

***TENNESSEE SUPREME COURT***  
***COMMISSION***  
***ON***  
***RACIAL AND ETHNIC FAIRNESS***

Final Report of the  
Tennessee Supreme Court Commission  
on Racial and Ethnic Fairness

Submitted to the  
Tennessee Supreme Court  
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**Tennessee Supreme Court Commission on  
Racial and Ethnic Fairness in the Court System**

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# Foreword

With the establishment of Tennessee's first constitutional court in 1834, a judicial system based on principles of fairness, accessibility, and excellence began. Yet, despite this solid foundation and the best of intentions, over time, deficiencies and shortcomings in its operation have been uncovered.

To address these deficiencies and shortcomings, at least to the extent that race or ethnicity is a factor, the Supreme Court established the Commission on Racial and Ethnic Fairness. The charge given the Commission is included in this report, and it need not be repeated here. Suffice it to say, the charge is broad and all-encompassing.

The findings and conclusions of the Commission show, in the main, that problems experienced by racial and ethnic minority persons in their interaction with the justice system rarely stem from overt acts of mistreatment or disrespect. Nor do explicit manifestations of racial bias abound. Rather, as the Commission has found, institutionalized bias is relentlessly at work. Institutionalized bias is pervasive, and it describes a residue of beliefs that linger in the subconscious of society and perpetuate negative stereotypes. Accordingly, this institutionalized bias affects the speech and conduct of persons--often unbeknownst even to the speaker or actor.

Perhaps this is the reason for the continuing perception minority persons have--that the courts are unfair, that justice is not done. Perhaps this explains the oft-posed

question "Just why is justice so hard to come by?"

Increased understanding fosters fairness, and through the Commission, the Supreme Court has taken the initiative to do just that--to increase understanding as a means to foster fairness.

The report of the Commission is not self-executing. Only if those who are sworn to serve justice and administer it, and all others who participate in and contribute to this mission, accept the report and permit it to raise their awareness to heightened levels will a sufficient number of adequate solutions emerge.

We realize that solutions may be numerous and varied as we individually confront the issues. However, institutional bias will never be eliminated unless the institution itself identifies it as an issue and undertakes to address it. Through the establishment of the Commission and indirectly, through this report, we have done that--at least, we have begun.

Adolpho A. Birch, Jr., Chief Justice  
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# Dedication

This report is dedicated to the people of the state of Tennessee who will benefit from the recommendations found herein--particularly, the litigants who come to the judicial system seeking the justice they deserve and to which they have a constitutional right.



# Acknowledgments

The Commission is grateful for the contributions, commitment and support of everyone who assisted in its investigation of the Tennessee Judicial System. The Commission acknowledges its gratitude to the following Justices of the Tennessee Supreme Court for demonstrating their commitment to equal justice, by establishing this Commission in 1994 to examine the treatment of racial and ethnic minorities in the Tennessee Judicial System:

Chief Justice Charles H. O'Brien  
Justice Frank F. Drowota, III  
Justice E. Riley Anderson  
Justice Lyle Reid  
Justice Adolpho A. Birch, Jr.

The Commission extends a special word of appreciation to our present Chief Justice Adolpho A. Birch, Jr., the Commission's Liaison with the Court, for his time, commitment, guidance and support.

The Commission also acknowledges its gratitude to the following:

Justice Penny J. White for her support and encouragement during her service on the Tennessee Supreme Court.

Oscar Miller, Jr., Ph.D., of the Department of Social Work and Sociology at Tennessee State University, for drafting and developing the methodology and surveys to attorneys, court personnel, judges and jurors and for providing the Commission a detailed analysis of survey responses.

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The Administrative Office of the Courts, for the investment of its personnel and resources and for providing funds for the public hearings and surveys conducted by the Commission. A special acknowledgment and profound thanks to Suzanne G. Keith, Esq., who serves as the Commission's liaison with the Administrative Office, for her extraordinary efforts on our behalf.

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The Commission is deeply indebted to the many people across the state of Tennessee who shared with the Commission their experiences with and hopes for the Tennessee Judicial System.

# Introduction

*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

## Amendment 14, United States Constitution

\_\_\_\_\_ *That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.*

## Article I, Section 17, Constitution of the State of Tennessee

*That all courts shall be open; and every man, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay....*

## Article I, Section 17, Constitution of the State of Tennessee

These constitutional provisions make it clear that all individuals appearing in a court of law are entitled to, and should receive, equal and fair treatment and justice without regard to race or ethnicity. Our goal is equal justice. Equal justice, as Harold

G. Clark, former Chief Justice of the Georgia Supreme Court, has said, is a redundancy. He further states, “All justice, by its definition, must be equal because unequal justice is no justice at all. When court proceedings fail the equality test, they also fail the justice test.”

In furtherance of its commitment to justice, the Tennessee Supreme Court established this Commission by Order issued September 27, 1994. (A copy of the order is attached at Exhibit A.) The Order assembled the Commission and directed it to:

1. Examine the Tennessee Judicial System and identify issues relating to racial or ethnic fairness in that system; and
2. Recommend revisions in rules, procedures and administration to ensure equality of treatment for all persons free from racial or ethnic bias.

The establishment of this Commission is consistent with national efforts to eliminate racial and ethnic bias in the courts. In March 1995, the First National Conference on Eliminating Racial and Ethnic Bias in the Courts was held in Albuquerque, New Mexico. Representatives from all fifty states attended. Several states, including Tennessee, sent at least one justice from its highest court. Tennessee is also a member of the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts. This group meets annually to review the actions of the various commissions and task forces dealing with racial and ethnic fairness.

The members of the Commission are diverse. They are multiracial and multiethnic and include men, women, lawyers, non-lawyers, private practitioners,

corporate counsel, court clerks, trial judges and appellate judges.

In conducting its investigation, the Commission conducted public hearings in each of the three grand divisions of the state--Memphis, Nashville and Chattanooga. It sent surveys to attorneys, court personnel, judges and jurors. It received written testimony from all individuals willing to submit their experiences in writing.

This report is a result of a two-year review of the Tennessee Judicial System and how matters of race and ethnicity are implicated in that system. The Commission's primary objective is to provide a fair and balanced assessment of how issues of race and ethnicity affect Tennessee's system of justice and how the system addresses those issues. Based on the results of its investigation, the Commission has proposed recommendations designed to ensure that the decisions emanating from Tennessee courts are unaffected by the race or ethnicity of the litigants and that the legal environment allows for equal access to the courts regardless of ethnicity or race.

Some members of the legal profession have asked why judicial fairness needs to be discussed. They insist they have not observed ethnic or racial bias in the judicial system. Other respondents have identified instances of racial or ethnic bias and have been offended. Unfortunately, discussions of racial and ethnic differences are not addressed directly, often with the hope that somehow those matters will disappear.

Lawyers and judges have all taken oaths to defend and uphold the federal and state constitutions. The judicial system cannot merely react to bias or unfairness in the administration of justice. It must be vigilant and proactive to make sure that the guarantees and protections afforded by the constitutions are enforced equally for all

Americans. Charles Hamilton Houston, former Dean of Howard University Law School and former Chief Legal Counsel for the National Association for the Advancement of Colored People (NAACP), recognized this important role for lawyers. He said that a lawyer who acts as a social engineer is by definition "the mouthpiece of the weak and a sentinel guarding against wrong."

The Commission makes the following findings and recommendations with the firm conviction that, when implemented, they will improve Tennessee's Judicial System and ensure that justice is truly equal and fairly administered.



# Summary of Recommendations

## General Recommendations

The Commission makes two general recommendations concerning the discharge of its responsibilities:

1. That the Tennessee Supreme Court create, and the Tennessee Legislature fund, an entity: (a) to continue the study of how race and ethnicity affect the fair and equitable dispensation of justice in the State of Tennessee; (b) to follow through on the recommendations made by this Commission; (c) to identify other appropriate measures that should be taken to eliminate discrimination or bias in the practice of law and in systems of criminal and civil justice; and (d) to report periodically to the Tennessee Supreme Court, the Legislature and the Governor on the accomplishment of appropriate goals and recommendations.
2. That the Tennessee Supreme Court amend the Tennessee Rules of Professional Responsibility to prohibit, *inter alia*, bias or discrimination by lawyers. Examples of rules that prohibit this inappropriate and offensive activity are attached at Exhibit B to this report.

Bias and discrimination have no place in the courts and in the performance of legal services. The concept of one system of justice for all persons does not contemplate, nor should the profession and the Court permit, prejudice or discrimination by lawyers.

This recommendation does not intend to regulate words or conduct that are protected by federal or state laws and remedies, and does not intend to prohibit speech otherwise protected by the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution.

## Education and Training Recommendations

1. Law schools should continue their affirmative efforts to recruit, admit and graduate more minority law students.
2. Law schools, together with the bar associations and state education officials, should increase their efforts to disseminate information about careers in the law to encourage minority high school and college students to consider careers in the legal profession.
3. Law schools should offer greater financial assistance to minority applicants and law students.
4. The Tennessee Supreme Court and the Legislature should promote appropriate methods to increase financial assistance to minority law students by such programs as scholarships, loans, and tuition forgiveness.
5. Law schools should increase the diversity of their teaching faculty--both full-time and part-time--by continuing their efforts to attract and retain high quality minority professors.
6. Law schools should act as community resources with outreach to communities across the state to help eradicate existing forms of discrimination and bias and to improve opportunities for all persons to achieve personal and professional goals, regardless of race or ethnicity.
7. Law schools should continue or initiate mentor programs to support the academic success and professional development of minority law students.
8. Law firms, corporations, government agencies and other law-related

offices should develop in-house mentor programs to support the professional development of minority lawyers.

9. Law offices should implement programs to assure equality in the nature, scope and importance of tasks assigned to all attorneys regardless of race or ethnicity.

10. Law schools should develop activities to improve the knowledge and responsiveness of students, lawyers and judges to issues of race and ethnicity in the workplace.

11. Law schools should continue efforts to increase employment opportunities for minority students and graduates, ensuring that minorities have access to the same employment opportunities as other law students and graduates.

12. Local and state bar associations and the courts should develop educational programs to provide training for primary and secondary school students and the public through community forums.

13. Judges should educate public audiences about the legal system and the adversarial process to help avoid confusion and misunderstandings about the judicial process that may be misinterpreted as bias.

14. Judges should exercise authority and receive funding to require sensitivity training for all court personnel.

15. Local bar associations, in conjunction with legal and judicial organizations, should develop handbooks to provide judges, attorneys and court personnel with information that will improve their interaction

and communication with persons of diverse racial and ethnic backgrounds  
in courtroom and judicial settings.

16. The Legislature should require state and local law enforcement officials to invest time and resources in diversity training for officers and support staff.

17. The Tennessee Supreme Court should require that continuing legal education include, within its ethics and professionalism requirements, racial and ethnic diversity training.

18. Judicial Conferences, the Court Clerks Conference, the bar associations and other associations that offer continuing legal education programs should encourage the selection of educational faculty from diverse racial and ethnic backgrounds.

## **Court Environment Recommendations**

1. Judges should issue clear and concise directives to eliminate discriminatory practices within the court environment.
2. Courts should ensure that in civil or criminal fee generating cases, attorneys are appointed on a nondiscriminatory basis.
3. All participants in the court environment should be addressed by appropriate formal titles.
4. State and local bar associations, in conjunction with judges and clerks, should develop court monitoring programs to ensure court environments free

from racial or ethnic bias.

5. The Tennessee Supreme Court should prepare reports showing minority representation among court personnel by judicial districts, and make such reports available to appointing authorities.

6. Judicial appointing authorities should establish as a priority the increase of minorities in judicial and quasi-judicial appointments.

7. The Tennessee Supreme Court and the Presiding Judges of Judicial Districts should designate minority judges to fill temporary vacancies, including those in jurisdictions that have little or no minority representation in the bench or bar.

8. The Legislature should review the composition of the Judicial Selection Commission to ensure compliance with statutory requirements of diversity.

9. Judicial candidates should be screened and disqualified upon evidence of racial and ethnic bias prior to appointment.

10. The judicial evaluation process should include screening for bias when evaluating sitting judges and evaluators should reflect the proportionate population of minorities.

11. The Tennessee Supreme Court and the Legislature should review all aspects of the system of assessing and providing bail bonds; should set forth specific guidelines regarding surety requirements; and should consider a public pre-trial service system free from bias as an appropriate alternative or addition to the current bail bonding practices.

12. Judges should encourage sheriffs, clerks, and other court personnel who hire court assistants to appoint minority personnel.
13. The Administrative Office of the Courts should recruit and hire minority court reporters for use in state funded cases.

## **Court Policy and Procedure Recommendations**

1. Local court systems should designate an ombudsman to assist public participants in the judicial system.
2. The Administrative Office of the Courts should collect and distribute data on the impact of current bail bonding policies on racial and ethnic minorities.
3. The Administrative Office of the Courts should compile and distribute data on civil cases to evaluate the influence and impact of race and ethnicity issues on outcomes, settlements and damage awards.
4. The Tennessee Department of Commerce and Insurance should require insurances companies to report the amount of personal injury settlements and the race and ethnicity of the parties.
5. The Legislature should enact legislation to provide for sanctions against insurance companies that discriminate on the basis of race or ethnicity in the evaluation and settlement of personal injury and workers' compensation claims.
6. The Tennessee Department of Correction should compile and

distribute data on the access minorities have to, and their success in, offender programs that offer educational, vocational and drug rehabilitation treatments.

7. Courts should ensure that jury source lists represent the racial and ethnic make-up of the areas they serve. If standard list sources, such as driver licenses, property tax and voting lists, do not adequately represent minority demographics, courts should consider lists from other sources, such as school enrollment, public housing residents and utility customers.

8. Courts should review jury service and its policies and adjust those policies that may be barriers to minority participation, such as the length of service, jurors' ability to serve on call at home, the level of reimbursement, and assistance with child care.

9. Courts, district attorneys and public defenders should assure that all defendants receive the same quality of treatment and representation.

10. The Tennessee Commission on Children and Youth should compile and distribute data on the outcomes of juvenile court proceedings by race and ethnicity and recommend appropriate corrective actions if such data shows bias.

11. The Tennessee Commission on Children and Youth should compile and distribute data regarding the extent to which minority children are eligible for educational, vocational and drug rehabilitation programs and the outcome of such programs for minority participants.

12. The Legislature and the Tennessee Supreme Court should expand efforts to make legal representation available to low and moderate income

people.

13. The Tennessee Supreme Court should ensure appropriate interpreters are available pursuant to applicable law.



# Chapter 1

## History, Structure and Purpose of the Commission

The Tennessee Supreme Court established the Commission on Racial and Ethnic Fairness by its order dated September 27, 1994. (See Exhibit A.)

The first meeting of the Commission was held on November 15, 1994. The Commission was sworn in by its liaison to the Supreme Court, Chief Justice Adolpho A. Birch, Jr. Justice Birch thanked Commission members for their willingness to serve on the Commission and explained the significance and importance of the work of the Commission and how its work will tangibly and materially assist the Tennessee judiciary, the legal community and the people of the state.

Over the following two years, the Commission met frequently to address the issues explicitly identified for consideration by the Tennessee Supreme Court's order and matters related to that order. The Commission held public hearings in Memphis, Nashville and Chattanooga. These hearings elicited information about issues of race and ethnicity in the judicial system, within the profession and attendant to judicial proceedings, both criminal and civil. The Commission employed a statistician, Oscar Miller, Jr., Ph. D., of the Department of Social Work and Sociology, Tennessee State University, to assist it in understanding perceptions about race and ethnicity in

criminal and civil justice systems and in the practice of law. Dr. Miller designed survey documents to elicit information about issues of race and ethnicity in the courts and legal system from jurors, judges, attorneys and court personnel. Data from the survey was collected and compiled into a report prepared by Dr. Miller and submitted to the Commission in the Fall of 1996. (See Exhibit C.)

The survey results were informative and useful to the Commission in showing the extent to which perceptions of unfairness or inequality exist in the judicial system. However, the survey results also suggest that issues of race and ethnicity, like issues of gender, are often quite subtle. These issues will require ongoing study and review to identify changes in perceptions, outlooks and behavior and to follow through on recommendations.

Through the process of public hearings and the survey, the Commission sought to understand the extent to which matters of race and ethnicity play a part in legal systems. The Commission, in pursuing its fact-finding mission, was concerned about all evidence or information as to discrimination or bias against a person, irrespective of race or ethnicity. The Commission was concerned about discrimination or bias against Caucasians just as it was concerned about discrimination or bias against African-Americans, Asian-Americans, Hispanic-Americans or members of any other race or ethnic group. The Commission's goal was to understand the influences, if any, that race and ethnicity play in our legal systems.

The Commission is comprised of a true cross-section of Tennesseans. It includes a mix of lawyers, judges and lay persons who reflect the state's diversity by

race, ethnicity, gender and geography. The members brought to the Commission a collective wisdom and insight based on their experience, training and knowledge. Their wisdom and insight, further informed by public hearings, deliberations and statistical inquiries, have permitted the preparation of this report and its recommendations.

The Commission established three committees to review specific areas of the justice system and to report their findings in those areas. The committees addressed the following areas:

- 1) Education and Training;
- 2) Court Environment;
- 3) Court Policy and Procedure.

Some issues overlap among committees. However, efforts were taken to streamline the presentation of similar findings and conclusions.



## **Chapter 2**

# **Methodology, Data Gathering and Information Sources**

### **Introduction**

Following the initial meeting of the Commission, members discussed ways in which to study and assess racial and ethnic fairness in the civil and criminal judicial systems of Tennessee. The Commission was guided by the Tennessee Supreme Court's order charging them to examine the components of the Tennessee Judicial System and to recommend revisions in rules, procedures, and administration to ensure equality of treatment for all persons free from race or ethnic bias.

The Commission studied the judicial system in a variety of ways, including researching and studying information from other states, receiving comments during public hearings held across the state, obtaining statistical data from questionnaires sent to people in the system, advertising the existence of the Commission and its work and soliciting public comments, gathering information from bar associations, law schools and other entities and exchanging information among its members as to their own personal knowledge and experiences.

### **Public Hearings**

The Commission held public hearings at sites in each of the three grand divisions of the state. The cities Memphis, Nashville were chosen due to overall population size in their respective grand divisions. Chattanooga is not the largest metropolitan city in the Eastern Division but was chosen over Knoxville since a higher percentage of racial minorities live there and thus afforded a greater opportunity to hear more public expressions concerning racial and ethnic matters. The public was advised of the hearings and asked to submit written outlines or descriptions of their comments. Some people appeared to speak at the meetings without advance notice and no one was denied the opportunity to address the members of the Commission. Comments received from the hearings were transcribed and furnished to the Commission for further study. (See Exhibit D.)

Many of the comments received during the public hearings addressed law enforcement agencies. Even though these agencies are not under the control of the judiciary, the public perceives law enforcement agencies and the court system as one entity. Many of the persons appearing before the Commission were disappointed to learn the courts were actually a separate body. Some comments reflected misunderstandings about the operations of the court system, lack of adequate communication by judges and other court personnel with persons appearing in court, and a general overall lack of understanding of the court system. The Commission quickly determined that public education is needed to help people understand the separate branches and agencies in government and how they operate. Procedurally, the court system is still a mystery to many of the individuals who appeared at the public hearings.

Several comments received during the public hearings in each of the grand divisions addressed a general distrust for the legal system and expressed concern for the system as to self monitoring and disciplinary procedures. As a step toward assuring the public that lay persons are involved in such disciplinary procedures, the Commission endorses the Tennessee Supreme Court's recent appointment of three nonlawyers as members of the Board of Professional Responsibility, the body charged with investigating and disciplining lawyers for ethical violations.

## **Public Comments**

The Commission solicited written and verbal comments from the public throughout its work.

## **Law Schools, Bar Associations, Administrative Office of the Courts and Other Agencies**

The Commission solicited information from law schools, bar associations, the Administrative Office of the Courts and other agencies for consideration by the members. Examples of such information are included in Exhibits E, F, G and H to this report. They are varied in their content and complexity and are discussed in detail in other parts of the report.

## **Questionnaire Survey**

The most structured method of obtaining data was provided through a productive collaboration between a statistician, Oscar Miller, Jr., Ph. D., from the Tennessee State University's Department of Social Work and Sociology and the Commission. The Commission approved methodology to conduct a rigorous, statistical, state-wide study of racial and ethnic fairness as observed or experienced by attorneys, child support referees, court personnel, district attorneys, judges, jurors, and public defenders. These groups were chosen because they represent a cross-section of practitioners in the judicial system. They also have direct involvement in the areas of the judicial system that were identified in the court's order. Litigants were omitted from the list of target groups after determining that no reliable lists of litigants, necessary for drawing a random sample, existed across the State's many and varied jurisdictions.

The questionnaires distributed in the study defined "minority" by the following statement: "Know that 'Minority' is used throughout this questionnaire to refer to African-Americans/Blacks, Asians, Hispanics, Native Americans, and other persons identified as a racial or ethnic minority (including religious minority)."

For purposes of this report, the Commission defines "racial minorities" to mean persons of color, including but not limited to African-Americans, Hispanics, Asians, and Native Americans. The Commission also defines "ethnic minorities" to refer to persons with an affiliation based on common national, religious, tribal, linguistic or cultural origins and backgrounds. When using the term "minority" without either "racial" or "ethnic" as a qualifier in this report, the Commission intends to include both racial and ethnic minorities.



Several areas of the judicial system were identified by the Commission as the focus of the questionnaires. The areas of study included courtroom treatment of litigants, witnesses, and attorneys, and disparate treatment in child support, support enforcement, fee-generating court appointments, the judicial nominating process, status of court employment and promotion, and treatment of lawyers in chambers and also in professional gatherings.

The questionnaires inquired as to nearly 140 items in the effort to assess racial and ethnic fairness in the judicial system. (Copies of the questionnaires are included in Exhibit C.) Questions covered personal characteristics, observations and experiences and interpersonal relations. Dr. Miller and Commission members worked together in designing the questionnaires after studying survey instruments used by other states, the mandate in the Court's Order, and Tennessee demographics. Different questionnaires were designed for attorneys, court personnel, judges and jurors that reflected each group's area of work. Questions allowed respondents to indicate any race or ethnic bias they observed or experienced toward minorities or majorities or to indicate that they had not observed bias from or by either group.

Each person selected in the study from the target groups received a survey packet containing a questionnaire, a stamped return envelope and a cover letter from the Tennessee Supreme Court explaining the purpose of the study and requesting their anonymous participation. The questionnaires were mailed during April and May, 1996 to random samples of the larger target groups and to all participants in the smaller groups.

The sample of jurors was drawn from six counties: one metropolitan and one

non-metropolitan or rural county within each grand division of the State. An additional criterion for selection in the study was the racial composition of the county. (See Exhibit H.) Counties were considered if their minority racial composition was comparable to the racial composition of Tennessee. One metropolitan county in each grand division met the selection criteria: Shelby County (Memphis) in the Western Division, Davidson County (Nashville) in the Middle Division, and Hamilton County (Chattanooga) in the Eastern Division. Haywood County was randomly selected as the non-metropolitan county in the Western Division from among the following counties that also met the selection criteria: Madison, Obion, Tipton, Fayette, Gibson, Hardeman, Lake and Lauderdale. Montgomery County was selected over Maury and Trousdale counties in the Middle Division, and Knox County was chosen instead of a non-metropolitan county in the Eastern Division since the representative percentage of minorities was low in the East. According to the 1990 census, there were several counties with no minority residents in the eastern part of the state. Juror lists were obtained from the selected court clerk offices in the six counties and jurors were randomly selected into the sample.

The sample of attorneys was drawn from a list of 12,725 licensed attorneys provided by the Tennessee Board of Professional Responsibility. Lists of state funded child support referees, court personnel, district attorneys, judges, and public defenders were provided by the Administrative Office of the Courts. All of the district attorneys general and their assistants, public defenders and assistants, and state funded child support referees were surveyed. A random sample of court clerks, jurors and court reporters were surveyed.

Table 1 of Dr. Miller's study shows the number of persons from each group who were selected to receive a questionnaire and the number and percent that returned the completed questionnaires. Response rates were highest for district attorneys and assistant district attorneys (86%), child support referees (78%), and public defenders and assistant public defenders (72%). With the exception of attorneys, who returned a respectable 43% of questionnaires, and some jurors, as broken down by county response, the remaining groups targeted in the study returned questionnaires at rates above 47%. The combined return rate for all groups was 49%. This is considered to be a respectable return rate for mail surveys. There is a computed margin of error rate of 5% due to sampling bias, meaning that we can be 95% certain that the sample data are within plus or minus five percentage points of the percentages for the entire population.

Table 2 of Dr. Miller's report shows the racial composition of survey respondents for each target group. Seventy-nine percent of the jurors who responded to the survey described themselves as Caucasian, 16.4% African American, .8% Hispanic, 3.4% Native American, and .4% other. No category as to classes of ethnicity was included. Attorneys, district attorneys, public defenders, court personnel, and judges who responded to the survey are much less racially or ethnically diverse groups than jurors. Of the 38 judges responding to the survey, one is African-American and the rest are Caucasian. All 38 court personnel who responded are Caucasian. Table 2 suggests that the race and ethnic composition of respondents is similar to the race and ethnic composition of practitioners in the Tennessee Judicial System.

## **Racial and Ethnic Fairness**

The study of racial and ethnic fairness in the Tennessee Judicial System examines observed or experienced differences in career issues, workers' compensation, damages and torts awards, courtroom interaction, criminal proceedings and miscellaneous issues among minority and majority practitioners and litigants. An analysis by the statistician, comparing responses of minority respondents with the responses of Caucasian respondents revealed that the two groups had similar observations and experiences on each of the items presented in Figures 1 through 40 of the report, with the exception of Figures 20 and 28. Since minority and majority practitioners reported similar observations and experiences in the judicial system, the data is presented in percentage tables that show the percentage of attorneys, court personnel and judges selecting the available answers for each item. Respondents could also write comments about experiencing or observing specific instances of minority bias or minority related problems for each aspect of the judicial system explored in the study. The comments appear, unedited, in Appendix A of Dr. Miller's report.

## **Career Issues in the Judicial System**

The survey asked ten questions about career issues in the judicial system. The questions addressed employment, promotions, mentor relationships, legal assignments and court appointments, judicial nominations and selection, and recruitment. The

results indicate that a substantial percentage of respondents observed or experienced racial or ethnic related problems in legal careers in Tennessee.

In response to the question about whether desirable positions in private law firms are offered to attorneys (or peers in the case of court personnel) on the basis of race or ethnicity, 42% of attorneys and 30% of judges reported that fewer desirable positions in private law firms are offered to minority attorneys. Six percent of attorneys also indicated that fewer desirable positions in private law firms are offered to majority attorneys. Court personnel reported that no race or ethnic difference existed in offers their peers received for desirable positions in private law firms.

Are more desirable promotions given to minority or non-minority attorneys or peers? According to the respondents, 6% of court personnel, 11% of attorneys and 17% of judges have experienced or observed that more desirable promotions within their law firms go to majority attorneys or peers, while 3% of attorneys and 8% of judges said that minority attorneys received better promotions than majority attorneys.

Are meaningful mentor relationships available to minority attorneys? Of the attorneys responding, 37%, and judges, 39%, report that fewer meaningful mentor relationships are available for minority attorneys. Only 1% and 8%, respectively, said that fewer meaningful mentor relationships are available for majority attorneys. Court personnel see no race or ethnic difference in the number of meaningful relationships available to their peers.

One question and its responses suggest that race or ethnicity of attorneys and peers moderately affects the assignment of desirable legal projects or clients to attorneys and court personnel. More desirable assignments to legal projects or clients

are given to minority attorneys or peers as reported by 3% of attorneys and 10% of judges. However, 19% of attorneys, 6% of court personnel and 20% of judges observed that more desirable assignments to legal projects or clients are given to majority attorneys or peers.

The responses show that fee-generating court appointments tend to go to majority attorneys. Fewer fee-generating court appointments are given to attorneys who are of a minority group as reported by 13% of attorneys and 6% of judges. Only 2% of attorneys observed that fewer fee-generating court appointments are given to majority attorneys. This may appear to be skewed since many counties have a low percentage of practicing minority attorneys.

Two percent of attorneys say that more lucrative fee-generating appointments are given to attorneys who are of a minority. While 18% of attorneys and 12% of judges reported that more lucrative fee-generating court appointments are given to majority attorneys.

The responses show a large racial and ethnicity gap in the judicial nominating process. Data received from the Administrative Office of the Courts indicates few minority applicants submit their names as candidates. The Tennessee Judicial Selection Commission has addressed the issue of the small number of minority candidates by adding a statement to its press releases and advertisements for public hearings that encourages minorities to apply. All appellate and trial court positions are filled by the Judicial Selection Commission submitting the names of three candidates to the Governor for consideration of appointment. Although the public perception appears to be that minorities are discriminated against in this process, the

data does not support that theory in all areas.

Of a total of 141 applicants who have submitted their names in the last two years for vacancies on the trial and appellate court benches, only nine have been African-American and no one from any other minority race has applied. Of the nine who submitted their names for consideration for appointments, the Judicial Selection Commission forwarded four or 44% of the total of number of applying minorities to the Governor for consideration. However, none have been appointed by the Governor in the past two year period. (Judicial Selection Commission statistics are set forth in Exhibit H.)

At the limited general jurisdiction level of court, including the general sessions and municipal or city court levels, vacancies for judgeships for unexpired terms of office are filled by appointments made by local county commissions. No data as to the number of minority applicants is available at this level.

## **Workers' Compensation and Damages and Torts Awards**

The survey asked ten questions about workers' compensation, damages and tort awards. These questions addressed legal representation and actions by the jury, plaintiffs' and defense attorneys, judges and insurance companies. All ten items reflect some racial or ethnic bias in the judicial system. Three suggest little bias or bias that favors both minorities and majorities. Seven indicate clear racial or ethnic bias in favor of majority litigants.

Figure 11 in the report suggests that the race or ethnicity of litigants influences the likelihood that they will be represented by counsel. Three percent of attorneys observed that litigants are more likely to be represented by counsel when they are members of a minority. However, 23% of attorneys and court personnel and 21% of judges reported that majority litigants are more likely to be represented by counsel.

Figure 12 in the report shows the impact of race or ethnicity in the awarding of compensatory damages to plaintiffs. The survey reported 25% of attorneys observed such activity in the judicial process with 20% reporting that juries award lower compensatory damages to minority plaintiffs. Similar observations were noted by 5% of judges, but none observed majority plaintiffs receiving lower awards than minority plaintiffs. All court personnel who responded to this item observed no difference between majority and minority plaintiffs in the amount of compensatory damages juries award.

The next figure in the report indicates that 22% of attorneys, 7% of court personnel and no judges observed that race or ethnicity played a role in the amount of



punitive damages juries award to plaintiffs. Juries award lower punitive damages to minority plaintiffs as compared to majority plaintiffs as reported by 17% of attorneys and 7% of court personnel. And 5% of attorneys indicted that the amount of punitive damages juries awarded favored majority plaintiffs.

Six percent of attorneys said that plaintiffs' attorneys recommend smaller settlements when plaintiffs are of a minority race. One percent indicated that this occurred for majority plaintiffs. None of the court personnel and judges saw racial or ethnic difference in settlements recommended by plaintiffs' attorneys.

Although court personnel and judges see no racial or ethnic difference in settlement recommendations of defense attorneys, 23% of attorneys reported such differences. Defense attorneys recommend smaller settlements when plaintiffs are of a minority race as observed by 22% of attorneys. Only 1% of attorneys observed this difference as disadvantaging majority plaintiffs.

The injured party's race or ethnicity was observed by 6%, 18%, 28% of attorneys, court personnel and judges, respectively, to affect plaintiffs' attorneys strength of an injured party's case. Plaintiffs' attorneys are more likely to regard cases as "winnable" when the injured party is of the majority race as reported by 21%, 6% and 18% of attorneys, court personnel and judges, respectively.

One item shows the diverse experiences of attorneys and judges regarding whether insurance companies are more likely to regard cases as "winnable" based on the race or ethnicity of the injured party. Of the attorneys reporting, 32% observed that an injured party's race or ethnicity affected how insurance companies regarded cases. Seventeen percent of attorneys reported that their experience suggested that

insurance companies are more likely to regard cases as “winnable” when the injured party is of a minority race, while an essentially even number--15%-- observed that this was the case when the injured party is of the majority race. Eight percent of judges said that insurance companies are more likely to regard cases as “winnable” when the injured party is of a minority race, while 15% of judges and 8% of court personnel observed that this was the case when the injured party is of the majority race.

Do judges consider claims based on race or ethnicity? Race or ethnicity affected judges’ consideration as observed by 12% of the attorneys. Only 2% stated judges gave more serious consideration to claims of minority plaintiffs, while 10% observed judges giving more serious consideration to claims of majority plaintiffs. Both court personnel and judges were unanimous in observing no race or ethnic difference in judges giving more serious consideration to plaintiffs’ claims.

Do attorneys consider claims based on plaintiffs’ race or ethnicity? Attorneys (13%) observed a racial or ethnic difference in attorneys’ consideration of plaintiffs’ claims, all indicating that more serious consideration is given to claims of majority plaintiffs. Similarly, both court personnel and judges were unanimous in observing no difference in attorneys giving more serious consideration to claims based on plaintiffs’ race or ethnicity.

Many respondents observed that race or ethnicity was a basis for plaintiffs’ attorneys using peremptory challenges to disqualify jurors. Plaintiffs’ attorneys are more likely to use peremptory challenges to disqualify minority jurors as reported by 12% of attorneys, 6% of court personnel and 14% of judges. Plaintiffs’ attorneys are

more likely to use peremptory challenges to disqualify majority jurors as observed by 24% of attorneys and 5% of judges.

Defense attorneys are more likely to use peremptory challenges to disqualify minority jurors as observed by 36% of attorneys, 6% of court personnel, and 24% of judges. Defense attorneys using peremptory challenges to disqualify majority jurors as observed by 10% of attorneys, 13% of court personnel and 0% of judges.

## **Minority Representation on Juries and on the Bench**

Responses suggest that minorities are “often” adequately represented in jury pools and on petit and grand jury panels. The responses suggest a greater perception that there is a disparity in representation of minorities on the bench. Attorneys and judges reported that minorities are “sometimes” adequately represented on the bench. Court personnel saw more adequate representation than attorneys and judges.

The collected scores in Table 5 of Dr. Miller’s report suggest that court personnel seldom observe that attorneys base their preparation of litigants’ cases on stereotypes of minorities. Attorneys and, to a slightly greater degree, judges observe that attorneys base their preparation of litigants’ cases on stereotypes of minorities somewhat more than “seldom” and more often than “sometimes.” The data suggests that attorneys use stereotypes more than judges. Attorneys reported that judges “seldom” based their evaluations of litigants’ claims on stereotypes of minorities, while court personnel and judges observed that such use of stereotypes “almost never” occurs among judges. Similarly, Table 6 suggests that attorneys, court personnel and

judges reported that court decisions “almost never “ reflect racial or ethnic bias.

However, jurors report that court decisions “often” reflect bias against minorities and majorities.

## **Professionalism**

These scores suggest that attorneys, court personnel and judges “seldom” to “almost never” observe or experience practitioners using derogatory language, making demeaning remarks or jokes, or acting disrespectful toward other practitioners or litigants. Jurors, regardless of race or ethnicity, did not give the judicial system high scores on these issues as the practitioners did, but they nevertheless reported seldom observing attorneys, court personnel or judges using derogatory language, demeaning remarks or jokes, or being disrespectful toward other practitioners or litigants. There is an average difference of about six-tenths of a point between the scores of practitioners and jurors, which may be explained by jurors being less familiar with the adversarial process of litigation. Jurors may have interpreted interactions that practitioners perceive as normal adversarial process as derogatory, demeaning or disrespectful.

## **Criminal Proceedings**

Each aspect of criminal proceedings described in the 19 responses suggests attorneys, prosecutors and judges make decisions based on race or ethnicity of defendants and victims. In each case the use of race or ethnicity favors majority defendants.

Many respondents (34% of attorneys, 14% of court personnel and 19% of judges) observed that the likelihood that a defendant will be physically abused while in custody is affected by the defendants' race or ethnicity. A greater likelihood of minority defendants being physically abused while in custody was noted by 28% of attorneys, 7% of court personnel and 14% of judges as compared to 6% of attorneys, 7% of court personnel and 5% of judges who observed that majority defendants were more likely to be physically abused while in custody.

There is a greater tendency among prosecutors to file charges against minority defendants as observed by 23% of attorneys, 6% of court personnel and 13% of judges. Attorneys (3%) are the only respondents who observed prosecutors as more likely to file charges against majority defendants.

Prosecutors are more likely to file charges when victims are of the majority race as noted by 25% of attorneys, 6% of court personnel and 9% of judges. There is a higher propensity among prosecutors to file charges when victims are of a minority race as noted by only 2% of attorneys and 4% of judges.

Minority defendants are more likely to remain in custody prior to trial. Attorneys, court personnel and judges experienced a racial or ethnic difference in a defendant's likelihood of remaining in custody prior to trial. Attorneys (47%), court personnel (37%), and judges (42%) reported that defendants are more likely to remain in custody prior to trial as to minority defendants. The remaining attorneys (53%), court personnel (63%) and judges (58%) experienced no difference.

Two percent of attorneys experienced that prosecutors are more likely to make favorable plea offers when defendants are of a racial minority. Prosecutors are more

likely to make favorable plea offers when defendants are of the majority race as reported by 16% of attorneys, 5% of court personnel and 13% of judges.

What is the role of the victim's race or ethnic status as to plea agreements?

The report revealed that 10% of attorneys, 5% of court personnel and 8% of judges observed that prosecutors are more likely to make favorable plea offers when victims are of a minority race. Prosecutors were more likely to make favorable plea offers when victims are of the majority race as reported by 8% of attorneys and 4% of judges.

Figure 30 shows that the race or ethnicity of victims affects how strong prosecutors perceive their cases. Attorneys (2%) and court personnel (6%) say that prosecutors are more likely to perceive their cases as strong when victims are of a racial minority. However, 25% of attorneys, 6% of court personnel and 17% of judges observe that prosecutors are more likely to perceive their cases as strong when victims are of the racial majority.

Race and ethnicity seem to affect how strong prosecutors perceive their cases. Prosecutors are more likely to perceive their cases as strong when defendants are of a racial minority as observed by 24% of attorneys, 6% of court personnel and 8% of judges. The study showed that 2% of attorneys, 6% of court personnel and 4% of judges believe prosecutors are more likely to perceive their cases as strong when defendants are of the racial majority.

Race and ethnicity of defendants seems to affect their sentences. Prosecutors are more likely to recommend reduced sentences when defendants are of a racial minority as reported by 1% of attorneys and 4% of judges. However, 19% of

attorneys, 6% of court personnel and 20% of judges observed that prosecutors are more likely to recommend reduced sentences for majority defendants.

The responses suggest that race or ethnicity of victims matters, but less than that of defendants, as indicated in Figure 32. Figure 33 shows that 10% of attorneys, 6% of court personnel and 12% of judges observed that prosecutors are more likely to recommend reduced sentences when victims are of a racial minority. Only 5% of attorneys and 4% of judges saw prosecutors recommending reduced sentences when victims are of the racial majority.

Two percent of attorneys observed that prosecutors are more likely to recommend intermediate sanctions in lieu of prison when defendants are of a racial minority. However, 17% of attorneys, 6% of court personnel and 12% of judges reported that prosecutors are more likely to recommend intermediate sanctions in lieu of prison for majority defendants.

The victim's race or ethnicity plays a smaller role in prosecutors' decisions to recommend intermediate sanctions in lieu of prison than does the race or ethnicity of defendants. Only 9% of attorneys, 6% of court personnel and 8% of judges say prosecutors are more likely to recommend intermediate sanctions in lieu of prison when victims are of a racial minority. Only 3% of court personnel and 4% of judges reported that prosecutors are more likely to recommend intermediate sanctions in lieu of prison when victims are of the racial majority.

The responses suggest that judges are more likely to impose severe sanctions for the actual or threatened use of violence by minority defendants. Attorneys (21%) and court personnel (5%) observe that judges are more likely to impose severe

sanctions for the actual or threatened use of violence by minority defendants.

The race or ethnicity of victims affects judges' decisions to impose sanctions for the actual or threatened use of violence. Judges are more likely to impose severe sanctions for the actual or threatened use of violence against majority victims as observed by 18% of attorneys, 5% of court personnel and 4% of judges.

Judges are more likely to make mitigating departures from sentencing guidelines for majority defendants. Attorneys (19%), court personnel (10%) and judges (12%) reported that judges are more likely to make mitigating departures from sentencing guidelines for majority defendants. Only 3% of attorneys observed that judges are more likely to make mitigating departures from sentencing guidelines for majority defendants.

One item shows a low level of racial or ethnic-based decision making about sentencing by judges. Attorneys (7%), court personnel (5%) and judges (12%) reported that judges are more likely to make mitigating departures from sentencing guidelines when victims are of a racial minority. Only 5% of attorneys observed judges making more mitigating departures from sentencing guidelines when victims are of the racial majority.

Figure 39 shows that a low to moderate level of decisions about sentencing among judges are affected by the race or ethnicity of defendants. Judges are more likely to make aggravating departures from sentencing guidelines to raise sentences for minority defendants as reported by 16% of attorneys, 5% of court personnel and 4% of judges. Only 1% of attorneys and 5% of court personnel observed that judges are more likely to raise sentences for majority defendants.



Figure 40 corroborates findings from Figure 39. Judges are more likely to make aggravating departures from sentencing guidelines when victims are of the racial majority as reported by 14% of attorneys, 5% of court personnel and 4% of judges.

## **Witness Testimony**

According to Dr. Miller's report, attorneys "seldom" and court personnel and judges "almost never" observe that judges find the testimony of majority lay or expert witnesses or litigants more credible than minority lay or expert witnesses or litigants.

## **Child Support**

Attorneys observe that judges often apply the same standards in deciding child support amounts and the terms of child support and enforce child support orders equally for minorities and majorities. Court personnel and judges reported that this is always the case. Attorneys and judges observed that minorities are seldom more likely than majorities to receive jail terms for violating child support orders, while court personnel report that minorities are never more likely than majorities to receive jail terms for violating child support orders.

## **Overall Bias**

According to the report and its results, it is suggested that attorneys "seldom" observe that the judicial system in Tennessee displays subtle bias against minorities

and it “almost never” demonstrates blatant bias against minorities. Court personnel and judges say that the judicial system “almost never” demonstrates subtle or blatant bias against minorities.

## **Summary**

This analysis of the Tennessee Judicial System reveals that race and ethnicity matters. The data show that career issues, workers’ compensation, damages and torts awards, minority representation on juries and on the bench, professionalism and criminal proceedings generally favor majority practitioners and litigants. These results are based on perceptions and experiences of lawyers, judges and jurors. However, the broad-based input obtained from all practitioner groups and jurors (who are overwhelmingly Caucasians) would suggest that the portrait of racial and ethnic fairness in the Tennessee Judicial System described in these findings is more subtle than overt.

# Chapter 3

## Analysis, Findings and Recommendations

### I. Education and Training

#### A. *Overview*

The Commission looked at legal education in Tennessee--at the law schools, at professional development and training of court personnel, and at public education--as they relate to matters of racial and ethnic fairness and equality. In many ways, the ultimate fairness of our judicial system depends on how well our institutions of learning and training teach notions of justice and how effectively they bring minorities into the profession.

Minority group members are being educated in the state's four law schools and their education will have a lasting effect on the students' ability to address the future of racial and ethnic fairness in the state. The Commission also looked at educational programs and professional training for judges, attorneys and other court personnel. These programs could provide opportunities to educate those individuals on ways to improve the court environment and the practice of law with respect to matters of race and ethnicity.

The Commission also reviewed the need for information about the judicial system for those who have experience with the court system.

Education of the public can take many forms, but a comprehensive educational plan must begin in the primary schools. The benefits of public education and training about racial and ethnic differences in the court system are far reaching and have the potential to make that environment more accepting of racial and ethnic differences.

### ***B. Discussion of Findings***

Four law schools in Tennessee provide basic legal education, The University of Memphis, The Nashville School of Law, The University of Tennessee, and Vanderbilt University. Certainly, a substantial majority of lawyers and judges in the state received their law degrees and their legal education from these schools.

All of Tennessee's law schools submitted information regarding their programs. The results of the surveys were collected by the Commission (See Exhibit E to this report). The Commission also reviewed the final draft report of the Tennessee Bar Association Commission on Women and Minorities (hereinafter "TBA Commission Report"), which describes the status of racial and ethnic minority lawyers and women attorneys in Tennessee. The TBA Commission Report and the results of this Commission's survey identify several important issues concerning the responsiveness of the law schools to issues of racial and ethnic fairness.

This Commission studied the racial and ethnic composition of the law school classes. The University of Tennessee College of Law reported that in both years 1994-1995 and 1995-1996 African-American students made up 9.2 % of their student

body. The University of Memphis reported that in 1994-95, minority students comprised 8% of the student body and African-American students comprised 7% of the student body while in 1995-96, minority students comprised 11% of the student body and African-American students comprised 10% of the student body. Vanderbilt University reported that approximately 17% and 18% respectively of their student body were or are members of a racial or ethnic minority group in 1994-95 and 1995-96. These percentages appear to be consistent with, or perhaps better than, the TBA Commission Report that in 1994, the three ABA-accredited law schools were comprised of 12.2% minority students. The Nashville School of Law, which holds classes at night, reported that only 1.5% of its student body are members of racial or ethnic minority groups and the figures are not included in the chart below for the two years as reported to the Commission

COMPOSITION OF LAW SCHOOL CLASSES  
As reported to the Commission  
FOR YEARS 1994-1995 & 1995-1996  
(Excluding the Nashville School of Law)

University of Tennessee	University of Memphis	Vanderbilt Law School
9.2% African/American	8% Min/7% Af/American	17% Minority
9.2% African/American	11% Min/10% Af/America	18% Minority

The number of racial or ethnic minority members who teach at Tennessee law schools has remained relatively constant over the past few years. The University of Memphis reports one full-time minority faculty member in the 1994-95 and the 1995-96 academic years and three part-time minority faculty members in 1994-95 and four

in 1995-96. Vanderbilt University reports that there were six members of racial and ethnic minorities on the full-time and part-time faculty in academic year 1994-95 and four full-time and part-time faculty members in academic year 1995-96. Three untenured faculty members are included in those numbers. The University of Tennessee College of Law had two minority full-time faculty members in 1994-95 and three in 1995-96. There were no part-time faculty members who are members of racial or ethnic minority groups. The Nashville School of Law, which has only part-time, non-tenure track faculty, had four minority faculty members in 1994-95 and three for the 1995-96 year.

#### NUMBER OF MINORITY FACULTY FOR LAW SCHOOLS

As reported to the Commission for 1994-1995 and 1995-1996

Univ. of Tennessee	Univ. of Memphis	Vanderbilt*	Nashville**
2 full & 0 part time	1 full & 3 part time	6 total	4 part time
3 full & 0 part time	1 full & 4 part time	4 total	3 part time

\*Vanderbilt reported the combined total of full and part time faculty members.

\*\*Nashville does not employ any full time faculty since it is a night school.

All Tennessee law schools reported many courses regularly taught in their curriculum that addressed issues of discrimination against racial or ethnic minority groups, the legal or policy implications of race, or racial diversity in the legal profession. The range of these curricular opportunities is impressive: it spans traditional curricular opportunities such as constitutional law, administrative law and employment law to specialized courses such as discrimination in the law, international human rights and an externship with the United States Equal

Employment Opportunity Commission (EEOC).

Three law schools feature student groups and activities that assist minority students in law school. Memphis, Tennessee and Vanderbilt have African-American law student groups that assist students at their law schools. One school has an Asian-American law student group and another school has a Jewish law student group.

These three schools also provide support programs which, although not specifically limited to minority students, are available to support the academic success and progress of all law students, including members of minority groups. The University of Tennessee has a support program that links African-American students with African-American practitioners in the Knoxville legal community and places them in a mentoring relationship as they begin law school. The University of Memphis also reported a mentor program for all first-year students and a more informal mentor program conducted by the Black Law Student Association that links together first-year African-American students with local African-American lawyers and judges.

Also, these law schools reported that they offer administrative staff support within the law school for minority law students. They reported that there were individuals who, as an assigned part of their responsibilities, assisted minority students with several forms of assistance, such as housing and financial aid. The schools also report offering other forms of assistance to minority students, including job and career counseling, assistance with academic progress, and with other individual or personal difficulties experienced by students.

The law schools report various activities that may promote a culture of greater

acceptance for minority law students at the respective institutions. These activities can be useful in addressing perceptions of insensitivity to issues of race and ethnicity in the classroom and around the campus. For example, one law student testified about a faculty member's apparent insensitivity to a racial issue raised in class and described the discussion's chilling effect on minority students present.

The University of Memphis reports efforts through the University's Office of Diversity to provide greater support and assistance to minority students and the law school has attracted minority speakers and visitors to the law school including prominent African-American judges and academics. Vanderbilt University reports having various lecture series addressing the roles of African-Americans, women and other special groups in the American legal and social systems. The University of Tennessee College of Law reports holding receptions for minority law students co-sponsored with the Knoxville Bar Association and special seminars available to minority students. Moreover, there seems to be important, and useful, involvement by law faculty at the law schools in assisting African-American and other minority students.

Three law schools reported that they had increasing numbers of minority students who apply for admission to their school. For example, The University of Memphis School of Law reported receiving between 178 and 251 applications from minority applicants during each of the last few years. Similarly, The University of Tennessee reports receiving between 85 and 100 minority candidates for admission to law school during each application period. Vanderbilt University reported that it does quite well in recruiting minority students, thanks especially to aggressive recruiting



efforts of its minority students at the law school. The schools also reported their need to recruit highly-qualified candidates to ensure that students who are admitted are likely to be successful in law school and in the practice of law.

The TBA Commission Report identifies job placement and salaries as an area where women and minorities do not fare as well as white and male graduates. The information solicited from the law schools for the 1994 and 1995 graduating classes is not clear largely because much of the information on career placement by graduates was not solicited or not provided. Nashville and Vanderbilt did not report placement and salary information because it was not maintained. The two state law schools reported information on 31 African-American students who graduated during 1994 and 1995. Twenty-five reported employment, two were not seeking employment, and three were unemployed, but seeking employment. The employment rates for these graduates are consistent with employment rates for white graduates. Generally, salaries reported by graduates from The University of Tennessee over several years showed that average salaries of African-American graduates were sometimes higher than average salaries for all reporting graduates and sometimes they were lower. There is not a sufficient base of information to draw more, or clearer, conclusions about salary comparisons for recent majority and minority graduates.

The Nashville School of Law reported that it awarded few scholarships and that none were on the basis of race or ethnicity. The other three law schools reported more substantial scholarship programs and awards. The University of Memphis stated that it annually awarded approximately \$250,000 of private and public funds to its minority law students. The University of Tennessee College of Law stated that the

average scholarship award granted to entering African-American students in 1994 was \$9,500 for the first year of law school. It also reported that 100% of the entering and continuing African-American students at the College of Law receive scholarship assistance. Tennessee also reports that African-American students, who comprise about 9% of entering classes, received 70% of the total scholarship funds awarded by the College of Law in 1995. Vanderbilt reported that its scholarship assistance is administered on a need, rather than merit basis, and that significant allocation of scholarship money to minority students occurs on that basis.

The state-supported law schools (The University of Memphis and The University of Tennessee) both indicated their use of funds received through the Tennessee desegregation funding that the state provides as a result of the court-approved settlement in Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd 801 F.2d 799 (6th Cir. 1986). These funds permit law and other professional schools to award a substantial stipend to African-American law students and thereby increase minority student enrollment in law and other professional programs.

Both law schools reported deep concerns about the continuing availability of these funds, which have been used extensively and exclusively to support the academic progress and financial needs of African-Americans. The U.S. District Court in Nashville is now examining the continuing necessity of the remedial order and will soon determine as to whether the order, in whole or in part, should be amended. The law schools articulated a need for more scholarship assistance for members of all minority groups and greater stability in the funding of financial support and assistance for African-American students.

The law schools also offered insightful comments about what more they might do to prepare minority students for the practice of law and to assist the profession and the State of Tennessee on issues of race and ethnicity. Vanderbilt Law School suggested “the appropriate posture for The Vanderbilt Law School is to support diversity including racial and ethnic considerations, as an important component of its institutional ethos.” It appears that the law schools support diversity, including racial, ethnic and gender considerations as integral parts of their programs. This is not, however, reflected in its faculty which have few full-time faculty members. The law schools also identified other ways to enhance their ability to educate minority law students and support the legal profession in Tennessee. The University of Memphis School of Law responded that an enhanced preparatory course might assist undergraduate minority students who are interested in law school. Memphis also encouraged greater sponsorship of educational programs for law students, lawyers, and the community concerning the legal rights of all citizens; social and legal effects of legal discrimination and discriminatory behavior; and the need for citizens to openly address issues of race and ethnicity such as those raised by hate speech codes and affirmative action policies.

The University of Tennessee College of Law suggested that consideration be given to establishing a program under the auspices of the state or local bar associations to assist minority students in passing the Tennessee bar examination.

Vanderbilt Law School reported on its aggressive programs directed towards recruitment of minority students and how the character of its institutional life, including curriculum offerings and student organizations, can serve as an important

way to improve diversity in its law school. Vanderbilt also identified a faculty report prepared approximately five years ago by a faculty committee that extensively debated the need for greater diversity at the institution. That report, shaped by debate and deliberation, has influenced the conduct and activities of the law school with respect to implementing its diversity goals.

The Tennessee court system does not currently have a written plan for training court personnel, jurors, litigants or witnesses about racial and ethnic diversity. Various programs have been presented by the Tennessee Judicial Conference regarding gender and racial fairness and sensitivity issues. The Tennessee Judicial Conference's membership consists of all the trial and appellate judges in Tennessee. The Conference has a standing committee entitled "Judicial Fairness and Sensitivity" that has been instrumental in planning and presenting such programs for judges. Also, the Education Committees of the Tennessee Judicial Conference, the Tennessee General Sessions Judges Conference and the Tennessee Clerks of Conference are involved in planning and promoting further education as to such issues as a part of the overall curriculum for judicial personnel. The Tennessee Judicial Academy, a program designed for the orientation and training of new trial, appellate and general sessions judges, includes programs addressing gender and race or ethnicity. The Administrative Office of the Courts conducts the educational programs for the Academy and the Conferences. Preparations are underway to include more such training for judges, court clerks and other judicial personnel and also to encourage the use of minority faculty in planning and teaching judges and court personnel. Behavior-based education should be encouraged for all judicial training programs as a

means of addressing the problems inherent in our court system, in addition to educational sessions regarding substantive law issues as to race, gender and ethnicity issues..

Litigants, jurors and witnesses often do not understand the roles of court staff and attorneys. Jurors, who are not understanding of racial and ethnic diversity, may interact with other jurors offensively. Judges should take responsibility for helping educate jurors as to such possibilities. Some of the judges routinely send correspondence to attorneys and jurors annually soliciting comments and suggestions, including those regarding possible discrimination issues. A copy of such a letter sent by Judge Seth Norman, Criminal Court Judge in the 20th Judicial District, is included in Exhibit I. The trial and appellate judges were provided a copy of a brochure, "Guidelines for Bias-Free Conduct," that was developed by the Memphis Bar Association for use in the courts. (See Exhibit G.) Individual judges and judicial districts are taking other steps to address these problems.

Although law-related educational programs have proved to be effective in empowering the lay person to maneuver through the court system, few schools offer such programs.

Court personnel generally have little or no training to increase their awareness of racial, ethnic or language differences. Poor communication and discriminatory behavior can occur in the court system because court personnel are unaware of the dynamics of interacting with persons of other cultures. In the Commission's public hearing in Nashville, an Iranian man testified about his perception of bias in regard to his language difficulties in a divorce or custody matter. In Chattanooga, women of

foreign national origin testified about their beliefs of discrimination based on national origin or ethnicity in regard to divorce matters where their failure to fully understand and communicate English was part of the problem. A lack of knowledge can lead to stereotyping that causes misunderstandings among co-workers as well as failure to communicate when providing assistance to the public.

The public forums held by the Commission to hear testimony from citizens about their experiences with the court system showed that lay persons believe that law enforcement personnel are a part of the court system. Judicial leaders must recognize that even though law enforcement is not formally part of the court system, the public will judge the system by the fairness of their contact with law enforcement. Police and sheriffs' departments need diversity training to ensure that law enforcement efforts are handled in a non-discriminatory manner. The Davidson County Police Department has established diversity training for its officers that should be considered for presentation by other law enforcement departments across the state.

### ***C. Recommendations***

1. Law schools should continue their targeted efforts to recruit, admit and graduate minority law students.
2. Law schools, together with bar associations and state education officials, should increase their efforts to disseminate information about careers in the law in order to encourage minority high school and college students to consider careers in the legal profession.
3. Law schools should seek greater financial assistance and support to

minority applicants and law students.

4. The Tennessee Supreme Court and the Legislature should seek appropriate methods to increase financial assistance to minority law students by such programs as scholarships, loans, and tuition forgiveness.
5. Law schools should increase the diversity of their teaching faculty—both full-time and part-time—by continuing efforts to attract and retain high quality minority law professors.
6. Law schools should act as community resources with outreach to communities across the state to help eradicate existing forms of discrimination and bias and to improve opportunities for all persons to achieve personal and professional goals, regardless of race or ethnicity.
7. Law schools should continue or initiate mentor programs designed to support the academic success and professional development of minority law students.
8. Law firms, corporations, government agencies and other law-related offices should develop in-house mentor programs to support the professional development of minority lawyers.
9. Law offices should implement programs designed to assure equality in the nature, scope and importance of tasks assigned to all attorneys regardless of race or ethnicity.
10. Law schools should develop activities to improve the knowledge and responsiveness of students, lawyers and judges about issues of race and ethnicity in the workplace.

11. Law schools should continue efforts to increase employment opportunities for minority students and graduates, ensuring that minorities have access to the same employment opportunities as other students and graduates.
12. Local and state bar associations and the courts should develop educational programs to provide training for primary and secondary schools and the public through community forums.
13. Judges should educate public audiences about the legal system and the adversarial process to help avoid confusion and misunderstandings about the judicial process that may be misinterpreted as bias.
14. Judges should exercise authority and receive funding to require sensitivity training for all court personnel.
15. Local bar associations, in conjunction with legal and judicial organizations, should develop handbooks to provide judges, attorneys and court personnel with information that will improve their interaction and communication with persons of diverse racial and ethnic backgrounds in courtroom and judicial settings.
16. The Legislature should require state and local law enforcement officials to invest time and resources in mandatory diversity training for officers and support staff.
17. The Tennessee Supreme Court should require that continuing legal education include, within its ethics and professionalism requirements, racial and ethnic diversity training.



18. Judicial Conferences, the Court Clerks Conference, bar associations and other organizations that offer continuing legal education should encourage the selection of educational faculty from diverse racial and ethnic backgrounds.

## **II. Court Environment**

### **A. Overview**

Many different participants and factors determine the court environment. Judges, clerks, quasi-judicial officers, clerical employees, court reporters, attorneys, clients, witnesses, bailiffs and jurors all contribute to the atmosphere of a courtroom and the surrounding courthouse. This report defines the “court environment” as the courtroom setting as well as the support offices that make the courtroom function such as clerks’ offices and judicial support staff and personnel. The Commission examined whether there is disparate treatment of racial or ethnic minorities within the court environment by any court personnel or by judges in the decision making process. The resulting recommendations are intended to help promote diversity and fairness in the court environment setting.

Article I, Section 17, of the Constitution of the State of Tennessee provides that “all courts shall be open; and every man for an injury done him in his lands, person or reputation shall have remedy by due course of law.”

The Constitution and the state laws provide that no legal barriers, procedural or substantive, may prevent any Tennessean “free access” to the courts. However, there are ingrained societal and economic barriers that prevent courts of this state

from truly being open to all.

Results from the scientific survey undertaken by Dr. Oscar Miller and the Commission indicate that race and ethnicity affect a person's access to the Tennessee court system and thus result in some forms of disparate treatment.

In the area of criminal proceedings, each aspect that the survey addressed suggested that attorneys, prosecutors, and judges make decisions based on the race or ethnicity of defendants and victims. On the subject of plea-bargaining, the survey results showed a low to moderate level of racial or ethnicity based decision-making among prosecutors. However, respondents perceived that prosecutors are more likely to recommend alternatives to incarceration for Caucasian defendants. The survey found that the race or ethnicity of the victim also played a role, though a small one, in prosecutors' decisions to recommend alternatives to incarceration. Only a very small percentage of attorneys, court personnel and judges stated that prosecutors are more likely to recommend alternative sentencing when victims are Caucasians.

Regarding issues of child support and enforcement, the survey's findings show that attorneys observed that judges often apply the same standards in deciding child support and enforcing child support orders equally for minorities and majorities. Court personnel and judges reported that this is always the case. Furthermore, attorneys and judges observed that minorities are seldom more likely than Caucasians to receive jail terms for violating child support orders. Court personnel report that minorities are never more likely than Caucasians to receive jail terms.

The absence of minority prosecutors has a negative impact on public perception of the legal system. The Commission requested employment information

from the offices of the District Attorneys General in both Davidson and Shelby counties where most of the state's African-American lawyers reside. The District Attorney General for Davidson County employs no full-time African-American prosecutors. The Davidson County prosecutor admits that approximately 100 African-American lawyers work in Davidson County, but states in his letter of August 6, 1996, to the Commission, "it is a challenge for any legal office to hire and retain minority attorneys in view of the small number of prospects and the competition for such employees." It is significant to note, however, that the State Attorney General's office (located in Nashville), the Law Department for Metropolitan Nashville-Davidson County, and the Davidson County Public Defender's office have African-American lawyers in numbers that are more representative of the population they serve. The Shelby County prosecutor employs 72 attorneys. Four are African-Americans and four are "Jewish-Americans" as noted in his letter. The support staff includes only six African-Americans, but no other minorities. (See Exhibit J).

With regard to other issues such as legal representation, orders of protection, and obtaining bond or bail in criminal matters, it appears, based on the written comments of the survey, that wealth and education may have more effect on whether an individual is given fair access to the court system. A person who is well-educated and has an income level to support litigation will fare better in the court system than a poor person with less education. If every one has the means to present his or her case (meaning a certain level of education and income) the system can serve everyone fairly. However, this may disparately affect minorities in Tennessee.

Written comments from the survey expressed the belief that the court system

is fair, but it becomes biased when individuals employed in the system inject their personal prejudices as they carry out their work. This individual bias corrupts the system.

The bar associations across the State of Tennessee also received letters requesting policy information from the Commission. Memphis, Nashville and Knoxville Bar Associations replied. (See Exhibit F.) The Memphis Bar developed guidelines for bias free conduct which relate to the court environment. (See Exhibit G.) The Knoxville Bar Association approved special recommendations to address issues of racial and ethnic fairness including education and training of judges, court staff and attorneys. The recommendations encourage all court personnel to be sensitive to these issues and urge the hiring and promotion of more minorities in all areas of the courts.

The Knoxville Bar also encourages the screening of judicial candidates for racial and ethnic bias and urges appointment of minority members to judicial nominating and screening committees, as well as to the Court of the Judiciary. The Knoxville Bar Association's recommendations for court environment improvement indicate a thorough and well thought-out policy. It is our recommendation that this policy be adopted by all bar associations. The Nashville Bar Association has adopted special recommendations that address court environment issues in detail. It, likewise, has recommendations that are encouraged by this committee.

## ***B. Discussion of Findings***

Judges set the ethical tone of treatment of persons in the courtrooms and the

court environment. Clear and concise directives can alleviate discriminatory practices. To this end, fair treatment of court participants by judges and lawyers helps to reduce disparate treatment of racial or ethnic minorities. Care should be taken to eliminate the appearance of any disparate treatment of anyone who is a part of the court environment. All staff must address the public and each other using proper titles and forms of address. Judges should be consistent in setting bonds, sentencing, damage awards, child support, child custody, and other rulings and sanctions as to all parties. Judges may dispel perceptions of bias by giving clear reasons rulings or sentencing.

Tennessee's court clerks hire their deputy clerks and support personnel. Judges, the Administrative Office of the Courts and local bar associations should encourage clerks to employ minorities consistent with the proportionate population of minorities within their counties. Public announcement and advertising of employment positions will give fair opportunity for applicants. The commitment is to reflect the diversity of the population served by the court. Employers should recognize that the hiring of a representative of one minority may not improve the perception of other minorities that the system is fair. Tokenism is not the solution to inequality for minorities.

All persons should be required to address each individual having business with the court in a polite and civil manner. Clerks should be responsible for ensuring that their staff show no disparate treatment to any individuals.

Some attorneys will address witnesses on the stand and in other court settings using their first names. Fair treatment of individuals is better ensured when the

District Attorneys General and Public Defenders employ staff that are diverse and show no disparate treatment of any persons with whom they have business.

Minorities see a different justice system than majorities do. Some African-Americans feel that the judicial system is stacked against them--that they will not receive equal justice in the courts of Tennessee. It is critically important that judges and court support personnel be trained to address racial and ethnic bias with a goal of ensuring delivery of services and reaching decisions free from bias. Judges especially should be aware of the need to dispel the perception of unfairness and bias in the court environment. To this end, judges should be careful to explain their actions and rulings whenever possible.

The Tennessee Supreme Court recently instituted the “SCALES” (Supreme Court Advancing Legal Education for Students) project, an initiative designed to educate high school students about the judicial branch of government. Participating students have a unique opportunity to attend a Supreme Court session in their own community. The project encourages students, teachers and the general public to attend and ask questions at the close of the sessions. The Commission applauds the project and encourages its continuation. It will help to educate the public about the judicial process. A brochure describing this project in more detail is attached to this report as Exhibit K.

The Commission recommends a similar project be organized at the trial and intermediate appellate levels. Careful planning will be needed because of the complex nature of jury trials. Bench trials will be less complicated. However difficult it may be, there is a great need to educate the public about the justice system.

This Commission encourages presiding judges and the Supreme Court to assign minority judges for temporary services as designated judges in rural jurisdictions.

The Commission's study shows a substantial racial or ethnic gap in the judicial nominating process. Information from the Judicial Selection Commission shows that minority candidates need to apply in greater numbers to be considered for positions on the trial and appellate bench. The Judicial Selection Commission records for the period of September 1994 through October 1996 reveal that nine persons of racial minority (African-Americans) applied during the past two-year period. No other racial minorities applied. A total of 141 candidates applied for consideration by the Judicial Selection Commission to fill vacancies on the trial and appellate courts of Tennessee during this period. Of the total of 6.4% (9 out of 141) of African-Americans that applied as compared to the total number of applicants, 44% (4 of the 9) of the African-Americans were selected by the Judicial Selection Commission as the most qualified nominees. Their names were forwarded to the Governor for consideration of appointment to the judicial vacancies, however, none were appointed.

The questionnaires that were received regarding the perception of minorities being nominated to judgeships reveal that 40% of attorneys, 28% of court personnel and 48% of judges observed that fewer nominations to judgeships go to attorneys or judges who are of a racial minority. Conversely, 10% of attorneys, 6% of court personnel and 12% of judges reported that they perceive fewer nominations to judgeships go to attorneys or judges who are of the racial majority.

The study shows that 58% of attorneys, 45% of court personnel and 61% of judges observed racial or ethnic bias in judicial appointments. Of those reporting, 14% of attorneys, 10% of court personnel and 18% of judges say that more appointments to judgeships go to attorneys or judges who are of a racial minority. However, 44% of attorneys, 35% of court personnel and 43% of judges reported that more appointments to judgeships go to attorneys or judges who are of the majority race.

It has been the observation and finding of this Commission that there has been a lack of sufficient effort to promote minority judges to policy-making judicial assignments. Since its formation in the 1930's, the Tennessee Judicial Conference has not selected a minority judge or woman to serve as president of the conference.

In regard to the question of whether the judicial nominating process usually favors attorneys or judges who are of a racial minority or majority, or no difference,-- the Commission's study shows that while 17% of attorneys, 11% of court personnel and 16% of judges reported that the judicial nominating process usually favors attorneys or judges who are of a racial minority, it should be noted that 31% of attorneys, 17% of court personnel and 8% of judges observed that the judicial nominating process usually favors attorneys or judges who are of the racial majority.

The study shows that attorneys, court personnel and judges have observed or experienced racial or ethnic bias affecting the judicial selection process. Attorneys (51%), court personnel (32%) and judges (34%) reported such experience. The judicial selection process usually favors majority attorneys or judges as noted by 18% of attorneys, 11% of court personnel and 21% of judges.



Although the Commission's study reflects bias affecting the judicial selection process, data shows that the Judicial Selection Commission has acted positively in submitting names of minority candidates to the Governor for consideration as appointees.

The Judicial Selection Commission is a 15-member body of attorneys and laypersons appointed to serve in considering applicants for trial and appellate judgeships. The Judicial Selection Commission conducts public hearings and private interviews with each of the candidates, then votes and sends the names of three candidates to the Governor for consideration and appointment. Membership of the Judicial Selection Commission, by statute, is a representative mix of the state's population by geography, sex and dominant minority racial make-up. The Commission advertises for applicants to vacancies and encourages all qualified attorneys to apply for consideration without regard to race, ethnicity or gender. The Judicial Selection Commission also states in its press releases and notices for public hearings that the Commission is committed to the goal of a diverse judiciary.

The Commission's study shows that race or ethnicity is a factor when it comes to awarding compensatory damages to plaintiffs. Twenty-five percent of attorneys observed this bias in the court system. Juries award lower compensatory damages to minority plaintiffs as compared with majority plaintiffs as reported by 20% and 5% of the judges surveyed had similar observations. None of the judges observed majority plaintiffs receiving lower awards than minority plaintiffs. The responding court personnel observed no difference.

Looking at punitive damage awards by juries, it appears that 22% of attorneys,

7% of court personnel and none of the judges observed that race or ethnicity played a role in the amount awarded to plaintiffs. Attorneys (17%) and court personnel (7%) reported that juries award lower punitive damages to minorities. Punitive damages awarded by juries favored majority plaintiffs as noted by 5% of the attorneys.

In regard to criminal proceedings, the Commission's study shows that attorneys, prosecutors, and judges make decisions based upon the race or ethnicity of the defendants and victims. Each inquiry indicated that bias toward race or ethnicity favors majority defendants.

Of those responding, 34% of attorneys, 14% of court personnel and 19% of judges observed the likelihood that a defendant will be physically abused while in custody is affected by race or ethnicity. Attorneys (28%), court personnel (7%) and judges (14%) observed a greater likelihood of minority defendants being physically abused while in custody as compared to 5% of attorneys, 7% of court personnel and 5% of judges who thought that majority defendants were more likely to be physically abused while in custody.

Data from the Administrative Office of the Courts of the Tennessee Supreme Court reveals that African-American judges comprise only 5% of the total number of judges serving on the trial and appellate benches. All active and retired trial and appellate judges of the state, by statute, are members of the Tennessee Judicial Conference. Of the 178 active trial and appellate judges in the conference, nine are African-Americans.

Of the 178 judges in the Tennessee Judicial Conference, the only African-American currently serving on the appellate level is Chief Justice, Adolpho A. Birch,

Jr. Tennessee has 29 appellate judicial positions at this time, including five supreme court justice positions, 12 court of appeals judge positions, and 12 court of criminal appeals positions. Only one of 29 appellate judges is of a racial or ethnic minority.

Two African-American judges sit in the 20th Judicial District in Nashville, one appellate judge and one chancellor. The remaining seven African-American judges in the Tennessee Judicial Conference serve on the trial bench in the 30th Judicial District in Memphis. According to the 1990 population figures, Memphis has the largest percentage, 43.6%, of African-Americans living in any metropolitan area of the state, and Nashville ranks second with 23.4%.

An even lower percentage of racial minority judges serve on the limited jurisdiction level. Of the 154 members of the Tennessee General Sessions Judges Conference, three are African-Americans. Less than 2% of racial minority judges serve at the limited jurisdiction level.

In the over 250 separate court clerks' offices in the state, only one African-American serves as the official appointed or elected clerk. No African-Americans currently serve as state-funded child support referees out of the ten on the bench at this time. According to information from the Administrative Office of the Courts, none of the state-paid court reporters serving in the criminal courts are members of racial minorities. No other racial minorities serve in the judicial positions discussed above.

Exhibit H shows the percentage of Caucasian, African-American and all other minority populations by county and also by judicial district.

### ***C. Recommendations***

1. Judges should issue clear and concise directives to eliminate discriminatory practices within the court environment.
2. Courts should ensure that in civil or criminal fee generating cases, attorneys are appointed on a nondiscriminatory basis.
3. All participants in the court environment should be addressed by appropriate formal titles.
4. State and local bar associations, in conjunction with judges and clerks, should develop court monitoring programs to ensure court environments free from racial or ethnic bias.
5. The Tennessee Supreme Court should prepare reports showing minority representation among court personnel by judicial districts, and make such reports available to appointing authorities.
6. Judicial appointing authorities should establish as a priority the increase of minorities in judicial and quasi-judicial appointments.
7. The Tennessee Supreme Court and the Presiding Judges of Judicial Districts should designate minority judges to fill temporary vacancies, including those in jurisdictions that have little or no minority representation in the bench or bar.
8. The Legislature should review the composition of the Judicial Selection Commission to ensure compliance with statutory requirements of diversity.
9. Judicial candidates should be screened and disqualified upon evidence

of racial and ethnic bias prior to appointment.

10. The judicial evaluation process should include screening for racial or ethnic bias when evaluating sitting judges and evaluators should reflect the proportionate population of minorities.

11. The Tennessee Supreme Court and the Legislature should review all aspects of the system of assessing and providing bail bonds; should set forth specific guidelines regarding surety requirements; and should consider a public pre-trial service system free from bias as an appropriate alternative or addition to the current bail bonding practices.

12. Judges should encourage sheriffs, clerks, and other court personnel who hire court assistants to appoint minority personnel.

13. The Administrative Office of the Courts should recruit and hire minority court reporters for use in state funded cases.

### **III. Court Policy and Procedure**

#### **A. Overview**

In any study of Tennessee courts, it is difficult to make observations or recommendations that apply to the whole state. Some courts serve counties with populations of a few thousand, others serve hundreds of thousands. We have entire judicial districts with virtually no African-American families and some with a majority. Some counties have two or three attorneys; others have hundreds. Despite this diversity, most of the Commission's findings and recommendations apply across the state, even though a response that would be appropriate to one district may not work in another.

To judges and lawyers, court policies and procedures may seem to be a neutral set of rules, designed to simplify court operation and decision making. Although that may be their intent, in fact each policy and procedure has an impact on the racial and ethnic fairness of the judicial system itself. The list from which jurors are selected, the rules about how an attorney may address a witness, how bail must be posted and how attorneys are appointed to criminal cases and fee-generating civil cases all determine how well our system serves minorities, and how it appears to serve them.

Throughout the country, one-third of all African-American males between the ages of 18 and 25 are either incarcerated, on probation, or in some way under the legal authority of our criminal justice system. The Commission does not suggest that this statistic by itself suggests bias. It does dramatize that any defect in the criminal justice system will have an immediate and disproportionate impact on African-Americans.

Similarly, the Commission's study and other national studies of the subject show that the general public does not understand the judicial system and mistrusts the institution and its results. When minority participants see an outcome they disagree with and do not understand, their natural tendency is to suspect that bias is involved. Again, defects in the system produce particularly unwelcome results among minority participants.

The Commission's public hearings, survey, review of data and review of reports from other states all established that the judicial system in Tennessee needs to make a sweeping and immediate review of its court practices and procedures in order to improve the real and perceived impact on the state's racial and ethnic minorities.

At the same time, however, it is important to note that the statewide survey showed that those who know the system the best--lawyers, clerks, judges and other officers of the court-- reported fewer problems and concerns than the public apparently perceives. (Of the total sample surveyed in the statewide survey, 89.6% were white; 7.6% were African/American and all other minorities were 2.8%). Overall, in Tennessee, judges, lawyers and court personnel can take pride in their success in addressing problems and concerns that were significant issues only a few years ago.

## ***B. Discussion of Findings***

Several years ago, public institutions, including courts, began keeping less information about public participation by race or ethnicity, for fear that such information would be used for improper purposes. As a result, we do not know as much as we should about the implications of some policies and procedures. We urge

the state to:

- 1) Review current policies relating to data collection and look for ways that including information about race or ethnicity can improve the public's understanding about the use of the courts and the impact on court policies and practices; and
- 2) Distribute more deliberately the information it does collect.

Each court system in the state should identify one person or office that will be available to help members of the public understand and participate in the judicial process. Witnesses, parties, jurors and others are often confused about the process and their roles in it. They need the same kind of assistance that courts increasingly provide to victims. Large, urban judicial districts may be able to hire full-time individuals. In small, rural counties it might be sufficient to identify one person, to act as an ombudsman, with the responsibility of guiding participants to find answers to their questions.

Tennessee, like the nation, is becoming more ethnically diverse. Counties that have for years been homogeneous now have participants who speak not only Spanish, but Vietnamese, Creole and other languages. Courts must accommodate not only their language, but recognize how their cultures affect their understanding of court policies and procedures. Courts should not automatically assume that friends or family members will be appropriate interpreters. Local governments should assist their courts to accommodate the many growing numbers and diversity of ethnic participants in our justice system.

Even though law enforcement departments are not formally part of the



judiciary, the way law enforcement officials treat the public shapes how the public perceives our system of justice. Many more people encounter law enforcement personnel than courts. No matter how careful courts are in avoiding discrimination, if police departments show bias or discrimination, the public will perceive that our system of justice is unfair. Court officials, district attorneys general and public defenders must make it clear that they will not tolerate bias or discrimination by law enforcement officials against defendants, victims, witnesses or any other persons. When they do encounter bias, they should make reports to superiors, prosecute, move for contempt or apply whatever sanctions are within their authority.

Many of the problems the Commission identified do not lend themselves to resolution by rule or regulation. Ultimately, fairness will depend upon the desire of participants in the process to be fair. To encourage such sensitivity, courts should take advantage of opportunities to raise issues of racial and ethnic fairness with the bar, with participants in litigation, and with the general public. For example, courts might use annual Law Day observances as an opportunity to examine and promote fairness. In drafting local rules, courts should also adopt strong provisions against discrimination in language or practice, including sanctions against such behavior.

Pretrial procedures, particularly regarding law enforcement practices, bail and decisions whether to prosecute, have significant impact on the public's perception of our system of justice, even if some aspects of pretrial procedure are not technically the responsibility of the courts. The Commission urges judicial leaders, including judges, clerks, district attorneys, public defenders and others, to use what influence they have to address bias at any stage in the process, including behavior by law enforcement

officials, bail bonding personnel, and retained or appointed counsel.

As the Tennessee Supreme Court Commission on the Future of the Tennessee Judicial System report so strongly noted, Tennessee's bail bond system poses significant burdens on low and moderate income defendants, regardless of race. However, since minority defendants are often poor, bail practices affect them disproportionately and for that reason deserve special scrutiny.

Jury participation is essential to an effective judicial system. Jury participation is not only a right but a duty. At least one judicial district in Tennessee has implemented a one-week, one-trial jury service system. This system encounters less resistance to jury duty than longer terms of service previously used and is reportedly working well.

The jury system in Shelby County allows jurors to choose a one-week period of jury service from among dates that are offered during a particular term of court. Once they have selected this date, they are responsible to appear on that date to begin their service. During orientation, jurors are told that they will have to serve for approximately one week or one trial. If they are selected and sworn in as jurors on a case, they are excused once a verdict has been rendered. After service, they are excused for a period of ten years. If they are not sworn in as a juror on a case, they are responsible for approximately a one-week period of service which translates, on average, into three days of total service.

### ***C. Recommendations***

1. Local court systems should designate an ombudsman to assist public participants in the judicial system.

2. The Administrative Office of the Courts should collect and distribute data on the impact of current bail bonding policies and practices on racial and ethnic minorities.
3. The Administrative Office of the Courts should compile and analyze data on civil cases to evaluate the influence and impact of race and ethnicity on outcomes, settlements and damage awards.
4. The Tennessee Department of Commerce and Insurance should require all insurance companies to report the amount of personal injury settlements and the race and ethnicity of the parties.
5. The Legislature should enact legislation to provide for sanctions against insurance companies that discriminate on the basis of race or ethnicity in the evaluation and settlement of personal injury and workers' compensation claims.
6. The Tennessee Department of Correction should monitor the access minorities have to, and their success in, offender programs that offer educational, vocational and drug rehabilitation treatments.
7. Courts should ensure that jury source lists represent the racial and ethnic make-up of the areas they serve. If standard list sources, such as driver licenses and voting lists, do not adequately represent minority demographics, courts should consider lists from other sources, such as school enrollment, public housing residents, and utility customers.
8. Courts should review jury service and its policies and adjust those policies that may be barriers to minority participation, such as the length of

service, jurors' ability to serve on call at home, the level of reimbursement and assistance with child care.

9. Courts, district attorneys and public defenders should assure that minority defendants receive the same quality of treatment and representation.

10. The Tennessee Commission on Children and Youth should compile and distribute data on the outcomes of juvenile court proceedings by race and ethnicity and recommend appropriate corrective actions if such data shows bias.

11. The Tennessee Commission on Children and Youth should compile and distribute data regarding the extent to which minority children are eligible for educational, vocational and drug rehabilitation programs and the outcome of such programs for minority participants.

12. The Legislature and the Tennessee Supreme Court should expand efforts to make legal representation available to low and moderate income people.

13. The Tennessee Supreme Court should ensure appropriate interpreters are available pursuant to applicable law.



# Conclusion

The Commission has examined the courts, the court environment, the processes for educating lawyers, judges and court personnel, and public perceptions of the court system to understand the roles that race and ethnicity play in the system of justice in Tennessee. The Commission offers this report and its recommendations to the Tennessee Supreme Court. Commission members hope that this report will initiate a sustained state-wide consideration of issues of race and ethnicity in the court system.

The Commission is pleased to report that it found no substantial evidence of a systemic bias against individuals within the justice system in Tennessee. In many respects the systems operated openly and fairly for all participants. However, the Commission did find evidence that significant perceptions of bias and discrimination do exist in some aspects of our judicial system. Although the majority of the individuals surveyed believed the system is fair, many jurors, court personnel, attorneys and, most significantly, judges have observed discrimination against minorities. Any personal bias by those administering justice is unacceptable. The imposition of bias in the administration of justice corrupts the system thereby denying individuals their basic constitutional rights to equal and fair treatment. We can and must make improvements--sometimes modest and sometimes more substantial--to

improve perceptions of the systems and to make judicial processes and practices more fair for all people regardless of their race or ethnicity.

The Commission's report emphasizes the importance of continuing the consideration and evaluation as to how to make processes and practices within and across the judicial system more fair. The Commission hopes that the fundamental recognition of an inclusive system of justice, free from the specter of discrimination or bias, will be embraced by the citizens of Tennessee and promoted by the branches of state and local government.