[4]Memorandum from Hon. Burton B. Roberts to Hon. Milton L. Williams (July 25, 1988).

[5]3 New York City Hearing, supra note 1, 27, 3, (testimony of Hon. Bruce McM. Wright); see also photographs appended to vol. 1, Executive Summary of this report.

CHAPTER EIGHT MINORITY CONTRACTORS

CHAPTER 8

MINORITY CONTRACTORS

To obtain information about UCS contracting procedures, Commission staff members and its counsel met with OCA officers and administrators.[1] Throughout this meeting, the Commission learned that there are three different methods used by OCA to obtain immediately available goods and services. In order of priority, they are as follows.[2]

First, New York State has contracts with vendors entered into by the Office of General Services (OGS). If a UCS entity needs goods or services which are available through one of these contracts, OCA may initiate the OGS system simply by issuing a purchase order. OGS has an index of goods and services available on this basis.[3]

Second, if no OGS contract exists, sections 175-a and 175-b of the State Finance Law provide for the purchase of selected goods from the Industries for the Handicapped and the Industries for the Blind.[4] Section 175 of the State Finance Law also designates preferred status to the New York State Department of Corrections for the purchase of prison-made goods.[5] If there is no OGS contract covering the goods in question, these sources must be utilized unless poor quality is demonstrated.[6]

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[1] Memorandum from David Klein to Hon. Samuel L. Green (Feb. 28, 1990) (discussing Feb. 8, 1990 meeting attended by Edna Wells Handy, David Klein, Anne Pfau, Robin L. Faine, Michael F. McEneney and Andrew Onda) [hereinafter Klein Memorandum]

[2] Id. at 1.

[3] Id.

[4] See N.Y. State Fin. Law §§ 175-a, 175-b (McKinney 1989).

[5] See id. at § 175.

[6] Klein Memorandum, supra note 1, at 1.

Third, the UCS has its own statewide contracts covering many of the goods and services used by the court system. The typical UCS service contract is for two or three years. The typical commodity contract is for one year. A purchase order is all that is required to acquire the desired goods or services from one of these vendors.[7]

If none of the above sources can provide particular goods or services, a new contract may be entered into with a new vendor. If the amount of the proposed contract is less than $2,500, there is no requirement for open, competitive bidding. The purchaser may prepare the contract which is forwarded to Central Purchasing in Albany and then to the Attorney General and State Comptroller for final approval.[8]

The state Finance Law requires open, competitive bidding for any contract over $5,000,[9] but OCA has a self-imposed requirement that competitive bidding be used for any contract over $2,500. Where competitive bidding is used, a purchaser mails bid specifications to vendors on bidder lists which have been established over the years. Bid invitations are also extended to anyone who requests to participate and, if the contract price exceeds $5,000, the bidding must be advertised in the New York State Contract Reporter.[10]

UCS contracts typically cover widely used goods and services like copier supplies, photocopy machines and personal computer maintenance. UCS also maintains contracts for goods and services which originally were the responsibility of individual court entities, such

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[7] Id. at 2.

[8] Id.

[9] See N.Y. State Fin. Law § 144(1) (McKinney 1989).

[10] Klein Memorandum, supra note 1, at 2.

as specially bound books, printed file jackets, magnetometers, central copier programs, juror forms and computers.[11]

Although exact figures are not available regarding the amount of money that UCS has budgeted for the purchase of goods and services not covered by existing contracts, the total amount allocated in the 1989 UCS budget for nonpersonal services was $19,469,000. The total available for discretionary purposes (i.e., for goods and services not covered by OGS, UCS or GSA contracts) was approximately $8,000,000, of which approximately $3,000,000 was actually spent.[12]

UCS also has many contracts corresponding to the individualized needs of the numerous entities (courts, etc.) within the UCS. Those goods and services which are not yet contracted for by UCS must be obtained by going through OGS, preferred status contracts, federal (GSA) contracts or by entering into new contracts. Occasionally, due to the peculiarity of a particular commodity, a contract is awarded to a sole source. If the expenditure exceeds $5,000, this contract also must be subject to competitive bidding.[13]

UCS does not maintain any construction contracts. Space for courts and court-related facilities, if not state-owned, must be rented. The rental of space to OCA is reported in the New York State Contract Reporter. Some UCS entities have leases with private landlords which must be approved by the State Attorney General and Comptroller.[14]

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[11] Id. at 3.

[12] Id. at 5.

[13] Id. at 3. Exemption from the bidding process is available for expenditures between $2,500 and $5,000 if the "sole source" nature of the contract is demonstrated. Id.

[14] Id.

Court security is provided in various ways. The counties of Bronx, Kings, Nassau, v York, Queens, Richmond, Suffolk and Westchester all use uniformed UCS court cers to provide security. The remaining counties in the state are responsible for viding their own security, but OCA is obligated to reimburse them at the rate of their on contracts plus fringe benefits. No upstate municipality contracts with a private agency court security. Instead, they rely on local law enforcement agencies. The cost to OCA ies from $1,000 per year for the smallest municipality to over $2,000,000 for Erie County. CA's 1989-90 budget for court security is $14,400,000.[15]

There is no existing OCA policy to require contractors to have a diverse work force in to federal affirmative action hiring policies. However, a provision in every standard CA contract prohibits a contractor from discriminating on the basis of race, creed, color, nder, national origin, age, disability or marital status in the hiring of employees. This ovision mirrors the requirement of Section 296 of the Executive Law.[16] Until recently ere was no monitoring in place to encourage minority participation in UCS contracts. This tuation is apparently in the process of being rectified. UCS has recognized the need for eater minority participation in the contracting for the purchase of goods and services by ıe court system and has adopted an affirmative policy to encourage same.[17] This policy as since been incorporated into UCS's purchasing and contracting procedures, and a

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[15] Id. at 4.

[16] See N.Y. Exec. Law § 296 (McKinney 1982).

[17] Memorandum from Jonathan Lippman to Edna Wells Handy (June 27, 1990) (outlining the new M&WBE [Minority ınd Women-owned Business Enterprises] policy).

supplementary list of vendors which includes minority and women-owned businesses has been distributed.[18]

[18]Telephone conversation between Commission counsel and Andy Onda (OCA Court Operational Services) (Feb. 26, 1991).

FINDINGS CHAPTERS 4 - 8

1. Whites comprise 82% of the entire nonjudicial work force of 12,000 employees.

2. A draft Affirmative Action Plan for nonjudicial employees, developed for OCA 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 was 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 of the Task Force, 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 Workforce 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 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.

RECOMMENDATIONS CHAPTERS 4 - 8

1. The implementation commission recommended in this report is to 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 such behavior.

4. The Unified Court System should continue to review and develop alternative hiring criteria in job classifications requiring testing and 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 continually monitor its testing system in job classifications, requiring all tests to be 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 statewide; 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, such closing date should be extended; a statement should accompany such 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. To the extent that the following measures have not already been adopted by the UCS, they are recommended:

   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, including, but not limited to, minority set aside programs where 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) The UCS should monitor the diversity programs of all subcontractors, whether private or public, and require best efforts to diversify when contracting for security services outside the New York City area.

f) Minority-operated banks should be identified and utilized for monies received by UCS in the first instance.

g) Minority professionals should be recruited for consultation and personnel services contracts.

h) OCA should actively solicit the participation of minority contractors in the construction of court facilities.

SEPARATE STATEMENT OF COMMISSIONER PEGGY C. DAVIS

My colleagues on the Commission, both members and staff, have worked diligently to address the very serious issues that we were convened to investigate. The Commission's modestly funded, but wide ranging investigations have been undertaken with a tirelessness and dedication that I deeply respect.

Although I fully support virtually all of the Commission's recommendations, I have been in disagreement concerning the interpretation and presentation of certain of the data that we have collected. The Commission has voted to adopt approximately 1,000 pages -- including formal and informal findings, and reports and interpretations of data from a wide variety of sources -- as its final report. A decision of this kind forces each member to balance the need for compromise that inheres in collective decision-making against individual convictions with respect to the numerous and important issues about which the Commission collectively speaks. In my own case, inconsistencies between deeply held judgments and various aspects of the report have required the filing of a separate statement. The individual convictions that prompt this separate statement include the following:

- The report fails adequately to convey the amply documented risk that stereotypes function, in the judicial system as well as in all human enterprises, to prejudice outcomes against minority litigants and to produce interactions that wound the dignity of minority litigants, witnesses, spectators, attorneys and judicial and nonjudicial personnel.

- The Commission's investigation of law school policies, consisting primarily of telephone interviews, provides an inadequate basis for conclusions with respect to the

admissions practices of law schools or for conclusions and detailed recommendations concerning difficult and subtle pedagogic issues that affect minority retention and achievement.

- The Commission's recommendations with respect to the availability of legal representation for minority litigants, particularly in housing court, are inadequate to address the extreme hardships revealed by the Commission's investigation.

- The physical conditions that contribute to the dehumanizing environments of "ghetto courts" are inextricably linked to resource decisions that overcrowd those courts and to attitudinal issues that lead to abusive treatment of litigants appearing in them. The Commission is not qualified to evaluate the extraordinary fiscal situation faced by the City of New York. Precise recommendations with respect to New York City capital funding solutions should, in light of the Commission's mandate and expertise, be avoided in favor of strong recommendations that attitudinal and space allocation issues be addressed by the court system. Funding relief should be sought not only in the form of capital improvements, but also in the form of judicial and nonjudicial staffing at a level appropriate to burgeoning caseloads.

- The report fails to take sufficient account of the extent to which minority people believe, and research findings establish, that the dignity and value of minority lives are demeaned by criminal justice processes that result in more serious treatment of crimes involving nonminority victims and trivialization of crimes involving minority victims.

- The report's discussion of the bar examination is skewed by a failure adequately to explore the issue of job-relatedness, by an insufficiently critical analysis of research addressing differential pass rates, and by a failure to probe the implications of programs that have been successful at improving minority pass rates.

- The available data concerning fiduciary assignments (consisting primarily of responses to a questionnaire addressed to litigators) are inadequate to justify conclusions concerning patterns of appointments.

Most of the considerations that cause me to issue this separate statement relate to a concern that the report underemphasizes serious impediments to equity for minorities in the justice system. I hope, therefore, that the statement will serve to emphasize what I regard as the central lesson of our investigation: The court system must seize every opportunity to control the risk that stereotyped patterns of behavior will compromise the mission of just adjudication of disputes. The Commission reports that minority litigants are subjects of ridicule and abuse in the courthouse (see the Executive Summary); that minority attorneys are insulted by being searched at the courthouse door, physically assaulted by court officers on the basis of unreasonable, unfounded suspicions, and forced to overcome barriers of inattention and disrespect; that minority witnesses are ridiculed and disbelieved; and that professionals in the system regard cases alleging harm to minorities (and defenses against charges of wrongdoing by minorities) as less "winnable." Surely it is urgent that the court system take all reasonable steps to do what enlightened businesses and other institutions in this increasingly multi-cultural society are learning to do. Surely it must select, train, discipline and retain judicial and nonjudicial personnel in ways that make clear this crucial

goal: that every actor in our courthouses demonstrate competence and respect in dealing with people from each of the subcultures that comprise our society.