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Report of the Third Circuit Task Force on Equal Treatment in the Courts

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1997]

REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL
TREATMENT IN THE COURTS

COMMISSION ON GENDER*

COMMISSION ON RACE & ETHNICITY**

Editor's Note: Our subscribers will note that citation and textual material contained within the Third Circuit Task Force Report on Equal Treatment in the Courts do not conform with The Blue Book: A Uniform System of Citation or the Villanova Law Review's usual stylistic form. As requested by the Task Force, the Law Review has followed the format and style, for both citation and text, of the original publication by the Third Circuit. Volume 2 of this Report, an appendix containing sample survey and data collection forms upon which this Report is based, is available from the Circuit Executive's Office, 601 Market St., Philadelphia, PA 19106. Telephone: (215) 597-0718.

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I. REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL
TREATMENT IN THE COURTS

A. *Introduction and History*

ON June 29, 1994, the Third Circuit Task Force on Equal Treatment in the Courts ("Task Force") was created by unanimous resolution of the Judicial Council of the Third Circuit.¹ The resolution states:

The Judicial Council hereby authorizes the formation of the Third Circuit Task Force on Equal Treatment in the Courts. The Task Force is charged with conducting a comprehensive examination of the treatment of all participants in the judicial process by judicial officers, their staffs, and court personnel in the Third Circuit to assure equality, regardless of gender, race or ethnicity. The Task Force will be expected to study, *inter alia*, the treatment of litigants, witnesses, victims, attorneys, and jurors; the selection, retention, promotion and treatment of employees; the appointment of arbitrators, experts, and special masters, and any other appointments made by judges of the courts, including committees; the effect or impact of gender, race or ethnicity, if any, in bankruptcy cases or administration, and any other matters within the jurisdiction of the courts of the Third Circuit that may have an impact on the equality of treatment of participants in the judicial process. Based on its findings, the Task Force should make recommendations to the Judicial Council appropriate to correct any inequities.

The Judicial Council authorizes its chair to appoint a chair of the Task Force, who will be authorized to undertake all necessary and appropriate actions to further this endeavor. Together, the chair of the Judicial Council and

1. The scope of the Task Force was limited to the language of the resolution. Therefore, issues such as treatment of persons based on sexual orientation, religion or disability were not addressed.

the chair of the Task Force will appoint the other members of the Task Force.

In accordance with the resolution, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit asked Chief Judge Anne E. Thompson of the United States District Court for the District of New Jersey to chair the Task Force. Ultimately twenty-three persons were selected to serve on the Task Force. The members of the Task Force are a representative group of judges from the various courts of the Third Circuit, attorneys from both private practice and the public sector, law professors and representatives of the court support staff and the public.

Chief Judge Sloviter and Chief Judge Thompson also appointed two commissions, one on gender and one on race and ethnicity. The Gender Commission was co-chaired by Judge Dickinson R. Debevoise of the District of New Jersey and Magistrate Judge M. Faith Angell of the United States District Court for the Eastern District of Pennsylvania. The Race & Ethnicity Commission was co-chaired by Judge Theodore A. McKee of the Third Circuit and Lawrence S. Lustberg, Esq., a partner at Crummy, Del Deo, Dolan, Griffinger & Vecchione and an adjunct professor of law at Seton Hall University School of Law. The forty commission members included appellate, district, magistrate and bankruptcy judges as well as law professors, prosecutors, federal defenders, private practitioners, court staff and probation officers.

In addition, one judge from each district within the Third Circuit was appointed to serve as a liaison for that district's interaction with the Task Force. The Task Force and Commission members and liaison judges are listed in appendices at the end of this Report.²

Implicit in a study of this nature is the understanding that diversity of gender, race and ethnicity among public officials and public employees and fair and equal treatment of all persons served by government are positive values in a pluralistic and democratic society. Such a study seeks to improve the environment for diversity, fairness and equality.

2. For a list of the Task Force members, see Appendix A. For a list of the Members of the Commission on Gender, see Appendix B. For a list of the Members of the Commission on Race & Ethnicity, see Appendix C. For a list of the liaison judges, see Appendix D.

B. *Process*

In November 1994, the Task Force held its first meeting. Dr. Molly Treadway Johnson, Project Director of the Federal Judicial Center's *Research Guide on Studying the Role of Gender in the Federal Courts*, discussed other similar efforts in the federal circuits, and the members of the Task Force determined the purposes and composition of the commissions.

After wide advertisement for the position of Project Director, followed by the review of over three hundred applications, Chief Judge Thompson, with the concurrence of Chief Judge Sloviter, selected Betty-Ann Soiefer Izenman as the Task Force Project Director. Ms. Izenman is a former Assistant United States Attorney in the District of Columbia and former Counsel to the United States Senate Committee on Governmental Affairs. She assumed her position in December 1994.

In December 1994 and January 1995, the commissions held their first organizational meetings. During these meetings, they established committees to review particular areas of concern, such as the interaction between the court system and witnesses, jurors, litigants and attorneys; special issues relating to criminal justice; and court employment and personnel practices. Members of the commissions volunteered to head the efforts of those committees.

The commission members who became committee chairs then recruited volunteers to work with them on the specific issue areas they were to address. Each committee tried to include representatives from each of the districts in the Third Circuit. Several committees were so geographically widespread that they "met" only via telephone conference. The committee members are listed in an appendix to this Report.³

The 1995 Judicial Conference of the Third Circuit introduced the work of the Task Force to the Third Circuit community. Chief Judge Sloviter spent one-half of the 1995 Judicial Conference introducing the work of the Task Force to the judges and lawyers of the Third Circuit. The introduction gave all participants an opportunity to be heard and to make suggestions as to issues that should be considered and the manner in which inquiries should be made. At a plenary session, the issue of racism and sexism in the twilight of affirmative action was addressed, and the different approaches to the issue of equal treatment in the courts were presented. The next day, there was a town meeting on equal treatment issues at which

3. For a list of the committee members of the Task Force, see Appendix E.

the participants and members of the audience engaged in frank discussion. Conference participants then divided into ten breakout sessions and discussed many of the issues under consideration by the Task Force and commissions. Reports on the sessions and comment sheets filled out by the participants were transmitted to the Task Force and commission members for use in planning efforts.

In order to present the Task Force and its mission to the widest possible court audience, the Project Director traveled throughout the Third Circuit. She visited each district and spoke to as many staff members as possible about the purpose, scope and methodology of the Task Force and the commissions. Many of the court employees in each court unit volunteered to assist the Task Force effort.

The commissions met bimonthly. Their first order of business was to decide on what data to gather and the best method of obtaining it. The Task Force agreed that it needed a multidimensional approach to data gathering, including quantitative and qualitative information. Quantitative data can be summarized and reported in terms of numbers and percentages. Qualitative information provides more detail and depth about individual human experience, but is generally incapable of being assigned a numerical value. Thus, to discern the presence, absence or extent of racial, ethnic or gender bias in the courts of the Third Circuit, the Task Force sought information from the existing records in court offices, written questionnaires, telephone interviews, focus groups and public hearings. The commissions also began meeting jointly to formulate research decisions and decided to survey all judges and employees in the Third Circuit. The commissions and Task Force also agreed to question a random sample of attorneys across the Third Circuit.

The inquiry of the Task Force and the commissions was designed to stay within the limited budget. The Administrative Office of the U.S. Courts (AO) had approved hiring of the Project Director for a total of two and a half years. No other funds were sought outside of the circuit. The court of appeals allocated a total of \$60,000 of its funds, and the District Court of New Jersey allocated \$5000. All expenses, including mailing and printing, were paid from this budget. Most of the work performed on behalf of the Task Force, the commissions and the committees was done on a volunteer basis by the members.

1. *Questionnaires*

The creation of all three questionnaires was a collaborative effort that melded the practicalities of the court process with the demands of social science. Dr. Donald N. Bersoff, Director of the Law and Psychology Program at Villanova University School of Law and Allegheny University of the Health Sciences, with the assistance of his students, formulated relevant questions, which the commissions reviewed. Dr. Bersoff's background made him particularly well suited to assist the Task Force. With a Ph.D. in psychology from New York University and a J.D. from Yale Law School, and having practiced law as well as psychology, Dr. Bersoff was able to bridge the forensic gap between the practice of law and social science. Although Dr. Bersoff had been appointed as a member of the Race & Ethnicity Commission, he worked closely with both commissions.

The draft questionnaires were edited numerous times to reduce duplication, confusion and bulk. In addition, concerns about the accuracy of information possessed by the targeted respondents led to additional revisions.

The initial drafts of the questionnaires produced by Dr. Bersoff attempted to eliminate or reduce "response bias," which occurs when respondents are led to select a particular response for reasons other than the question itself. For example, Dr. Bersoff advised that in mail surveys, respondents tend to select the first choice offered, while in telephone surveys, respondents are more apt to prefer the last choice offered. Volunteer "test" respondents found the questionnaires to be extremely tedious and time consuming in part because of similarly worded, repetitive questions designed to reduce response bias. Therefore, the number of questions was reduced, and the questions were simplified in order to encourage a more comprehensive sample of respondents to complete and return the questionnaires.

The questionnaire to be distributed to the judges was reviewed and critiqued by two independent social scientists, Dr. Johnson of the Federal Judicial Center and Dr. Shari Seidman Diamond, professor of psychology at the University of Illinois, a senior research fellow at the American Bar Foundation and the author of a chapter of the *Reference Manual on Scientific Evidence*. The structure and substance of the questionnaires were revised to reflect their suggestions. The judges questionnaire was pretested by several state court judges. The employee and attorney questionnaires were also pretested by volunteers.

It was recognized that mail surveys are at a disadvantage because they do not lend themselves to extensive probing or exploration of the complexities of the subject matter. In addition to using focus groups and public hearings to add a personal dimension to the questionnaire responses, the commissions left space on all three questionnaires for anecdotes or personal experiences that would illustrate respondents' answers. There was also a lined, blank page at the end of each questionnaire that could be used to supply additional comments or explanations. A substantial number of respondents took advantage of these opportunities to provide additional information.

a. Employee Survey

In February 1996, the first of the questionnaires was sent to all court employees. The personnel specialists in each court unit provided information to ensure that each employee on the Third Circuit payroll would receive a questionnaire. Questionnaires accompanied by a cover letter from Chief Judge Thompson were provided to each personnel specialist for distribution to court employees. In addition, Chief Judge Thompson wrote to each judge in the Third Circuit asking that his or her staff be given time to complete the questionnaire. Many judges and court offices cooperated with the Task Force by allowing employees to use administrative leave to complete the questionnaires during working hours. A few weeks after the first mailing, follow-up letters were sent out through the personnel specialists. A total of 2140 surveys was distributed. Of that number, 1017 (47.5%) were returned.

In order to encourage employees to respond, complete anonymity was promised. The questionnaires were accompanied by prepaid envelopes addressed to Dr. Bersoff at Villanova University School of Law and have not been handled by Task Force members or staff.

b. Judicial Officer Survey

In the Spring of 1996, questionnaires were sent to every judicial officer currently sitting in the circuit. This included appellate, district, magistrate and bankruptcy judges. A total of 164 questionnaires were distributed through the liaison judges of each district and the courts of appeals. Here, too, the blank questionnaires were accompanied by prepaid envelopes addressed to Dr. Bersoff to ensure confidentiality. Like the employee questionnaires, the judicial officer questionnaires remain in the secure possession of Dr. Ber-

soff and Villanova University School of Law. The Task Force members and staff have never seen these questionnaires. A total of 117 (71.3%) judges completed the questionnaire.

c. Attorney Survey

In July 1996, questionnaires were sent to 9433 attorneys. Based on the recommendation of Dr. Bersoff, the attorney names and addresses were chosen by a computer program that randomly selected a predetermined percentage of names from databases of attorney names and addresses supplied by each clerk of the district and bankruptcy courts and the clerk of the court of appeals. The databases contained the names and addresses of attorneys who had filed pleadings in each court. Unfortunately, the databases contained numerous outdated addresses, so many questionnaires were returned as undeliverable. Apparently, the databases also contained the names of many attorneys who rarely appeared in the courts of the Third Circuit and were not familiar with its interactions.

A preliminary analysis of the initial attorney responses indicated that there were very few minority respondents.⁴ The response rate from women attorneys, however, mirrored the percentage of women attorneys living in the districts of the Third Circuit according to 1990 figures from the United States Census Bureau. In an effort to increase the number of minority attorneys participating in the survey, mailing lists were obtained from each of the minority bar associations in the Third Circuit. From the information obtained through minority bar associations, an additional 1441 questionnaires were mailed. Each mailing was followed by a reminder from Chief Judge Thompson.

Because the minority bar mailing lists were not comprised exclusively of federal practitioners, respondents were asked to reply even if they did not practice in federal court. Completed questionnaires were received from 83 minority attorneys who practice in the federal courts.

4. The term "minority" was defined as "non-Caucasian," although such groups may, in fact, constitute the majority population in specific regions of the Third Circuit such as the Virgin Islands. The categories included in the term "minority," as used with regard to law clerks on the judges questionnaire, were not specified and include African-Americans, Asian-Americans, those of Hispanic origin and any other persons who define themselves as non-Caucasian. The terms Caucasian and white, African-American and black are used interchangeably throughout this Report.

The response rates were 1755 (18.6%) from the original mailing and 174 (12%) from the mailing to minority bar members.⁵ The combined response was 1929 surveys or 17.7%. Although this was a disappointing return in terms of percentages, the return sample of almost 2000 respondents was a sufficient basis for statistical analyses.⁶

After the responses were received, the judges survey results were analyzed by Dr. Bersoff and his students. Because of time constraints and the large amount of data, the Task Force enlisted the assistance of the Center for Forensic Economic Studies in Philadelphia, a well-known and experienced firm, to analyze the attorney and employee surveys. The analyses were conducted in such a way that the social scientists were able, without compromising the confidentiality of the respondents, to determine whether there were statistically different results among or between respondents by race, gender or district. Both Dr. Bersoff and the staff of the Center for Forensic Economic Studies were careful to ensure that the analyses were provided in the format required by the committees and that they were methodologically sound.

2. *Internal and External Data Collection*

As the questionnaires were being prepared and reviewed, the committees submitted requests for relevant data they wished to review and that might be obtained internally. Toward this end, Chief Judge Thompson issued letters of request to each court unit. These requests were sent to every clerk of the district and bankruptcy courts, to each chief probation office, to each chief of pretrial services and to the four units of the court of appeals (clerk's office, staff attorneys, library and circuit executive). The letters requested information about the racial and gender makeup of the office staffs, promotions, hiring, firing and disciplinary actions, as well as the use of leave, child care facilities and interpreters. Each office was also asked to provide its most recent personnel manual. The responses were thorough and informative and reflected many hours of diligent research.

5. Interestingly, of the 174 responses received, 91 minority attorneys indicated that they did not practice in federal court and could not complete the survey. The Task Force could not obtain statistics regarding the number of minority attorneys currently practicing in federal court.

6. The Task Force is not able to determine whether those who responded to the questionnaire are representative of all the attorneys who practice in the Third Circuit.

This information was collated by subject matter and transmitted to the appropriate committees. In addition, the personnel information was analyzed by the Center for Forensic Economic Studies. This facilitated a review of salary, supervisory and equal employment opportunity (EEO) categories by race, gender and district. In many instances, it was the first time such circuit-wide data had been compiled. Further requests were made to the federal defender offices and the AO for information about the Third Circuit workforce. The federal defender offices provided a breakdown of their offices by race and gender, while the AO provided information on the statistics collected annually for their EEO reports.

In addition to these internal data requests, the Task Force requested information from several units of the Department of Justice that work closely with the courts. The Department of Justice responded promptly, sending charts of the gender and race distribution of all employees in each United States Attorneys Office and each United States Marshals Office within the Third Circuit. This information was also transmitted to the pertinent committees.

a. Judicial Officers

The following tables illustrate the composition of the judiciary in the Third Circuit as of the end of 1996:

TABLE 1: BREAKDOWN OF ARTICLE III AND VIRGIN ISLANDS ARTICLE I JUDGES IN THE THIRD CIRCUIT AS OF DECEMBER 1996

Court	Total Judges (N=109)	Female Judges (N=12)	Minority Judges (N=12)
Ct. App.	18	3	2
D. Del.	8	1	0
D.N.J.	19	3	3*
E.D. Pa.	37	3	4
M.D. Pa.	8	1	0
W.D. Pa.	17	1	2
D.V.I.	2	0	1

Note: Includes active and senior judges. An asterisk (*) means one minority female. N = total number of judges within each category.

SOURCE: Administrative Office of the U.S. Courts.

TABLE 2: BREAKDOWN OF MAGISTRATE JUDGES IN THE THIRD CIRCUIT AS OF DECEMBER 1996

Court	Total Judges (N=34)	Female Judges (N=7)	Minority Judges (N=1)
D. Del.	1	1	0
D.N.J.	11 (2 P/T)	1	0
E.D. Pa.	10	3	1*
M.D. Pa.	4	0	0
W.D. Pa.	6 (2 P/T)	2	0
D.V.I.	2	0	0

Note: Includes active and senior judges. An asterisk (*) means one minority female. N = total number of judges within each category. P/T means part-time judge.

SOURCE: Task Force liaison judges.

TABLE 3: BREAKDOWN OF BANKRUPTCY JUDGES IN THE THIRD CIRCUIT AS OF DECEMBER 1996

Court	Total Judges (N=21)	Female Judges (N=8)	Minority Judges (N=0)
D. Del.	2	1	0
D.N.J.	8	5	0
E.D. Pa.	5	1	0
M.D. Pa.	2	0	0
W.D. Pa.	4	1	0
D.V.I.	0	0	0

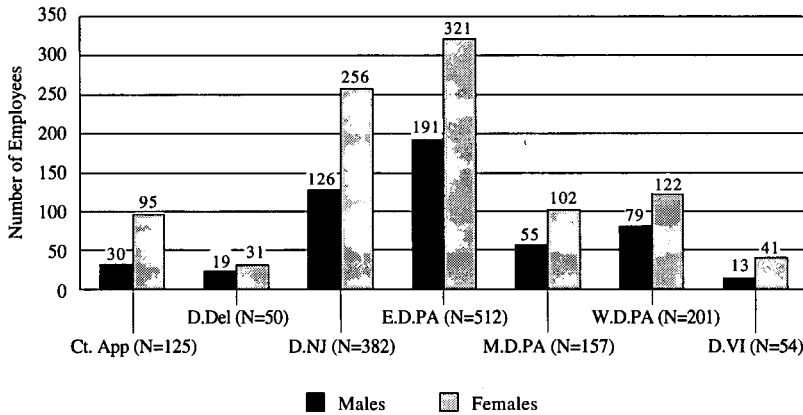
Note: Includes active and senior judges. N = total number of judges within each category.

SOURCE: Circuit Executive's Office.

b. Employee Workforce

The following figure illustrates the gender composition of the workforce of the Third Circuit as delineated by district:

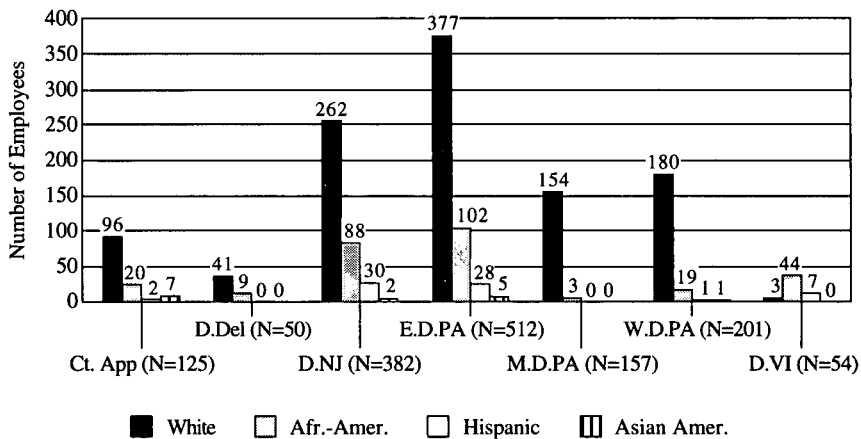
FIGURE 1: GENDER BREAKDOWN OF EMPLOYEES IN THE THIRD CIRCUIT BY DISTRICT



Note: N = total number of employees in the given district excluding chambers staff.
 SOURCE: Court units as analyzed by the Center for Forensic Economic Studies (1996).

Figure 2 illustrates the racial and ethnic composition of the circuit workforce:

FIGURE 2: RACE AND ETHNICITY OF EMPLOYEES IN THE THIRD CIRCUIT BY DISTRICT



Note: N = total number of employees in the given district excluding chambers staff.
 SOURCE: Court units as analyzed by the Center for Forensic Economic Studies (1996).

3. Focus Groups

While other efforts were ongoing, several committees were planning to conduct focus groups. The focus groups were conducted by trained facilitators who worked from a script prepared by the committee members in conjunction with social scientists. Focus

groups had been used in a number of similar studies as a means of enabling constituent groups of the court to provide richer and more detailed examples and illustrations of problem situations than would be obtained through hearings, questionnaires or analyses of court statistics. The purpose of these focus groups was to look specifically at certain issues that were of concern to members of the targeted groups.

For example, the Intersection of Race and Gender Committee held focus groups with women of color in Pittsburgh, Philadelphia and Newark. The Committee held separate meetings for attorneys and employees. The Committee studying employment issues for the Race Commission held one such meeting with court employees.

4. *Public Hearings*

During the Spring of 1996, it became apparent to the members of the commissions that holding public hearings would be an important way of reaching those individuals and groups who might not otherwise receive questionnaires or be included in the Task Force effort. Therefore, the Task Force and commissions began to plan public hearings to be held in each district within the Third Circuit. Members of the Task Force and commissions volunteered to organize such hearings within their local communities. In October and November 1996, public hearings were held in Camden and Newark, New Jersey; Harrisburg, Philadelphia and Pittsburgh, Pennsylvania; St. Thomas and St. Croix, U.S. Virgin Islands; and Wilmington, Delaware.

In each location, members of the public, including officials, representatives of special interest organizations and members of the bar, were invited to speak about the treatment they had witnessed or received in the courthouses of the circuit or any other issues they desired to bring to the attention of the Task Force. All sessions were recorded stenographically and professionally videotaped. The speakers addressed a variety of topics: opportunities for Criminal Justice Act (CJA)⁷ assignments, jury source lists, foreign-language interpreting, opportunities for appointment to the magistrate and bankruptcy judge benches, treatment by U.S. Marshals and court security personnel and more. Members of the Task Force and the Gender and Race Commissions attended each of the hearings, and transcripts were made available to each committee.

7. 18 U.S.C. § 3006A (1994).

5. *Individual Committee Efforts*

Several committees found that the specific issues they were charged with addressing could not be reached by any of the previously mentioned methodologies. Therefore, they designed and implemented their own methods of obtaining this information.

a. Bankruptcy Debtor Survey

With the assistance of Dr. Bersoff, the Bankruptcy Committee devised a telephone survey designed to reach debtors within the system. The members of the Committee trained volunteer attorneys to conduct the questioning process. Over the course of several evenings, 1115 telephone calls were made in the District of New Jersey. Of those calls, 191 were completed, representing 245 contacts with persons who had used the bankruptcy court in that district.

b. Criminal Justice Defendant Survey and Pretrial Detention Study

The Committee on Criminal Justice Issues of the Race Commission designed a two-page questionnaire to be sent to persons convicted of crimes in the district courts of the Third Circuit. This survey was created with the assistance of Dr. Jane Siegel, an assistant professor of criminal justice at Widener University. Fifty questionnaires were sent to convicted defendants in each district. The names of these individuals were selected randomly from the files of each probation office. Attempts were made to ensure that incarcerated defendants were included. A special effort was also made to ensure that an adequate number of female defendants were reached.

Three hundred questionnaires were mailed by the Committee with a cover letter from Assistant Federal Public Defender Penny Marshall and a prepaid return envelope. Again, anonymity was assured. A second survey and reminder letter were mailed several weeks later. Fifty-eight questionnaires were returned due to inaccurate addresses, primarily from the Virgin Islands, that had previously alerted the Committee to a potential problem with addresses. Therefore, a total of 242 questionnaires was presumed to be delivered. Of those, 94 (38.8%) were returned, with many containing written comments. The responses were sent to the Task Force Project Director for transmission and analysis by Dr. Siegel.

This Committee also obtained from the AO the records of 13,570 criminal cases activated within the Third Circuit between September 1993 and September 1996. The information provided was derived from Pretrial Services Agency reports on each defendant and included information about the defendant's criminal history, current charge(s) and demographics. Dr. Siegel analyzed this data and looked for trends in pretrial detention for possible correlation to race, ethnicity or gender.

c. Juror Survey

The Committee on Jury Issues also formulated a two-page questionnaire designed to be completed by all jurors sitting on cases in the Third Circuit over a period of six weeks. The questionnaire was distributed to 1021 jurors who sat on cases heard in the Third Circuit from September 3, 1996 through October 15, 1996. Prior to the distribution, the liaison judges of each district notified their colleagues of the upcoming survey, and with their assistance, as well as the cooperation of courthouse staff, 74.5% of jurors responded to the survey. In the Western District of Pennsylvania and the District of the Virgin Islands, the response rate was 100%. The information gathered in that effort was of particular interest because the districts do not keep statistics regarding the race or gender of jurors actually selected to sit on cases within the Third Circuit.

C. *Report Drafting*

Once all of the data collected from these varied sources had been compiled and disseminated to the committee co-chairs, the committees began to sift through voluminous survey, census and employment statistics. They read public hearing and focus group transcripts and reviewed the individual comments written on each of the questionnaires. They worked with the analyses of their individual data collection efforts as well and often used additional data compiled by the committees themselves. For example, one committee compared all of the personnel manuals in the Third Circuit, while another counted the numbers of attorneys who received CJA appointments in each district.

Gradually, the committee members began to reach a consensus about what the data showed, how it should be reported and what their findings and recommendations might be. Draft reports were prepared and reviewed by all commission members. Data were discussed and reanalyzed. New committee members were enlisted to assist in the drafting process.

Each committee report was presented to its respective commission for approval. In March 1997, the reports were approved by the commissions. On April 8, 1997, the Task Force met and received the 600 pages of reports. In light of the voluminous and overlapping nature of the reports, the Task Force decided to draft its own, shorter report which would synthesize the commissions' work in preparation for presentation to the Third Circuit Judicial Council along with all of the committee reports and accumulated statistical data.

Once again, Chief Judge Sloviter used the Third Circuit's Judicial Conference to permit presentation of the results of the Task Force inquiry to the Third Circuit community. The Judicial Conference is open to all lawyers practicing in the courts of the circuit. One morning of the 1997 Judicial Conference, held in May in Philadelphia, was devoted to a plenary session on the forthcoming Task Force report, and in particular to the findings of the commissions. Chief Judge Thompson presided over the well-attended session, in which each commission co-chair and many committee chairs participated. Some of the statistical results were projected on a large screen available for viewing by the audience, and members had the opportunity to ask participants questions during the session and informally thereafter.

D. *Use of Perception Information*

From the beginning of this process, Task Force and commission members debated the value and weight that should be given to the perceptions of individuals as distinguished from the objective data, such as the percentage of minority employees in the workforce. Most of the information the Task Force and its commissions assembled and incorporated in the reports of its committees was "hard" data—such as census reports, employment statistics and EEO reports. Some of the information to which reference is made in the various reports, however, consists of perceptions of participants in the judicial process.

As described below, the validity of some of the perceptions could not be tested. Some perceptions led to further study and the discovery of genuine problems that could be addressed. The existence of perceptions of differential treatment based on gender, race or ethnicity, even if no bias was shown, is information that would be of interest to the court in determining what, if any, remedial action to take.

Three sources of information were collected to ascertain whether there was equal treatment in the courts of the Third Circuit regardless of gender, race and ethnicity: (1) questionnaires directed to employees, attorneys and judges, (2) focus groups and (3) public hearings. Of these, the answers to the questionnaires provided the most valuable and reliable information because they were sent to all of the groups involved or a large representative cross section. The comments derived from focus groups and public hearings were more anecdotal in nature. Information adduced at the focus groups and public hearings, however, led to further inquiry and reflection and is the basis for some of the recommendations.

Overall, the responses to the employee and attorney questionnaires were positive. For example, 88% of 519 employees responding to one question did not believe that gender played a role in the decision to hire them, while only 12% believed that gender did play a role. A slightly higher percentage of the women who responded to the question believed gender played a role, but the difference was not statistically significant.

There were, however, statistically significant differences in the responses given by the different districts and agencies. In one district, 18% of the responding employees believed gender played a role in the decision to employ them, as compared to the overall 12% response. Responses to other questions showed similar differences between districts and agencies. A minority (10%) of employees believed that male and female employees were not afforded equal respect by their supervisors and coworkers. This overall percentage was increased by responses from two districts (10.4% and 15.4%), one of which was the same district in which a greater number of employees believed that gender played a role in the decision to hire them.⁸

These answers and differences in the figures for the various agencies and districts were reflected in the comments which accompanied many of the answers. Although such comments are not necessarily dispositive of the existence of gender bias in some districts or lack of gender bias in others, they do suggest that more intensive self-study may be advisable in some districts.

The analysis cannot end with overall figures. For example, one question asked whether women employees were encouraged to at-

8. For the responses of attorneys to the question of "[h]ow frequently, if at all, have you observed judges cutting off or interrupting female attorneys while permitting men more time to make their point," see Table 8 of the Report of the Committee on Court Employment and Personnel Issues of the Gender Commission.

tend professional seminars at the same rate as other employees. The “yes” response of 92% of those who answered would suggest a generally satisfactory situation. Twenty-two percent of Hispanic female employees and 41% of African-American female employees, however, disagreed. This discrepancy suggests that court administrators should determine if there is any basis for the negative view held by so many minority employees and should address the reasons for the negative perception without regard to its validity.

The answers to the questionnaires showed there are different, often opposing, perceptions by different ethnic groups. A considerable number of minority employees believed minorities were disfavored in both the hiring and promotion process. At the same time, a similar number of white employees believed there was favoritism shown to minority employees in the hiring and promotion process. Numerous comments, which accompanied the answers to employee questionnaires, suggested that general failures and inadequacies in employment and promotion procedures unrelated to race or gender may have contributed to these perceptions. As one employee wrote: “[D]iscrimination is not always based on race or gender. It depends on who the Clerk likes.”

Answers to questionnaires directed to “consumers” of the courts’ services and to jurors were generally positive. A complete discussion of the results of the survey of jurors may be found in the Report on Jury Issues of the Race & Ethnicity Commission. Of 1021 questionnaires sent to persons who had served as jurors, 761 (74.5%) responses were received. Almost none of them perceived that gender bias was directed toward them by any participants in the system. Most of the exceptions resulted from the actions or words of fellow jurors. The jurors were asked if they had been “insulted” in any way based on their race or ethnic group. Only 7 of the 761 who answered responded affirmatively. One felt insulted by a judge, one by a court employee, one by a witness and four by another juror.

A similarly positive response was received in the pilot telephone survey conducted of consumer debtors who had filed for bankruptcy in the District of New Jersey and whose cases were closed in August 1996 after dismissal or discharge. A complete discussion of the results of the debtor survey may be found in the Report on Bankruptcy Issues. Of the 245 contacts that debtors who responded had with the system, only 5 produced negative or somewhat negative responses, of which only 1 specifically related to gender or race. Many survey responses consisted of anecdotal

expressions of fair, equal and courteous treatment, particularly by Chapter 7 trustees, who are frequently a debtor's only contact with the bankruptcy system.

There were 94 responses to the questionnaires sent to 242 defendants in criminal cases to solicit their views on how they were treated in federal court. Of those responding, 36% were females and 64% were males; 66% were white males and females and 34% were minority males and females. It is not possible to assume that those who responded were representative of the defendant population as a whole. Nonetheless, of this group, 81% stated that they had not seen or heard any of the various court officials do or say anything that the respondent regarded as disrespectful or insulting to any person based on race, ethnic background or gender. Those who did believe such disrespect was shown (17 persons) pointed most frequently to actions or words of judges and prosecutors, followed by the actions or words of pretrial officers. Of those who thought gender was a factor, most males and most females believed that the system favored women. A complete analysis of the defendant survey may be found in the Criminal Justice Issues Report.

As might be expected with anecdotal data, the focus groups and the public hearings produced much more dramatic differences of perception about the role of gender and race in the court system, particularly the role of race. On the one hand, in employee focus groups, many minority females spoke of the devaluation of women of color and expressed their skepticism about whether they are treated fairly. In questionnaire comments, white females, on the other hand, expressed their belief that, in the workplace, women of color are advantaged by their race.

Many white female and male attorneys who spoke at the public hearings attested to the fairness of the system based upon their own experiences and their observation of the system. This view was not entirely shared by minority lawyers. In hearing after hearing, these lawyers emphasized that even minority attorneys who had never directly experienced racist treatment believed that there is a strong perception within minority communities that racism does exist within the judicial system of this circuit.

According to these speakers, this perception is fueled by the small number of minority jurors; by the absence of minority magistrate judges, bankruptcy judges and district judges in some districts; by the small number of minority persons with whom users of the court system deal in the clerks' offices and probation offices and

who serve as security officers; and by the small number of minority attorneys appointed to represent defendants in criminal cases.

There are undoubtedly many historical and societal reasons independent of treatment by the courts and institutions of the Third Circuit that account for the perception expressed by the minority attorneys. Most of these factors are outside the scope of actions that can be taken by the Judicial Council and the courts of the Third Circuit. Nonetheless, the focus groups and public hearings served the useful purpose of providing an avenue for expression of those perceptions. The findings disclose that the distrust of judicial institutions among minority communities is shared by many respected minority attorneys with established practices. Recognition of the existence and depth of this distrust can lead to more sensitive approaches to all of the participants in the judicial system.

While it was not the charge of the Task Force to fully explore the reasons underlying this mistrust, the examination process undertaken by the Task Force has revealed various practices that could reasonably account for perceptions of racial or gender inequities. For example, in some offices, it appeared that employee hiring, promotion and training procedures were deficient. In some instances, there may have been insufficient notice of new positions or openings. In other instances, favoritism may have played a role in an appointment or promotion. In addition, discipline may have been unequally applied. While it is difficult to determine if such practices were the principal cause of the perception of inequity, correcting such deficiencies would remove one cause of the perception of unequal treatment.

Perhaps the most significant example of the manner in which nongender, nonracial defects in the system may have caused the perception of racial or gender bias is the manner in which courts select attorneys for appointment to court-related positions. At most of the Task Force public hearings, minority attorneys commented vigorously about the failure to appoint minority attorneys as mediators, arbitrators and particularly as CJA attorneys. At one hearing, a female minority attorney stated:

There is a great disparity in how you get CJA appointments. You are told to write a letter to the judge and let him know who you are and what your credentials are, what your background is. However, those appointments never seem to come. They only go to the same people who get them all the time. . . . I don't know any African-American

females who get appointed and, frankly, I don't know any males, either, and I know, obviously, a large number of African-American lawyers.⁹

A study of the CJA plan in the district involved disclosed that the plan provided for appointment of applicants to the panel and rotation of appointments to represent defendants. Over the years, however, the CJA panel had become so large that it became impractical. Of necessity, each judge or magistrate made appointments from a list that the judge developed. As a consequence, an attorney, such as the person who spoke at the public hearing, could be appointed to the CJA panel, but would never be appointed to represent a defendant.

There is no evidence that gender or race motivated these appointments, but the breakdown of the district's published CJA plan created a perception of gender and racial bias in the appointment of CJA attorneys. Upon being advised of these findings, the district court moved to establish new procedures for the selection, training and assignment of CJA panel members. Publication of the new plan to members of the trial bar and implementation of the plan should help eliminate one possible reason for the perception of bias.

Similar problems may exist in other districts with respect to either CJA appointments or other kinds of appointments. While the statements at the public hearings were often anecdotal and may have reflected misunderstandings about the functioning of the court, they highlighted genuine problems of which the courts were unaware and which contributed to a sense of gender and racial bias.

Regardless of whether perceptions are rooted in social factors beyond the court's control, or stem from specific conduct that has been interpreted as reflecting unequal treatment by a member of the court community, the courts of the Third Circuit and its units should consider, on an ongoing basis, how best to reduce these perceptions.

E. Findings

The "comprehensive examination" mandated by the Judicial Council resolution creating the Task Force demonstrates that,

9. Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: Newark, New Jersey* 97-99 1 (Oct. 30, 1996) [hereinafter *Public Hearings: Newark, New Jersey*].

notwithstanding the identification of certain discrete problems that demand attention and the presence of differences in perception between whites, minorities, men and women, the overall record of the courts and administrative units of the Third Circuit is a positive one. Many commission findings document significant progress toward the achievement of "equality, regardless of gender, race or ethnicity." The commission reports which follow this Report contain the specific data and findings from which these findings were drawn.

The data collected by the Gender Commission reveal the overall progress that women have made in increasing their numbers in the courts of the Third Circuit. The Task Force found that women are well represented as bankruptcy judges. Nationally, only 18% of such judges are women. In the Third Circuit, 8 of 21 bankruptcy judges, or 38%, are women. Moreover, 59% of all circuit bankruptcy court law clerks are women. As of 1996, 5 of the last 11 magistrate judges chosen in the Third Circuit have been women. The total percentage of female magistrate judges has increased to 21% circuit-wide.

Similarly, the Task Force found, according to the judges responding to the questionnaires, that women are represented in judicial clerkships at rates consistent with the student population in law schools and that as of September 1997, they will constitute almost half (44%) of all law clerks.

Other Task Force findings point to a marked improvement in the status of women and minorities in the courts. For example, many commentators have discussed the importance of increasing the number of minority law clerks.¹⁰ While only 9% of the law clerks of those judges responding to the survey have been minority group members during the past ten years, 15% of their current (1996) law clerks are minority group members. At the court of appeals level, 20% of the 1996 law clerks of those judges responding to the survey were minority group members.¹¹ This percentage is

10. The Task Force notes that this goal may become even more difficult to achieve. Recent legislation and judicial determinations in California and Texas have resulted in a dramatic reduction in the enrollment of African-American students in law schools within those states. See Peter Applebome, *Minority Law School Enrollment Plunges in California and Texas*, N.Y. TIMES, June 28, 1997, at A1. According to a newspaper report, Boalt School of Law (U.C. Berkeley) has enrolled one African-American student in its entering class of 270 in the fall of 1997. See *id.* This compares to 20 black students in the previous year's entering class. See *id.*

11. The Task Force was unable to obtain the class standings of law students by race. Because the judges responding to the Task Force questionnaire considered academic performance to be the most important factor in hiring law clerks, this

on par with the minority population in law schools across the country (19%).¹² Minority legal interns, who are potential law clerks, are being chosen in proportions equal to their population in their law schools.

Aside from these “hard numbers,” other survey data collected by the Task Force indicated that large majorities of all groups agreed that they had not suffered or observed adverse treatment based upon race, ethnicity or gender. Some disparities did exist, however, based upon the race, ethnicity or gender of respondents. Litigants, namely bankruptcy debtors and sentenced criminal defendants, overwhelmingly believed that they had not been the victims of discriminatory treatment. Only 1 of 245 bankruptcy debtors surveyed believed that his or her race affected the treatment he or she received. Among the sentenced criminal defendants, 79% believed they were treated the same as a person of a different race would have been treated. An even greater number, 81%, concurred that they were not treated adversely on the basis of their sex. The jurors surveyed reported very few instances of being insulted, or seeing another juror, or any other person, insulted on the basis of race, ethnicity or gender during the course of their jury duty.

Analyses performed for the Task Force by Susan Katzenelson and Kyle Conley of the United States Sentencing Commission suggest that race does not play a significant role in the sentencing process.¹³ On one hand, the raw data reveals striking racial disparities in sentencing for the same types of offenses and within criminal history categories. On the other hand, the multivariate analysis employed by the study concludes that “[t]he majority of those sentence differences [among racial and ethnic groups, both overall and within specific offense categories] were explained by a set of legally relevant factors, most often associated with characteristics of the offense and criminal history of the defendant.” Further study, which takes additional factors into account and examines whether the “legally relevant factors” are themselves influenced by race, is necessary to determine whether race, in fact, influences sentencing in a statistical sense.

lack of data makes a direct comparison of minority and nonminority law students impossible.

12. We note that the Race Commission’s Report on Appointments by Judges found that relatively low percentages of minority applicants interviewed have been offered clerkships after their interviews.

13. The views expressed in the report prepared were those of the authors and were not meant to represent the views of the United States Sentencing Commission. The report is available from the Circuit Executive’s Office, 601 Market St., Philadelphia, PA 19106. Telephone: (215) 597-0718.

It should be noted, however, that the Katzenelson-Conley analyses show that for several categories of offenses (violent crimes, larceny and drugs), even controlling for legally relevant factors, gender is a statistically significant variable in sentencing. Women receive less severe and more noncustodial sentences than men.

Additionally, the Task Force has addressed the treatment of participants by and in the judicial system. For example, a study performed for the Committees on Criminal Justice Issues of both the Gender and Race & Ethnicity Commissions by Dr. Jane Siegel of Widener University found that, even controlling for a number of appropriately considered personal characteristics and other legally relevant factors, male defendants are almost twice as likely to be detained without bail as female defendants. Minority men were found to be almost twice as likely to be detained without bail as white male defendants charged with comparable crimes and with similar criminal histories. Here again, it is necessary to undertake a further study that considers additional and as yet unexamined factors and explores the statistical interaction between legally relevant factors and race or gender.

Court employee surveys showed that employees generally had no complaints regarding racial, ethnic or gender issues. Large majorities of court employees believed that discipline did not vary based upon race or ethnicity. Similarly, significant majorities of all employee groups believed that they were treated with respect, not subjected to adverse treatment by supervisors, and not assigned unequal workloads or required to endure a hostile work environment based upon their race or ethnicity.

With respect to gender, the surveys told a similar tale. Large majorities of employees believed that they were treated equally regardless of gender, that they were afforded equal respect by their supervisors, that discipline was meted out without regard to gender, that work space and work assignments were not assigned on a gender-discriminatory basis and that they were not subjected to a hostile work environment on the basis of sex. Where differences were noted, however, they were reported by persons of the same race or gender.

According to the survey responses collected by the Task Force regarding "court system interaction," it was rare for judges to treat other judges, attorneys, court employees, witnesses, litigants or jurors adversely on the basis of gender or race. Conduct evidencing gender discrimination by attorneys, against any participants in the

judicial system, was similarly rare. Very few instances of sexual harassment were reported.

Additionally, there were few reports that United States Marshal's Services personnel, court security officers or court employees had treated individuals in a demeaning or disparaging manner based upon gender, race or ethnicity.¹⁴

Furthermore, the Task Force found that the courts of the Third Circuit have initiated a number of salutary programs that advance equal treatment of participants in the courts. The Eastern District of Pennsylvania is 1 of 6 pilot districts designated to accept Chapter 7 bankruptcy petitions without a filing fee from debtors who qualify to file *in forma pauperis*. This program increases the access of women and minorities to the bankruptcy courts.

The Task Force also learned that certain case assignment practices have negative, albeit unintended, impact on families. For example, the District of New Jersey assigns criminal cases randomly among the district judges sitting in the three vicinages (Camden, Newark and Trenton), without regard to where the alleged crime took place or where the indictment was returned. Under this "wheel system," a criminal case may be assigned to a judge sitting in Newark even when the alleged crime was committed in Camden County and the defendant, witnesses, Assistant United States Attorney, defense counsel and their families are all located in the southern part of the state. As a result, each of these participants in the court process must make a significantly longer commute for each court appearance, up to two and a half additional hours at each end of the day, than if the case had been assigned to a judge at the nearest federal courthouse. During criminal proceedings of any length, this system imposes a significant burden on all participants and their families. Either they must arrange to stay overnight near the courthouse, away from their families, or they must travel several additional hours every morning and evening.

The District of Delaware has shown a sensitivity to non-English speaking persons by using bilingual signs in its courthouse. The District of New Jersey has expanded the pool of jurors in an effort to assure a greater cross section of the community. That district also has centralized responsibility for selecting interpreters by hiring a staff interpreter-coordinator who exercises quality control with respect to the interpretation function. All the courts of the Third Circuit have adopted EEO plans that comply with instruc-

14. Applebome, *supra* note 10, at A1.

tions from the AO. Significantly, the court of appeals has adopted a sweeping EEO policy that covers the broadest possible range of issues, including sexual harassment.

Any perception of unequal treatment based upon race, ethnicity or gender, may be due, in part, to the following:

- As of this writing, only 1 of the 34 magistrate judges and none of the 21 bankruptcy judges in the Third Circuit are minority group members.
- The percentage of women on the lists of certified arbitrators and mediators in the districts of the Third Circuit range from a low of 7.2% to a high of 22% in the Virgin Islands.¹⁵
- In some districts, newer attorneys, a group which includes large numbers of women and minority attorneys, have encountered great difficulties gaining appointments as CJA attorneys.
- Throughout the Third Circuit, although women comprise the majority of the workforce, female court employees hold disproportionately fewer supervisory positions than males, and overall, female court employees have lower average salaries than men.
- Similarly, minority court employees hold few supervisory positions throughout the Third Circuit and, as a result, earn relatively lower salaries than do white employees.
- With the exception of the Virgin Islands and one Bankruptcy Clerk of Court, none of the Federal Public Defenders, Clerks of Court or Chief Probation Officers are minority group members.
- According to data collected by the Task Force, in 1996, there were no minority Assistant Federal Public Defenders in the District of New Jersey or the Middle and Western Districts of Pennsylvania, although many of the Public Defender Offices' clients are minority group members.
- Except in the Virgin Islands, minority group members are called to serve in relatively low numbers in jury pools throughout the Third Circuit as compared to their percentages in the eligible populations.

Minorities may be disadvantaged by the court's inability to deal with non-English speaking persons. The Task Force found that interpreters were not always available when needed and that courts sometimes utilized family or friends of the litigant, bilingual counsel, court employees or even other litigants to translate. Indeed, 75% of all Hispanic employees who responded to the Task Force

15. Through the judges survey, an attempt was made to ascertain comparable figures with respect to minority attorneys, but the Task Force was unable to do so to any degree of certainty.

survey stated that they had, at one time or another, been asked to translate. The Task Force found a shortage of properly qualified interpreters and a lack of quality control programs to assure that interpreters are properly chosen and satisfactorily trained to perform their critical function.¹⁶

It might be said that the question of whether treatment of participants in the judicial process varies based upon gender, race or ethnicity turns on the perception of the participants. For example, based upon a factual inquiry regarding the race of respondents and the security procedures to which they were subjected, the Task Force found that minority court employees consistently reported experiencing more intrusive security procedures upon entering the courthouse than did white employees.¹⁷

As noted previously regarding the use of perception data, these findings confirmed that men and women and whites and minorities view their experiences in the judicial system very differently. The Task Force's work revealed a number of circumstances in which the gender, race or ethnicity of respondents affected the answers given to Task Force inquiries. For example, the question of whether the treatment of criminal defendants varies based upon their race or ethnicity yields different answers depending on who is asked. Minority attorneys were much less likely than white attorneys to answer "never" to the questions of whether they had observed U.S. Marshals, court security officers, judges, court employees or attorneys treating criminal defendants in a demeaning or disparaging way based upon race or ethnicity. Regarding the treatment of criminal defendants or other litigants by judges, 94.9% of white attorneys answered that they never saw judges act inappropriately on the basis of race, but African-American and Hispanic attorneys answered "never" only 65% of the time. Similarly, sentenced defendants who were surveyed by the Task Force differed significantly as to whether they believed race played a role in their case: only 13% of whites did, but 46% of African-Americans and 57% of Hispanics answered this inquiry affirmatively.

This disparity in views is not limited to criminal defendants or to issues of race. The Task Force's survey of court employees showed that of those employees who perceived disparate treatment, women were more likely than men to believe that gender plays a

16. For a further discussion of the qualification of interpreters, see the Report of the Race Commission's Committee on Language Issues.

17. See Report of the Race Commission's Committee on Court System Interaction.

role in hiring, encouragement to seek training, treatment in the workplace, disciplinary treatment and hostility in the workplace. Similarly, female attorneys are far more likely than male attorneys to see demeaning or disparaging conduct by judges to attorneys on the basis of gender.

More specifically, women are far more likely than men to believe that judges are more deferential to attorneys of their own gender and that gender affects the amount of informal access provided to attorneys. Female attorneys are more likely to have observed judges (1) singling out female attorneys for disparaging or demeaning remarks about their professional competence or performance; (2) interrupting female attorneys more often than males (86.9% of male attorneys—as opposed to only 49.6% of female attorneys—stated that they had never seen this occur); (3) addressing female lawyers in a less professional manner than male lawyers; and (4) being unresponsive or insensitive to an attorney's parental obligations. Finally, the Task Force found that, to a statistically significant extent, women attorneys are more likely to report having observed gender-biased treatment by attorneys to other attorneys, by attorneys to judges and even by attorneys to witnesses.

Race and ethnicity also appear to influence the way in which court employees and attorneys perceive their treatment or the treatment of others in the courts of the Third Circuit. For example, only 4.2% of white court employees felt that they were treated with less respect based upon their race or ethnicity, while about one-quarter of all minority respondents perceived less respectful treatment. Minority employees were more likely than whites to perceive unequal treatment on the basis of race or ethnicity, inequality in workloads on the basis of race or ethnicity and the existence of a hostile work environment because of race or ethnicity. Similar to female attorneys, minority attorneys were far more likely than white attorneys to report having observed judges engage in demeaning or disparaging conduct toward attorneys or litigants on the basis of race or ethnicity and to believe that judges are more deferential and provide greater informal access to attorneys of their own race or ethnicity.

Most significant was the reporting by women of color. Essentially, these women, whom men and nonminority women viewed as advantaged, saw themselves as doubly disadvantaged within the court system.

These examples do not exhaust the universe of the Task Force's findings of varying perceptions between men and women or

whites and minorities. They do, however, point to the problem which, more than any other, the Task Force confronted—the difference in the way in which men and women, and whites and minorities perceive the justice system in the Third Circuit.

F. *Recommendations*

The reports of the various committees have developed a variety of recommendations for action in response to the findings of this study. Some are long range and general, while others are short range and specific. In many instances, the recommendations of the various committees echoed each other. The Task Force has drawn upon the numerous committee recommendations in developing the recommendations set forth here.

In general, the committee recommendations resonated a theme of increasing opportunities for women and minorities as well as increasing awareness and cross-cultural education among court personnel about perceived differential treatment or sensitivities. It is likely that a number of these recommendations could have been made without establishing a Task Force, but many could not. None could have been made with the same degree of confidence that the Task Force has arrived at on the basis of its investigation.

The process of self-examination has revealed facts that would not have otherwise been discovered. The manner in which these facts have been disclosed, through a public format rather than in isolation, has already prompted remedial action in several areas. Moreover, the investigative tools utilized by the Task Force—public hearings and surveys to jurors, criminal defendants, debtors, attorneys and employees—provided critical insights into the condition of our courts that would have been unavailable with the mere adoption of generalized recommendations.

1. *General Recommendations*

a. *Addressing Perceptions*

The courts should recognize that perceptions of gender, racial or ethnic bias as described earlier in this Report, and more fully illustrated in the committee reports, do exist. Regardless of whether such perceptions are rooted in social factors beyond the courts' control or stem from specific conduct that has been interpreted as reflecting a bias on the part of a member of the court community, the courts of the Third Circuit and its units should con-

sider, on an ongoing basis, how best to address these perceptions and take remedial action where warranted.¹⁸

b. Continuing Review

The Judicial Council should adopt a mechanism to conduct a periodic review of the equality of treatment throughout the Third Circuit regardless of gender, race or ethnicity, including the status of implementation of the recommendations of this Report.

2. *Public Interaction*

a. Court Security

Court security search procedures should be posted at the magnetometer near the entrance to each of the courthouses in the Third Circuit so that courthouse users will know what to expect and will be less likely to assume disparate treatment.

b. Language Barriers

Each court within the circuit should consider displaying bilingual or multilingual signs in the lobby areas of its courthouses.

c. Misconduct Complaints

- The Judicial Council should affirm that it interprets 28 U.S.C. § 372(c)¹⁹ as including gender, racial and ethnic bias, sexual harassment and comparable discriminatory conduct as “conduct prejudicial to the effective and expeditious administration of the business of the courts.”²⁰
- Each court within the Third Circuit should publicize the procedures for receiving, investigating and resolving complaints regarding unequal treatment on the basis of race, ethnicity or gender by court personnel, including judges and unit heads.

18. The Judicial Conference of the United States has recommended that “since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts.” JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS [recommendation 78] (1995).

19. See 28 U.S.C. § 372(c) (1994). This statute governs judicial discipline and allows any person to file a complaint against any judge in the circuit with the clerk of the court of appeals. The clerk transmits such a complaint to the Chief Judge of the circuit.

20. 28 U.S.C. § 372(b) (1994).

3. Court Functions

a. Jury Pools

Each district court should utilize all practicable resources and methods, not inconsistent with statutory authority, to ensure that the racial, ethnic and gender composition of its jury pool comports with the racial, ethnic and gender composition of the district.

b. Interpreters

- Each district court of the Third Circuit should determine whether there is a sufficient number of certified interpreters in the languages regularly used in that district. This determination should recognize that interpreter services may be necessary for a wide range of court proceedings.²¹
- There should be a staff court interpreter in each district eligible for such a position who has responsibility to oversee the selection and availability of qualified interpreters.²²
- Each district should prepare written guidelines for counsel regarding the availability of interpreters from the court's roster to translate correspondence and attend attorney client meetings. The guidelines should also note the principal features of the certification system established by the Court Interpreters Act²³ and the Administrative Office's Interim Regulations.
- Except in emergency situations, court proceedings should be adjourned if qualified interpreters are not available.
- Each district should include some basic information about interpreters' credentials in its local roster and should make the roster available to users of their services.
- Each district should provide copies of the *Model Code of Professional Responsibility for Interpreters in the Judiciary* to all persons hired as freelance interpreters. Districts should consider conducting seminars on professional responsibility for freelance interpreters, referring such interpreters to existing seminar programs.

21. This is consistent with the recommendation of the Judicial Conference of the United States that "court interpreter services should be made available in a wider range of court proceedings in order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves." JUDICIAL CONFERENCE OF THE U.S., *supra* note 18, at [recommendation 81].

22. Funding for this position may be available through the AO where appropriate justification is presented.

23. 28 U.S.C. § 1827 (1994).

- The repeated use of the services of court employees as informal translators should be factored into their workloads and compensation.
 - Each district should maintain a record of complaints about interpreters and establish a system for assessing the frequency and validity of such complaints.
4. *Employment in the Judicial System*
- a. Employment Opportunities
- Viewing diversity in the workplace as desirable, courts and related agencies should ensure that job opportunities are widely publicized. Notification for positions, including clerkships, should be addressed, *inter alia*, to minority and female bar associations and should be publicized in a manner designed to reach minority law students and minority community groups.
 - Promotional opportunities within the court systems should be widely publicized within the court and should include a statement of specific qualifications for each position.
 - Unit heads should continually monitor salary disparities between employees to ensure fairness.
- b. Employee Work Life
- Unit heads should specify in writing the conduct which may result in disciplinary action. Supervisors should initiate procedures and dialogues designed to eliminate any perceptions of favoritism among court employees.
 - Each court within the circuit should ensure that it has an effective mechanism for receiving, investigating and resolving complaints by employees regarding sexual harassment and gender, racial and ethnic bias and shall publish details about that mechanism to all employees.
 - The designated EEO officer for each court unit should be a person not employed by that unit. The EEO officer should handle all employee complaints relating to race, ethnicity or gender bias.
 - Written criteria should be developed for selecting employees to attend educational or training programs. Qualified employees should have the opportunity to attend, on a rotating basis, educational or training programs that provide information helpful to career advancement.
 - Each court should develop written policies for promotion, leave taking, flextime and job sharing.

- Career counseling and training should be instituted within courthouse offices. Opportunities for informal mentoring should be sought and developed within the court units.

5. *Education*

a. All Court Personnel

Each court and unit within the Third Circuit should establish educational programs for all court personnel, including judges and chambers staff, directed towards: (1) identifying actual bias and the perception of bias; (2) examining their causes; and (3) working to eliminate actual bias and the perception of bias from the workplace.²⁴

b. United States Marshals Service Personnel

United States Marshals Service personnel who work in the courthouses of the Third Circuit, including court security officers, should be encouraged to participate in training similar to that recommended for court personnel.

c. Unit Heads

All Third Circuit unit heads, including Federal Public Defenders, should receive management and diversity training which will enable them to mentor, promote and discipline minority employees as effectively as nonminority employees.

6. *Appointments by Judges*

a. Selection Panels

Those judges appointing merit selection panels should ensure that the panels that review candidates for magistrate and bankruptcy judgeships reflect the diverse population of the community.

b. CJA

- Each district of the Third Circuit is encouraged to adopt, in whole or in part, the provisions of the Model Criminal Justice Act Plan. The plan adopted by the districts should be widely

24. The Judicial Conference of the United States recommends that "federal judges and all court personnel . . . strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them." JUDICIAL CONFERENCE OF THE U.S., *supra* note 18, at [recommendation 79].

published to all bar groups so as to encourage broad access to appointment of qualified counsel.

- The plans adopted by the districts should provide for rotation of assignments, where feasible, and ongoing training of new attorneys in federal criminal defense practice.

c. Notice of and Criteria for Appointments

- Each court in the Third Circuit should examine whether the criteria it has established for appointments of attorneys and others, including but not limited to mediators, arbitrators and special masters, include unnecessary conditions that may unintentionally exclude women and minorities.
- Each court in the Third Circuit should ensure that all opportunities for appointment as magistrate judges and bankruptcy judges made by the court are widely publicized.
- Each court should examine whether the appointment process for supervisors and professional persons in units or offices within the court, particularly those units and offices that have few minority persons in such positions, gives unreasonable weight to factors such as experience within the unit or office. Such factors may have an exclusionary effect on minority candidates who, for historical reasons, have not had an equal opportunity to gain such experience.

7. *Criminal Justice Issues*

a. Federal Public Defender Offices

- There should be nationwide advertising for lawyers so that a wide range of applicants, including minorities, can be seriously considered.
- To the extent that there are minority attorneys in defender offices, they should be encouraged to participate in hiring procedures and in suggesting outreach activities. Racial and ethnic minorities from the bar should also be included in training activities of Federal Defender offices.

b. Pretrial Detention and Sentencing

The Judicial Council should periodically review the available data to determine whether considerations of race, ethnicity or gender have affected matters such as pretrial release or sentencing.

8. *Case Management*

a. *Geographical Assignment of Cases*

Those districts with courthouses in several cities are urged to review their case assignment system (e.g., geographic assignment of cases rather than district-wide assignment among the various courthouses) in light of the impact of travel requirements on the participants and their families.

b. *Continuances*

Courts should be encouraged to be sensitive to the need for accommodation, when reasonably possible, of requests for continuances based on the personal circumstances of an attorney, party or witness that may be family related. This includes, but is not limited to, pregnancy, adoption or child care. Attorneys should be encouraged to bring such requests to the court's attention as promptly as possible.

G. *Conclusion*

The above recommendations sound recurring themes: greater efforts toward inclusion and self-education of judges and courthouse employees. Some recommendations were so evident, as with multilingual courthouse signs, that they seemed obvious. As the concerns of the individual participants in the court system become the concerns of the court system as a whole, and as perceptions are voiced, understood and viewed in light of the data, the differences in people's experiences fade before the greater sensitivity gained and greater knowledge achieved. The court system is dedicated to serving the ends of justice. Its effectiveness requires that all participants have confidence that it is engaged in a continuing pursuit of "equal justice under law."

The Task Force leadership wishes to acknowledge its gratitude to all of those volunteers who met difficult deadlines in the midst of conflicting professional obligations. Appellate, district, magistrate and bankruptcy judges participated in meetings, wrote draft reports and spent hours sifting through data. Law school professors, private practitioners and courthouse employees gave unselfishly of their time and insights. Without them, and without the professional assistance of dedicated social scientists, this project would never have reached its successful completion.

All of those persons who have participated in this process, whether as committee, commission or Task Force members, have

found that it has fostered a greater understanding of both the similarities and differences among and between the districts which comprise the Third Circuit. The large number of people involved, who brought their individual perspectives to the task, educated all of its participants. They have learned much about the way in which things are done in other courthouses. Task Force and commission members have attempted to analyze the available data and present an objective, balanced report to the Judicial Council and to the entire Third Circuit community consistent with its mandate.

Respectfully submitted,

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Chairperson

Magistrate Judge M. Faith Angell

Judge Dickinson R. Debevoise

Co-Chairs, Commission on Gender

Lawrence S. Lustberg, Esq.

Judge Theodore A. McKee

Co-Chairs, Commission on Race &
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On behalf of:

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Judge Donald E. Ziegler

II. SEPARATE STATEMENT OF JUDGE EDMUND V. LUDWIG

While I have joined in the Task Force Report, I do so as a Task Force member who did not serve on either of the two commissions or their committees. Many Task Force members also had leadership positions on the commissions. They and their numerous co-workers, together with the executive director and her staff, deserve the credit for the formulation and preparation of the commission and committee reports—an arduous undertaking and achievement. The Task Force met periodically to review the progress of the commissions and, after the commissions made findings and recommendations, drafted and issued its report.

Through the commissions, committees, survey respondents and participants in group programs, the Task Force reached out in many directions and touched many people. If our court system is thought of as a community of its constituents, the work of the Task Force, as a societal exercise, had a number of worthwhile effects. The Task Force impelled our system to think about itself and each of us to look carefully at ourselves. It brought together diverse groups and opened up issues that had probably not been discussed by any of us in that fashion before. It demonstrated that problems that continue to divide and test our country, at times with great bitterness and even extreme violence, can be considered without ostensible rancor. It offered constructive hope for the future, in a society undergoing incredibly rapid and enormous change. In all of these measures, our circuit was indeed fortunate to have undertaken this process—and I, in turn, to have participated as a member of the Task Force.

There are areas of the Task Force and commission work product that, in my view, should receive special comment. These comments necessarily reflect my personal history as a judge for almost thirty years and my loyalty to the Eastern District of Pennsylvania, where I have been a member since 1985.

The major approach to data collection consisted of anonymous surveys prepared by social scientists working under the supervision of the commissions. My preference would have been to reduce the volume of survey questions and conduct more interviews and group meetings. The data, as analyzed, is subject to the standard criticisms of statistical computations, particularly where the numbers, or bases, are not substantial. Perhaps more importantly, the use of interviews and greater dialogue could have added an educational value that was not available in the surveys.

In terms of judicial complement, the Eastern District of Pennsylvania is by far the largest district in our circuit. As an example, its current number of authorized active (23), as well as senior (14), Article III judges represents 42% of that segment of the judiciary in service in all five Article III districts (88). It outnumbers the combined total in both categories in the Middle and Western District of Pennsylvania and the District of Delaware. The District of New Jersey, with its 17 active and 4 senior judges, is the only district that comes close enough for this type of comparison.

The general administration of the Eastern District of Pennsylvania's work is performed by a staff of 298 employees in the Clerk of Pennsylvania Court's Office. Each of the next largest clerks' offices, the District of New Jersey (112) and the Middle District of Pennsylvania (105), is only approximately 30% of that size. The Eastern District of Pennsylvania's workforce makes up nearly 50% of the district court clerks' office personnel in the entire circuit. Significantly, the number of minority employees in the Eastern District of Pennsylvania clerk's office (61) is one-and-a-half times as many as the total of all of the other districts (40) (excluding the Virgin Islands), and dwarfs the Western District of Pennsylvania (8), the Middle District of Pennsylvania and the District of Delaware (2 each). These comparisons are important because each district's universe of potential survey respondents was defined by its existing workforce.

In the court employment sections of their reports, the Race & Ethnicity and Gender Commissions remarked on the perceptions of bias expressed in survey responses by some employees of the Eastern District of Pennsylvania clerk's office as well as by those of the District of New Jersey's bankruptcy court. The reports also quoted various criticisms. Although the number of complaints was relatively small, it was sufficient to be considered statistically significant. While noting a lack of hard data, the commission reports concluded that the perceptions of bias in the Eastern District of Pennsylvania clerk's office presented serious and problematic issues. No attempt was made to explain the underlying reasons for the employees' charges or to suggest any strategies for investigating them. Those projects are beyond the purview of the Judicial Council resolution that established the Task Force.

One hypothesis that may be offered is that the Eastern District of Pennsylvania clerk's office is a microcosm of the greater Philadelphia metropolitan area. For years, racial and gender conflict has been widespread in Philadelphia, and it reverberates in the court

system in the form of an increasing incidence of employment discrimination cases. Diversity and equal treatment are related, but often involve separate issues. While the presence of diversity is a necessary predicate for most complaints of disparate treatment, the resolution of the Judicial Council directed the Task Force to conduct a "comprehensive examination of the treatment of all participants in the judicial process" and made no reference, as such, to diversity. Arguably, what the commissions uncovered was that large-scale diversity in court employment has occurred primarily in the Eastern District of Pennsylvania. Racial diversity is almost nonexistent in three of the other districts. Not surprisingly, employment issues, particularly in an organization of any size, can be translated into unequal treatment issues. Whether or not this or any other supposition has validity remains to be seen. The perceptions of racial and gender bias cannot be ignored, and the judges of the Eastern District of Pennsylvania must consider themselves accountable at least to make a further inquiry.

The Task Force and commission reports also recommend that educational and training programs be instituted within the circuit to deal with perceptions of bias and to accord equal treatment. The objectives of such programs are unquestionably beneficial, and, indeed, the law proscribes racial and gender discrimination. My concern is that such recommendations can be read to mean that judges, as a group, and others in the court system are not alert or sensitive to these issues. Why else, one might ask, is there the need for such indoctrination? One reason is that some of the issues involved are not simplistic, and the contexts and solutions are constantly changing. Another is that while most judges today are well aware of these issues, there may be some who in practice disregard them. A selective educational program for those judges alone would be impracticable. Nevertheless, without adequate disclaimers, the public may be misled into believing that judges and their administrators have been repeatedly violating the law and not upholding equal treatment principles. My understanding is that those implications were not intended by the Task Force, and the Task Force and commission reports should not be interpreted so as to give credence to them.

In my view, the Task Force process will have served the greatest good if it can continue to bring together the many diverse constituents in our circuit. The establishment, for this purpose, of a permanent or standing committee to carry on the work of the Task Force should be encouraged.

III. REPORT OF THE COURT SYSTEM INTERACTION COMMITTEE OF
THE GENDER COMMISSION

A. *Introduction*

The federal courthouse brings together disparate groups of people for a common purpose. Judges, court employees, attorneys, witnesses and jurors must all interact in order for justice to be served. The Gender Commission created the Court System Interaction Committee (“CSI Committee”) to study whether these participants in the legal system treat each other equally, regardless of gender.

In order to assess the experiences and perceptions of these courthouse participants, the CSI Committee sought information from judges, attorneys and court employees regarding interactions among the different players in the legal system. It posed survey questions to each of these groups and reviewed written comments submitted with the survey as well as public hearing testimony taken throughout the Third Circuit.

Overall, the survey results show that the participants rarely see people being treated differently because of their gender. Females, however, generally report observing differential treatment more often than males. In addition, the testimony at the public hearings and the comments submitted, along with the surveys, reveal that many females involved in the judicial system, whether judges, attorneys or court employees, feel that they are or have been treated differently because of their gender.

B. *Do Judges of the Third Circuit Treat People Differently by Gender?*

Probably all participants in and observers of the legal system would agree that the conduct of judges themselves sets the standard for the system as a whole. Because of their visibility, their influence and the high repute in which they should be held, even a few instances of perceived gender bias by judges should be taken seriously and examined closely.

1. *Do Judges Treat Attorneys Differently According to Gender?*

a. Survey Results in General

Court employees and attorneys were asked whether they had seen *judges treating attorneys* differently based on the attorneys’ gender. Specifically, court employees and attorneys were asked whether they had observed judges within the Third Circuit say or

do anything to attorneys which they thought demeaned or disparaged the attorney based on his or her gender.

TABLE 4: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO ATTORNEYS WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Attorney	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	6.9	6.9	6.9	6.9
Nonminority female	6.8	6.7	6.8*	6.3*
Minority male	6.9	6.8	6.9	6.8
Minority female	6.9	6.7	6.9*	6.5*

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Employee Survey Question 8 and Attorney survey Question 6.

Generally speaking, court employees and attorneys, male and female, reported that they had almost never observed judges demean or disparage attorneys based on gender. The reported averages from all groups range from 6.3 to 7.0, with 6.0 equaling "rarely" and 7.0 equaling "never."

Court employees and attorneys, male and female, generally agreed that judges treat male attorneys slightly better than they do female attorneys. Although unequal treatment by gender was infrequently reported by all groups, female attorneys reported such behavior more frequently than did the other groups.

Female attorneys observed somewhat more demeaning or disparaging behavior by judges toward all groups of attorneys than did the other groups. There were statistically significant differences between male and female attorneys in their reported observations of judges' demeaning or disparaging conduct toward female attorneys, with females reporting more such conduct. This difference is illuminated by looking at the range of responses. Lower percentages of women attorneys than men reported that they "never" see such conduct by judges and, conversely, higher percentages of women attorneys reported that they "sometimes" or "rarely" (but not "never") had observed such conduct. For example, as Table 5 indicates, there was a statistically significant difference between the re-

sponses of Caucasian male and Caucasian female attorneys to the question: "Have you observed *any judges or judicial officers within the Third Circuit* say or do anything to nonminority female attorneys which you thought demeaned or disparaged that person based on his or her *gender*?"

TABLE 5: RESPONSES OF CAUCASIAN ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO NONMINORITY FEMALE ATTORNEYS WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Gender of Caucasian Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.8*	89.3	6.3	3.2	0.8	0.3	0.1	0.0	7.6
Female avg = 6.3*	64.4	16.0	13.2	3.7	1.4	1.4	0.0	12.4

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 6.

That is, 4.0% of white male attorneys reported that they "sometimes" had seen judges demean or disparage nonminority female attorneys; 16.9% of white female attorneys "sometimes" had seen such behavior. Female attorneys reported having seen somewhat more demeaning or disparaging conduct by judges toward their own group than did female court employees.

b. Judges' Treatment of Attorneys: Particular Areas of Conduct

Attorneys were asked a series of questions asking whether they had observed particular types of conduct toward attorneys based on the attorneys' gender. Some of these topics also were raised by attorneys speaking at the public hearings.

i. Deference and Respect

Attorneys were asked: “Are judges more deferential to *attorneys* of their own *gender* than to attorneys of the other gender?” Male and female attorneys responded as follows:²⁵

TABLE 6: RESPONSES OF ATTORNEYS TO THE QUESTION: “ARE JUDGES MORE DEFERENTIAL TO ATTORNEYS OF THEIR OWN GENDER THAN TO ATTORNEYS OF THE OTHER GENDER?”

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.2*	57.9	24.1	9.3	4.9	1.9	0.8	1.1	20.2
Female avg = 5.3*	29.7	25.8	12.7	15.7	8.7	5.7	1.7	25.2

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 16.

About one-fifth of male attorneys (20.2%) and about one-quarter of female attorneys (25.2%) responded “don’t know” to this question. Of those attorneys giving a numerical rating to this question, women attorneys more often reported deference by judges to same-gender attorneys at least “some of the time.” The disparity of responses between men and women attorneys in this regard was statistically significant. Although the survey question itself did not ask the respondents whether they had observed any “deference differences” as between male and female judges, the comments offered by attorneys reflected a full spectrum of opinion as to whether judges, male and female, gave more deference (or, more broadly, “respect”) to male or female attorneys.

A number of attorneys, male and female, expressed the view that *judges in general* (gender unspecified) at all levels of the court system have been *less respectful toward women attorneys*: “I saw a Third Circuit panel abuse and insult a female attorney for not watching football on TV.”

25. Not all of the attorneys responding to the survey gave their gender in response to the separate question asking for that information. The figures and the text here, and the charts and text that follow in this section, represent the responses of those attorneys who did identify themselves by gender.

Several judges demean women attorneys and witnesses by dismissing legitimate anger as, e.g., a little fit of pique; or by referring to emotionalism and hormones. I have seen this many times, often by well-meaning judges. It still rankles.

Several attorneys, male and female, expressly observed that *female judges*, as well as male judges, were *more deferential to male attorneys*: “Judges, even women judges, seem to give greater credence to men and tolerate antics from men that are not tolerated from women.” Some other attorneys, male and female, felt that *male judges in particular* were *less respectful to women attorneys*: “[Four named male judges] treat female lawyers differently and with less respect than males.”

Conversely, some attorneys said that *female attorneys* are given *more deference or respect* by judges in general. A female attorney reported: “I have found myself, for the most part, at an advantage because of my sex and outgoing attitude. Any ‘discrimination’ has been positive, e.g., letting me make my argument first; court being solicitous. So, I have no complaints.”

A number of *male attorneys* reported that *female judges* in particular gave *greater deference to female attorneys*:

In my experience, [the] greatest gender tension is between female judges (particularly bankruptcy judges) and male members of the bar. Probably with good reason, female jurists appear very wary of ‘old boy network’ type attorneys. Unfortunately, sometimes male attorneys who have no gender bias are lumped by the jurist with those that do and therefore receive disparate treatment.

I have on two or three occasions been present when female judges made comments in a multi-party case about certain litigants not having female lawyers involved. It seems that non-minority males are the only group who can still be bashed.

Finally, quite a few attorneys, male and female, reported that *judges generally were equally respectful or discourteous* to all groups:

As we all know a good number of judges in [district omitted] and probably other federal districts are mean, tyrannical—difficult to work with. They generally seem to be even-handed about this, treating all with the same degree of civility or disdain. I’ve seen attorneys mistreated, or treated harshly, I’ve seen courts tell attorneys things that

you wouldn't say to a dog, sometimes in front of juries. . . .
But I don't believe I've ever seen these things break out
along racial, ethnic or gender lines.

ii. Disparaging Remarks About Professional Competence or
Performance

Attorneys were asked: "How frequently, if at all, have you observed judges singling out female counsel to make disparaging or demeaning remarks to them about their professional competence or performance?" Male and female attorneys responded as follows:

TABLE 7: RESPONSES OF ATTORNEYS TO THE QUESTION: "HOW FREQUENTLY, IF AT ALL, HAVE YOU OBSERVED JUDGES SINGLING OUT FEMALE COUNSEL TO MAKE DISPARAGING OR DEMEANING REMARKS TO THEM ABOUT THEIR PROFESSIONAL COMPETENCE OR PERFORMANCE?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.9*	90.8	6.8	1.7	0.2	0.1	0.3	0.1	7.7
Female avg = 6.5*	73.8	13.3	6.1	4.6	1.9	0.4	0.0	14.1

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 22.

A sizable majority of both male and female attorneys responded that they had "never" observed such conduct by judges. A higher percentage of female than male attorneys, however, reported observing this sort of behavior by judges at least "some of the time." This difference between female and male attorneys was statistically significant.

Several female attorneys reported their own experiences, which they interpreted as undeservedly demeaning of their professional performance:

I was once on the receiving end of some nasty comments about complying with a scheduling rule, while the magistrate said nothing to the other attorneys (both male) who had the initial responsibility regarding compliance.

Both [two male district court judges] have accused me of unprofessional conduct, at hearings of which I have the transcripts, in a manner that was injudicious and without any foundation in fact or law. I will always wonder, and never know, whether it was because I'm female.

Several attorneys and court employees, male and female, reported examples of judges, male and female, expressing variations of "traditional" sex role notions to the detriment of women attorneys: "One female judge commented that female lawyers should stay home with their children and not be pursuing [a] career." A female attorney recounted an experience she had in district court: "I was admonished by a judge for being too aggressive—a comment which, under the circumstances, would probably not have been made to a male since men are allowed to be more aggressive than women."

In a parallel vein, a male attorney reported that he had been the subject of a female judge's criticism along sex role lines: "I was once castigated by a female judge for referring to a 'housekeeping matter' rather than a 'ministerial matter,' accusing me of sex role bias. In my case, I was a househusband, but I accepted the judge's criticism without comment rather than embarrass the judge over her ignorance."

A related area involves cases of "mistaken identity," in which a judge had not realized that a woman was an attorney. Several attorneys, male and female, recalled such instances. One female attorney reported: "On a trial call, a judge asked me, after I stated, 'ready, plaintiff,' if I was 'waiting for my attorney.'" A male attorney recalled an instance in which a female associate set up a pretrial telephone conference with a judge's chambers. The judge called a male partner of the firm, having assumed that the female caller was a secretary, not an attorney. All participants were embarrassed by the incident, according to the attorney, who observed: "Even in this day and age female attorneys may have to add 'Esquire' after their name in letters, memos, etc., to insure that they are treated as attorneys." At a public hearing, a female attorney repeated a story that had been told to her by another female attorney:

[O]n a number of occasions, at least one federal judge called one of our lawyers and wanted to know why a secretary was signing the pleadings. In thinking about that, that was as much a product of the fact, to the judge's

knowledge, there were no women in our office except secretaries.²⁶

iii. Interrupting Female Attorneys

Attorneys were asked: "How frequently, if at all, have you observed judges cutting off or interrupting female attorneys while permitting men more time to make their point?" Men and women attorneys responded as follows:

TABLE 8: RESPONSES OF ATTORNEYS TO THE QUESTION: "HOW FREQUENTLY, IF AT ALL, HAVE YOU OBSERVED JUDGES CUTTING OFF OR INTERRUPTING FEMALE ATTORNEYS WHILE PERMITTING MEN MORE TIME TO MAKE THEIR POINT?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.8*	86.9	8.2	3.1	0.9	0.2	0.4	0.3	8.4
Female avg = 5.8*	49.6	18.8	8.6	12.4	4.5	4.5	1.5	13.1

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 24.

A large majority of the responding male attorneys (86.9%), and just about half of the responding female attorneys (49.6%), reported that they had "never" observed judges interrupting women attorneys while affording more time to men. Concomitantly, higher percentages of women attorneys reported observing this behavior "some of the time" and, again, the difference between men and women attorneys was statistically significant.

iv. Forms of Address

Attorneys were asked: "How frequently, if at all, have you observed judges addressing female counsel in a less professional manner than they address male counsel?" Male and female attorneys responded as follows:

26. Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: Pittsburgh, Pennsylvania*, 73 (Oct. 24, 1996) [hereinafter *Public Hearings: Pittsburgh, Pennsylvania*].

TABLE 9: RESPONSES OF ATTORNEYS TO THE QUESTION: "HOW FREQUENTLY, IF AT ALL, HAVE YOU OBSERVED JUDGES ADDRESSING FEMALE COUNSEL IN A LESS PROFESSIONAL MANNER THAN THEY ADDRESS MALE COUNSEL?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.7*	79.7	14.2	2.9	1.9	0.5	0.6	0.2	7.9
Female avg = 5.8*	45.7	23.4	9.3	12.3	5.6	3.0	0.7	12.1

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 19.

In this area as well, there was a statistically significant difference between the responses of women attorneys and men attorneys. More women reported "less professional address" by judges toward women attorneys at least "some of the time." Nearly four-fifths of the responding male attorneys (79.7%) had "never" observed such conduct; 45.7% of responding female attorneys had "never" observed such behavior.

The comments from attorneys on this particular topic, both in the surveys and at the public hearings, indicated that at least some people take sharp notice of the way that judges address female attorneys (especially when the judge addresses them differently than their male counterparts), and that the female attorneys are more comfortable with formal (or at least equally formal) forms of address. These comments fell into several categories.

It was reported that some judges seem unsure of the most appropriate way to address female attorneys, i.e., as *Miss*, *Ms.* or *Mrs.* A number of female attorneys themselves have said they prefer to be addressed simply as "attorney" or "counselor."

A number of attorneys, both male and female, reported incidents in which judges had addressed a women attorney by her *first name* but had addressed a male counterpart as "Mr." or as "counselor." Conversely, several female attorneys reported incidents in which judges had addressed them by their full name but had addressed the male adversary by his first name. This had raised a question in the female attorneys' minds as to whether this was because the male attorney had practiced longer and was better known

to the judge; whatever the reason, the female attorneys noticed and were uncomfortable with the different treatment. One female attorney commented: "I would say judges consciously are more formal to female attorneys, which just highlights that they are considered 'different.'"

Both men and women attorneys reported references by judges to female attorneys as, for instance, "young lady" or "the lady lawyer." A female attorney commented:

I have appeared before the Third Circuit Court of Appeals and been referred to as a "young woman" by a circuit judge in open court and during oral argument. This particular judge also suggested that because of my youth, I could not "understand" what he was referring to. (I have been practicing for 9 years).

Male and female attorneys, as well as court employees, reported hearing some judges refer to female attorneys as "girl" or "little girl" or "girlie." One female attorney reported: "I have heard judges both from the bench and in chambers make inappropriate comments that would never be said to a man, e.g., 'be a good girl.'" Another woman attorney reported that a judge had said to her: "Honey, I think you should reconsider your position." Similarly, a male attorney at a public hearing said: "I recall a judge referring to a female paralegal as missy, and I did swear to her on a stack of Bibles I would tell you about that because it bothered her for a number of years, and I'm not sure that's the first time it happened."²⁷

At the public hearings several female attorneys emphasized that their *clients* likewise *had noticed and remarked upon differences* in the way the judge had addressed them vis-a-vis their male adversaries (e.g., the judge addressing the female attorney by her first name and the male adversary as "Mr." or "counselor").

v. Sexually Suggestive Remarks

Attorneys were asked: "How frequently, if at all, have you observed judges making sexually suggestive comments to female counsel?" Male and female attorneys responded as follows:

27. Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: Harrisburg, Pennsylvania* 14 (Nov. 18, 1996) [hereinafter *Public Hearings: Harrisburg, Pennsylvania*].

TABLE 10: RESPONSES OF ATTORNEYS TO THE QUESTION: "HOW FREQUENTLY, IF AT ALL, HAVE YOU OBSERVED JUDGES MAKING SEXUALLY SUGGESTIVE COMMENTS TO FEMALE COUNSEL?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.9	95.0	4.0	0.5	0.2	0.3	0.0	0.1	7.4
Female avg = 6.8	88.5	8.5	1.1	1.5	0.4	0.0	0.0	11.8

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Attorney Survey Question 21.

Large majorities of both women and men attorneys (88.5% and 95% respectively) responded that they had "never" observed judges making sexually suggestive comments to female counsel. A somewhat higher percentage of women attorneys than men (8.5% and 4.0% respectively) reported that they had "rarely" observed such conduct; 3% of women attorneys and 1% of men attorneys reported observing such conduct "some of the time."

A number of attorneys and court employees, male and female, included comments to the survey indicating that some judges occasionally remark upon the *physical appearance and attire* of female attorneys. For example, a male attorney reported: "One judge I have appeared before has a habit of commenting on the dress of certain female attorneys. I feel the comments are not ill-intentioned, but are inappropriate." Another attorney commented: "[I h]ave heard one particular judge make comments of a sexual nature re: attorneys, defendants; witnesses, jurors such as, 'She should wear that skirt a little higher.'" A female attorney reported: "I have seen [a district court judge], numerous times, make comments to or about women, their looks, their dress, etc. It is unbecoming. Many men have commented to me about it. I happen to like Judge [name omitted] but his comments about women are tasteless."

In a related vein, a female attorney reported a judge's "*racy stories*" told by a judge *in chambers*: "One judge in particular in district court in [location omitted] tells racy stories or anecdotes to counsel in chambers on virtually every occasion I have been present. I believe such conduct demeans both males and females." Another female attorney offered this anecdote about *sexually suggestive art* displayed *in chambers*:

Personal art displayed in the chambers of a . . . judge spoke volumes about the attitude of this judge toward women. Chambers were used for conferences. . . . [In general], federal court in [district omitted] has presented a gender neutral and race neutral environment in which to practice law. The comments herein reflect isolated instances over my 15 year experience with the Court. The only experience which left me with doubts involved the art in the chambers of the judge. I was so taken aback that my presentation in the conference was affected.

Finally, several attorneys singled out one particular male judge for special comment:

Judge [name omitted] is a notorious sexist. He demeans female lawyers and is known to “hit” on them . . . “Pig” is way too mild a term for his behavior.

Much of Judge [name omitted]’s inappropriate conduct does not appear “of record” because his court reporters do not transcribe these incidents.

vi. Scheduling and Parental Obligations

Attorneys were asked: “How frequently, if at all, have you observed judges being unresponsive or insensitive to counsel or parties’ parental obligations (e.g., maternity or paternity leave, child-care schedules) when scheduling case events?”

Female attorneys more often reported that judges were unresponsive or insensitive to parental obligations in scheduling matters, at least “some of the time,” than did men. The difference in the responses between men and women is statistically significant. A considerable portion of attorneys, however, responded “don’t know” to this question: nearly one-third of female respondents (32.7%) and nearly one-fifth of male respondents (19.4%).

Although a number of attorneys responding to the survey complained in general terms that judges were unrealistic or impractical in their scheduling practices, relatively few of those attorneys’ comments specifically addressed “family-friendly” or “family-unfriendly” scheduling practices. One male attorney noted, “I have seen [judges] insensitive to all kinds of counsel’s scheduling problems and I have seen them sensitive.”

TABLE 11: RESPONSES OF ATTORNEYS TO THE QUESTION: "HOW FREQUENTLY, IF AT ALL, HAVE YOU OBSERVED JUDGES BEING UNRESPONSIVE OR INSENSITIVE TO COUNSEL OR PARTIES' PARENTAL OBLIGATIONS (E.G., MATERNITY OR PATERNITY LEAVE, CHILD-CARE SCHEDULES) WHEN SCHEDULING CASE EVENTS?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.5*	76.9	10.1	5.8	3.4	1.7	1.4	0.7	19.4
Female avg = 5.9*	57.3	12.6	11.7	7.3	3.9	4.9	2.4	32.7

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 26.

In response to the survey, several female attorneys commented expressly on their own experiences in requesting pregnancy-related scheduling changes:

This month the court scheduled my case for trial. The trial was 3 weeks prior to my due date. I requested an adjournment until after my maternity leave (4 months later)—it was my first request for an adjournment but my adversary did not consent. The court denied my request for an adjournment twice. When I appeared in court, the judge seemed surprised that I was so PREGNANT. Preparing for trial in the 9th month of pregnancy is difficult! The Third Circuit was very cooperative in rescheduling oral argument to accommodate my maternity leave.

Attorneys in the Western District of Pennsylvania noted at the public hearing there that, several years ago, two female attorneys had been denied requests for trial continuances because of their respective late-term pregnancies. In response to that situation, the district court thereafter adopted a policy statement granting continuances for good cause, including compelling personal reasons, and specifically including childbirth.

On a related topic, it has been brought to the attention of the CSI Committee that the District of New Jersey assigns criminal cases on a nongeographic basis among the district judges sitting in the three courthouses located in the district (in Newark, Trenton and

Camden), and that this practice has “family unfriendly” consequences for the participants. Under this “wheel system,” a criminal case is assigned randomly among the district judges in the three vicinages, without regard to where the alleged criminal activity occurred or where the indictment is returned. A criminal case may be assigned to a district judge sitting in Camden even though the alleged crime was committed in the northern part of New Jersey and even though the defendant, the witnesses, the families of the defendant and witnesses, the Assistant United States Attorneys and the defense counsel all are located in the northern part of the state. Conversely, criminal cases in which all participants are physically located in the southern part of the state may be assigned to a district judge sitting in Newark.

The consequence of this system is that the participants are required to travel as much as two and one-half hours longer at each end of a court day than would be the case if the case were assigned to a district judge at the nearest federal courthouse. During criminal trials of any length, this added commute imposes a significant burden on the defendants, witnesses, family members who may wish to attend the proceedings and on the prosecution and defense attorneys. Either these participants must arrange to stay overnight near the courthouse, away from their families, or they must travel several additional hours during the morning and evening of each day. Each of these scenarios predictably causes disruption in the households of these participants. The District of New Jersey does assign its civil cases on a geographic basis, generally according to the location of the plaintiff. The CSI Committee has been advised that the District of New Jersey is alone among the multicourthouse districts within the Third Circuit to use a nongeographic “wheel system” for criminal cases.

vii. Informal Access

Attorneys were asked: “Does an attorney’s gender affect the amount of informal access the attorney has to judges?” Male and female attorneys responded as follows:

TABLE 12: RESPONSES OF ATTORNEYS TO THE QUESTION: "DOES AN ATTORNEY'S GENDER AFFECT THE AMOUNT OF INFORMAL ACCESS THE ATTORNEY HAS TO JUDGES?"

Gender of Attorney	Percentage of Responses							
	Never 7	6	5	4	3	2	Always 1	Don't Know
Male avg = 6.3*	67.3	15.3	7.7	6.0	1.5	0.8	1.4	34.6
Female avg = 5.3*	37.0	15.4	11.1	20.7	8.2	4.8	2.9	32.0

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always. An asterisk (*) indicates a statistically significant difference between male and female respondents.

SOURCE: Attorney Survey Question 18.

About one-third of both male attorneys (34.6%) and female attorneys (32%) responded "don't know" to this question. Of those attorneys giving a numerical response, women attorneys more often reported that an attorney's gender *does* affect the amount of informal access that the attorney has to judges, at least "some of the time." The disparity of responses between men and women attorneys is statistically significant.

The notion that an "old boys club" operates among long-practicing male attorneys and male judges, to the detriment both of women attorneys and to more newly admitted attorneys, was voiced frequently in attorneys' comments to the survey and at the public hearings. A female attorney commented: "The old boys club is alive and well in [area omitted]. Women and minority judges and attorneys just aren't included, and they are expected to be inferior in some respects."

Several female attorneys, recalling instances in which a male judge had addressed their male adversary by his first name, wondered whether the "old boys network" was at work. A number of women attorneys also specifically remarked on sports outings: "Male judges tend to play golf with male attorneys. I have observed the 'good old boys' club in court by a small number of judges. . . . The women are excluded from the 'old buddy' dialogue between judges and male attorneys regarding their golf scores and inside jokes."

Several attorneys, male and female, commented that some groups of attorneys (to which the respondents did not belong) seemed to have more informal access to the court. They ques-

tioned, however, whether there was really any gender bias at work. A woman attorney commented: "While there does not appear to be outright sex/gender bias, there is most definitely a favor to defense counsel. As just an example, I have been on numerous times denied conferences while defendants on same case are granted same." Other attorneys questioned the actual power of the network. A male attorney commented:

At a more subtle level, there is an "old boys network," even with minority and female judges and attorneys at every level. I say this as an aspiring old boy. As a non-member of the club, I am fairly confident that social and professional relationships between judges and lawyers over several decades suggests chumminess but not any substantive effect on outcomes. Also, I am learning that just because two older white males have known each other for a long time and greet each other fondly does not actually mean that they like each other or would *do* anything for each other, except greet each other fondly.

A number of attorneys would add, however, that the very perception that judges may be more accessible to particular groups of attorneys can damage the court's reputation for evenhandedness, as well as the "comfort level" of attorneys who feel themselves outside the club.

2. *Do Judges Treat Court Employees Differently According to Gender?*

Court employees and attorneys were asked whether they had observed *judges* within the Third Circuit say or do anything *to court employees* that they thought demeaned or disparaged the employee based on his or her gender. The court employees and attorneys gave the following average responses:

TABLE 13: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO COURT EMPLOYEES WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Employee	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	6.9	6.8	7.0	7.0
Nonminority female	6.8	6.6	7.0	6.8
Minority male	6.9	6.8	7.0	7.0
Minority female	6.9	6.7	7.0	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 8 and Attorney Survey Question 6.

Several points are indicated by this survey data. Overall, court employees and attorneys, male and female, reported that they have seldom observed judges demean or disparage court employees based on gender. The reported averages from all groups ranged from 6.6 to 7.0, with 6.0 equaling "rarely" and 7.0 equaling "never."

Court employees, male and female, reported slightly more demeaning or disparaging conduct by judges toward court employees than did attorneys. Females, both court employees and attorneys, reported slightly more demeaning or disparaging conduct by judges toward female court employees than did their male counterparts. Several female court employees commented on their perception that some judges treat male employees with more respect: "Some judges treat female employees with less respect than male employees. For example, females are expected to type and answer [the] phone regardless of their equal credentials."

A couple of male employees commented that a female judge treated female court employees more courteously than she did males:

There's a female judge who refuses to acknowledge my presence as a human being or any other male I have questioned. . . . I have tested her several times in various settings—she's almost cordial/friendly to women but will not

acknowledge males with a wave, nod, spoken word, etc. Is this gender bias, or what?

Several law clerks, male and female, commented on perceived gender bias by some judges in their treatment of law clerks:

I have been treated, and have seen other female law clerks and judges treated, as if they (I) were not there—the invisibility factor by certain male judges.

In chambers, the female clerk was expected to take care of the library. The male clerk was expected to go to lunch with the judge and his friends. Apparently, it has been done that way for a number of years. In general, there was a subtle feeling of sexism, but it may have been a generational conflict/difference of opinion.

Finally, several employees reported that some male judges have (and continue to) “make passes at” female court employees.

3. *Do Judges Treat Witnesses, Litigants or Jurors Differently According to Gender?*

Court employees and attorneys were asked whether they had observed judges within the Third Circuit say or do anything to *witnesses, litigants* and/or *jurors* which they thought demeaned or disparaged the person based on his or her gender. The court employees and attorneys gave the following average responses:

TABLE 14: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: “HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO WITNESSES WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?”

Race and Gender of Witness	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	7.0	6.9	6.9	7.0
Nonminority female	6.9	6.9	6.9	6.7
Minority male	7.0	6.9	6.9	6.9
Minority female	6.9	6.9	6.9	6.7

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 8 and Attorney Survey Question 6.

TABLE 15: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO LITIGANTS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Litigant	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	7.0	6.9	6.9	7.0
Nonminority female	6.9	6.8	6.9	6.7
Minority male	6.9	6.9	6.9	6.9
Minority female	6.8	6.9	6.9	6.7

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 8 and Attorney Survey Question 6.

TABLE 16: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO JURORS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Juror	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	7.0	7.0	7.0	7.0
Nonminority female	7.0	6.9	7.0	6.9
Minority male	7.0	6.9	7.0	7.0
Minority female	7.0	6.9	7.0	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 8 and Attorney Survey Question 6.

Court employees and attorneys, male and female, reported that they had observed little gender-based demeaning or disparaging conduct by judges toward any of these groups. The reported averages from all groups ranged from 6.7 to 7.0, with 6.0 equaling "rarely" and 7.0 equaling "never." Among these three groups, slightly more demeaning or disparaging behavior was reported toward (female) litigants than toward (female) jurors, with treatment of (female) witnesses falling in the middle.

Female attorneys reported slightly more demeaning or disparaging conduct by judges toward female witnesses and litigants than did other groups. All groups agreed that they had never, or almost never, observed demeaning or disparaging behavior by judges toward jurors. Females, however, were slightly more likely to observe and report any such behavior. For example, a female attorney commented specifically about a judge's conduct toward potential jurors: "Once or twice a judge has treated female jury panel members as silly or irresponsible for raising concerns about jury service having to do with personal safety or obligations to care for children, an elderly parent, or an ill or disabled spouse."

Several attorneys commented on judges' attitudes toward female litigants: "[Male judge, name omitted]'s demeanor, on occasion, suggests impatience with female litigants and suggests that their claims are trivial. I have generally found female judges and magistrates more sensitive to my minority female clients." A male court employee offered this anecdote about a judge's conduct toward a female criminal defendant: "One District Judge in taking a guilty plea of a pregnant woman used the term twice 'miscarriage' of justice in a playful manner."

4. *Do Judges Treat Other Judges Differently According to Gender?*

a. *What Do Judges Say?*

The judges were asked two questions about whether their colleagues on the bench treated each other differently by gender. One question dealt with their perceptions of respect accorded themselves, and one dealt with their observations of their colleagues' behavior.

TABLE 17: RESPONSES OF JUDGES TO THE QUESTION: "IN GENERAL I HAVE BEEN TREATED WITH MORE, THE SAME AMOUNT OF, OR LESS RESPECT THAN JUDGES OF THE OTHER GENDER?"

Amount of Respect	Number of Judges Responding
More	0
Same	109
Less	7

SOURCE: Judge Survey Question 23.

Of the 116 judges responding to the survey, 109 identified themselves by gender, including all seven of the judges reporting that they had been treated with "less respect" than judges of the

other gender. Of these seven judges reporting “less respect” based on gender, two are male judges and five are female judges. Of the 19 female judges responding, 26% (5 of 19) reported “less respect,” and of the 90 male judges responding, 2.2% (2 of 90) reported “less respect.” There was a statistically significant difference between male and female judges in this regard.

These seven judges further reported that the following groups, with the following frequencies, had treated them with “less respect”:

TABLE 18: RESPONSES OF JUDGES TO THE QUESTION: “BY WHOM ARE YOU GENERALLY TREATED WITH LESS RESPECT?”

Groups Treating Judges with Less Respect	Number of Judges Responding
Other judges	6
Attorneys	4
Litigants	2
U.S. Marshals	1
Court Security Officers	1
Other court employees	1

SOURCE: Judge Survey Question 23a.

Judges also were asked whether they had observed any federal judges say or do anything to or about other judges which they thought demeaned or disparaged that person based on gender, race or ethnicity.

TABLE 19: RESPONSES OF JUDGES TO THE QUESTION: “HAVE YOU OBSERVED ANY FEDERAL JUDGES SAY OR DO ANYTHING TO OR ABOUT OTHER JUDGES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER, RACE OR ETHNICITY?”

	Number of Judges Responding
Yes	6
No	99
Don't know	4

SOURCE: Judge Survey Question 31.

Some of the judges' comments to the survey elaborated on the perception, by a few of the judges, that some of their colleagues treat them differently by gender. One female judge said: “In the judicial lunchroom it is not uncommon to be ignored as though

invisible or to be ‘teased’ about gender-related issues.” Another female judge, speaking of comments made by other judges, said:

The comments are generally critical—not specifically based on gender, race or ethnicity. I have heard more critical comments about women judges than non-Caucasians, but there are more women judges than non-Caucasians. There are some federal judges who I have heard make many negative comments about specific women judges and I have *never* heard them make a positive comment about any woman judge.

Conversely, there was also this judge’s comment:

I have seen female judges impute sexually-based motives to male judges when there palpably was none The only instances [of different treatment by judges] I have seen are a few isolated instances of a female colleague imagining sexism present when no fair person—of either sex—would see it.

The perception that a few court employees may be less respectful to female judges was reflected in the comments of one judge: “[A] court employee . . . did not give a female judge the respect to which she was entitled when she first came on the bench. Insofar as I know, it never reoccurred after I spoke to him in the presence of the affected judge.”

b. What Do Court Employees and Attorneys Say?

Court employees and attorneys were asked about their observations as to whether *judges treat other judges* differently based on gender.

In general, these groups reported that they had almost never observed demeaning or disparaging conduct by one judge to another based on gender. Female court employees reported such conduct slightly more frequently; both court employees and attorneys (and both male and female) reported such conduct slightly more frequently directed to female nonminority judges.

TABLE 20: AVERAGE RESPONSES OF EMPLOYEES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ANY JUDGES OR JUDICIAL OFFICERS WITHIN THE THIRD CIRCUIT SAY OR DO ANYTHING TO JUDGES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Judge	Survey Respondents			
	Male Employees	Female Employees	Male Attorneys	Female Attorneys
Nonminority male	7.0	6.9	7.0	7.0
Nonminority female	6.9	6.8	7.0	6.9
Minority male	7.0	6.9	7.0	6.9
Minority female	7.0	6.9	7.0	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 8 and Attorney Survey Question 6.

A few comments from employees likewise indicated that some judges had occasionally made gender-based disparaging comments directed at their female colleagues. For example, one employee reported: "One male judge described a non-minority female judge as too emotional and suggested she makes too big a deal about child care issues and family responsibilities." A few attorneys made comments in the same vein: "During [a particular female judge's] early years some of the judges made cutesy comments about her. I have heard some judges refer to decisions from a female judge to have been decided 'when the judge was having PMS.'"

C. *Do Attorneys Treat People Differently According to Gender?*

The CSI Committee also studied whether attorneys practicing in the Third Circuit treat other courthouse participants equally, regardless of gender. Only attorneys, however, were specifically surveyed on this issue.²⁸ They were asked if they had observed attorneys say or do anything to a member of a certain group which they thought demeaned or disparaged that person based on his or her gender.

The survey reveals that women attorneys generally see gender-biased behavior more often than their male colleagues. Moreover,

28. The CSI Committee feels that the survey would have been more informative if judges and court employees had been asked to report on gender-biased behavior of attorneys.

female attorneys report that such behavior is more often directed at female attorneys than judges, witnesses, court employees or jurors.

1. *Do Attorneys Treat Other Attorneys Differently According to Gender?*

Overall, attorneys reported that they almost never observed gender-biased conduct by attorneys against other attorneys. To stop there, however, would be to miss some important differences in the responses given by male and female attorneys. For example, male and female attorneys differ on how frequently they observed female attorneys being demeaned or disparaged because of their gender.

The average male response is between 6.4 and 6.5 (almost never). The average female response is between 5.8 and 5.9. The difference in the average responses of male and female attorneys is statistically significant. Despite this difference, most female attorneys (58.9%) “rarely” or “never” observe gender-biased treatment by other attorneys. Of course, this leaves a substantial minority of female attorneys who see such gender bias “sometimes” (34.7%) or “frequently” (6.4%).

TABLE 21: AVERAGE RESPONSES OF ATTORNEYS TO THE QUESTION:
“HAVE YOU OBSERVED ATTORNEYS SAY OR DO ANYTHING TO
ATTORNEYS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT
PERSON BASED ON HIS OR HER GENDER?”

Race and Gender of Attorney	Survey Respondents		
	Average	Male	Female
Nonminority male	6.7	6.7	6.7
Nonminority female	6.3	6.4	5.8
Minority male	6.6	6.6	6.6
Minority female	6.4	6.5	5.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Attorney Survey Question 10.

The primary concerns of the female attorneys observing gender-biased behavior appear to be the use of terms of endearment, and rude and otherwise unprofessional behavior by male attorneys, including sexual comments. For example, one Caucasian female attorney stated: “I think that quite often male attorneys are rude, inconsiderate and condescending to female colleagues by using

terms such as 'sweetheart' [and] by making lewd comments"
Another Caucasian female attorney wrote:

I have experienced male attorneys treating me with a familiarity which I deemed unprofessional. Usually a request corrects the situation but not always. Examples include (1) addressing me by my first name while referring to other male attorneys as "Mr. _____" during hearings, depositions, etc., and (2) shortening my first name to a cute nickname while not doing the same with male attorneys.

A Hispanic female attorney wrote: "White male attorneys are quick to refer to aggressive female attorneys as 'bitches' or use terms of endearment such as 'dear' or 'hon.'" Some female attorneys reported rude comments about their appearance. For example, one female attorney reported: "There have been one or two attorneys who have made remarks about me that I found disparaging—commenting on my looks or body features during a court proceeding." Similarly, another Caucasian female attorney wrote: "On numerous occasions I have heard male attorneys make rude comments about female attorneys, court employees, and litigants, such as how they are dressed, their figures, and what they would like to do with these women." Another Caucasian female attorney reported:

I heard a non-minority male attorney make a comment to a non-minority female attorney (during trial) regarding her sexual activity which she reported to the court as highly offensive. On another occasion I heard a non-minority male attorney remark that a female minority attorney "must be on the rag" when she raised her voice during cross examination.

The same respondent observed that comments and suggestions made by women co-counsel were sometimes ignored by their male counterparts: "In multi-defendant cases, it is not unusual to have non-minority males ignore strategic suggestions of female attorneys, including, but not limited to, jury selection." Other attorneys observed similar behavior. A Caucasian male attorney said: "I have seen male attorneys afford less respect to fledgling female attorneys in depositions than they afford to male attorneys. Although not openly biased, there is not infrequently a large difference in the male's behavior."

Some of the comments seem to reflect that older male attorneys are more likely to engage in gender-biased behavior toward female attorneys. One Caucasian male attorney stated: "Most older attorneys in Philadelphia are bigots as far as gender goes, particularly older attorneys whose wives don't work." Another Caucasian male attorney said: "Some comments have been made by old white male attorneys about and to young white female attorneys. This has decreased over time as there are more female attorneys and they are more accepted by the old generation."

Attorneys who reported disparaging remarks by male attorneys toward female attorneys often attributed this behavior to an attempt to gain a tactical advantage in litigation rather than any deep-seated gender bias. For example, one attorney, who did not reveal his or her gender, observed the occurrence of "[a]bsolutely outrageous comments by defense attorneys (usually the over-45 crowd) to female prosecutors. I assumed [they were] designed to rattle them like 'you must be getting your period,' [and] 'you don't have to be such a bitch about it.'"

2. *Do Attorneys Treat Judges Differently by Gender?*

There is general agreement that attorneys rarely demean or disparage judges because of their gender. Again, however, when such behavior is reported, females are more likely to see it, particularly toward nonminority female judges. When asked whether they observed nonminority female judges being demeaned or disparaged by attorneys, the average female response was 6.4 while the average male response was 6.7. This difference is statistically significant. The table below summarizes the average responses of attorneys:

TABLE 22: AVERAGE RESPONSES OF ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED ATTORNEYS SAY OR DO ANYTHING TO JUDGES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON HIS OR HER GENDER?"

Race and Gender of Judge	Survey Respondents		
	Average	Male	Female
Nonminority male	6.9	6.9	6.9
Nonminority female	6.6	6.7	6.4
Minority male	6.8	6.8	6.8
Minority female	6.7	6.7	6.6

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Attorney Survey Question 10.

Several attorneys and one judge commented on perceived differential treatment of female judges. A Caucasian male attorney reported: "I have heard many judges and attorneys make disparaging remarks based on gender, including vile and unprofessional remarks directed at Judges [female judge, name omitted] and [female judge; name omitted], which are gender-based." Another Caucasian male attorney saw similar behavior: "I have heard attorneys disparage female judges outside of their presence." A Caucasian female attorney said: "As a former law clerk to a female judge I did—on several occasions—observe attorneys appearing before her treat her in a condescending manner—as if a woman judge could not possibly comprehend their legal arguments." A minority attorney observed: "Attorneys do not hesitate to make disparaging remarks about [a particular female judge] even though many male judges are equally demanding." A female judge expressed concern about her treatment by attorneys as follows: "Some attorneys do not accept my rulings without comments I feel are rude and would not be made to a male judge."

3. *Do Attorneys Treat Litigants Differently According to Gender?*

Again, male and female attorneys see little differential treatment of litigants based on gender. There is, however, a slight difference in the perceived treatment of minority female litigants. The average male attorney score was 6.5, while the average female attorney score was 6.3.

4. *Do Attorneys Treat Court Employees Differently According to Gender?*

Male and female attorneys responding to the survey agree that they almost never see an attorney demean or disparage a court employee based on gender.

5. *Do Attorneys Treat Witnesses Differently According to Gender?*

Male and female attorneys see little differential treatment of witnesses based on gender. There is, however, a slight difference in the perceived treatment of nonminority female witnesses. The average male attorney score was 6.6, while the average female attorney score was 6.4. This difference was found to be statistically significant.

D. *Do Court Employees Treat People Differently According to Gender?*

The personnel who work for the court in support of its high ideals are charged with the responsibility to treat members of the court, the bar and the public in a fair and equal way, without any regard to gender. The Task Force surveyed judges, attorneys, jurors and court employees themselves in an attempt to determine if gender was a factor in the way court employees treat others. While all groups surveyed basically agreed that court personnel *rarely to never* demean or disparage individuals based on their gender, perceptions between judge and employee groups were slightly different as to which individuals, if any, received unequal treatment in those few instances.

Also, females working in the court (especially minority females), and Asian-American males observed more often than other groups that court staff may treat female court employees, female litigants and female attorneys in a somewhat different way.

The qualitative data shows more concern by court employees than any other group. Employees commented about their treatment of each other more often than about any other target group. Representative comments include:

[A] few of the men get together and tell "dirty jokes," sometimes to women who are willing to listen. At times it is hard to avoid hearing this smut.

[T]o females remarks such as "hey honey" or flirting or sexual comments are often made. Also female attorneys are often not taken [as] seriously as male counterparts.

I have heard female employees referred to as “honey” “doll” “babe” on numerous occasions. I have heard males referred to as “moron” or “dummy” a couple times.

I have seen court employees who are generally older males refer to younger females as “dear,” “honey” or “sweetie.” On several occasions, I have observed court personnel incorrectly assume that a woman was either a paralegal or secretary when, in fact, she was an attorney.

Crude remarks about overweight female employees and coworkers from other offices made by certain males in my office can make the work environment unhappy and strained.

In addition, one court employee said of a supervisory-position court employee: “Although he appears to show respect to the judges he treats the senior and female judges with disdain. He even remarked that [a particular female judge] would make a good centerfold for Playboy.”

Some attorneys also observed gender-based problems among court employees. Perhaps the most striking example of this was the following comment from a Caucasian male attorney: “I am personally familiar with *dozens* of incidents which would constitute sexual harassment in any *other* workplace.” Other attorneys, however, observed no such behavior. For example, one attorney reported: “I have never observed any federal court employee make disparaging remarks to any minority or gender group despite regular court appearances.”

The quantifiable data is more positive than the assumptions that can be drawn from some of the comments represented. Yet, a slight difference in the perceptions of male and female employees can be seen in the table below.

TABLE 23: AVERAGE RESPONSES OF COURT EMPLOYEES TO THE QUESTION: "HAVE YOU OBSERVED ANY COURT EMPLOYEES SAY OR DO ANYTHING TO ATTORNEYS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Attorney	Survey Respondents		
	Average	Male	Female
Nonminority male	6.8	6.9	6.8
Nonminority female	6.7	6.8	6.6
Minority male	6.8	6.8	6.7
Minority female	6.7	6.8	6.6

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 10.

TABLE 24: AVERAGE RESPONSES OF COURT EMPLOYEES TO THE QUESTION: "HAVE YOU OBSERVED ANY COURT EMPLOYEES SAY OR DO ANYTHING TO JUDGES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Judge	Survey Respondents		
	Average	Male	Female
Nonminority male	6.9	6.9	6.9
Nonminority female	6.9	6.9	6.8
Minority male	6.9	6.9	6.9
Minority female	6.9	6.9	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 10.

TABLE 25: AVERAGE RESPONSES OF COURT EMPLOYEES TO THE QUESTION: "HAVE YOU OBSERVED ANY COURT EMPLOYEES SAY OR DO ANYTHING TO LITIGANTS WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Litigant	Survey Respondents		
	Average	Male	Female
Nonminority male	6.8	6.9	6.8
Nonminority female	6.7	6.9	6.7
Minority male	6.9	6.9	6.7
Minority female	6.8	6.9	6.7

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 10.

TABLE 26: AVERAGE RESPONSES OF COURT EMPLOYEES TO THE QUESTION: "HAVE YOU OBSERVED ANY COURT EMPLOYEES SAY OR DO ANYTHING TO COURT EMPLOYEES WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Employee	Survey Respondents		
	Average	Male	Female
Nonminority male	6.7	6.8	6.6
Nonminority female	6.4	6.6	6.3
Minority male	6.7	6.8	6.6
Minority female	6.5	6.7	6.4

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 10.

TABLE 27: AVERAGE RESPONSES OF COURT EMPLOYEES TO THE QUESTION: "HAVE YOU OBSERVED ANY COURT EMPLOYEES SAY OR DO ANYTHING TO WITNESSES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Witness	Survey Respondents		
	Average	Male	Female
Nonminority male	6.9	7.0	6.9
Nonminority female	6.9	6.9	6.8
Minority male	6.9	6.9	6.9
Minority female	6.9	6.9	6.8

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 10.

E. *Do U.S. Marshals Service Personnel Treat People Differently According to Gender?*

The U.S. Marshals Service (USMS) personnel have a very strong presence in the courthouse setting, interacting with groups of individuals at all levels. Here, again, professionalism and equal treatment of persons is paramount in assuring a positive courthouse environment. Responses to the surveys showed no statistically significant disparities in treatment of individuals of either gender by USMS personnel.

1. *Do Deputy U.S. Marshals Treat People Differently According to Gender?*

Although both males and females in all survey groups agreed that there are almost *never* any occurrences of unequal treatment, the data analyzed showed that women are more apt to recognize such rare occurrences than are men. When such instances are observed, they most frequently involve female court employees, minority female litigants and female attorneys. A few such instances were reported in comments to the surveys. For example, one judge observed "[o]ccasional 'flirting' with female attorneys." More usually, however, judges reported no instances of inappropriate behavior by USMS personnel. Representative comments included:

Very rarely I have observed behavior [by USMS personnel] that may be unwelcome toward female attorneys, jurors, or criminal defendants, occurring perhaps not at all in the last five years.

Deputy U.S. Marshals are frequently in my court with criminal defendants and witnesses in custody. They are uniformly polite and courteous to all participants in proceedings before me.

My experience has been that the US Marshals Service treats all individuals equally and with respect.

Observations by employees were largely consistent with those of judges. One employee said: "I have never seen the U.S. Marshals act disrespectful to anyone at anytime." Employees, however, were somewhat more likely to point out what they perceived as unequal treatment of women by the USMS personnel.

Certain court employees must go in and out of the Marshal's office to conduct business. If a rule, such as security, is overlooked they get more upset if [the] employee is a female than they do if a male employee forgets a rule.

I have seen female law clerks treated differently, sometimes more positively, than males. Attractive female clerks sometimes receive inappropriate comments on their appearance.

Other employees commented upon a tendency of some USMS personnel to make female employees feel excluded or unwelcome in certain settings. One female employee said: "In the exercise room, run by the U.S. Marshals and open to court employees, there are subtle and not-so-subtle indications that it's a 'boys club.' I find pictures on the wall of women in leotards offensive and constantly feel the female presence is reluctantly accepted." Another Caucasian female employee echoed this perception:

Sometimes the Marshals exhibit a "macho boys club" mentality that reflects in their dealings with court employees. I really think, however, that they are unaware of the impression that they sometimes create. Many of the males in the law enforcement area exhibit such behavior—they do so because they're expected to be tough and macho—I just think sometimes they forget to step out of that role.

Comments by attorneys were generally positive. Representative comments included:

The U.S. Marshals Service has consistently maintained the highest integrity regarding courtesy.

20+ years in federal courts of [district omitted] never saw marshals do anything demeaning.

I have a lot of contact with the U.S. Marshals Service and have never seen them be discourteous to anyone, including prisoners.

U.S. Marshals Service personnel have ALWAYS been polite and professional to everyone.

My observations of United States Marshals Service personnel have in all instances been cordial, respectful and professional.

I have never witnessed any member of the U.S. Marshals Service treat anyone in a gender-biased fashion.

A few attorneys, however, reported inappropriate comments by USMS personnel. For example, one attorney observed that such comments were “usually directed at women dressed provocatively—‘cute bunny,’ slut, whore, bimbo.” A Hispanic female attorney commented “on the female/male general references to ‘honey’ and/or the ‘girls.’” The following comment by a Caucasian female attorney demonstrates that when crude conduct calling attention to gender differences is designed to offend, the results can be appalling:

The Marshals often used my gender to embarrass me, but I thought they were motivated by my being a defense lawyer. Their favorite technique was to make me interview my clients through the bars of the bull pen while other prisoners would display their penises, making a show of using the urinal. The Marshals would smirk and exhibit body language encouraging the prisoners to do it.

2. *Do Court Security Officers Treat People Differently According to Gender?*

Court Security Officers (CSOs) are under contract and the direct authority of the USMS. CSOs are generally the first point of contact with the people who enter our courthouses. In a sense, they act as the ambassadors of the court. Their role in fostering a positive perception of the court system and ensuring equal treatment of all individuals is as important as their role in providing security to the court and its environs. Information gathered from surveys, focus groups and public hearings reveals that the CSOs in the Third Circuit do not treat men and women differently. Almost

all of the people polled on this issue answered that they *never* observed disparaging remarks or behavior indicative of unequal treatment.

For both males and females working in or visiting the courts, a routine security screening in the courthouse lobby consists primarily of passing through the metal detector, having bags x-rayed and removing metal objects, in that order. Data collected by the Task Force does not suggest a gender-based disparity with regard to the method of screening utilized by CSOs. Comments were made, however, regarding women sometimes having to remove shoes due to the sensitivity of the magnetometer equipment. For example, one employee observed the CSOs “subjecting certain females to hand wand procedures—requiring some women to remove shoes and re-enter metal detector.” Another employee commented:

With respect to CSOs’, my observation is that they are usually more friendly with females than males. However, I don’t think this is a reflection of a “lack of respect” but more a result of the male/female dynamic. However, I do note that women may frequently pass through the metal detector, set it off and then get the hand-held detector, whereas males would need to re-enter the upright metal detector.

Court employees, judges, and attorneys were surveyed regarding the CSOs’ treatment of specific target groups. Comments from judges were very positive. Representative comments included:

My experience has been that the Court Security Officers comport themselves in a professional manner, even when dealing with individuals who are difficult and demanding when clearing the security checkpoints.

I have never seen or heard of our Court Security Officers being disrespectful or discriminatory toward anyone.

Court employees agreed:

I have never seen the CSO staff exhibit anything but courtesy to all individuals entering the courthouse.

Our CSOs tend to be goodwill ambassadors with the public, especially jurors, witnesses and attorneys.

I have never seen the CSOs treat anyone with anything but respect and patience.

A male African American attorney stated: "I have always observed them to be courteous and professional in their demeanor." Similarly, a female African-American attorney stated: "I have never observed Court Security Officers demean or disparage on the basis of gender."

In the few reported incidents of differential treatment, nonminority female court employees were most frequently involved:

On several occasions I have observed CSOs attempting to flirt with female employees or commenting on their hair, dress, etc., in a manner which I think is inappropriate for a workplace.

CSOs occasionally say things to women employees that are slightly sexist but is always in a joking, very non-threatening way.

While jurors were surveyed about their own treatment by courthouse personnel and any demeaning or disparaging treatment they observed of others, the survey question did not specifically pertain to treatment by CSOs. The jurors' responses, however, were uniformly favorable regarding all of the treatment they experienced or observed from any court employees.

The following table illustrates the results from the employees, judges and attorneys surveys which show that CSOs were *rarely to never* observed demeaning individuals based on gender. Both males and females shared this view.

TABLE 28: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO ATTORNEYS WHICH YOU THOUGHT DemeanED OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Attorney	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	6.9	7.0	7.0
Nonminority female	6.8	6.9	6.9
Minority male	6.9	6.9	6.9
Minority female	6.8	6.9	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

TABLE 29: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO JUDGES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Judge	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	7.0	7.0	7.0
Nonminority female	7.0	7.0	7.0
Minority male	7.0	7.0	7.0
Minority female	7.0	7.0	7.0

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

TABLE 30: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO LITIGANTS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Litigant	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	6.9	6.9	6.9
Nonminority female	6.8	6.9	6.9
Minority male	6.9	6.9	6.9
Minority female	6.8	6.9	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

TABLE 31: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO COURT EMPLOYEES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Court Employee	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	6.9	7.0	7.0
Nonminority female	6.7	6.9	6.9
Minority male	6.9	6.9	7.0
Minority female	6.8	6.9	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

TABLE 32: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO WITNESSES WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Witness	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	6.9	7.0	6.9
Nonminority female	6.9	6.9	6.9
Minority male	6.9	6.9	6.9
Minority female	6.9	6.9	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

TABLE 33: AVERAGE RESPONSES OF EMPLOYEES, JUDGES AND ATTORNEYS TO THE QUESTION: "HAVE YOU OBSERVED COURT SECURITY OFFICERS (EXCLUDING OTHER USMS PERSONNEL) SAY OR DO ANYTHING TO JURORS WHICH YOU THOUGHT Demeaned OR DISPARAGED THAT PERSON BASED ON GENDER?"

Race and Gender of Witness	Survey Respondents		
	Employees	Judges	Attorneys
Nonminority male	6.9	7.0	6.9
Nonminority female	6.9	6.9	7.0
Minority male	6.9	7.0	7.0
Minority female	6.9	7.0	6.9

Note: The scale is 1-7, indicating how frequently disparate treatment was observed, with 7 = never and 1 = always.

SOURCE: Employee Survey Question 6, Judge Survey Question 27 and Attorney Survey Question 4.

F. Findings

- Overall, the judges, court employees and attorneys who responded to the survey reported that they had very rarely, if ever, observed incidents of gender bias in courthouse interactions. This same general response was voiced at the public hearings. Most of the respondents indicated that they had "never" or "rarely" observed such incidents; conversely, most of the respondents who did report such incidents emphasized that these were relatively isolated occurrences within the courts of the Third Circuit.
- Women more frequently than men—judges, court employees, attorneys—reported that they had observed instances of gender bias, directed to themselves and to other women in other groups. Consistently higher percentages of men than women reported that they had "never" observed gender-bias conduct.
- Although most of the reported gender-bias incidents operated to the detriment of women (e.g., demeaning comments to or about women), a few men and women reported instances in which they had observed women treated with a greater degree of respect or deference (e.g., some male judges treating female attorneys and witnesses with extra solicitude).
- While most of the judge-related incidents of reported gender bias were directed to male judges, some female judges also were criticized for gender-preferential treatment (sometimes of

- males, sometimes of females) and for their expression of gender-biased statements.
- Very few instances of sexual harassment (e.g., male judges or supervisory court employees making passes at women) were reported. Even isolated incidents of this sort, however, must be taken seriously and with a “zero tolerance” attitude because such situations obviously can be very disturbing to the participants and real power differences exist between the male judges and supervisors and the women in question.
 - Even relatively simple instances of differential treatment, such as judges addressing women in different terms than their male counterparts (either more or less formally, or in gender-distinctive terms such as “young lady”), are noticed and remembered by women and men, attorneys, court employees, witnesses and clients.
 - Although respondents overall, (judges, courthouse employees and attorneys) reported that they had “very rarely” observed gender bias by courthouse employees, female court employees cited relatively more instances of bias, both by CSOs and by other court employees.
 - Women attorneys report more gender-based demeaning treatment by male attorneys than by judges. In addition to direct disparaging comments and conduct by their male colleagues at the bar, some women lawyers perceive more subtle gender bias at work in their male adversaries’ excessively aggressive and abusive litigation tactics. These female attorneys perceive that the courts are insensitive to or uninterested in these matters.

G. *Recommendations*

- Each court of the circuit should utilize those courses available through the Federal Judicial Center and the AO of the U.S. Courts to receive education about the effects of gender bias on the judicial system. Such education should include methods for avoiding such bias, as well as the appropriate manner in which to handle courtroom manifestations of such bias. Such education should also include information on the more subtle manifestations of gender bias (e.g., the way women are addressed) and potential litigation consequences. All judges should insure that attorneys, litigants, witnesses and court personnel are treated fairly in their courts. To that end, judges should intervene whenever they perceive gender bias toward attorneys, court employees, litigants or witnesses in their courts.

- Each court of the circuit should adopt a local rule expressly prohibiting gender bias in the litigation process. Such local rules should be communicated to counsel at the beginning of all cases.
- The Judicial Council of the Third Circuit should recommend to the Judicial Conference of the United States that the Code of Conduct for United States Judges be amended to include a specific obligation of judges not to engage in or condone gender-biased behavior in their courtrooms or by persons under their supervision or control.
- The Judicial Council of the Third Circuit should recommend to the Judicial Conference of the United States that the Code of Conduct for Judicial Employees be amended to include a specific obligation not to engage in gender-biased behavior.
- All court employees should receive education on equal opportunity policies, sexual harassment (as well as other forms of gender-based discrimination) policies and complaint procedures applicable to their employment. Programs such as those sponsored by the Federal Judicial Center and the AO of the U.S. Courts should be presented to court employees in order to increase their awareness of the subtle manifestations of gender bias.
- District courts are urged to consider adopting a local rule or policy statement permitting continuances for the pregnancy of attorneys, litigants and witnesses. Such a rule should also note that in nonemergency situations attorneys have the responsibility to make timely requests for such continuances.
- All multicourthouse districts should consider assigning all cases, criminal and civil, on a geographic basis, whenever possible.
- Each court of the circuit should ensure that it has an effective mechanism for receiving, investigating and resolving complaints of gender bias, including sexual harassment, by judges and supervisory court employees. Each court should publicize these procedures and should make it clear that incidents of sexual harassment will be taken seriously and with a “zero tolerance” attitude, because even isolated occurrences can be very disturbing to the participants and because real power differences exist between judges and supervisors and those under their control.

IV. REPORT OF THE COMMITTEE ON APPOINTMENTS BY JUDGES OF
THE GENDER COMMISSION

A. *Purpose*

Judges, individually or collectively, are responsible for appointing or establishing the procedures for appointing persons to fill a number of positions ranging from law clerks to magistrate judges. The Gender Commission sought to determine the effect, if any, that gender has upon these appointments and whether existing procedures provide both men and women an equal opportunity for these appointments.

B. *Data Relied Upon (Methodology)*

The Gender Commission had available to it general demographic data, such as the number of attorneys in each district, the gender of these attorneys and the gender of attorneys attending various law schools in recent years. The Gender Commission obtained pertinent statistics showing the gender of persons serving as judicial clerks, appointed as special masters and experts and appointed to CJA, arbitrator and mediator panels. In addition, the Commission reviewed the answers to the judges' and attorneys' questionnaires, considered the comments which accompanied pertinent portions of these questionnaires and reviewed the transcripts of the public hearings held throughout the circuit.

The Gender Commission was unable to determine the precise number of attorneys practicing in the federal courts of this circuit. Other limitations of the data obtained are noted as they are used.

C. *Appointments by Judges*

1. *Magistrate Judges*

The breakdown by gender of United States magistrate judges throughout the Third Circuit in 1996 was:

TABLE 34: THIRD CIRCUIT MAGISTRATE JUDGES BY GENDER (1996)

District	Total Judges (N=34)	Female Judges (N=7)	Male Judges (N=27)
D. Del.	1	1	0
D.N.J.	11 (2 P/T)	1	10
E.D. Pa.	10	3	7
M.D. Pa.	4	0	4
W.D. Pa.	6 (2 P/T)	2	4
D.V.I.	2	0	2

Note: N = total number of judges within each category. P/T means part-time judge.
SOURCE: Liaison judges.

During the past five years, the district courts have made eleven magistrate judge appointments (including part-time magistrate judges). Five of the judges selected were women.

Qualifications of magistrate judges are established by statute.²⁹ The judges of each district appoint magistrate judges

pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.³⁰

The Judicial Conference of the United States adopted regulations establishing standards and procedures for the appointment and reappointment of magistrate judges. For example, public notice is required. The court must appoint a merit selection panel having at least 7 members, of whom at least 2 must be nonlawyers. The panel considers the applications of all potential nominees and in its report to the court specifies the 5 nominees that the panel has determined to be the best qualified. The court shall select from the 5 nominees or, if there is not a majority in favor of any of the 5, the court may request the panel to submit a second list of 5 names. At that point, the court may select from either list. If a majority vote is still lacking, the chief judge will make the selection from the two lists.

29. See 28 U.S.C. § 631(b) (1994).

30. *Id.* § 631(b)(5).

The Gender Commission has not obtained the gender composition of the merit selection panels which participated in the recent appointments of magistrate judges. The Gender Commission is aware, however, that the recent appointments have included a significant number of females.

The procedure for the reappointment of magistrate judges is set forth in the Judicial Conference regulations. The judges of the court may decide not to reappoint the incumbent, which creates a vacancy that must be filled as described above. If the court decides to consider reappointment, notice is published and comments about the magistrate judge are invited. A merit selection panel is appointed. The panel is required to review the incumbent's service as magistrate judge; consider public comments and other evidence of the incumbent's good character, ability, and commitment to equal justice under the law; and report to the court whether the incumbent is recommended for reappointment. The court then decides whether to reappoint the incumbent.

At a few of the public hearings comments were made about the lack of female magistrate judges in the district where the hearing was being held. Indeed, in two districts, the District of the Virgin Islands and the Middle District of Pennsylvania, there are no female magistrate judges.

2. *CJA Attorneys*

Each court is responsible for the manner in which private attorneys are appointed to represent indigent defendants in criminal cases pursuant to the provisions of the CJA. The court of appeals and the various districts have adopted different procedures to make these appointments. At the public hearings held by the Task Force, several speakers stated that these procedures tend to exclude women and minority attorneys from the panels from which CJA attorneys are selected, and tend to exclude women and minority lawyers who are on the panels from being appointed to represent indigent defendants. The following section describes the methods which the court of appeals and district courts have adopted to obtain CJA attorneys and the gender breakdown for each district.³¹

When considering the statistics showing the number of female appointees to CJA panels or to CJA cases, the proportion of the bar that is female and the proportion that is male should be kept in mind. The Gender Commission obtained 1990 figures from the

31. For a summary of the statistics for the district courts and court of appeals, see Table 37 of this Report.

United States Census Bureau showing attorney statistics by gender for each state (by county) in the circuit. Task Force staff computed this by district. Unfortunately, these statistics simply indicate the number of attorneys who lived in the states of the circuit as of 1990. We can neither presume that they practice law within these states or territories (New Jersey, Pennsylvania, Delaware and the Virgin Islands), nor that they practice in the federal courts.

Furthermore, it is likely that these figures understate the percentage of female attorneys as of 1997, because the proportion of female attorneys compared to male attorneys has increased since 1990. We are unable to determine whether the male-female proportions are the same among federal criminal law defense practitioners as they are among the bar in general. Despite these shortcomings, the 1990 figures provide some assistance in evaluating the CJA appointment statistics.

TABLE 35: ATTORNEY STATISTICS BY DISTRICT AND GENDER (1990)

District	Total Number		Percentage of Total	
	Male	Female	Male	Female
D. Del	1,453	413	77.9%	22.1%
D.N.J.	23,169	7,232	76.2%	23.8%
E.D. Pa.	13,597	4,670	74.4%	25.6%
M.D. Pa.	3,585	1,015	77.9%	22.1%
W.D. Pa.	6,452	1,762	78.6%	21.4%
D.V.I.	315	170	64.9%	35.1%

SOURCE: United States Census Bureau (1990).

a. Eastern District of Pennsylvania

Until recently this district had three panels of CJA attorneys: (1) the felony panel; (2) the misdemeanor panel; and (3) a panel consisting of the staff attorneys of the federal defender. For a lawyer to qualify for the felony panel, the attorney must have been engaged for three years prior to application for membership in the trial of civil or criminal cases before a U.S. district court or a trial court of record in Pennsylvania and he or she must have knowledge of the Federal Rules of Criminal Procedure. Membership on the felony panel is limited to 200 attorneys and the term of appointment is three years, with an opportunity to be reappointed. The plan was amended in 1990 to allow attorneys to handle complex multidistrict cases.

Qualification for membership on the misdemeanor panel requires an appearance as an attorney for a party in a civil or criminal case in a U. S. district court or a Pennsylvania trial court, at least two appearances in a trial or other adversary proceeding in a civil or criminal proceeding and knowledge of the Federal Rules of Criminal Procedure. No more than 25 attorneys may be members of this panel. Appointment is for a three-year term with the opportunity for reappointment. The Gender Commission has been advised that the Eastern District of Pennsylvania no longer maintains the felony panel and the misdemeanor panel separately because misdemeanor cases are almost nonexistent in the district.

According to the district's CJA plan, application for appointment to a panel is made to a 7 member selection committee consisting of the Chief Federal Defender of the Federal Courts Division of the Defender Association of Philadelphia, 4 private attorneys who shall be selected by the district court judges and 2 private attorneys who shall be selected by the district's magistrate judges. The selection committee reviews applications, interviews applicants and notifies the Chief Judge of its recommendations for action by the court.

As of January 1997, there were 185 members of the combined felony-misdemeanor panel, of whom 161 were males and 24 (13.3%) were females. Judges and magistrate judges appoint CJA counsel from the combined panel, but in extraordinary circumstances may appoint an attorney who is not a member of a panel.

At the public hearing held in the Eastern District of Pennsylvania, there was no criticism of these procedures. Nevertheless, a representative of the Women Lawyers Division, Philadelphia Chapter, of the National Bar Association, offered several suggestions: (1) African-American women should be encouraged to practice in the federal courts; (2) full information should be disseminated about the opportunities available for participation not only on CJA panels but also as arbitrators, mediators and special masters; (3) criteria for eligibility on CJA panels should be disseminated; and (4) courts should consider giving less experienced attorneys the opportunity to serve without compensation as "second chair" in CJA cases. This speaker raised the question of the extent to which state court experience could be considered as a qualification for panel membership.³² The district's CJA plan criteria treat

32. See Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: Philadelphia, Pennsylvania* 38-41 (Oct. 24, 1996) [hereinafter *Public Hearings: Philadelphia, Pennsylvania*].

federal and state court trial experience as equal, although an additional criterion is knowledge of the Federal Rules of Criminal Procedure.

b. Middle District of Pennsylvania

This district has established a panel of attorneys eligible for CJA appointment. To be eligible for appointment an attorney must be a member of the federal bar and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

Applications for appointment to the CJA panel are obtained from the Federal Defender's Office and submitted to a panel selection committee. The committee consists of a judge of the court, a magistrate judge, an attorney in private practice experienced in criminal defense and the Federal Public Defender. The committee reviews applications and submits its recommendations to the court, which makes the appointments to the CJA panel.

In addition, the CJA plan calls for a CJA training panel for attorneys lacking the experience for appointment to the CJA panel. From the CJA training panel, appointments can be made to serve as second chair in criminal cases without compensation.

The CJA plan requires appointment of CJA attorneys from the panel on a rotating basis. A judge or magistrate can make exceptions to this rotation where the nature and complexity of a case, attorney experience, geography or other exceptional circumstances call for it. As of January 1997, there were 214 attorneys on the panel of whom 17 (8%) were female and 197 were male.

At the public hearing held in this district, there were no comments about the CJA plan's procedures for appointing CJA attorneys or about implementation of these procedures.

c. Western District of Pennsylvania

The CJA plan of the Western District of Pennsylvania gives the Federal Public Defender considerable responsibility for implementation of the plan's provisions for the appointment of CJA attorneys, although the court retains final authority for the selection and removal of panel members.

To be eligible for appointment, an attorney must be a member of the bar of the district and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Sentencing Guidelines. Application

forms for appointment to the CJA panel may be obtained from the Clerk's Office or from the office of the Federal Public Defender. The applications are submitted to the Federal Public Defender.

The Federal Public Defender recommends to the judges the appointment, addition and removal of attorneys based on their qualifications. That office is responsible for the distribution of cases to the CJA panel and for the management of the panel. When a judge or magistrate judge seeks the appointment of a CJA attorney, he or she notifies the Federal Public Defender who appoints attorneys on a rotational basis. Appointments are subject to the court's discretion to make exceptions to this procedure based on the nature and complexity of the case, experience of counsel and geographical concerns.

In addition, the district's CJA plan provides for a CJA training panel for those who lack experience and wish to acquire it by serving as an uncompensated second chair in criminal cases. The Gender Commission was informed that the training panel is not used extensively and now has two members. The court has established mandatory training sessions that all panel members must attend each year, regardless of their level of experience.

At the public hearing held in the Western District of Pennsylvania, the two co-chairs of the Women's Bar Association's Minority Affairs Committee commented that there were very few minority members on the CJA panel. They attributed this to the relatively small number of minority attorneys and, perhaps, to a lack of information about the procedures for obtaining membership.³³

Federal Public Defender Shelley Stark, whose office is responsible for the management of the CJA panel, described some of the results of a self-evaluation. Historically, the CJA panel included few women and no minorities. During the 1980s there were, on average, 2 women serving on the panel. Moreover, 7 minority lawyers served on the panel during the past 12 years.³⁴ This reflects the small number of minority lawyers who practice in the district. As of the end of 1996, there were 103 members on the panel of whom 93 were male and 10 (9.7%) were female.

The Gender Commission is aware that the district is dissatisfied with the number of women and minority CJA panel members and is in the process of revising membership of the panel. The court is relieving present members, running advertisements soliciting applications from all qualified members of the bar and encouraging wo-

33. See *Public Hearings: Pittsburgh, Pennsylvania*, *supra* note 26, at 56-57.

34. See *id.* at 69.

men and minority attorneys to apply. The court has also decided to reduce the size of the CJA panel so that its members will be assigned to a greater number of cases, acquire additional experience, have an incentive to participate in the court's training sessions and generally develop better skills.

d. District of New Jersey

The current CJA plan provides that the selection of CJA counsel shall be within the exclusive province of the district or magistrate judges. Qualification for appointment to the CJA panel is membership in the bar of the court and demonstrated experience and knowledge of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

The district has adopted a Plan for the Composition, Administration and Management of the Panel of Private Attorneys Under the Criminal Justice Act ("Appointment Plan"). The Appointment Plan recites that prior to the effective date of the CJA, which is 1964, the court established a master panel of competent attorneys to represent defendants who are financially unable to obtain an adequate defense. The panel was selected from persons recommended by bar associations, judges and the court's Committee for the Defense of Indigent Defendants. The list was supplemented thereafter as required by the court with attorneys meeting the qualifications described above. The master panel was subdivided so that there was a separate panel for each vicinage—Newark, Trenton and Camden.

The Appointment Plan ratifies the existing panels and the procedures employed in establishing these panels and provides that

[a]dditions to and deletions from the separate panels may be made from time to time by the court at each vicinage, so that there shall be a sufficient number of names on the list to provide adequate representation to persons financially unable to obtain counsel and to distribute the work fairly among members of the bar.

The announced policy under the Appointment Plan is as follows:

[A]t each vicinage to make appointments pursuant to the CJA, if feasible, on a rotational basis. However, it shall be the practice of the court in making said appointments to take into consideration the nature and complexity of the

- case, the experience of counsel, the residence or place of incarceration of the person to be represented, the convenience of witnesses, and all other relevant factors.

The Appointment Plan further provides, “[t]o advance the policy of making appointments on a rotational basis, if feasible, each district judge or magistrate judge, prior to making an appointment, should communicate with the office of the clerk to learn the name or names of one or more counsel next available on the list.”

In practice, however, appointments of CJA attorneys generally are not made as contemplated by the Appointment Plan. No committee or other body exists to receive applications for appointment to the CJA panels or to pass on qualifications. Attorneys who apply and appear to meet the qualifications are added to the panels. The form on which the applications are made advises the applicant to notify each magistrate judge of the applicant’s availability. The ratification of the existing panel of attorneys and the addition of many applicants over the years has resulted in huge panels in each vicinage which consist of attorneys of varying degrees of interest and competence, making rotation of appointments unfeasible. This situation prevails even though in the mid-1980s the members of the panels were required to reapply. Of necessity, in furtherance of their responsibility to ensure effective representation of indigent defendants, district and magistrate judges have had to depart from appointments on a rotation basis. Because there is no program for evaluating and training attorneys, judges and magistrate judges have had to rely on their knowledge or the reputation of the attorneys they appoint.

As of the end of 1996, the master panel of CJA attorneys consisted of 771 lawyers, of whom 98 (12.7%) were women and 673 were men. The figures for the three vicinages are seen in the table below:

TABLE 36: GENDER COMPOSITION OF THE DISTRICT OF NEW JERSEY
CJA MASTER PANEL (1996)

Vicinage	Males	Females
Newark (N=517)	448	69
Trenton (N=127)	116	11
Camden (N=127)	109	18

Note: N = total number of CJA attorneys in each vicinage.
SOURCE: District court clerk’s office.

It should be noted that every attorney who sought appointment to the panel received it. Therefore the low number of women on the master panel probably reflects the lower number of women seeking membership on the panel at that time.

Of the full panel, only 126 attorneys had been appointed at least once during the period from October 1, 1994 to mid-1997. This included 26 (20.6%) women and 100 men. Many of these attorneys were appointed more than once during that period. The vast majority of the appointments was made by magistrate judges at the time of the defendants' initial appearance.

This system of appointment of CJA attorneys has generated the strong impression among some women and minority attorneys that the system works against their appointment. Several of these attorneys observed that the procedures for obtaining appointment to the CJA panel and for obtaining assignments to cases have not been made known to the bar. One minority attorney stated that the only reason he learned of the opportunity to be appointed to the panel was that one of the judges urged him to apply.³⁵ A female attorney gave the following statement at one public hearing:

I am a member of the Garden State Bar Association and I have been to the Federal District Court in Newark on a number of occasions on privately retained cases. . . . My concern this evening and what I would like to share with this esteemed panel is the fact that there is a great disparity in the way CJA appointments are made. In general they are not given to African-American attorneys, and they are certainly not given very often to African-American female attorneys.

. . .

There is a great disparity in how you get CJA appointments. You are told to write a letter to the judge and let him know who you are and what your credentials are, what your background is. However, those appointments never seem to come. They only go to the same people who get them all the time. The impact on the economics of your practice is crucial.

. . .

I don't know any African-American females who get appointed and, frankly, I don't know any males either, and I know, obviously, a large number of African-American law-

35. See *Public Hearings: Newark, New Jersey*, *supra* note 9, at 68.

yers. . . . You write the letter, you send the credentials, you send everything you know to send, every in service you've ever taken, every everything, every case you've ever tried, I sent a list of trials I've done. So you don't hear. You have no way of knowing except the fact that you didn't get an appointment that you are not on the list.³⁶

As of this writing, the New Jersey District Court has appointed a committee of judges to review the workings of the district's CJA plan and to propose revisions.

e. District of Delaware

In response to the Gender Commission's request for information about CJA appointments in the District of Delaware, it was reported that "a Criminal Justice Act Blue Ribbon Panel of attorneys was established by the Court in 1990 to provide for the appointment of counsel for defendants who qualify under the CJA." The panel attorneys were selected, in turn, by a CJA "Special Committee," the members of which were selected by the judges of the court. The Special Committee still operates to periodically restructure the membership of the panel. With respect to appointments to cases, it was reported that "[a]ssignment of cases to members of the Panel is done on a random, rotating basis."

As of January 1997, the Blue Ribbon Panel was comprised of 35 attorneys, of whom 4 (11%) were female and 31 were male.

At the public hearing held in Wilmington, one African-American female attorney in private practice commented that there were few, if any, minority practitioners on the panel.³⁷ Another reported that an attorney who checked with the Clerk's Office to inquire about appointment to the CJA panel "really didn't even get an answer."³⁸ A Wilmington City Council member stated: "I am one of the people who went to the Clerk's Office once and inquired about CJA and they brushed [me] off, you know, well, we're not sure, we don't know."³⁹ This district is currently reviewing its CJA plan.

36. *Id.* at 97-100.

37. See Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: Wilmington, Delaware* 71-72 (Nov. 20, 1996) [hereinafter *Public Hearings: Wilmington, Delaware*].

38. *Id.* at 74.

39. *Id.* at 125-26.

f. District of the Virgin Islands

In the District of the Virgin Islands, there appears to be no problem with respect to CJA appointments of female attorneys. All members of the private bar admitted to practice in the Virgin Islands are required to accept CJA appointments. At the public hearing held in St. Thomas, there were no critical comments about CJA appointments.

At the public hearing held in St. Croix, a private attorney expressed doubts about the system:

It appears to be random without taking into account the experience that an attorney might have in criminal matters and that, again, maybe the Commission could take [that] into account. . . . That creates a problem especially when you consider that ineffective counsel might come and represent a defendant who doesn't know how to try a case or doesn't know how to handle a case and you're appointing them to represent in pretty big drug cases or situations where they are called and skills they may not have.⁴⁰

For a variety of reasons it would be difficult to apply the District of the Virgin Islands' procedures in other districts.

g. Court of Appeals

The court of appeals has two methods of appointing CJA attorneys. First, the person appointed as CJA attorney by the trial court is deemed to have been designated CJA attorney to continue the appeal unless relieved by the court of appeals. It is to be expected that these appointments will reflect the district court appointments from the perspective of gender.

Second, when other appointments are required, the Clerk of the Court, under court supervision, maintains lists of attorneys in those areas surrounding the main cities of the circuit. Ideally, the court of appeals requests that an appointee have at least five years membership in the Bar, including membership in the bar of the court of appeals, and five years experience in progressively complex criminal trials and appellate cases. A candidate should have other qualifying experience such as two years of federal litigation, federal law clerkship or staff attorney experience and other state and federal trial experience. Occasionally, law professors have been added

40. Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: St. Croix, Virgin Islands* 107 (Nov. 8, 1996) [hereinafter *Public Hearings: St. Croix, Virgin Islands*].

to the list in light of their particularized fields of expertise. The clerk receives applications to be placed on these panels and submits the names to the Chief Judge, the Judicial Council or to all judges for approval. Appointments are made from the panels in the manner that the court deems advisable in each case.

As of January 1997, the number of attorneys on all of the area panels was 110, of whom 20 (18.2%) were female and 90 were male. There were no comments at the public hearings concerning the composition of the court of appeals CJA panel.

3. *Arbitrators and Mediators*

Not all districts have formalized arbitration and mediation procedures. Where such programs exist, there is a significant difference between these programs and the CJA appointment programs. Generally, arbitration and mediation are provided for in local court rules, which are readily available to the bar. There is easy access to them. On the other hand, the procedures for the appointment of CJA attorneys are usually incorporated in the district court's CJA plan, which covers many other subjects. The plan is not included in the local court rules and is not something with which the bar is or needs to be intimately familiar. As a result, however, there is often a lack of clarity about the method of CJA appointments. This confusion is less likely in arbitration and mediation appointments. The following table summarizes the statistics provided by each district and the court of appeals regarding the gender breakdown of various appointments. The statistics are discussed in greater detail in the sections that precede and follow.

TABLE 37: PERCENTAGE OF WOMEN APPOINTED AS CJA ATTORNEYS, ARBITRATORS AND MEDIATORS BY DISTRICT

District	CJA	Arbitrators	Mediators
Ct. App.	22.0%	N/A	N/A
D. Del.	11.0%	N/A	N/A
D.N.J.	13.0%	12.0%	11.0%
E.D. Pa.	13.0%	15.0%	8.4%
M.D. Pa.	8.0%	N/A	16.0%
W.D. Pa.	17.7%	7.2%	9.8%
D.V.I.	N/A	N/A	22.0%

Note: N/A = not applicable.

SOURCE: District court and court of appeals Clerk's Offices.

a. Eastern District of Pennsylvania

Qualifications for appointment as an arbitrator are (1) five year's membership in the bar; (2) admission to practice in the Eastern District of Pennsylvania; and (3) a determination by the Chief Judge that the appointee is qualified. Application to become an arbitrator is made on forms supplied by the Clerk's Office. The clerk submits the applications to the Chief Judge who certifies as many arbitrators as are needed to staff the Eastern District of Pennsylvania's well-organized and comprehensive arbitration program.⁴¹ All civil cases, with designated exceptions, are submitted to arbitration. In each case, a panel of three arbitrators is selected through a random selection process by the Clerk of the Court from among the lawyers who have been certified as arbitrators.

Qualifications for appointment as a mediator are: (1) 15 years membership in the bar; (2) admission in the Eastern District; and (3) determination by the Chief Judge that the appointee is qualified. Those who seek appointment as mediators apply on forms supplied by the Clerk's Office, which delivers them to the Chief Judge. The Chief Judge certifies as many attorneys as are needed to implement the program.

The clerk designates civil cases for mediation in accordance with criteria set forth in the local rules. Mediation is conducted by a mediator selected at random by the Clerk of the Court from the list of certified mediators.

As of September 1996, there were a total of 1431 certified arbitrators in the Eastern District of Pennsylvania of whom 219 (15.3%) were female and 1212 were male. There were 535 certified mediators in the Eastern District of Pennsylvania, of whom 46 (8.6%) were women and 489 were men.

Some speakers at the public hearing in Philadelphia suggested that information be provided about all categories of judicial appointments. These comments may have some justification with respect to CJA appointments, but the qualifications and procedures for appointment to arbitrator and mediator panels are fully detailed in the Eastern District of Pennsylvania local rules. The low percentages of females in both of these panels should be noted.

41. See E.D. PA. R. 53.2.

b. Middle District of Pennsylvania

The Middle District of Pennsylvania does not have a formal arbitration program, although a judge and counsel may devise an arbitration process in particular cases.

Qualifications for appointment as a mediator are (1) ten years membership in the bar; (2) admission to practice in the Middle District of Pennsylvania; (3) determination by the Chief Judge that the appointee is qualified; and (4) completion of the District's mediation training program. The court solicits persons to serve as mediators and the Chief Judge certifies as many qualified persons as are needed to implement the mediation program. Mediators serve *pro bono* and may not be called upon to serve more than twice each year without their consent.

The judge assigned to a case that is subject to mediation selects the mediator from the list of mediators certified by the Chief Judge. As of October 1996, the mediation panel consisted of 49 attorneys, of whom 41 were male and 8 (16%) were female.

At the public hearing held in Harrisburg, the President of the Dauphin County Bar Association, the association's first woman president, observed that very few women have been selected to serve as mediators.⁴²

c. Western District of Pennsylvania

Qualifications to be certified as an arbitrator are (1) ten years of practice of law; (2) admission to the Western District of Pennsylvania Bar or a faculty member of an accredited law school in Pennsylvania; (3) recommendation by the Court's committee on arbitration; and (4) determination by the Chief Judge that the candidate is competent to be an arbitrator.

Candidates for the arbitration panel are recruited through advertisements in legal publications and correspondence with law schools, law firms and individual lawyers. Applications are submitted to the committee on arbitration, which then submits a list of qualified persons to the Chief Judge. The Chief Judge certifies as many persons as may be needed in the program. The arbitration hearing is held before a panel of three arbitrators chosen by the Clerk of the Court through a random selection process from the certified arbitrators. As an alternative, the parties may agree upon the arbitrator or panel of arbitrators.

42. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 56.

The qualifications of mediators (referred to in the Western District of Pennsylvania as “adjunct settlement judges”) are (1) ten years of practice; (2) membership in the bar of the Western District of Pennsylvania; (3) a recommendation by a committee; and (4) determination by the Chief Judge that the candidate is competent to serve as a mediator. In addition, a person serving as a mediator must complete the district’s training program.

Applications to be designated as a mediator are submitted to a committee, which then submits a list of qualified persons to the Chief Judge. The Chief Judge certifies as many persons as are needed in the program.

All civil actions are subject to mediation upon order of the judge or magistrate judge to whom the case has been assigned. In designating a mediator, the judge and the Clerk of the Court will endeavor to designate a lawyer who is experienced in the area of law involved in the action.⁴³

At the public hearing held in Pittsburgh, the two co-chairs of the Women’s Bar Association’s Minority Affairs Committee observed that only a small number of minority attorneys in general, including female minority attorneys, were appointed as mediators, magistrate judges and CJA attorneys. It appeared that the primary focus of this observation was upon magistrate judges and CJA appointments rather than the appointment of mediators.⁴⁴

As of the end of 1996, the arbitration panel contained 471 attorneys, of whom 35 (7.4%) were female and 435 were male. As of the end of 1996, there were 169 attorneys on the Western District of Pennsylvania’s adjunct settlement judge panel of whom 17 (9.8%) were female and 152 were male.

d. District of New Jersey

The qualifications for arbitrators in New Jersey are (1) five year’s membership in the bar; (2) admission to practice in the district; (3) recommendation by the court’s committee on arbitration; and (4) a determination by the Chief Judge that the candidate is competent to perform the duties of arbitrator. Attorneys may apply for certification. A wide variety of trial cases are subject to compulsory nonbinding arbitration, and others may be submitted to arbitration by consent. When cases are assigned to arbitration, the

43. See W.D. PA. R. 16.3.

44. See *Public Hearings: Pittsburgh, Pennsylvania*, *supra* note 26, at 56.

Clerk of the Court selects the arbitrators from the list of certified attorneys.

When the arbitration program was initiated, New Jersey attorneys in the ABA's Litigation Section and members of the New Jersey State Bar Association's Federal Practice Committee were invited to apply to become arbitrators. Since then, many others have applied, most of whom view service as an arbitrator to be essentially a *pro bono* task despite the modest compensation paid to them. By the end of 1986, approximately 600 persons had been certified. Thereafter, approximately 162 persons sought and were granted certification until the master panel grew to its present size of 689 members. As of the end of 1996, 641 were male and 48 (7%) were female. No committee was appointed to review applications. The total number of panel members is difficult to ascertain because many have become judges, have retired or have died.

The panel was much larger than needed, and consequently, there were 173 persons (divided roughly evenly among the three vicinages) selected from the master panel to whom cases were assigned for arbitration. As of the end of 1996, 152 were male and 21 (12%) were female. The Clerk's Office personnel who administer the active list are going back to the master panel and introducing new names to the active list. It is not clear on what basis the original active list was established and on what basis new names are being added to it.

The qualifications for mediator are (1) five year membership at the bar; (2) admission to practice in the district; (3) a determination by the Chief Judge that the candidate is competent to serve as mediator; and (4) participation in the district's mediators training program. Attorneys may apply to become mediators, and the Chief Judge will appoint as many as are necessary to conduct the program.

Mediators are not routinely appointed in civil cases. In view of the intensive work which a mediator must perform to be successful, appointments are usually reserved for more difficult, complex cases. A magistrate judge has been appointed as the compliance judge to administer the mediation program. When a judge or magistrate judge wishes to have a mediator appointed, he or she advises the compliance judge, who then makes the appointment from the list certified by the Chief Judge. The parties to a case, with the consent of a judge or magistrate judge, may agree to mediation and select a mediator.

Unlike the procedures for admission to the CJA and arbitration panels, admission to the panel of mediators is under the continuing supervision of a magistrate judge and admission is not automatically granted on request. When the mediation program was started an initial panel was recruited, trained and certified. Thereafter, applications for membership on the panel were collected, and when additional mediators were needed, the supervisory magistrate judge and the Chief Judge selected as many applicants as required. Those selected were given a training course and added to the panel.

This procedure results in a small master panel, all the members of which receive assignments. Quite often, the assignments are based on the geographical location of the mediator and the attorneys in the case. As of the end of 1996, the mediation panel had 72 members, of whom 64 were male and 8 (11%) were female.

e. District of Delaware

The District of Delaware reported that "because of the Court's use of its own magistrate judge as a mediator/settlement facilitator, we do not normally appoint arbitrators, mediators, or special masters."

f. District of the Virgin Islands

The District of the Virgin Islands has no formal arbitration program. In the rare cases where arbitration is sought, the litigants present a list of potential arbitrators to the judge who makes the selection.

On the other hand, a judge or magistrate judge may order any civil matter or issue to mediation. The qualifications for mediator are (1) twenty hours of participation in a court-approved training program; (2) observation of four mediation conferences conducted by certified mediators; (3) conducting four mediation conferences under the supervision and observation of certified mediators; and (4) five year's membership in the District of the Virgin Islands Bar, being a retired judge certified by the Chief Judge or the possession of a master of arts degree, with membership in a business or professional field along with five year's practice in the Virgin Islands.

The court certifies as many mediators as it determines are necessary to conduct the program. Mediators are appointed in cases on a rotating basis with exceptions if called for by the nature of a case.

As of the end of 1996, the panel of mediators consisted of 37 persons, of whom 9 (24.3%) were female and 28 were male. Of the total number of mediators, 25 serve in St. Thomas and 12 serve in St. Croix, with 2 serving in both places.

No criticism about the appointment of mediators was voiced at the public hearings held in St. Thomas or St. Croix.

4. Law Clerks

Each judge appoints one or more law clerks each year. These are prized appointments and are visible to law students and law schools. A number of questions on the judges' questionnaire were directed to this subject. The following table shows the responses of judges to the survey questions regarding the gender of those appointed as well as the gender of present law clerks and of persons accepted for future clerkships. Although judges have been required to report the race and gender of applicants interviewed and chosen to the AO, this appears to have been honored in the breach.

Thus, circuit-wide, the 117 reporting judges appointed 1452 law clerks, of whom 644 (44%) were female and 808 (56%) were male. These figures are consistent with the ratio of men and women in the law schools in the Third Circuit and in other law schools from which judges in this circuit frequently select law clerks. According to the ABA, the percentages of women J.D. candidates in 1995 in those law schools are as follows:

TABLE 38: APPOINTED LAW CLERKS BY GENDER AND DISTRICT

Court	10	10	Current Female	Current Male	Accepted Female	Accepted Male
	Year Total Female	Year Total Male				
Ct. App.	123	185	16	25	26	33
D. Del.	25	31	3	1	1	3
D.N.J.	182	187	25	20	33	23
E.D. Pa.	191	172	31	21	30	26
M.D. Pa.	36	62	7	8	3	6
W.D. Pa.	59	61	13	11	3	2
D.V.I.	11	5	6	1	2	0
Totals	627	703	101	87	98	93

Note: The numbers for each district include law clerks appointed by the district's bankruptcy judges and magistrate judges. Minor discrepancies in various tabulations which have been made arise from the occasional failure of judges to answer all parts of a question.

SOURCE: Judges Survey.

TABLE 39: PERCENTAGES OF FEMALE J.D. CANDIDATES AT SELECTED LAW SCHOOLS

Law School	Percentage of Women
Columbia University	42%
Dickinson University	47%
Duquesne University	43%
Georgetown University	46%
Harvard University	41%
University of Notre Dame	38%
University of Pennsylvania	40%
University of Pittsburgh	39%
Rutgers University - Camden	42%
Rutgers University - Newark	44%
Seton Hall University	46%
Stanford University	45%
Temple University	46%
Villanova University	45%
Widener University	42%
Yale University	45%

SOURCE: Rick L. Morgan, *A Review of Legal Education in the United States*, in AMERICAN BAR ASSOCIATION, A.B.A. SECTION ON LEGAL EDUCATION & ADMISSION TO THE BAR (1995).

The questionnaire to which judges responded listed 21 possible criteria for selection of law clerks, asking each judge to rate the importance of each factor which he or she considered from 1 (not at all important) to 10 (of utmost importance).

Universally, responding judges rated academic achievement as the most important factor and personality the next most important factor. Other factors which average 6 or more points on the 1 to 10 scale among at least one category of judges were: law review membership, prior employment/work experience, computer literacy, writing samples, reputation and recommendations from others, reputation of law school and academic achievement in undergraduate school. Table 40 details the factors as ranked by responding judges:

TABLE 40: TOP 10 CRITERIA OF JUDGES IN SELECTION OF LAW CLERKS IN ORDER OF IMPORTANCE⁴⁵

Category	Overall mean	Male Judges mean	Female Judges mean
Academic achievement	8.7	8.8	9.0
Personality	7.9	7.7	8.8
Law Review participation	7.4	7.3	7.7
Prior work experience	7.2	7.0	8.3
Computer literacy (skills)	7.1	7.0	7.4
Writing sample	7.1	6.8	7.4
Recommendations	6.4	6.3	6.7
Reputation of law school	6.4	6.5	6.4
Undergraduate grades	5.8	6.0	5.3
Scholarly publications	5.6	5.6	5.2

Note: The scale is 1-10, indicating the importance of each factor, with 1 = not important at all and 10 = of utmost importance.

SOURCE: Judges Survey.

The following criteria were rated more important by female judges than by male judges: outside interests, personality, judicial philosophy, prior personal experience with the applicant and prior work experience. The following criteria were rated more important by minority judges than by nonminority judges: participation in community activities, gender and race.

Overall, factors which were of relative unimportance (scoring less than 4 points on the 1 to 10 scale) for the judges as a group were: EEOC policy considerations, family situation or responsibilities, judicial philosophy, race, LSAT score and gender.

The judges were asked if they gave any consideration to gender in selecting law clerks and its relative importance. Forty-one judges answered this question. Many judges responded that they did not consider gender at all. Most who did consider gender sought to maintain a rough equality between male and female clerks. Some thought it desirable to have one person of each gender each year; some affirmatively sought a female clerk to cure any imbalance arising over a course of years; several stated that they had a slight preference for a female clerk; and one expressed a strong preference

45. The criteria included: reputation of law school, academic achievement in undergraduate school, participation in community activities, participation in school activities, judicial colleagues' opinion of applicant, race or ethnicity, personality, family situation or responsibilities, EEOC policy considerations, scholarly publications, prior personal experience with applicant, academic achievement in law school, participation on law review, prior employment & work experience, gender, reputation or recommendation from others, LSAT score, outside interests, writing sample, computer literacy (skills), judicial philosophy of applicant and other.

for a female clerk. Another judge cited a need to hire female clerks to cure a historical imbalance. One judge sought to have two male clerks in one year and two female clerks in the next.

Judges were also asked if they recruited law clerks and if so, how often they utilized 13 possible recruiting techniques. These techniques were: contacting law schools for referrals, minority judges, women's bar associations, nonminority judges, women judges, minority bar associations, minority lawyers, state or local bar associations, nonminority lawyers and advertising to a minority readership, in on-line services, in legal publications and in-house publications, magazines or periodicals.

Of the 117 reporting judges, only 56 responded to this question about recruitment of law clerks. Most likely this reflects a number of comments from judges that they do not "recruit" law clerks; they receive a large number of applications and select candidates to be interviewed from those applying. No judges indicated that they used any of the listed techniques other than contacting law schools for referrals. The responding judges reported that this technique was used some of the time. There were no significant differences in any group of respondents based on gender, race, any combination of gender and race or court.

5. *Other Judicial Appointments*

There are a number of other judicial appointments which are not being considered in this Task Force Report for the reasons set forth below.

Appointment of bankruptcy court judges by the court of appeals is detailed in the Report of the Committee on Bankruptcy Issues elsewhere in this Report.

A review of the data concerning the appointment of special masters and experts throws little light upon the effect, if any, of gender in making these appointments. As comments in response to the judges' questionnaire pointed out, experts and special masters are usually appointed because a person has highly specialized training or experience, often in a field of science or engineering. Gender statistics would be more likely to reflect the extent to which women have entered those fields rather than the effect of gender upon judicial appointments.

A district judge's chambers staff in addition to law clerks commonly includes a secretary, deputy clerk and court reporter. Secretaries are nearly all female, deputy clerks are mostly female and there are a substantial number of female court reporters.

In each of these positions, practices with respect to appointment vary widely. Secretaries, of course, must be selected by the judge involved, but in many cases the judge inherits a predecessor's secretary, brings one with him or her from prior employment or accepts a recommendation of the Clerk of the Court. The degree to which judges select their deputy clerks and court reporters varies widely. Some may actually select a specific individual. More often the choice is dictated by availability of personnel within the Clerk's Office or the availability of persons who are on the roster of court reporters. These are matters which are not within the control of judges.⁴⁶

The court of appeals and the district courts appoint numerous committees such as the various lawyers' advisory committees, selection committees and many others. Time did not permit obtaining an inventory of committees throughout the Third Circuit nor listings of the membership of these committees. It must be left to each court to ensure that its various committees adequately reflect the composition of the federal bar within its jurisdiction.

D. Findings

- Very few women are being appointed as magistrate judges in individual districts across the circuit (two districts have no women), although the aggregate is 20.6% of the total number of judges (34).
- Throughout the Third Circuit, as a whole and in the individual districts, there is no apparent imbalance in the appointment of male and female law clerks.
- The two most important criteria for the selection of law clerks are academic achievement and personality. As a rule, judges do not recruit law clerks. Rather they rely for the most part on applications received from law students or from persons serving clerkships elsewhere. The applicant pool consists largely of graduates from local and national law schools. The percentage of females in most of these law schools exceeds 40%. Therefore, there is no shortage of female students from whom judges can or do select law clerks.
- The appointment of CJA attorneys is conducted without any intent to discriminate against female attorneys, and in fact many

46. We note, however, that certain persons may be "steered" to certain judges and that the Clerk of each court exercises great discretion in this area. Some employees specifically reported a lack of promotion due to their gender. See Report of the Committee on Court Employment and Personnel Issues.

female attorneys receive these appointments. The appointment process in some districts, however, may have the effect of limiting the appointment of females as CJA attorneys. This is particularly true in districts where there is an inadequate program for recruiting, evaluating, appointing, training and rotating assignments or in districts where there is such a program on paper but it is inadequately implemented.

- Female attorneys who practice in several districts of the federal courts believe that CJA appointments favor white male attorneys. In part, this belief reflects defective CJA appointment programs in some districts.
- This adverse perception regarding CJA appointments also derives, in part, either from the failure to disseminate among the members of the bar the manner in which CJA appointments are made and the manner in which attorneys can qualify and apply for such appointments, or from the failure to follow the procedures which the court has adopted.
- In a district which has an inadequate CJA appointment program, district and magistrate judges have to rely upon their knowledge of the capabilities of attorneys to provide adequate representation. Thus, the same attorneys are often appointed and reappointed. District and magistrate judges are less likely to become aware of the capabilities of younger attorneys as they enter the profession. This harms all newer attorneys, but because more recent graduates generally include a greater proportion of female and minority attorneys, there is an overall disproportionate impact upon females and minority attorneys.
- Adherence to a well-organized program for the appointment of CJA attorneys, which would include stiff standards for appointment to the panel and would require rotation among all panel members might result in more or fewer female panel members and more or fewer minority panel members. All attorneys, however, would have, and would know that they had, the opportunity to participate on an equal basis.
- The arbitration and mediation plans, in all districts which have them, appear to be working without discrimination against females in the process of appointing arbitrators and mediators. This is accomplished, in part, because the plans include detailed provisions concerning the qualifications and procedures for making appointments to the panels and, in part, because the plans are set forth in local court rules available to all members of the bar.

- Where there is a perception that these plans work against the appointment of females as arbitrators and mediators, the perception comes from a lack of familiarity with the plans.
- Very low percentages of females are being appointed as arbitrators and mediators in all districts which make such appointments.

E. *Recommendations*

1. *Magistrate Judges*

- The appointing judges in those districts with one or no women magistrate judges should be aware of and sensitive to these numbers when making the appointment of the next magistrate judge in the district.

2. *CJA Appointments*

- With respect to CJA appointments each district court should examine its appointment process to determine whether it ensures the appointment of qualified attorneys and that all qualified attorneys can participate on an equal basis.
- The plans should include some or all of the following features:
 - (a) Panels which have become outdated and which include attorneys who are no longer interested or qualified, or programs which have become unmanageably large, should be reconstituted.
 - (b) Detailed criteria, including experience in state or federal criminal trials, should be adopted.
 - (c) Applications for panel membership should be solicited through advertisements and notice to organizations of the bar, including womens' and minority bar groups and associations.
 - (d) An active committee, or an agency such as the Federal Defender, should be appointed to review applications, interview applicants when appropriate and recommend to the Chief Judge or court attorneys for appointment to the CJA panel. The committee or agency should play a continuing role by monitoring the performance of panel members and recommending dismissals from the panel and new appointments.
 - (e) Some panels should be limited to a specific number of members to ensure that each member will receive a reasonable number of assignments to cases.
 - (f) Some panels should be divided into two groups based upon experience. Members of the more experienced panel would be qualified for appointment to more difficult cases.

(g) A training panel should be established to which attorneys, not yet qualified for appointment to the CJA panel, can be appointed. Members of the training panels should be appointed as second chair in criminal cases, serving without compensation to obtain experience.

(h) Whenever a district or magistrate judge appoints counsel for an indigent defendant, the judge should obtain the name of an attorney from the court clerk or agency administering the program.

(i) Attorneys should be selected on a rotating basis from the master CJA panel, although, in unusual circumstances, there can be some departure from this procedure. Such circumstances might include a case of unusual difficulty or geographical considerations.

- Whatever the method of appointment of CJA attorneys may be, each district court should ensure that it conforms with the official CJA plan adopted by the court.
- Each court should make readily available to members of the bar full details concerning its procedures for appointing attorneys to CJA panels and its procedures for assigning attorneys to cases. In this way all attorneys will know how they can participate in the process if they wish to do so and how they can have or acquire the necessary qualifications. Also, misconceptions concerning the process can be avoided.

3. *Arbitrators and Mediators*

- Procedures for the appointment of arbitrators and mediators are contained in local rules, but because there appears to be some misunderstanding concerning them, consideration might be given to further publicizing them.
- Outdated panels should be reconstituted.
- Courts should review the very low percentages of females being appointed as arbitrators and mediators.

4. *Law Clerks*

- With respect to the appointment of law clerks, the present process does not appear to have any gender bias, so the Gender Commission has no recommendations.

5. *Other Court Appointments*

- The Gender Commission lacked the time to study in detail court-appointed committees to determine whether any gender imbalance exists in these committees. Each court might wish to

review its committees to ensure that there is no problem of this nature.

V. REPORT OF THE COMMITTEE ON COURT EMPLOYMENT AND PERSONNEL ISSUES OF THE GENDER COMMISSION

A. *The Committee and Its Purposes*

The Court Employment and Personnel Issues Committee ("CEPI Committee") was formed in order to study the role of the court as an employer in the following offices or units: bankruptcy and district court Clerk's Offices, U.S. Probation and Pretrial Services Offices, Circuit Executive's Office, library staff, Staff Attorneys and the court of appeals Clerk's Office. The specific employment issues studied by the CEPI Committee include recruitment, hiring, promotion, salaries, leave policies, job sharing, layoffs, facilities (including child care) and complaints of sexual harassment or discrimination.

Specifically, this Report deals with the hiring, employment practices and work environments of the courts in the Third Circuit, the management of employees and the efforts by the Third Circuit to accommodate family issues. This Report also examines the personnel manuals and other training guides used in the courts and the treatment of gender issues in those guides. It concludes with a list of findings and recommendations. It is the hope of the CEPI Committee that this Report will assist in identifying and remedying gender issues within the Third Circuit's offices.

B. *Structure of the Report*

1. *Data Relied Upon*

This Report was based on a variety of data obtained from several sources. First, the CEPI Committee considered the responses to the questionnaire distributed to court employees and the written comments provided by the employees, as well as the responses to data requests sent to each court in the circuit. The CEPI Committee also looked at statements made at public hearings throughout the circuit, responses from focus groups and other written submissions. Finally, in order to get a clear idea of the demographics of Third Circuit employees, the CEPI Committee also examined statistics and reports from the AO and the United States Census Bureau.

2. *Format and Presentation*

In order to understand the data and information presented, it is helpful to understand the formats used in this Report. Percentages have been rounded to the nearest whole number for ease of reading, except when they are less than one percent. When this Report states that X% of Y responded to a survey question in a certain way, Y stands for the total number of employee respondents. Not every employee who responded answered every question. When this Report indicates that a statistically significant difference exists or that a finding is statistically significant, these terms have a specific meaning as defined by the social scientists who analyzed the survey response data. If a portion of survey respondents indicated that they did not know the answer to a question, that percentage is not reported.

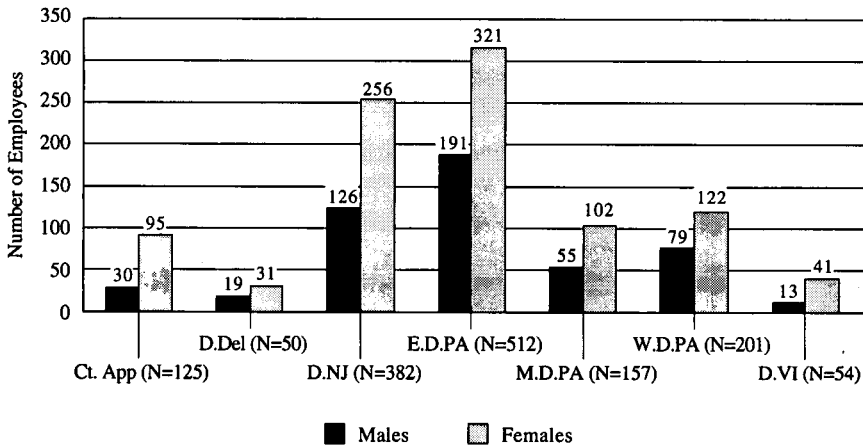
This Report also includes a number of comments from court employees. Not all employees wrote comments, but some employee respondents did write in the spaces provided on the survey questionnaire. The CEPI Committee has selected quotes which are illustrative of the general trends among all the employee comments. The authors of the comments or quotations are not identified in order to protect the anonymity of all the employees who responded to the surveys.

C. *Employment and Hiring Practices in the Third Circuit*

1. *A Snapshot of the Third Circuit Workforce*

In order to understand how the courts of the Third Circuit treat their employees, we must first identify the employees. According to a 1995 report prepared by the AO of the U.S. Courts ("AO Report"), the various courts comprising the Third Circuit employ approximately 1761 people. Included in this number are district court, magistrate and bankruptcy judges, as well as law clerks. Removing the judges and judicial staff, including secretaries and law clerks from the picture, information received from court units indicate that the courts of the Third Circuit employed approximately 1480 employees from 1995 to 1996. Data which exclude chambers staff shows that, across the circuit, female employees outnumber male employees in all districts. The following figure shows the distribution of each district by gender:

FIGURE 3: GENDER BREAKDOWN OF EMPLOYEES IN THE THIRD CIRCUIT BY DISTRICT (1995-96)



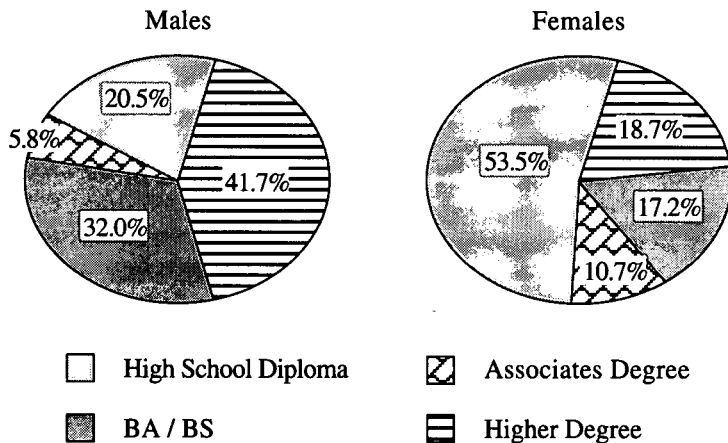
Note: N = total number of employees in the given district.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

Of those employed by the court units, there are more female employees (968 of 1480) than male employees (512 of 1480). White female employees (693 of 968) outnumber minority female employees (275 of 968). Most minority female employees are African-American, with only a few Hispanic or Asian females. The distribution of minorities among male employees is similar.

Again, excluding judges and chambers staff, the data shows that, on average, male employees in court units tend to have attained a higher level of formal education than female court employees. More than half of the female employees (516 of 968) only have a high school diploma. In contrast, a greater proportion of male employees (377 of 512) have a bachelor's degree or higher. In fact, over 40% of males in the Third Circuit have attained a degree higher than a bachelor's degree. Figure 4 shows the breakdown of education levels and gender:

FIGURE 4: EDUCATION OF THIRD CIRCUIT EMPLOYEES: HIGHEST LEVEL COMPLETED (1995-96)



Note: Percentages do not include judges or chamber staff.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

The CEPI Committee also analyzed the circuit's workforce according to the categories developed by the Equal Employment Opportunity Commission (EEOC) to classify the type of work done. There are six EEOC categories: professional (general, legal and administrative), technical, legal secretarial and office or clerical. Professional occupations require knowledge in a field of science or learning which is usually acquired through education equal to a bachelor's degree. Examples of professional positions include: circuit executives, probation and pretrial services officers (general), staff attorneys and legal research assistants (legal). Administrative positions involve analytical ability, judgment, discretion and responsibility. Examples of such occupations include the clerks of the courts and administrative assistants to chief judges.

Technical occupations involve work that requires extensive practical knowledge gained through on-the-job experience. Technical jobs include court reporting and automation. Legal secretaries are not included in the category of "office/clerical" because these secretaries work only with judges, clerks and staff attorneys. The office or clerical occupation includes positions such as library aide, court crier and messengers. The following percentages of males and females are employed by the circuit in each EEOC category:

TABLE 41: CATEGORIES OF THIRD CIRCUIT EMPLOYEES AND THEIR PERCENTAGES BY GENDER (1995-96)

EEOC Category	Total Employees	Gender	
		Males	Females
Professional (General)	259	56%	44%
Professional (Legal)	200	46%	54%
Professional (Administrative)	439	29%	71%
Technical	103	51%	49%
Legal Secretarial	89	1%	99%
Office/Clerical	390	24%	76%

Note: Excludes judges and chambers staff.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996)

Females within the Third Circuit units are employed predominantly as office or clerical workers (31% of 968) or in professional (administrative) positions (32% of 968). For example, more females than males are employed as docket clerks and courtroom deputies. Secretarial positions, including positions as judicial secretaries, are almost exclusively held by females. There is only one male legal secretary in the entire Third Circuit court system.

Male employees within the circuit tend to be employed in professional (general) positions (28% of 512) or professional (administrative) positions (25% of 512). The actual number of male and female workers in professional (legal) and technical positions are nearly equal. Male employees slightly outnumber female employees in professional (general) positions.

According to information provided by the AO, female employees are somewhat better represented in the Third Circuit's workforce than in the general workforce for the same geographical region as of 1995. The Third Circuit employs proportionately more females in general and legal professional positions than the population at large and tends to employ more women in administrative positions. The proportion of male employees to female employees in technical positions was consistent with the overall workforce.

2. Authority and Power Structures Among Employees

A large part of understanding any workforce is understanding who actually has authority and who is perceived as having authority. The answers to these two questions can be very different. For example, excluding judges and chambers staff, the actual number of female supervisors (119) in the Third Circuit is greater than the actual number of male supervisors (95). Nineteen percent of male

employees, however, are supervisors while only 12% of females are supervisors. Only a few supervisors (14% or 31 of 214) are minority women. Thus, although female employees outnumber male employees overall, male employees are slightly more likely to be in supervisory positions.

Female supervisors (25 of 32 supervisors) are more likely to be found in the court of appeals units (which include the staff attorney, librarian and circuit executive, all of whom are females) than in any district. The other courts in the Third Circuit have nearly equal numbers of male and female supervisors.

Most employees who responded to the Task Force survey perceived that male and female supervisors have equal authority in the same positions (74% of 860). Male employees (84% of 302), however, were significantly more likely than female employees (69% of 558) to feel that males and females in equal positions have equal authority.

A minority of employees (11% of 860) perceived that the distribution of authority is not equal based on gender. Where this inequality was noted, there were statistically significant differences of opinion based on gender. The majority of female employees who perceived an inequity (92% of 66) believed that male employees in the same position have more authority. By contrast, male employees who responded that they perceive inequity tended to believe that females in the same positions have more authority (55% of 20).

Employees of the court of appeals units were significantly more likely to perceive equality of authority than employees in other courts. This perception is not surprising given that female supervisors are more common in the court of appeals than elsewhere.

3. *Recruitment and Hiring*

The CEPI Committee's research looked not only at the people who were already employed by the courts, but also at the courts' efforts to attract new employees. The CEPI Committee inquired into court hiring practices and employees' perceptions of those practices. The purpose of this research was to see whether males and females have equal opportunities to learn of or obtain a job with the courts.

According to the AO, in fiscal year 1995, 1454 applicants interviewed with courts in the Third Circuit. Of these applicants, 46% were males and 54% percent were females. A total of 318 applicants were actually hired, of whom 148 (47%) were males and 170

(53%) were females. Data were not kept regarding the types of jobs sought by applicants or their qualifications.

The CEPI Committee surveyed current court employees to determine how they learned of their current jobs. The following percentages of employees indicated that they had relied on certain sources to find out about their current jobs:

TABLE 42: PERCENTAGES OF EMPLOYEE RESPONDENTS WHO UTILIZED THE FOLLOWING SOURCES FOR THEIR CURRENT JOB

Source	Percentage of Employees Responding
Word of mouth	46%
Newspaper listing	19%
School placement office*	17%
Posting in courthouse	8%
Supervisor	6%
In-house publication	4%
Legal periodical/journal	4%
Office of personnel management	3%
Radio/TV advertisements	0%

Note: An asterisk (*) means a statistically significant difference exists between male and female respondents.

SOURCE: Employee Survey.

The overwhelming source of information about jobs in the courts for most current court employees was word of mouth, with newspaper listings and school placement offices as the second and third most common sources. Only one source of information showed a statistically significant difference between males and females. A significantly greater percentage of male employees (21%) than female employees (15%) indicated that they had heard about their current position through a school placement office.

The CEPI Committee also surveyed current court employees about the questions asked of them on their job interviews, in an attempt to determine whether males and females were treated differently during the hiring process. The following table of current court employees indicated that they had been asked certain questions in their job interviews:

TABLE 43: PERCENTAGES OF PREVALENCE OF CERTAIN QUESTIONS
DURING JOB INTERVIEWS

Question topic	Total Employees	Gender	
		Males	Females
Marital status	44%	41%	46%
College grades*	44%	60%	32%
Affiliations with organizations	22%	24%	21%
Number of children	20%	15%	23%
Spouse's occupation	20%	18%	20%
Number of siblings	13%	15%	12%
High school grades	13%	10%	14%
Plans to have children*	6%	1%	9%
Religious affiliation	3%	3%	4%

Note: An asterisk (*) means a statistically significant difference exists between male and female respondents.

SOURCE: Employee Survey.

There were statistically significant differences by gender with respect to only two questions. Female applicants were significantly more likely than male applicants to have been asked about their plans to have children. By contrast, male applicants were significantly more likely than females to have been asked about their college grades. This latter difference may be reflective of the fact that male court employees are more likely to be college educated than female court employees.

Court employees were also asked to comment on the perceived hiring criteria for court jobs. Specifically, they were asked to evaluate whether they believe the following criteria are taken into account in hiring decisions:

TABLE 44: EMPLOYEE RESPONSES CONCERNING LISTED CRITERIA
USED IN THE COURTS' HIRING PROCESS BY PERCENTAGE

Criteria	Total Employees	Gender	
		Males	Females
Prior work experience	86%	87%	86%
Level of education*	72%	84%	64%
Personality	67%	72%	64%
Recommendations	65%	62%	66%
Schools attended*	35%	44%	30%
Performance on skills tests*	22%	17%	25%
Age	16%	18%	14%
Gender	12%	9%	13%
Race/ethnicity	9%	9%	9%
Marital/domestic status	4%	3%	5%
Seniority*	4%	6%	2%
Political connections	2%	2%	3%

Note: An asterisk (*) means a statistically significant difference exists between male and female respondents.

SOURCE: Employee Survey.

In most respects, the perceptions of males and females about hiring decisions were the same. Both males and females generally believed that the greatest weight in hiring decisions was placed on prior work experience, level of education, personality and recommendations.

With respect to certain criteria, however, the perceptions of male and female employees were very different. There was a statistically significant difference in the way males and females perceive the importance of educational level, schools attended and skills tests in the hiring process. Males who responded to the survey were significantly more likely to think that the court placed weight on an applicant's level of education and the school(s) attended than were female respondents. Female employees, on the other hand, were significantly more likely than male employees to perceive that performance on skills tests was a factor in hiring decisions. This difference in perception may be the result of the underlying differences in the types of positions held by males and females in the court system. As noted above, males are more likely to be employed in technical or professional positions, while women are more likely to be employed in clerical or secretarial positions.

Importantly, the majority of current employees who responded to this question (88% of 519) believed that gender does not play a role in hiring decisions. Only 12% of employees who responded indicated that they believed that gender affects hiring decisions,

and the CEPI Committee was unable to determine if this impact is perceived as a positive or negative one.

Based on their survey responses, a majority of court employees (62% of 846) believe that "it is important to recruit women as applicants for employment" by the courts. Some employees wondered, however, why the survey asked this question. For example, one female employee noted the greater number of female employees in the court system, and wondered why efforts needed to be made to recruit female applicants. Similarly, an employee from the Middle District of Pennsylvania wondered: "Why, in a woman-oriented operation, would you fail to ask a question about seeking out male candidates?" Some objections to this question were more strongly worded. For instance, one employee commented that aggressive efforts to recruit female applicants amounted to reverse discrimination.

Court employees generally were unable to point to any job advertising or recruitment methods specifically directed to females. The survey results provide no real guidance; there is no indication that any particular method of job advertising was relied on more by females than males.

Most employees also did not offer an opinion as to whether current advertising and job recruitment methods were effective in attracting female applicants. Female employees were more likely than male employees to believe that the courts do not effectively recruit or advertise to females. Individual comments from employees, however, frequently indicated that recruitment efforts in their particular offices were very good.

4. *Salary*

Salary statistics were compiled from data received about each employee's salary level within each court unit. The two different court pay scales, Judicial Salary Plan (JSP) and Court Personnel System (CPS), were entered into a computer system. Locality pay, seniority and job performance were not included in the calculations, but control factors such as court unit, EEO category and degree were included. The figures below also do not control for grade and step level, because such levels should be identical for all employees at identical levels. Therefore, the salaries reported below do not indicate that two employees in the same court unit at the same grade and step could have different levels of salary. Rather, they indicate that differing levels of seniority or job performance will affect the salaries of employees doing the same job.

There is a statistically significant difference between the salaries paid to male and female court employees. Excluding judges and chambers staff, as of November 1996, the average annual salary for all male employees was \$46,398, while females on average made \$43,566. The difference was even more pronounced for male supervisors and female supervisors. Male supervisors across the Circuit averaged \$68,276, while female supervisors earned only \$55,305. Table 45 illustrates the disparities in supervisor salaries by gender.

TABLE 45: THIRD CIRCUIT AVERAGE SALARIES FOR MALE AND FEMALE SUPERVISORS (1995-96)⁴⁷

District	Male Supervisors	Female Supervisors
Ct. App.	\$71,934	\$58,657
D. Del.	\$62,105	\$62,734
D.N.J.	\$66,544	\$53,016*
E.D. Pa.	\$70,556	\$57,061*
M.D. Pa.	\$66,627	\$50,685
W.D. Pa.	\$69,857	\$43,203*
D.V.I.	\$71,045	\$38,332
OVERALL	\$68,276	\$55,305*

Note: These figures control for court unit, EEO category and degree, but not for grade level, seniority or job performance. An asterisk (*) means average female salary is statistically significantly less than the average male salary.

SOURCE: Data obtained in 1995 from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

Female employees in particular districts have an average salary that was higher than that of male employees in only a few instances. In the court of appeals and the District of the Virgin Islands, nonsupervisory female employees earned slightly more on average than nonsupervisory male employees. In the District of Delaware, the overall average salary for female employees was \$44,703, while the overall average salary for male employees was \$44,529. Table 46 shows the average salaries for nonsupervisory employees in each district.

47. References to the districts in table form include the District Court and Bankruptcy Court Clerk's Offices, the U.S. Probation Offices, and Pretrial Services Agencies where applicable. The court of appeals includes all four units noted above.

TABLE 46: THIRD CIRCUIT AVERAGE SALARIES FOR MALE AND FEMALE NONSUPERVISORY EMPLOYEES (1995-96)

District	Male Employees	Female Employees
Ct. App.	\$36,742	\$39,338
D. Del.	\$39,842	\$37,339
D.N.J.	\$39,304	\$38,932
E.D. Pa.	\$40,746	\$40,580
M.D. Pa.	\$45,221	\$42,983
W.D. Pa.	\$45,628	\$42,929
D.V.I.	\$38,544	\$44,450
OVERALL	\$41,425	\$40,961

Note: These figures control for court unit, EEO category and degree, but not for grade level, seniority or job performance.

SOURCE: Data obtained in 1995 from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

The majority of court employees responding to the survey (69% of 851) indicated that they believe male and female employees in the same position and at the same level of seniority receive equal pay for their work. Female employees (11% of 551) were more likely than male employees (5% of 300) to perceive pay inequities based on gender. Among the minority of employees who believed that males and females are not compensated equally (8% of 851), most believed that males are paid better. A very small number of male employees (9) believed that female employees were paid better. The perception of pay disparity throughout the Third Circuit is shown in Table 47 below. It will be noted that when perceptions are matched against actual salary differences, the perceptions do not necessarily reflect actual differences.

TABLE 47: EMPLOYEE RESPONDENTS WHO PERCEIVED A DISPARITY IN PAY ACCORDING TO GENDER

District (N=total number)	Number	Percentage
Ct. App. (N=100)*	5	5.0%
D. Del. (N=53)*	1	1.9%
D. N.J. (N=256)*	22	8.6%
E.D. Pa. (N=249)*	35	14.1%
M.D. Pa. (N=90)*	5	5.6%
W.D. Pa. (N=118)*	8	6.8%
D.V.I. (N=33)	4	12.1%
OVERALL (N=899)	80	8.9%

Note: There is a statistically significant difference between the responses from the Eastern District of Pennsylvania and each district marked with an asterisk (*).

SOURCE: Employee Survey.

The salary disparity shown by statistical analysis between male and female employees may be related to the positions in which male and female workers are employed. As noted above, more female employees tend to hold secretarial or clerical positions. These positions tend to be the lowest graded and lowest paid positions in the courts. By contrast, a larger proportion of male workers hold professional positions, which may pay better. The CEPI Committee was unable to obtain data which would determine whether there are pay disparities between males and females in the same positions with the same seniority.

D. *Management of Court Employees*

This Report will now address various issues relating to the day-to-day interaction of court employees with each other and with their supervisors. These issues include opportunities for promotion and the overall work environment for court employees, as well as more sensitive questions about harassment, hostility and disciplinary actions among employees.

1. *Promotions*

According to the AO of the U.S. Courts, the courts of the Third Circuit promoted 344 employees in fiscal year 1995. Of this number, 121 were male and 223 were female. Sixty-nine of those promoted were minorities. Nearly the same numbers and percentages of employees were promoted in the 1994 fiscal year. There is no information about what kind of positions were involved in these promotions, or how many people applied for or were eligible for promotions.

According to the Task Force employee survey, approximately 345 of those court employees who responded (41% of 845) applied for promotions of some kind within the last 5 years. A greater percentage of male employees (45% of 299) applied for promotions than female employees (39% of 546), but this difference was not found to be statistically significant. Because there are more female employees overall than male employees, this difference in percentages may not indicate any difference in treatment.

There were no statistically significant gender disparities in the promotions actually received. Of 576 employees responding to this question of the survey, 35.8% reported that they had received the promotions for which they had applied. The percentages of males and females who reported that they had received promotions were nearly the same.

The majority of court employees who responded to the survey (64% of 92) indicated that gender is "never" a factor in getting a promotion. Only 10% of responding employees indicated that they believe gender is "sometimes" a factor in granting promotions. All of those who reported that gender may sometimes be a factor were female.

A slightly smaller majority of employees who responded (57% of 115) indicated that they believe gender is "never" a factor in the denial of a promotion. Approximately 27% of those who responded stated that gender is a factor in denying promotions at least "some of the time." Female employees were more likely than male employees to report that gender is sometimes a factor in the denial of a promotion, but this difference was again not found to be statistically significant.

The general feeling among most court employees appears to be that promotions are, and should be, made on the basis of qualifications, job performance and experience rather than on the basis of gender. By way of example, 2 female and 2 male employees, respectively, expressed their perceptions of the promotion process as gender neutral:

I believe that I was promoted on the basis of my work performance and the fact that I consistently received above average (excellent) performance evaluations from my supervisors.

Under the present Probation Chief, I've experienced nothing but competence and fairness. I competed for one promotion and lost to an applicant of equal or slightly greater ability.

In the past 5 years I applied for 3 different positions. One I received and two I did not. I believe all the decisions were based on merit and not on anything else.

They gave me a promotion because they thought I could handle the work. Not because I'm black or white, male or female.

Paralleling the statistics, the comments submitted to the CEPI Committee also indicate that some court employees believe that gender does occasionally play a role in the promotion process. The following comments, from 1 male and 2 female employees, respectively, are illustrative of this vocal minority:

Women and minorities are not considered for promotions as often as non-minorities.

I have work experience and seniority over at least ten employees who have been promoted over me. Since my reviews have always been very good or better I can only assume that my race and gender played a part in denying a promotion. [The m]ajority of those promoted over me do not have the skills and abilities that I have.

On one occasion a non-white female was promoted over me, due in part (in my opinion) to her race and gender.

Many comments by female employees reflect a perception that they are not considered for promotions or promoted as frequently as males. For example, one employee felt that females are passed over because males are perceived as "needing" promotions in order to support their families. Complaints and comments about females being passed over for promotions were particularly prevalent from employees in the Eastern District of Pennsylvania.

The comments also indicated that some male court employees felt that they have been passed over for promotions in order to promote females. For example, one male employee stated: "I was told years later by an upper management supervisor that although I was recommended for the position, I did not receive the position because another female supervisor was needed in the office." Similarly, another male employee stated: "I have lost at least one promotion wherein I was indirectly told that there was a need for a female."

Many of the complaints about the promotion process within the courts focused not so much on gender-specific issues, but on the lack of clear-cut objective guidelines for promotion. For instance, one employee complained that "there is no such thing as seniority, experience or using performance appraisals" in the promotion process. Employees commented that there are no career "tracks" within the court system that would allow them to plan for or train for promotion. Some employees also commented that they felt they were not encouraged to enhance their skills or receive additional training. In addition, employees complained that when they are turned down for promotions, they are not given an explanation or the opportunity to remedy problems.

The survey comments also indicated that some court employees perceived that particular people are groomed for particular positions, thus limiting others' chances for advancement. By way of

example, one female employee complained that supervisors have particular candidates in mind for promotion and pass up other employees. Another employee likewise expressed the similar feeling that supervisors preselect and train certain employees for promotions even before the openings are formally announced.

A group of employees also perceived inequality in the encouragement of employees to seek additional training which might lead to promotion. This perception breaks down along gender lines. Significantly more female employees (13% of 562) than male employees (5% of 300) believe that males and females are not equally encouraged to seek additional professional training to advance their careers. Among the group of female employees who believe that males and females are encouraged differently, the vast majority (92% of 63) perceived that males receive more encouragement. On the other hand, men who perceive different levels of encouragement are nearly equally divided on whether male employees or female employees receive more encouragement for training.

2. *Daily Work Life*

a. Respect and Overall Treatment

Most court employees who responded to the Task Force survey (76% of 859) believed that they were treated equally by their supervisors regardless of gender. A number of employees volunteered comments which reflected this positive perception, including the following statements:

I enjoy my job and feel that [I] am treated the same as those of different genders and races . . . I never feel more pressured just because I am of a different gender or race.

I have never experienced nor witnessed any disparate treatment.

When asked whether male and female court employees were afforded equal respect by their supervisors and co-workers, most employees (86% of 868) agreed that they are.

A vocal minority of employees (10% of 868) believed, however, that male and female court employees were treated very differently. The following comments are illustrative of this group's opinions:

This court is very male-oriented. They seem to [receive] more preferential treatment than women.

Being female, I am not always treated with the same respect [as] if I was male. Sometimes, given the same situation, men receive a more positive response.

Women get special consideration.

Table 48 shows the breakdown by district of those employees who felt they are treated with less respect based on gender.

TABLE 48: EMPLOYEE RESPONDENTS WHO FELT THAT THEY ARE TREATED WITH LESS RESPECT THAN THEIR COWORKERS BECAUSE OF THEIR GENDER

District (N=total number)	Number	Percentage
Ct. App. (N=101)*	2	2.0%
D. Del. (N=57)	4	7.0%
D.N.J. (N=260)	27	10.4%
E.D. Pa. (N=253)*	39	15.4%
M.D. Pa. (N=92)	7	7.6%
W.D. Pa. (N=120)	11	9.2%
D.V.I. (N=34)	2	5.9%
OVERALL (N=917)	92	10.0%

Note: An asterisk (*) means there is a statistically significant difference between the responses from Eastern District of Pennsylvania and the court of appeals.

SOURCE: Employee Survey.

Furthermore, 15% of 859 employees responding to the survey stated that they perceived differences in treatment from *their supervisor* based on gender. Females (18% of 558) were significantly more likely than males (11% of 301) to believe that supervisors did not treat employees equally based on gender. Among those who perceived an inequality, a statistically significant majority of female employees (92% of 84) felt that males are treated better than females. The small number of male employees who perceived inequality, on the other hand, was nearly equally divided as to whether males (48% of 31) or females (52% of 31) are treated better. As one employee stated, the perception still exists among some court employees that "white male employees still get the best treatment, or at least suffer least from discrimination."

Along the same lines, females (14% of 566) were more likely than males to perceive that they were treated with less respect than their male counterparts. Some employee comments echoed these female employees' belief that they often have not received the respect they feel they deserve. By comparison, a small number of male employees (3% of 302) agreed that females are treated with

less respect, while nearly an equal number (3.6% of 302) felt that males are treated with less respect.

Court employees were asked to identify the classes of people whom they believe treat them with less respect based on gender. The following table represents the percentages of employees who stated that they are treated with less respect, based on gender, by people in certain positions:

TABLE 49: PERCENTAGES OF EMPLOYEE RESPONDENTS WHO FEEL THAT THEY ARE TREATED WITH LESS RESPECT FROM PEOPLE IN CERTAIN POSITIONS IN THE COURTS

Treatment by	Total N=90	Gender	
		Males N=11	Females N=79
Other court employees	61%	73%	60%
Attorneys	32%	9%	35%
Judges	19%	46%	15%
CSOs	12%	0%	14%
USMs Personnel	8%	0%	9%
Litigants	7%	0%	8%

Note: N = total number.

SOURCE: Employee Survey.

Although these responses reveal some differences in perceptions between males and females, only one response showed a statistically significant difference by gender—treatment by judges. Interestingly, court employees were most likely to perceive that they were treated differently according to their gender by other court employees. This feeling appeared to be strongest among male court employees.

In general, most court employees (87% of 857) perceived no additional pressure to perform or prove their competence based on their gender. Among the small percentage of employees who felt gender-based pressure (7% of 857), female employees were more likely to feel such pressure than male employees. This is not to say, however, that male employees did not feel any gender-based pressures. One male employee commented that “white male [employees] are simply held to a higher standard than their co-workers.”

The responses to this question also had a geographical component. The following table indicates the number and percentage of employees in each district who felt additional pressure to perform based on their gender.

TABLE 50: EMPLOYEE RESPONDENTS WHO FELT THAT THEY WERE
PRESSURED BECAUSE OF THEIR GENDER

District (N=total number)	Number	Percentage
Ct. App. (N=100)*#	2	2.0%
D. Del. (N=55)	4	7.3%
D.N.J. (N=258)#	22	8.5%
E.D. Pa. (N=249)*	28	11.2%
M.D. Pa. (N=90)*	4	4.4%
W.D. Pa. (N=119)*#	3	2.5%
D.V.I. (N=34)*	0	0.0%
OVERALL (N=905)	63	7.0%

Note: There is a statistically significant difference between the responses from the Eastern District of Pennsylvania and each district marked with an asterisk (*). There is also a statistically significant difference between the responses from District of New Jersey and each district marked with a number symbol (#).

SOURCE: Employee Survey.

b. Rules of the Workplace

More than three-quarters of the employees responding (77% of 862) felt that males and females are treated equally when it comes to the rules of the workplace. A majority of employees (67% of 856) also perceived that males and females receive the same discipline for infractions of workplace rules, such as tardiness and absenteeism. A small percentage perceived that males and females are not treated equally (15% of 862), or that they are not disciplined equally for infractions (13% of 856).

Statistically significant gender differences exist, however, among those who felt that males and females are not treated equally with regard to the rules of the workplace. The large majority of the females who perceived unequal treatment (87% of 82) felt that males were treated better, while an even greater percentage of the males who shared this perception (92% of 36) felt that females receive better treatment. The perception of gender-based disparity with respect to the rules of the workplace also appears to vary by geographical location. Table 51 illustrates these perceptions.

TABLE 51: EMPLOYEE RESPONDENTS WHO FELT THAT OFFICE RULES WERE ADMINISTERED UNEQUALLY ACCORDING TO GENDER

District (N=total number)	Number	Percentage
Ct. App. (N=101)*#	8	7.9%
D. Del. (N=57)	7	12.3%
D.N.J. (N=259)*	35	13.5%
E.D. Pa. (N=248)*	51	20.6%
M.D. Pa. (N=92)*	10	10.9%
W.D. Pa. (N=120)#	23	19.2%
D.V.I. (N=34)*	2	5.9%
OVERALL (N=911)	136	14.9%

Note: There is a statistically significant difference between the responses from Eastern District of Pennsylvania and each district marked with an asterisk (*). There is also a statistically significant difference between the responses from Western District of Pennsylvania and each district marked with a number symbol (#).

SOURCE: Employee Survey.

Statistically significant differences by gender exist in the perception of the administration of discipline for infractions of workplace rules. Among those who believe that discipline for infractions is unevenly applied, female employees (16% of 555) were more likely than male employees (10% of 301) to feel that this disparity is based on gender. Female employees in this group tended to believe that they were more harshly treated, while the male employees in this group believed that males received harsher punishment. The perception of gender-based differences in discipline for violations of workplace rules was significantly lower in the court of appeals units than in the other units in the circuit.

c. Work Space and Work Assignments

Most employees responding to these survey questions (79% of 861) felt that males and females with equivalent job assignments and seniority were assigned work spaces of equal quality. Moreover, there was no statistically significant difference by gender among those who believed that males and females receive unequal work space. Among the small group of males and females who felt that work spaces are not equally assigned (4% of 861), female employees believed that better work spaces are assigned to males, while male employees felt that females got the better work spaces.

The lack of significant differences of opinion about the assignment of work spaces may be due to the fact that the federal courts adhere to national written standards for the allocation of space in their offices. The United States Courts Design Guide provides spe-

cific guidelines for the square footage, furniture and finishes allowed for various kinds of office space, including staff offices, secretarial stations, reception areas, storage areas and private offices.

Most court employees responding (67% of 865) agreed that, given identical job assignments and seniority, male and female employees receive the same amount of work. Only 11% of those who responded indicated that they felt work was being distributed unequally based on gender. There were no significant disparities by gender in the responses. Once again, the females who did perceive a difference felt that they receive more work than male coworkers, and male respondents believed that male employees end up with more work. Table 52 details the respondents from each district and the court of appeals who felt this way.

TABLE 52: EMPLOYEES RESPONDING THAT FEMALE EMPLOYEES DO NOT RECEIVE THE SAME AMOUNT OF WORK AS MALE EMPLOYEES FROM THEIR SUPERVISORS

District (N=total number)	Number	Percentage
Ct. App. (N=101)*	3	3.0%
D. Del. (N=57)	4	7.0%
D.N.J. (N=260)*	21	8.1%
E.D. Pa. (N=251)*	43	17.1%
M.D. Pa. (N=92)	9	9.8%
W.D. Pa. (N=120)	13	10.8%
D.V.I. (N=34)	2	5.9%
OVERALL (N=915)	95	10.4%

Note: There is a statistically significant difference between the responses from Eastern District Pennsylvania and each district marked with an asterisk (*).

SOURCE: Employee Survey.

Thus, the statistical information indicates that the number of dissatisfied employees is fairly small. Some employee comments, however, contained complaints from female employees about a gender-based perception that females should get less demanding work assignments because they are less intelligent or less committed to work than males. For instance, one female complained about an "attitude that I am less intelligent and more easily intimidated due to my gender." Two other comments from female employees reflect similar sentiments:

In today's society many view women as a weaker sex. Women are given less crucial jobs and assignment[s] because they are female.

A male manager would not train me in my position or give me any work. The male who replaced me thinks (stated to someone) that he is smarter than myself.

It is impossible to tell from the survey responses and comments whether this perception of female helplessness is shared by male court employees.

3. *Hostile Work Environment*

Employers in every sector are becoming increasingly aware of sexual harassment and sexual discrimination in the workplace. The CEPI Committee therefore asked court employees a number of questions about their work environment and their interactions with their coworkers to determine whether such behavior exists in the court system.

Overall, the large majority of court employees (89% of 790) did not feel that they were subjected to a "hostile work environment" on the basis of their gender.⁴⁸ One comment seems to sum up the opinion of the majority of employees: "I have found the Federal Court system in general to be one of the least hostile environments that I have ever worked [in] (especially in comparison to the state court system)."

A small number of court employees (7% of 790) indicated that they do perceive gender-based hostility. Female employees (8% of 516) were significantly more likely to perceive gender-based hostility than male employees (3% of 274). There was also a statistically significant difference in the perception of gender-based hostility within the Third Circuit. Table 53 lists those differences.

48. The survey intentionally did not provide a definition of this term, preferring to allow respondents to use their own experiences as a guide.

TABLE 53: EMPLOYEE RESPONDENTS WHO HAVE FACED HOSTILE WORK ENVIRONMENTS BECAUSE OF THEIR GENDER

District (N=total number)	Number	Percentage
Ct. App. (N=93)*	3	3.2%
D. Del. (N=49)	2	4.1%
D.N.J. (N=243)*	11	4.5%
E.D. Pa. (N=226)*	25	11.1%
M.D. Pa. (N=85)*	3	3.5%
W.D. Pa. (N=112)	8	7.1%
D.V.I. (N=29)	1	3.4%
OVERALL (N=837)	53	6.3%

Note: There is a statistically significant difference between the responses from Eastern District of Pennsylvania and each district marked with an asterisk (*).

SOURCE: Employee Survey.

Among those who complained about gender-based hostility in their workplace, one of the most frequent complaints involved inappropriate remarks by coworkers. For instance, several female employees who offered written comments objected to the use of the term "bitch" in the workplace. Other female employees also commented about constant degrading or disparaging remarks toward females. Employees of both sexes commented about male employees telling dirty or off-color jokes: "Most males think nothing of telling a sex joke or race joke whenever they feel like [it]."

In addition, a large number of female employees who supplied written comments talked about statements by their coworkers, which, while not offensive, they felt were demeaning. Female employees strongly objected to being referred to as "sweetheart," "honey" or by other pet names. Similarly, one male employee stated that he was offended by the use of the term "girl" for female employees.

In their comments, 3 female employees complained about "flirting" or sexual behavior from male employees. Female employees wrote of being propositioned by coworkers or subjected to unwanted sexual advances. Two female employees also stated that they had been inappropriately touched or fondled by coworkers. While the number of female employees who complained about sexually inappropriate conduct may be fairly small, the fact that any such complaints exist reflects a potentially serious problem.

Although the few complaints about hostile work environment were made by female employees, some male employees also took issue with the treatment they received from female coworkers. For instance, one male employee commented that he found female su-

pervisors and coworkers to be more critical and condescending than males.

The overall perception among court employees appears to be that there is little or no gender-based hostility in the workplace. The employees who perceive such hostility were very vocal and appeared to be very angry. The difference in tone of the employee comments may be due to the very serious nature of such complaints, the anonymity provided by the survey and the fact that employees who did not perceive a problem did not comment.

4. *Complaints and Disciplinary Actions*

Only a very small percentage of those employees who stated that they had been harassed or subject to a hostile work environment stated that they filed a formal complaint about the offensive behavior. Based on the survey, approximately 10 employees (all female) responding (1.4% of 714) had ever filed a complaint.⁴⁹

The survey asked those employees who perceived a hostile work environment why they had not filed complaints or grievances. The employee comments revealed a strong perception, particularly among female employees, that filing complaints about offensive behavior was a waste of time or counterproductive. For example, one employee indicated that she did not file a complaint because she believed there was no desire within the workplace to resolve the issues raised. Similarly, other female employees stated that they did not file complaints because they felt their complaints would not be treated seriously.

Two employees who provided written comments complained of retaliation or the fear of retaliation if they filed complaints or raised grievances. For example, one female employee stated that she did not complain about the way she was treated because she "felt [that] it would not have been properly addressed and could have affected future promotions or advancement."

Another employee likewise stated that filing a complaint or grievance diminishes an employee's chances for any future promotion. This fear of retaliation may be based on anecdotal evidence from other employees. For example, a female employee who actually had filed a formal complaint wrote that, since filing her com-

49. The few complaints filed were most likely to have been submitted to the employee's supervisor or with the personnel department. Because of the small number of employees who actually filed formal complaints, however, no reliable analysis of who receives complaints can be made.

plaint, she was required to turn in daily reports to her supervisor and was watched more closely than her coworkers.

It appeared that some employees may have chosen to resolve their problems through informal channels rather than through filing a formal complaint. Several comments indicated that problems they encountered in their offices had been successfully resolved in this fashion. One female did not file a complaint, but spoke informally with her supervisor about issues in their workplace. Those issues were successfully resolved. Several female employees wrote that they had resolved their problems with coworkers by talking directly with the offending coworker. Another female employee reported that she used the threat of bringing a formal complaint to convince a coworker to stop touching her. The survey questionnaire did not ask about informal methods of dispute resolution among employees and the CEPI Committee therefore has no statistical data on whether such informal methods are effective.

Employees also voiced concerns regarding their designated EEO coordinators. Each unit is required to have a designated person to whom complaints are to be brought. They are also required to have a backup individual assigned should the complaint be made against the EEO coordinator.

In reality, however, employees noted that they were uneasy about making complaints to their supervisors, particularly if the complaints concerned that supervisor's behavior. As one employee explained, "there exists no unbiased mediator to handle any situation." Several employees expressed a preference for revising the grievance or complaint system so that complaints could be brought to a neutral party. Employees in the District Court Clerk's Office of the Eastern District of Pennsylvania were particularly vocal about this concern. In response to these comments, the CEPI Committee gathered information from court units about their designated EEO officers. That information follows in Table 54.

TABLE 54: EEO COORDINATORS FOR EACH COURT OFFICE IN EACH DISTRICT OF THE THIRD CIRCUIT

Court or Division	District Court Clerk's Office	Bankruptcy Clerk's Office	U.S. Probation Office	Pretrial Services
AO Model	Up to the Court to Designate			
Ct. App.**	Circuit Executive (backup: Management Committee)	N/A	N/A	N/A
D. Del.	Chief Probation Officer	Chief Probation Officer	Chief Probation Officer	N/A
D.N.J.	Magistrate Judge (backup: designated by Chief Judge)	Magistrate Judge (backup: designated by Chief Judge)	Magistrate Judge (backup: designated by Chief Judge)	Magistrate Judge (backup: designated by Chief Judge)
E.D. Pa.	Clerk of District Court (backup: Chief Judge)	Clerk of District Court (backup: Chief Judge)	Chief Probation Officer	Clerk of District Court (backup: Chief Judge)
M.D. Pa.	Clerk of District Court (backup: designated by Chief Judge)	Clerk of District Court (backup: Chief Deputy)	Clerk of District Court (backup: designated by Chief Judge)	N/A
W.D. Pa.	Clerk of District Court (backup: designated by Chief Judge)	Clerk of District Court (backup: designated by Chief Judge)	Clerk of District Court (backup: designated by Chief Judge)	Clerk of District Court (backup: designated by Chief Judge)
D.V.I.	Clerk of District Court (backup: designated by Chief Judge)	N/A	Clerk of District Court (backup: designated by Chief Judge)	N/A

Note: A double asterisk (**) means the court of appeals includes the Circuit Executive, Library and Staff Attorney's Offices. N/A = not applicable; that office is technically included within another unit.

SOURCE: Court Units.

Most employees (59% of 843) seem to perceive that discipline for misconduct is meted out equally to male and female employees. This perception appears to be strongest in the District of the Virgin Islands and the court of appeals. Only a small percentage of employees believed that discipline for misconduct was skewed by gender (12% of 843). Among this group of employees, there are

statistically significant differences according to the gender of the responding employee. A greater percentage of female employees (13% of 546) than male employees (9% of 297) believed that misconduct was not dealt with in a gender-neutral manner. Once again, a large number of the males who perceived inequality of treatment (81% of 26), felt that male employees are treated more harshly, while females tend to believe that they are dealt with more harshly (90% of 68). Interestingly, one female employee agreed with the male perception that females often get treated more leniently, but pointed out that this more lenient treatment could be a double-edged sword for females: "I must say I have noticed at times I can get away with more than male employees would if they had my job; but I've also in the past been given less credit and I've seen a male co-worker get more for the same job."

E. *Is the Court a Family-Friendly Employer?*

This Report will now address issues that, while not limited exclusively to females, tend to affect female employees more than male employees. These issues include the availability of job sharing and other flexible job arrangements, child care issues and the availability of family and parental leave for court employees.

1. *Availability of Child Care Facilities for Court Employees*

Within the Third Circuit, only a few of the courts provide government-affiliated child care facilities for court employees. The Eastern District of Pennsylvania, the court of appeals (the same facility in Philadelphia), the District of New Jersey and the Western District of Pennsylvania have such facilities available. These facilities serve not just court employees, but all federal employees in that city. When asked whether their districts had government-sponsored child care facilities, 42% of employees responding to the survey stated that they did, 44% stated that they did not and 14% did not know.

Of those who responded to the survey question about child care facilities, most employees (72% of 795) stated that it did not apply to them. Only a very small percentage of court employees (3% of 795) indicated that they use the government-sponsored child care facility. There are significant differences by gender among the employees who reported that they use such facilities. Female employees (5% of 519) were significantly more likely to use them than male employees (0.7% of 276). It is difficult, however, to draw any conclusions from these statistics because the actual

number of employees using them is small. For example, in the District of New Jersey, only 5 of 258 employees responding to the survey actually use the provided facility. Likewise, in the Eastern District of Pennsylvania, only 5 of 119 employees responding use the provided facility for their children.

Despite these statistics, employee comments showed a great deal of interest in government-affiliated child care facilities. One employee suggested that child care facilities are needed so that males and females with child care responsibilities would be treated equally—otherwise, this employee felt, females with children would be asked to stay late less frequently than males.

It is unclear why the existing government-sponsored child care facilities are not utilized by more employees. Given the level of interest among employees in offices without access to such facilities, the small number of employees actually using them is curious. The employee comments do not provide illumination, as only a tiny number of employees who wrote comments even addressed this issue. One employee stated that she did not use the government-sponsored child care facility because she “would never put [her] kids in the danger of being in this building all day.” Another employee stated that the child care facility is dirty and expensive. Further inquiry into the specific facilities is necessary in order to determine why they are not being used more frequently by court employees.

2. *Job Sharing and Flex Time*

Some court offices, like private sector employers, have experimented with job sharing and other mechanisms for allowing employees with family responsibilities to continue to work. “Job sharing” means two or more employees sharing one full time position. “Flex time” is a general term for allowing full-time employees to adjust or distribute their hours over the course of a one-week or two-week period.

There is no circuit-wide policy on job sharing or flex time. Each district and court unit makes its own policy on whether to allow its employees to use these alternative arrangements. As a result, there are great differences across the Third Circuit regarding how employees are allowed to adapt their work life to their family life.

Five of the courts in the Third Circuit allow job sharing—the Eastern District of Pennsylvania, the Bankruptcy Court for the District of New Jersey, the Bankruptcy Court for the Middle District of

Pennsylvania, the Western District of Pennsylvania and the court of appeals. It appears that the first court to experiment with such a program was the Eastern District of Pennsylvania, whose program began in 1994.⁵⁰ When asked to report whether their office allowed job sharing, 11% of employees responding to the survey stated that it did, 48% stated that it did not and 41% did not know.

Even within those courts which allow job sharing, only a small number of employees have taken advantage of this option. About a dozen employees have set up a job-sharing arrangement since 1994. Ten employees are currently involved in job-sharing arrangements. All but one of these employees are female.

Likewise, the policy on flex time varies from office to office within the circuit. Fewer than half of the employees who responded to the survey (45% of 856) reported that their offices allow flex time. According to those respondents, offices which do allow flex time have a variety of arrangements and options. Certain offices permit employees to adjust their starting and ending times. Other offices apparently allow employees to arrange their time so as to work longer hours each day and take additional days off.

Where flex time is allowed, female employees seem to make use of the option more often than male employees. These percentages may be affected, however, by the fact that, overall, there are more female employees than male employees.

Many flex-time arrangements appear to be informally arranged with the permission of a supervisor, rather than part of a formalized office policy. Several employees praised their supervisors for allowing them flexibility to deal with family needs.⁵¹ For example, one employee wrote: "I have been permitted a great deal of (informal) flexibility and am allowed to work at home part of the time in order to care for my young children (one of whom has special needs)." In addition, another employee explained: "No flextime [is] possible, but boss is lenient in [mornings] and [afternoons] to accommodate personal errands of employees, so long as 80 hrs are worked in 2-week pay period."

This informality, however, may also lead to flex time being applied unfairly. One employee commented that a request to change work hours was denied, while others in similar positions had been

50. The CEPI Committee was only able to obtain data through May 1996. Any individual court unit's policy on job sharing may have changed subsequently.

51. The Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (1994), had become law shortly before the Task Force survey. Therefore, the CEPI Committee was unable to judge what, if any, impact it may have had on the granting of leave to handle family health needs.

allowed flex time. Another employee complained that flex time was offered to only “a few employees (mostly minority females).” In contrast, an employee in a different office stated that male workers had an easier time getting flex time.

Perceived inconsistency in treatment may have nothing to do with gender, but rather with other factors such as the employee’s position, office and workload. For example, a female employee commented that she had been denied flex time when her child was born, but now two other female employees in the same office are permitted to work part-time after the birth of their children.

Overall, employees responding to the survey were strongly in favor of both flex time and job-sharing. A large number of employees who volunteered comments expressed the desire to use flex time if it were offered, or to work at reduced hours for a reduced salary in order to deal with child care or other family responsibilities. One employee observed that “both job sharing & flextime are viable options to pursue in this time of budget cutbacks & also as a way of improving employee morale.” Others commented that job sharing or other flexible options were a necessity for working parents. For example, one female employee commented that she was particularly interested in a flex time arrangement which would allow her to be home when her young child returned from school.

The enthusiasm among employees for flexible work arrangements does not appear to be shared by all of their supervisors. Employees who offered written comments often indicated that their offices did not like part-time workers, or that their supervisors did not allow job sharing or flex time. One employee expressed the sentiment that efforts to introduce flexible work arrangements had negative effects: “I have been fighting for job-sharing or part-time and am now treated like I have the plague—despite my excellent work rating.”

All in all, the availability of job sharing, flex time and other flexible work arrangements in the Third Circuit courts depends to a great extent on where an employee works, the type of work the employee performs, the workload in the office and the attitude of the supervisor. The lack of a uniform, consistent policy across the circuit may contribute to employee perceptions that requests for flex time or job sharing are handled unfairly.

3. *Requests for Leave*

There are five official categories of leave allowed to court employees: (1) annual leave (vacation); (2) sick leave;⁵² (3) military leave; (4) administrative or excused leave (with pay); and (5) leave without pay. Any other types of leave, such as maternity or paternity leave, are based on some combination of these official categories of leave.

Court employees were asked whether they had requested time off from work within the last five years and whether that request had been granted or denied. This question was not limited only to official categories of leave, but instead asked about leave for particular purposes. The following table summarizes overall employee responses.

TABLE 55: PERCENTAGES OF EMPLOYEES WHO REQUESTED LEAVE AND THE PERCENTAGES DENIED

Purpose	Requested (N=634)	Denied
Funeral	60	0.6
Training/education	46	3
Leave to care for a sick child	33	0.9
Annual leave to care for a sick child*	22	0.2
Religious holiday	22	2
Leave without pay	11	2
Maternity leave	3	0.3
Paternity leave	3	0.3
Military leave	3	0

Note: An asterisk (*) means that the purpose for leave would now be covered by the FMLA. N = total number of requests.

SOURCE: Employee Survey.

There were statistically significant gender differences with respect to requests for certain kinds of leave. More males (7.1% of 211) than females (0.7% of 423) indicated that they had requested military leave. Female employees (25%) appeared more likely than male employees (14%) to request leave for religious holidays.

As illustrated in the chart above, requests for time off were almost always granted. Moreover, for most requests, there was no statistically significant difference by gender in the percentages of requests that were denied.

A gender difference did appear with respect to time off for training or education. A higher percentage of male employees

52. The survey did not specify that leave could be taken under the FMLA, which expanded the basis on which sick leave may be taken. *See id.* § 2612(d)(2).

(52% of 211) than female employees (43% of 423) requested such leave. The denial rate for training or educational leave was also higher for female employees (4%) than for male employees (2%). Given that there are more female employees overall than male employees, however, it is difficult to interpret these percentages without knowing the actual numbers of male and female employees who requested training or educational leave. Further, male court employees are more likely to be in technical or professional positions, where such training opportunities may be more frequently offered or expected.

In addition, female employees were more likely than male employees to request general leave without pay (15% versus 3%). Female employees were also more likely to have such requests denied. While 2% of requests by female employees for leave without pay were denied, no requests by male employees were denied.

The majority of employees responding to the survey (55% of 62) indicated that they did not believe that gender is ever a factor in denying leave requests. Only 18% of employees who responded to the survey stated that they felt gender might be a factor some of the time.

F. *Personnel Manuals*

The CEPI Committee reviewed the personnel manuals and materials used throughout the circuit focusing on gender-related issues and concerns. In particular, the CEPI Committee studied Equal Opportunity Plans, Complaint and Adverse Action Plans, updates to include the Family and Medical Leave Act of 1993,⁵³ gender-specific dress codes and gender-bias language. The following policy manuals were reviewed by the CEPI Committee:

- Third Circuit Court of Appeals Employee Information (August 1996)
- District Court of Delaware Orientation Manual for Clerk's Office Employees (revised October 1995)
- District of Delaware Bankruptcy Court Policies and Procedures (revised September 1993)
- District of New Jersey Personnel Policy and Orientation Manual
- District of New Jersey Bankruptcy Court (revised January 1995)

53. 29 U.S.C. §§ 2601-2654 (1994).

- Supplemental Materials from the District of New Jersey Probation Office
- Supplemental Materials from the District of New Jersey Pretrial Services
- Eastern District of Pennsylvania Clerk's Office Employee Manual (April 1991)
- Supplemental Employee Information from Probation Office for Eastern District of Pennsylvania
- Middle District of Pennsylvania Personnel Manual
- Middle District of Pennsylvania—Probation Office Personnel Manual
- Middle District of Pennsylvania—Bankruptcy Court Personnel Manual
- Western District of Pennsylvania Personnel Manual
- Western District of Pennsylvania Bankruptcy Court (November 1992)
- Western District of Pennsylvania Probation Office Procedures Manual (January 1996)
- Western District of Pennsylvania Pretrial Services
- District Court of the Virgin Islands (April 1986)

1. *EEO Plans*

The following courts in the Third Circuit have EEO plans in compliance with instructions from the Judicial Conference of the United States: the court of appeals, the District of Delaware, the Eastern District of Pennsylvania of Pennsylvania, the Middle District of Pennsylvania, the Western District of Pennsylvania and the District of New Jersey Bankruptcy Court. Although the District of New Jersey manuals make reference to such a plan, the plan was not included for review.

The supplemental employee information for the Probation Office from the District of New Jersey did not include any information about an EEO plan. The personnel information from the District Court of the Virgin Islands also did not include or make any reference to an EEO plan.

2. *Employee Complaint Plans and Adverse Action Plans*

There are four types of disputes which may arise between employees of the court: discrimination complaints, adverse action cases, grievances and instances of sexual harassment. The AO

Model EEO ("AO Model") Plan⁵⁴ groups all four types into the category of a discrimination complaint. By definition, discrimination complaints may occur when an employee has been discriminated against in any way on the basis of gender, race, ethnic background or other prohibited forms of bias. The other three types of complaints are more specific. Sexual harassment cases involve unwanted behavior with a sexual component. Adverse action cases involve an employee whose complaint is against his or her supervisor. Grievances are instances when one employee does not approve of a coworker's actions—whether it pertains to attire, attitude or any other job-related issue.

Most of the courts follow the AO Model plan for discrimination complaints. Some of the divisions of the courts do not have separate EEO plans, and it is unclear whether these divisions follow the district court plan. While the above complaint procedures all include discrimination based upon sexual harassment, only manuals for the court of appeals, the District of Delaware Bankruptcy Court, the Middle District of Pennsylvania District Court, the Western District of Pennsylvania and the District of New Jersey Bankruptcy Court provide separate policy sections which specifically address sexual harassment.

The AO Model does not contain specific procedures for adverse action, grievances or sexual harassment complaints. Consequently, some of the court units do not address these areas in their EEO plans. By contrast, the court of appeals EEO plan provides policies, procedures and forms in the areas of adverse action, grievances (general complaints), sexual harassment and discrimination complaints. For reference purposes, the following chart compares the individual district plans to the AO Model, although the CEPI Committee does not intend to endorse the AO Model as a standard to which the other plans should aspire.

54. Even though the AO plan is labeled as the "Model," it should be noted that the plan may be modified by each individual court unit. In March, 1997, the Judicial Conference of the United States adopted a Model Employment Dispute Resolution Plan which supersedes the current Model EEO Plan. The new plan does not specifically address adverse action or sexual harassment plans, however it does note that such policies already adopted by individual courts are not affected by the new plan.

TABLE 56: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE COURT OF APPEALS AND ITS UNITS

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
Third Circuit	•Procedure •Complaint form	•Procedure •Complaint form	•Procedure	•Policy •Procedure •Complaint form

The AO Model provides a general procedure and complaint form for any infraction that may occur. The issues of adverse actions, grievances and sexual harassment all defer to the guidelines of a discrimination complaint.

The court of appeals has set out its own plans for every situation in its Personnel Manual. It utilizes a complaint form in all cases except in cases of grievances. It has also adopted an actual policy regarding sexual harassment.

TABLE 57: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE DISTRICT OF DELAWARE

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
District Court Clerk's Office	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
Bankruptcy Court	•Procedure •Complaint form	•Policy	•Procedure	•Policy
U.S. Probation Office	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan

Note: The District of Delaware does not have a separate pretrial services office.

The units of the District of Delaware all differ in the plan they have adopted. Both the District Court Clerk's Office and the U.S. Probation Office follow the AO Model. The Bankruptcy Court, on the other hand, uses only one general complaint form, but sets out its own discipline policy in adverse action and sexual harassment cases, and has its own procedure in grievance and discrimination complaints.

TABLE 58: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE DISTRICT OF NEW JERSEY

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
District Court Clerk's Office	No specific plan	No specific plan	•Procedure	Not included
Bankruptcy Court	•Policy •Procedure •Complaint form	•Disciplinary actions	•Procedure •Complaint form	•Policy •Procedure •Complaint form
Pretrial Services	No specific plan	No specific plan	No specific plan	No specific plan
U.S. Probation Office	No specific plan	No specific plan	No specific plan	No specific plan

The Pretrial Services and the U.S. Probation Offices in the District of New Jersey have not indicated any specific plan in their personnel manuals for all complaints. The Bankruptcy Court provides a policy, procedure and a complaint form for discrimination and sexual harassment complaints. In cases of adverse action, the Bankruptcy Court has enumerated disciplinary actions that can be used against the supervisor who committed the infraction. Bankruptcy Court employees who wish to file grievances have a procedure and a complaint form which they can follow.

TABLE 59: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE EASTERN DISTRICT OF PENNSYLVANIA

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
District Court Clerk's Office	•Procedure •Complaint form	•Procedure	No specific plan	No specific plan
U.S. Probation Office	•Procedure	•Procedure	No specific plan	No specific plan
Pretrial Services	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan

The Eastern District of Pennsylvania plans vary slightly from the AO Model. The Pretrial Services division follows the AO Model exactly, while the District Court Clerk's Office has only a slight vari-

ation. The U.S. Probation Office for the district provides for a separate disciplinary procedure in adverse action cases, while grievance and sexual harassment complaints follow the procedure of a discrimination complaint.

TABLE 60: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE MIDDLE DISTRICT OF PENNSYLVANIA

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint form	No specific plan	No specific plan	No specific plan
District Court Clerk's Office	•Procedure	•Disciplinary actions	•Procedure	•Policy •Procedure
Bankruptcy Court	•Procedure	•Disciplinary guidelines	No specific plan	No specific plan
U.S. Probation Office	•Procedure	No specific plan	No specific plan	No specific plan

Note: The Middle District of Pennsylvania does not have a separate pretrial services office.

The Middle District of Pennsylvania does not have a specific complaint form for employees to fill out in any of its units. The District Clerk's Office, for example, has its own sets of procedures for discrimination, grievance and sexual harassment complaints. There is also a set policy on sexual harassment for that unit. The Bankruptcy Court has a general procedure for discrimination complaints, and disciplinary guidelines governing adverse action cases. The U.S. Probation Office is far more general, tracking the AO Model plan.

TABLE 61: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE WESTERN DISTRICT OF PENNSYLVANIA

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedure •Complaint Form	No specific plan	No specific plan	No specific plan
District Court Clerk's Office	•Procedure •Complaint Form	•Procedure	•Procedure	•Policy Statement
Bankruptcy Court	•Procedure •Complaint Form	•Disciplinary actions	•Procedure	No specific plan
Pretrial Services	•Procedure •Complaint Form	•Disciplinary actions	•Procedure	•Policy Statement
U.S. Probation Office	No specific plan	•Procedure	•Procedure	•Policy Statement •Reporting Deadline

The Western District of Pennsylvania plans vary significantly from the AO Model. Although the District Court Clerk's Office does have one general complaint form, each type of complaint has its own specific procedure or policy that it follows. The Bankruptcy Court and Pretrial Services Agency have very similar plans, but only Pretrial Services has a policy statement on sexual harassment complaints. The U.S. Probation Office has no specific plan for discrimination complaints, but has a procedure for both adverse action cases and grievances. Finally, it is interesting to note that the U.S. Probation Office has a reporting deadline for sexual harassment cases.

TABLE 62: COMPARISON OF AO MODEL EEO PLAN TO VARIOUS PERSONNEL MANUALS OF THE COURTS WITHIN THE DISTRICT OF THE VIRGIN ISLANDS

Court or Division	Discrimination Complaint	Adverse Action	Grievance	Sexual Harassment
AO Model	•Procedures •Complaint Form	No specific plan	No specific plan	No specific plan
D.VI	No specific plan	No specific plan	•Informal Complaint Procedure	No specific plan

Note: The District of the Virgin Islands does not have a separate Bankruptcy Court Clerk's Office.

The District of the Virgin Islands differs from all other districts since it handles all of its in-office disputes with an informal complaint procedure.

3. *Family and Medical Leave Act of 1993*

The court of appeals implemented the FMLA into the personnel manual with the interim regulations and distributed the final regulations (effective January 6, 1997) from the Office of Personnel Management (OPM) on January 7, 1997. As of the date of the CEPI Committee's review, the District of Delaware, the District of Delaware Bankruptcy Court, the Eastern District of Pennsylvania, the Middle District of Pennsylvania, the Western District of Pennsylvania (with separate statements from the Probation and Pretrial Service Offices), the Western District of Pennsylvania Bankruptcy Court and the District of New Jersey Bankruptcy Court had included interim regulations from the OPM consistent with the FMLA. The District of New Jersey and the District Court of the Virgin Islands did not include any regulations regarding the FMLA.

4. *Dress Codes for Males and Females*

The basic dress code requirements throughout the Third Circuit include general statements that professional, appropriate, traditional or businesslike attire should be worn by employees as representatives of the courts. The Western District of Pennsylvania Bankruptcy Court sets forth detailed dress-code guidelines for male and female attire.

5. *Language of Personnel Manuals and Employee Information*

All of the personnel manuals and materials that were submitted to the Committee for review contain gender-neutral language (i.e., probation officer, employee, supervisor, secretary, etc.) or gender-inclusive language (i.e., he or she, female or male, his or her, etc.). When addressing gender specific issues (e.g., maternity leave or dress codes for females and males), the language in all of the manuals was gender-specific where appropriate.

G. *Findings*

- Within the Third Circuit there are currently more female employees than male employees. The female employees, however, tend to be in lower-graded and lower-paying positions, such as clerical or secretarial positions.
- Overall, court employees appear to believe that they are treated fairly with respect to gender. Some employee comments, however, indicate a perception that there are pockets of gender-based inequality within the circuit.

- Where court employees perceive gender-based inequality, females are more likely to perceive that they are treated more harshly than males. Males who perceive gender-based inequality, by contrast, are more likely to believe that they are treated more harshly than females.
- The lack of established policies for leave, job sharing, flex time, promotions and other areas leads to perceptions of favoritism, discrimination and unfair treatment.
- The EEO policy currently in place for employees of the court of appeals and its units is more comprehensive than any other in the Third Circuit, including the AO Model. It includes policies and procedures to be used in the case of adverse action against an employee, as well as for general employee grievances and sexual harassment complaints.
- Relatively few employees use the formal complaint or grievance system. The CEPI Committee's review of the personnel manuals, however, indicates that this system is spelled out clearly. The lack of use may be due to a perception among employees that the complaint system is useless, futile and retaliatory.
- Based on employee comments, a very small number of employees may have experienced sexual harassment from their coworkers.
- Responses to the questionnaires and anecdotal evidence indicates that there is a particularly strong perception of a gender-related problems in the Eastern District of Pennsylvania District Court Clerk's Office.

H. *Recommendations*

- More active recruitment of court employees based on gender should be pursued where necessary to remedy the gender imbalance in those positions which tend to be overwhelmingly male or overwhelmingly female. Remedying the gender imbalance in these positions might also remedy the apparent salary disparity between male and female employees.
- The Third Circuit should develop written policies for promotion, leave, flex time and job sharing, with appropriate discretion given to vary policies based on workload, personnel needs and other office-specific factors. Objective, consistent policies would increase employee knowledge and understanding, as well as facilitate perceptions of fairness among employees.
- Courts and divisions which have not expressly designated the staff position or person who will act as EEO coordinator should

do so. The designated EEO coordinator should not be someone who is in a supervisory position over a large number of employees in the court or division. Courts and divisions should make sure that the designated EEO coordinator is a neutral party, and is perceived to be a neutral party.

- Other courts should consider adopting the comprehensive EEO plan currently used by the court of appeals and its units.
- In light of the many positive employee comments on the subject, courts and units which do not have access to government-sponsored child care facilities should explore the desire of employees for and the availability of such facilities.
- Efforts should be made to address the perceived problems in the Eastern District of Pennsylvania District Court Clerk's Office.
- There should be follow-up to this report to determine whether problems which have been identified are being addressed. Courts within the circuit may wish to resurvey or interview their employees periodically or consider establishing a gender liaison officer to handle gender-related issues.

VI. REPORT OF THE COMMITTEE ON CRIMINAL JUSTICE ISSUES OF THE GENDER COMMISSION

A. *Introduction*

The Committee on Criminal Justice Issues of the Gender Commission ("CJI Committee") attempted to ascertain the extent to which gender bias, or the perception of gender bias, exists in issues involving the criminal justice system within the Third Circuit. To make such an inquiry, the CJI Committee gathered information from a variety of sources to provide a basis upon which to make findings, draw conclusions and offer comments and recommendations. The CJI Committee determined that the following subject areas would provide an appropriate basis for its gender inquiry: (1) pretrial release of criminal defendants; (2) treatment of criminal defendants; (3) analysis of the gender of the attorneys operating within the criminal justice system; and (4) sentencing of criminal defendants.

As mandated by the Judicial Council of the Third Circuit, the CJI Committee focused on areas within the specific domain of the circuit rather than issues that could not be altered or influenced by the courts. Substantive law issues were excluded from consideration as being outside the scope of the committee's inquiry. The CJI

Committee also collaborated with the Race & Ethnicity Commission's Committee on Criminal Justice Issues.

B. *Pretrial Release and Detention of Defendants*

1. *Source of Information*

The CJI Committee obtained data from the AO on 13,570 cases activated in the circuit between September 1993 and September 1996. The information was derived from reports completed by Pretrial Service Agency officers about each defendant arrested and charged in any district court within the Third Circuit. The reports include information about the defendant's criminal history, current charge and demographic characteristics. Dr. Jane Siegel, an assistant professor of criminal justice at Widener University, utilized these data to examine what role, if any, a defendant's gender, race or ethnicity plays in decisions about his or her release prior to trial.

2. *Demographics of Defendants*

Dr. Siegel reports that most of the defendants in this sample were males (84%), and most defendants were employed (54%). Nearly 7 of 10 (69%) had no more than a high school education. A majority were unmarried, and most of those who were single reported that they had never been married. Defendants were typically renting their residences, although nearly one-quarter (24%) reported that they owned their homes. Slightly more than three-quarters of the defendants (77%) reported no substance abuse problems. Those who indicated that they had a drug abuse problem most frequently reported that cocaine was the drug that they abused.

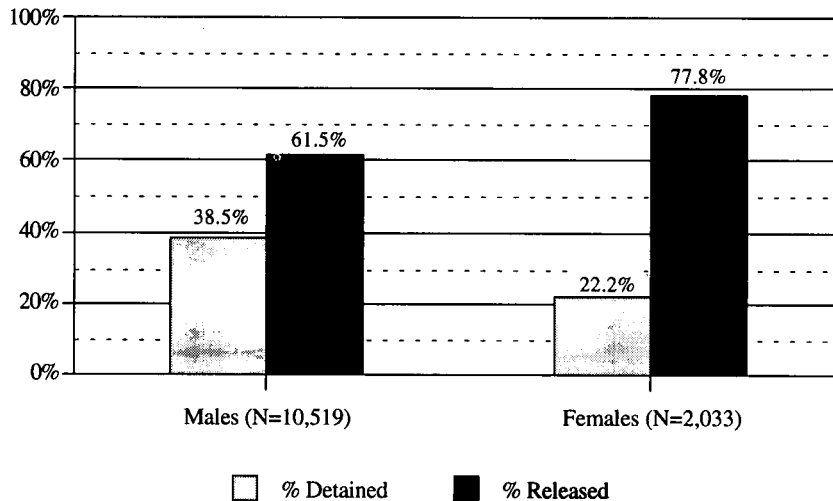
A majority of defendants (55%) had a previous criminal record, although at the time their cases were activated, 7 of 10 (69%) either had no criminal history or, if they did have a prior record, had no matters pending at the time their most recent case was activated. Seven percent had a questionable immigration status and approximately one-quarter (24%) were either on probation, parole, pretrial release or had an arrest warrant pending. The most common offenses with which defendants were charged were sales or manufacture of drugs.

3. *The Impact of Gender on Detention*

Dr. Siegel's analysis showed that, although nearly two-thirds of the defendants were released prior to trial (either at their initial

hearing or at a subsequent detention hearing), there was a marked difference by gender in the release rates. As shown in Figure 5, a greater percentage of women (78%) than men (62%) was released during the four-year period under review:

FIGURE 5: RELEASE AND DETENTION STATUS OF THIRD CIRCUIT DEFENDANTS BY GENDER (1993-96)



Note: N = total number.
 SOURCE: AO of the U.S. Courts.

The chart presents combined figures for the four-year period from September 1993 through September 1996. A breakdown from year to year indicates that the disparity between genders was fairly consistent during the four-year period, but that over time, greater proportions of defendants of both genders were detained despite the fairly constant number of cases brought each year. Thus, in 1995 and 1996, an average of 36% of all defendants were detained following a detention hearing, compared to 31% of defendants detained during the first two years of the period.

Table 63 shows the breakdown by year of (1) the total number of females and males processed by Pretrial Services; (2) the number and percentage of defendants who had detention hearings; and (3) the number and percentage of the total of all defendants who were detained following detention hearings. Although the disparity remains, the percentage of females arrested who were detained after a hearing is disproportionately less pronounced.

TABLE 63: GENDER ANALYSIS OF PRETRIAL DETENTION
TWELVE-MONTH PERIOD ENDING SEPTEMBER 30, 1993

Gender	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Males	2,943	1,233	42%	997	34%
Females	419*	135	26%	95	18%

Note: An asterisk (*) indicates one defendant whose gender was reported as "unknown."

TWELVE-MONTH PERIOD ENDING SEPTEMBER 30, 1994

Gender	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Males	2,730	1,067	39%	860	32%
Females	597	148	25%	116	19%

TWELVE-MONTH PERIOD ENDING SEPTEMBER 30, 1995

Gender	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Males	2,920	1,357	47%	1,109	38%
Females	514	151	29%	122	24%

TWELVE-MONTH PERIOD ENDING SEPTEMBER 30, 1996

Gender	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Males	2,830	1,283	45%	1,066	37%
Females	495	140	28%	106	21%

SOURCE: AO.

According to Dr. Siegel, the differences between the percentage of men and women detained may be explained if one group is more likely than another to possess legally relevant characteristics that would put it at risk of detention. For example, if men are more likely than women to have committed an offense that allows for a presumption of detention, that might explain why men were significantly more likely to have been detained.

The next step in Dr. Siegel's analysis was to determine whether the differences between gender groups would remain once other legally relevant variables were factored into the equation. To investigate this issue, Dr. Siegel created statistical models that controlled for personal characteristics of defendants as well as legally relevant factors. Table 64 lists those characteristics:

TABLE 64: CHARACTERISTICS TAKEN INTO ACCOUNT FOR
PRETRIAL DETENTION ANALYSIS

Personal Characteristics	Legally Relevant Characteristics
<ul style="list-style-type: none"> • Age • Citizenship status • Employment status • Ethnicity • Length of residence • Marital status • Psychiatric treatment status • Race • Substance abuse status • Gender • Type of resident (owner, renter, etc.) • Substance abuse status 	<ul style="list-style-type: none"> • Current criminal status (e.g., on probation or parole) • Primary current offense charged⁵⁵ • Prior number of arrests and convictions (e.g., felonies, misdemeanors, violent offenses and drug offenses) • Prior record of failure to appear in court • Prosecutor's recommendations with respect to disposition (e.g., detention, release on financial bond or release)

The judicial district and year in which the case was brought were also included as variables in Dr. Siegel's analysis in order to see if there were differences over time or place in detention decisions.

Dr. Siegel used the data to review two outcomes. The defendant may be detained at two points in the criminal process. The first point is at the initial appearance. The second is after a subsequent detention hearing. Therefore, the first model designed by Dr. Siegel looked at the question of who was ultimately released, either at the initial appearance or at a subsequent detention hearing. Of the 12,563 defendants for whom this information was available, 64% were eventually released, including 6822 who were released at their initial hearing.⁵⁶ The second part of the analysis focused on those who were detained at their initial hearing and, thus, had a subsequent detention hearing. Nearly one-quarter (23%) of the

55. There were 191 different offenses listed as the major offense with which defendants were charged. These were grouped into eleven different categories. Classification of offenses was guided by the categories listed in the U.S. Sentencing Commission Guidelines.

56. Information on the outcome of detention hearings was unavailable for 1007 of the 6744 people detained following their initial hearing.

5844 defendants who had a detention hearing were released following this second hearing.

The analysis results indicated that, for certain categories of defendants, gender continued to make a difference in determining whether the defendant was released prior to trial, either at the initial hearing or the detention hearing, once legally relevant factors were controlled. The odds of release for men were only 0.55 compared to the odds for women, which meant that men were only about half as likely to be released prior to trial. Additional analysis indicated that the odds of release were affected by a combination of a defendant's race or ethnicity and gender. The impact of such a combination of factors is contained in the Report of the Committee on Criminal Justice Issues of the Race & Ethnicity Commission.

As might be anticipated, legally relevant variables were also significant predictors of release or detention. The most important legally relevant variable—indeed, perhaps the most important of all the factors in the analysis—was the prosecutor's recommendation for a defendant's detention. The odds of a defendant's being detained if the prosecutor did *not* make such a recommendation were less than 0.05.

The offense with which a defendant was charged was also a significant factor in release decisions. The odds of release for those charged with immigration offenses (such as illegal entry or reentry or fraudulent citizenship) were significantly lower than the average for all defendants. This may be due to a lack of ties to the community or illegal immigration status. Defendants charged with serious property offenses (robbery, burglary, extortion), drug offenses (involving sales or manufacture) and serious violent offenses (murder, manslaughter, aggravated assault) also faced significantly lower than average odds of release. On the other hand, those charged with income tax offenses had significantly higher odds (3.9) of being released.

The only measure of a prior criminal record that significantly lowered the odds of release was the number of prior felony convictions. Those who had a pending immigration matter were more likely to be detained than defendants with no prior criminal record, while those with no other pending criminal matters were more likely to be released. Those who were already under some form of limited supervision (i.e. probation or parole) had a significantly greater chance of being released at the initial hearing than those with no record. Again, as is to be expected, the odds of detention also increased slightly as a function of the number of times that a

defendant had failed to appear for required court proceedings in the past.

Using the factors noted above, the statistical model was able to accurately predict the outcome of 90% of the cases. We note that many of these factors are required to be considered by statute.

In addition to the case-related factors noted above, certain personal characteristics of a defendant enhanced the likelihood of release. Citizenship status was an important predictor of release: the odds that U.S. citizens and legal aliens would be released were far higher than for illegal aliens. Defendants with evidence of strong community ties were also more likely to be released. For example, those who were employed had a significantly greater likelihood of release than those who were unemployed. Long-term residents of an area also had higher odds of release than did short-term (i.e., less than one year) residents. Single people were more likely to be detained than married people. Compared to homeowners, those without a fixed residence whose living arrangements were classified as "other" (e.g., neither a renter nor a homeless person) faced a significantly lower likelihood of release. Substance abuse problems were not a significant factor in determinations of release.

The second part of the analysis examined the factors that affected release following a detention hearing, which restricted the number of cases analyzed to 5193. Men continued to face a higher risk of detention than women. The unemployed, illegal aliens and those with no fixed residence were more likely to be detained. Those who were married no longer benefitted compared to those who were not married, when release was dependant on a detention hearing. Defendants detained at the initial hearing who had no alcohol or marijuana abuse problems were significantly more likely than average to be released, while those with cocaine problems were more likely to be detained.

The prosecutor's recommendation at the detention hearing continued to be an extremely strong predictor of detention. Those with no pending criminal matters beyond the current charge had a greater than average chance of release, while those with a pending immigration question were more likely to be detained. The odds of detention for those currently under supervision were not significantly different from the odds for first-time offenders. Following a detention hearing, the likelihood of detention increased as the prior number of both felony arrests and convictions increased, although a prior history of failures to appear was not a significant predictor of detention at this stage. Drug offenders were not at an

increased risk of detention at this point although those charged with serious offenses involving property, immigration offenses and serious violent offenses were at an increased risk.

C. *The Criminal Defendant's Perspective*

1. *Survey of Defendants*

Again with the assistance of Dr. Jane Siegel, the Criminal Justice Issues Committee of the Race & Ethnicity Commission designed an uncomplicated five-page survey to be sent to persons convicted of crimes in the district courts of the circuit. Surveys were sent to 50 convicted defendants from each district. Efforts were made to ensure that incarcerated defendants were included and a special effort was also made to ensure that an adequate number of female defendants were reached. Names were also selected randomly from the files of each U.S. Probation Office within that district.

Three hundred survey instruments were mailed by the Committee along with a cover letter from Assistant Federal Public Defender Penny Marshall and a prepaid return envelope. Again, anonymity was assured. A second survey and reminder letter were mailed several weeks later. Fifty-eight surveys were returned with incorrect addresses, primarily from the Virgin Islands, which had previously alerted the committee to a potential problem with addresses. Therefore, 242 surveys were presumed to be delivered. Of those, 94 (38.8%) were returned, many of which contained written comments. The results were analyzed by Dr. Siegel.

The survey asked respondents to provide details about various aspects of their case, the charge of which they had been convicted, the year of their conviction, the sentence received and the race and gender of those persons who had participated in their case (including the prosecutor, judge and defense attorney). The survey also asked if the race or gender of those persons had made a difference in the respondent's treatment.

2. *Demographics of Respondents*

Of the 94 surveys that were completed and returned, 34 (36%) were from females and 60 (64%) were from males. The respondents' ages ranged from 19 to 74. The average age of all respondents was 43. Men were, on average, six years older (45 versus 39 years old). Although a larger percentage of men than women had

at least some college education, the difference in educational level between the sexes was not statistically significant.

Respondents to this survey were not representative of all defendants sentenced in the Third Circuit. For example, data from the United States Sentencing Commission ("Sentencing Commission") indicates that during the period October 1, 1990 through September 30, 1994, 16% of all sentenced defendants were female. By contrast 36% of those responding to this survey were female. Consequently, male defendants who have been sentenced are under-represented in this survey.

In addition, 54% of the survey respondents reported that they had been sentenced to probation exclusively. According to the Sentencing Commission, however, fewer than 4 in 10 convicted defendants in the U.S. were sentenced exclusively to probation between 1990 and 1994. In view of such differences, the results reported here should not be generalized to the entire population of defendants across the circuit.

Most of the defendants who responded to the survey were represented by white male attorneys (76%), followed by white female attorneys (11%) and African-American male attorneys (8%). The balance of the defense attorneys included 1 Hispanic woman, 3 African-American women and 1 Hispanic man. Fifteen respondents reported that they were currently incarcerated. These prisoners included a disproportionately large percentage (53%) of females.

3. *Results*

Survey respondents were asked to indicate whether they had seen or heard any of the various court officials do or say anything that they believed "was disrespectful or insulting to any person based on race, ethnic background, or sex." A great majority (81%) indicated that they had not. Both males and females shared similar perceptions of how court personnel interacted with others.

Respondents who reported having witnessed what they perceived to be insulting behavior by court personnel were asked to identify who they felt was insulting and who was insulted. The most common response among the 17 people who observed insulting treatment was that they were the ones insulted, followed by witnesses and family members. Judges and prosecutors were most frequently identified as those who were disrespectful or insulting, followed by pretrial officers.

Defendants were asked if they believed that they had been treated better, the same as or worse than a person of the opposite

sex would have been treated, and if they believed that their gender played a role in their pretrial release, sentencing or, if applicable, probation violation.

Most of the defendants who responded to the survey felt that gender did not affect the way they were treated, with a majority (81%) reporting that they were treated the same as a person of the opposite sex would have been. A greater percentage of females (6%) than males (3%) believed that they were treated better than someone of the opposite sex. Conversely, a slightly larger percentage of males (12%) than females (9%) felt they were treated worse because of their sex. These differences, however, were not statistically significant. In the few cases where defendants reported that they believed their gender affected the decisionmaking about either their pretrial release (4 cases), sentence (11 cases) or probation violation (2 cases), males were just as likely as females to report feeling that their gender played a role in the outcome of the decision.

Respondents were also invited to comment on their perceptions about their treatment in the court. More than half (54%) of the respondents did so. Of those who provided observations, nearly half expressed negative feelings about their experiences in court but an equal number indicated that they were generally satisfied with the way they were treated. A small number of surveys contained both positive and negative comments.

In summary, a large majority of all the defendants who responded to the survey felt that their gender was not a significant factor in their treatment by court officials. A smaller percentage (19%), however, felt that their gender was a factor in their treatment. Both males and females perceived this; some concluded they were treated better and others concluded they were treated worse based on gender.

D. *Representation of Defendants*

1. *Data Compiled*

The CJI Committee determined that it would study the demographics of those undertaking the representation of criminal defendants throughout the Third Circuit to assess the breakdown of such representation along gender lines. Because the Federal Public Defender (FPD) offices are administratively governed by the courts of the circuit, the CJI Committee sought an analysis of personnel working for those offices. This Committee concluded that a

thorough analysis should also include a comparison of the FPD offices with the personnel of the United States Attorneys Offices (USAO) throughout the Third Circuit.

With the cooperation of the Executive Office for United States Attorneys, statistics for the 6 districts within the Third Circuit were compiled. Although USAO personnel are employees of the Department of Justice, and thus within the executive branch of the federal government, the CJI Committee felt a comparison of the demographics of those persons both prosecuting and defending within the circuit would be valuable. This Report addresses personnel within the FPD offices and the USAOs.

The data collected from each FPD office and USAO was organized into charts⁵⁷ to numerically assess the racial, ethnic and gender status of the employees according to job title and responsibility. Table 65 outlines the groupings of the various job titles:

TABLE 65: COMPARISON GROUPINGS OF JOB TITLES BETWEEN
FEDERAL PUBLIC DEFENDER OFFICES AND UNITED STATES
ATTORNEY OFFICES

Federal Public Defender Offices	United States Attorney Offices
•Federal Public Defender	•U.S. Attorney
•Assistant Federal Public Defender	•Assistant U.S. Attorney
•Supervisory Assistant FPD	•Supervisory Assistant U.S. Attorney
•USAO supervisory support personnel	•FPD supervisory support personnel
•USAO support personnel	•FPD support personnel
•USAO supervisory paralegals and staff investigators	•FPD supervisory paralegals and staff investigators
•USAO paralegals, staff investigators and law clerks	•FPD paralegals, staff investigators and law clerks

2. *Comparison of Office Personnel: Public Defenders and Prosecutors*

a. Federal Public Defenders and United States Attorneys

The CJI Committee compared the demographics of the FPDs and United States Attorneys within the 6 districts of the circuit. While recognizing that the U.S. Attorneys are presidentially-appointed, the CJI Committee thought it would be helpful to use these appointments as a benchmark to compare the court-appointed FPDs and national figures.

As of 1997, 3 of the 4 FPDs appointed by the court are male (75%). Only the Western District of Pennsylvania has appointed a

57. The charts may be found at the end of the Report on Criminal Justice Issues of the Race & Ethnicity Commission.

female FPD. In the Eastern District of Pennsylvania, there is also a female FPD, however, she is an employee of the Defender Association of Philadelphia, Federal Court Division, and is appointed by their Board of Directors. In the District of Delaware, there is a female Assistant-in-Charge who is technically assigned to the District of New Jersey. Because the Assistant-in-Charge is not a court-appointed position, for the purposes of this analysis, that position has been included in the following section reviewing supervisory assistants. Of the 6 U.S. Attorneys in the circuit, 1 is female (17%).

Nationwide, FPD appointments show fewer female appointees than in the Third Circuit. The reverse is true of U.S. Attorney appointments. Table 66 below outlines the comparison between Third Circuit appointments and national statistics overall.

TABLE 66: GENDER OF PUBLIC DEFENDERS AND U.S. ATTORNEYS:
THIRD CIRCUIT AND NATIONAL COMPARED (1997)

Position	Third Circuit			National		
	Total	Male	Female	Total	Male	Female
Federal Public Defender	4	3 (75%)	1 (25%)	50	41 (82%)	9 (18%)
Community Public Defender*	1	0	1 (100%)	13	8 (62%)	5 (38%)
U.S. Attorney	6	5 (83%)	1 (17%)	93	70 (75%)	23 (25%)

Note: An asterisk (*) means community-appointed public defenders are not court appointed, however, these individuals have the same responsibilities as the Federal Public Defenders.

SOURCE: Executive Office of U.S. Attorneys; AO of the U.S. Courts.

b. Assistant Federal Public Defenders and Assistant United States Attorneys

Those attorneys serving as Assistant FPDs and Assistant U.S. Attorneys are hired as career government employees by the FPD and U.S. Attorney, respectively. Table 67 below outlines the numbers of federal prosecutors and public defenders employed across the circuit. These figures suggest that both FPD offices and USAOs have comparable hiring ratios by gender for professional attorney positions while demonstrating that men are more frequently hired.

TABLE 67: GENDER OF ASSISTANT FEDERAL PUBLIC DEFENDERS AND ASSISTANT U.S. ATTORNEYS IN THE THIRD CIRCUIT (NOVEMBER 1996)

Position	Total	Gender	
		Male	Female
Assistant FPD	62	38 (61%)	24 (39%)
Assistant U.S. Attorney	319	205 (64%)	114 (36%)

SOURCE: Executive Office of U.S. Attorneys; Administrative Office of the U.S. Courts.

c. Supervisory Assistant Public Defenders and Supervisory Assistant United States Attorneys

As of November 1996, there were 5 Supervisory Assistant FPDs in the circuit. They are generally attorneys who supervise other attorneys within their respective offices. They are career government service positions and these supervisors are often promoted from within the office. In the summer of 1997, there were 3 females occupying such positions in the District of Delaware, the Middle District of Pennsylvania and the District of New Jersey.⁵⁸ The remaining positions were occupied by males. There were 52 Supervisory Assistant United States Attorneys. Thirteen of these positions are held by females (25%).

Because most of the promotions from assistant positions to supervisory positions occur internally, the proportion of female promotions to supervisory assistant should be noted. Whereas 39% of the Assistant FPDs are female, and 33% of the supervisory positions are held by females, there is a disparity in promotions of females to the position of Supervisory Assistant United States Attorney compared to males. Of the Assistant United States Attorneys, 36% are female, whereas only 25% of the Supervisory Assistant United States Attorneys are female.

The CJI Committee notes, however, that supervisors tend to be lawyers with more experience in an office, and women have only recently (i.e., since the 1980s) been hired in increasing numbers. The reduced number of supervisory positions for females, therefore, may be a result of that time lag. If so, this situation should improve in the future as women gain more experience and move up through the ranks of their offices.

58. Very recently a woman was promoted to First Assistant Federal Defender in the District of New Jersey. She is the first woman to hold this position in that district.

d. Support Personnel

Support personnel in both the FPD and USAO are secretaries and administrative assistants who are hired directly by their respective offices. Table 68 below outlines the numbers of support personnel employed across the circuit. The vast majority of support personnel throughout the Third Circuit are female. Few males are employed in this capacity. This disparity is particularly pronounced in most of the FPD offices throughout the circuit, where nearly all support personnel are female. The only exception is in the Eastern District of Pennsylvania where 4 of 12 support personnel are male.

TABLE 68: GENDER OF SUPPORT PERSONNEL (NOVEMBER 1996)

Position	Total	Gender	
		Male	Female
FPD support personnel	37	5 (14%)	32 (86%)
USAO support personnel	384	76 (20%)	308 (80%)

SOURCE: Executive Office of U.S. Attorneys; AO of the U.S. Courts.

e. Supervisory Support Personnel

Supervisory support personnel oversee the smooth functioning of the support personnel in both the FPD and USAOs. They are often drawn from the ranks of the currently employed support personnel. Table 69 below outlines the numbers of supervisory support personnel employed across the circuit. A disparate number of females are employed as supervisory support personnel in all offices, which is similar to the proportion of women employed as support personnel in general.

TABLE 69: GENDER OF SUPERVISORY SUPPORT PERSONNEL (NOVEMBER 1996)

Position	Total	Gender	
		Male	Female
FPD supervisory support personnel	12	0	12 (100%)
USAO supervisory support personnel	25	7 (28%)	18 (72%)

SOURCE: Executive Office of U.S. Attorneys; Administrative Office of the U.S. Courts.

f. Paralegal, Staff Investigators and Law Clerks

Paralegals, staff investigators and law clerks occupy paraprofessional positions in both the FPD offices as well as the USAOs. These positions are analyzed separately from the professional attorneys, as well as the standard clerical positions, because paralegals and investigators require specific professional training. They often have specialized training in the law, accounting or criminal procedure. They are hired as career employees by the respective agency. Table 70 below outlines the numbers of paralegals, staff investigators and law clerks employed across the circuit. Unlike the FPD offices which demonstrate an even mix of males and females employed as paralegals, staff investigators or law clerks, the USAOs have a disproportionately female-dominated structure.

TABLE 70: GENDER OF PARALEGALS, STAFF INVESTIGATORS AND LAW CLERKS (NOVEMBER 1996)

Position	Total	Gender	
		Male	Female
FPD paralegals, staff investigators and law clerks	40	20 (50%)	20 (50%)
USAO paralegals, staff investigators and law clerks	51	7 (14%)	44 (86%)

SOURCE: Executive Office of U.S. Attorneys; AO of the U.S. Courts.

The FPD and USAO are generally a mix of males and females throughout the Third Circuit. An analysis of both offices, however, must take into account the nature and qualifications that accompany the aforementioned positions. Because most of the staff in the FPD offices and USAOs are career employees, not court appointed, influential hiring decisions are made by the offices themselves. Because supervisory positions are often awarded internally, to current employees, a balanced workplace will continue to ensure diversity of gender in the higher levels of management.

g. Supervisory Paralegal and Staff Investigators

Supervisory paralegals and staff investigators are also hired positions, but unlike other support personnel, the job qualifications tend to require more specialized training, education and experience. There are no such supervisory positions in the FPD offices and USAOs throughout the Third Circuit, with the exception of the FPD in the District of New Jersey, where one male is employed in

this capacity, and the USAO in the Eastern District of Pennsylvania, where 1 female is employed in this capacity.

E. *Sentencing of Defendants*

A report prepared for the Task Force by Susan Katzenelson and Kyle Conley, staff members of the Sentencing Commission, entitled "Guideline Sentences in the Third Circuit" ("Katzenelson-Conley Report") was received too late to receive any meaningful review by the CJI Committee.

A preliminary review of the Katzenelson-Conley Report, however, indicated that of the five offense categories they studied (violent crimes, firearms, larceny, fraud and drug offenses), there may have been a gender difference in sentencing in three offense categories (violent crimes, larceny and drug offenses), but not in the other two (firearms and fraud). It should be noted that the entire Katzenelson-Conley Report focused only on these five offense categories and, therefore, its results are similarly limited in scope.

The reasons for this difference are not clear. Although the study controlled for many factors, it did not control for others that might be responsible for some of the noted disparities. For instance, a very important factor, the characteristics of the offense, was not taken into account, as the Katzenelson-Conley Report notes. The Katzenelson-Conley Report advises that its findings "should be interpreted with a number of caveats." The report noted that "major relevant factors in this study were unavailable, unmeasured and, therefore, uncontrolled in the multivariate analyses." Therefore, the noted "many relevant factors" unaddressed in this study should be identified and included for a meaningful and comprehensive analysis of the sentencing data.

F. *Findings*

- A statistical study has shown that males have a greater likelihood of being detained before trial when all other legally relevant characteristics are equal. In some cases, males are nearly twice as likely to be detained before trial. Factors such as race or the prosecutor's recommendation, however, were much more significant variables than gender.
- A majority of defendants responding to a survey felt that gender did not affect how they were treated. Most felt that they were treated the same as the opposite sex. Nineteen percent, however, felt differently.

- FPD appointments of females in the Third Circuit are above the national average. But the U.S. Attorney appointments are not. Both appointment percentages are well below the percentage of female attorneys in the two offices, and the percentage of females currently graduating from law school.
- There is a disproportionately large number of females occupying positions as support personnel; there are virtually no males employed in this capacity.
- Female attorneys in the USAO are not yet being promoted to supervisory positions at rates consistent with the proportion of professional positions they hold in those offices.

G. *Recommendations*

- The courts of the circuit should continue to analyze available statistics concerning pretrial detention. In particular, the topic of sentencing as a factor of gender is fruitful for further examination and study to determine how a wide variety of sentencing factors affect sentencing outcomes and what role, if any, gender plays in the sentencing results. Indeed, if gender does play a role, why would that be the case in certain offenses, e.g., larceny, but not in others so similar, e.g., fraud? At the moment, the CJI Committee has insufficient data to answer these important questions and, therefore, suggests that a further study is appropriate and should be conducted.
- The courts of the circuit should consider a follow-up survey of defendants regarding their treatment in the future.
- The FPD and U.S. Attorneys offices should review their hiring and promotion practices in five years to determine if females are being promoted to supervisory positions at rates consistent with the proportion of professional positions they hold.
- Further study should be undertaken, and periodically replicated, to determine whether gender affects pretrial release and sentencing determinations within the courts of the Third Circuit.

VII. REPORT OF THE COMMITTEE ON BANKRUPTCY ISSUES OF THE GENDER COMMISSION

A. *Statement of Mission*

The mission of the Committee on Bankruptcy Issues (“BI Committee”) was to understand the impact of gender on the administration of bankruptcy cases in the Third Circuit by studying and

analyzing in the context of gender the participation and perceived treatment of persons who deliver and receive services in the federal bankruptcy courts of the Third Circuit.⁵⁹

B. *Participants in Bankruptcy System*

1. *Demographic Data*

In connection with its study of the participation of women and minorities in the bankruptcy system, the Committee gathered relevant demographic information concerning bankruptcy judges and their staffs, clerks of the Bankruptcy Courts and United States Trustee Office personnel.⁶⁰ The BI Committee acknowledges with appreciation the assistance of Patricia Staiano, United States Trustee for Region 3, in this task.

a. Judges

There were 21 bankruptcy judges in the Third Circuit in 1996.⁶¹ Eight (38%) of the judges were female: 1 in Delaware, 1 in the Eastern District of Pennsylvania, 1 in the Western District of Pennsylvania and 5 in New Jersey. This percentage is above both the national average for sitting bankruptcy judges⁶² and the percentage of women practicing bankruptcy law. None was a minority. Of the chief bankruptcy judges in 1996 through 1997, one is female (Delaware). Two bankruptcy judges from the District of New Jersey, one of whom is female, were members of committees of the Judicial Council of the Third Circuit.

Bankruptcy judges are appointed by the Third Circuit Court of Appeals. The selection process begins with the appointment of a selection committee by the chief judge of the circuit. The committee reviews the vacancy announcement and, with the Circuit Executive's Office, determines the distribution for the announcement.

59. While designated a committee of the Gender Commission, the BI Committee also gathered data, where available, with respect to race and ethnicity because no parallel committee of the Race & Ethnicity Commission was addressing bankruptcy issues.

60. The Committee on Court Personnel has presented the demographic data concerning the employees of the various bankruptcy clerk's offices.

61. There is no bankruptcy judge assigned to the District of the Virgin Islands. The bankruptcy docket is handled by a visiting bankruptcy judge primarily through telephone hearings. This situation was the subject of public testimony. Witnesses at the public hearings held in the Virgin Islands expressed dissatisfaction with the lack of a judge's physical presence in the courthouses on St. Croix and St. Thomas. They believed that this detracted from the effectiveness and seriousness of the proceedings.

62. Of 325 incumbent bankruptcy judges, 57 (18%) are women.

Once applications are received, they are reviewed by the committee to determine who will be interviewed. Based on interviews and reference checks, the committee prepares a written report recommending 5 candidates, ranked in order of preference, to the Judicial Council. The Judicial Council then determines which applicants it will interview. In the Third Circuit, interviews are conducted by the full court of appeals which then makes the final decision. After the determination, there is a public comment period and Federal Bureau of Investigation (FBI) and Internal Revenue Service (IRS) investigations.⁶³

Statistics indicating the race and gender of applicants for the bankruptcy judgeships in the districts of the Third Circuit since 1993 reflect a paucity of minority candidates. Of the 60 interviewees by 4 selection committees during this period (one in each of the Districts of Delaware and New Jersey and the Eastern and Western Districts of Pennsylvania), 5 were minority applicants (3 in the Eastern District of Pennsylvania and 1 both in Delaware and New Jersey). Of those 5, 3 were African-American men, 1 was an African-American woman and 1 was an Asian-American woman. The gender breakdown was 38 men and 22 women. At the Judicial Council/court of appeals stage, 21 candidates were interviewed, 1 of whom was a minority male. The gender breakdown was 4 women and 17 men. Appointed from these processes were 2 women and 5 men, none of whom was a minority.

b. Clerks of the Bankruptcy Court

Of the 5 Clerks of the Bankruptcy Court in 1996,⁶⁴ there was 1 African-American male (Eastern District of Pennsylvania), 2 Caucasian females (Delaware and Middle District of Pennsylvania). and 2 Caucasian males (New Jersey and Western District of Pennsylvania).

63. Until legislation passed in the last Congress, sitting bankruptcy judges whose terms had expired were subject to the same process as first-time judicial applicants.

64. Each district of the Third Circuit has a separate district court and bankruptcy court clerk's office, each headed by its own chief executive officer, the Clerk of Court. While historically, physically and operationally separate, the Clerk's Office of the District and Bankruptcy Courts for the Eastern District of Pennsylvania was administratively deconsolidated on October 1, 1995 prior to the data gathering for this project. Data and findings regarding the bankruptcy clerk's offices were not addressed by this Committee, but rather analyzed by the Court Employment Committee as part of its study of the role of the court as an employer.

c. Chambers Staff

i. Law Clerks and Interns

The following are the percentages of law clerks currently employed by bankruptcy judges who responded to the judges questionnaire as well as clerks hired that have not yet started work. Also reflected are the demographics of total law clerks and interns hired by reporting judges during their tenure (up to ten years).

TABLE 71: RACE AND GENDER OF LAW CLERKS AND INTERNS TO BANKRUPTCY JUDGES

Race and Gender	Total Law Clerks for Past Ten Years	Current Law Clerks	Expected Law Clerks	Total Interns
Nonminority male	42 (39%)	8 (42%)	3 (50%)	92 (47%)
Minority male	2 (2%)	0 (0%)	2 (33%)	16 (8%)
Nonminority female	57 (53%)	9 (47%)	1 (17%)	32 (36%)
Minority female	6 (6%)	2 (11%)	0 (0%)	11 (9%)

SOURCE: Judges Survey.

The significance of these percentages is difficult to assess because no gender and race data is available for attorneys generally in the Third Circuit. The only general attorney population statistics available come from the 1990 United States Census Bureau data. They record the general attorney population resident in the districts of the Third Circuit.

TABLE 72: RACE AND GENDER OF ATTORNEYS RESIDING IN THE THIRD CIRCUIT (1990)

Race and Gender	Percentage
Nonminority male	73.0 %
Minority male	3.5 %
Nonminority female	21.0 %
Minority female	2.5 %

SOURCE: United States Census Bureau.

These figures are obviously dated and, therefore, it is not surprising that current participation by women and minority attorneys as law clerks is higher, although the gains for women appear greater. Given the small total number of bankruptcy law clerks, an increase by one or two minority clerks results in a marked change in percentage. Of the current 19 clerks of reporting judges, two, both women, were minorities.

Women are represented in the law clerk pool in higher proportions than in the overall circuit-wide population of law clerks. According to the Report of the Committee on Judicial Appointments of the Gender Commission, of the appointments circuit wide for the past ten years, 44% were female and 56% male. Within the bankruptcy courts, that breakdown is 59% female and 41% male. Indeed, it appears that the higher the court, the greater the percentage of men who have been hired as law clerks. This is discussed in great detail elsewhere in this Report.

ii. Other Judicial Staff

Secretaries and judicial assistants, courtroom deputies, court reporters and electronic sound recorder (ESR) operators comprise the balance of the judge's staff. According to the judges responding to the Task Force survey, the positions are held almost exclusively by women (97%). The race and ethnicity breakdown is 81% nonminority and 19% minority.

d. United States Trustee Office

Pursuant to 28 U.S.C. §§ 581-582, the Attorney General appoints one United States Trustee for Region 3, which is composed of the judicial districts established for the states of Delaware, New Jersey and Pennsylvania and any number of Assistant United States Trustees "when the public interest so requires." While under the supervision of the Attorney General as employees of the Department of Justice and, therefore, not court personnel, the United States Trustee's Office plays a significant statutorily authorized role in the administration and supervision of bankruptcy cases.⁶⁵

According to data provided by the United States Trustee in late 1996, the United States Trustee for Region 3 was a nonminority woman. Of the 4 Assistant United States Trustees, 1 was a nonminority woman (Middle District of Pennsylvania) and the remainder were Caucasian males. Of the 15 attorney-advisors, 9 were nonminority males and 6 were nonminority women, 2 of whom were in the Western District of Pennsylvania and 4 of whom were in the District of New Jersey. The Virgin Islands is in Region 21 and was staffed by a Caucasian male Assistant U.S. Trustee who resides in Atlanta, Georgia. Case trustees are drawn from a panel of local attorneys. Of the 5 active Chapter 7 trustees, there were 2 Caucasian

65. See 28 U.S.C. § 586 (1994).

males, 2 minority males and 1 minority female. The Chapter 13 standing trustee was a minority male.

The United States Trustee appoints the standing trustees who administer Chapter 13 cases and the Chapter 7 panel trustees from whom Chapter 7 case assignments are subsequently made. Those appointments are also made by the United States Trustee's office. In many cases, these appointed persons are the only contact debtors who file consumer bankruptcy cases have with the bankruptcy system. There were 7 standing Chapter 13 trustees as of late 1996, one of whom was an African-American male and none of whom was female. Of the 75 Chapter 7 panel trustees, 8 were female, 1 of whom was Hispanic. Of the remaining 67 male Chapter 7 panel trustees, 1 was African-American, 1 was Asian-American and the balance were nonminority. Asset and no asset Chapter 7 cases are assigned to members of the panel on a rotating, pro rata basis.

Calculating the above numbers as a percentage of the total Chapter 7 and Chapter 12 or 13 trustees in the Third Circuit, we are able to compare them with diversity statistics for all Chapter 7 and Chapter 12 or 13 trustees nationally as of August 1996 as follows:

TABLE 73: RACE AND GENDER OF CHAPTER 7 AND CHAPTER 12/13 TRUSTEES

	Third Circuit		National	
	Chapter 7	Chapter 12/13	Chapter 7	Chapter 12/13
Minority	4.0%	14.3%	57 (4.9%)	11 (5.4%)
Nonminority	96.0%	85.7%	1109 (95.1%)	192 (94.6%)
Female	10.7%	0.0%	153 (13.1%)	42 (20.7%)
Male	89.3%	100.0%	1013 (86.9%)	161 (79.3%)

SOURCE: Office of the United States Trustee.

The United States Trustee also appoints Chapter 11 trustees and examiners in Chapter 11 cases when the appointment is ordered by the court. These appointments may be made from outside the panel on consultation with the parties. In the last two years, the race, ethnicity and gender composition of Chapter 11 trustee appointments was as follows: 148 nonminority males; 28 nonminority females; 2 minority males; and 1 minority female. Four nonminority males have been appointed as examiners in the last two years in Region 3.

A representative of the United States Trustee's Office testified in the public hearings held by the Task Force. With respect to her gender, she stated that she has been treated with dignity, respect and as an equal to her male colleagues by her Office and the Bankruptcy and District Courts of New Jersey. She also stated that she had experienced no gender bias by attorneys in or out of court. She noted that the United States Trustee for Region 3 will be implementing a diversity plan which will seek to broaden the involvement of minorities and women in bankruptcy administration. She recognized that while the U.S. Trustee's staff is somewhat diverse, the Chapter 7 panel consists primarily of nonminority men. Efforts are to be made to pursue groups consisting of women and minorities to create a large qualified pool of potential trustees.⁶⁶

In connection with the Task Force's attorney questionnaire, two questions were posed concerning United States Trustee personnel (i.e., Assistant U.S. Trustees, staff attorneys, analysts and paralegals). Respondents were asked whether they had observed any United States Trustee personnel say or do anything to attorneys, judges, parties, court employees or witnesses which they thought demeaned or disparaged that person based on his or her gender. The same question was posed as to demeaning or disparaging treatment based on race or ethnicity. The respondent was required to quantify his or her answer on a scale of 1 to 7, with 1 for "always" and 7 for "never." These responses were then analyzed by gender, race and ethnicity of respondents to determine if there were any statistically significant variations.

Approximately 500 attorneys answered some or all parts of these questions.⁶⁷ With respect to both gender and race, the average response was between 6.9 and 7.0, indicating that hardly any respondents had observed U.S. Trustee personnel saying or doing anything to demean or disparage any of the groups identified in the questionnaire based on gender or race.

e. Attorneys Identifying Themselves as Concentrating in Bankruptcy

Of the 1937 attorneys completing the attorney questionnaire, 329 responded that their current area of concentration in federal practice was business bankruptcy. Three hundred attorneys responded that consumer bankruptcy was their current area of con-

66. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 38-44.

67. The number varied as some attorneys did not answer all of the subparts.

centration. Of those identifying their gender and race, the following demographics were revealed:

TABLE 74: CURRENT AREAS OF CONCENTRATION IN FEDERAL PRACTICE OF ATTORNEY RESPONDENTS BY RACE AND GENDER

Gender and Race	Bankruptcy: Business	Bankruptcy: Consumer
Male	233 (87%)	200 (82%)
Female	36 (13%)	43 (18%)
Caucasian	261 (94%)	223 (88%)
Minority	16 (6%)	31 (12%)

SOURCE: Attorney Survey.

Because a respondent could identify more than one area of concentration, the total number of attorneys responding that they concentrate in bankruptcy may be less than 629. Due to this probable overlap, we are unable to determine the precise gender or racial composition of the bankruptcy respondents. Nor, as stated above, do we have gender or race demographics for the Third Circuit without regard to type of practice. Finally, we do not know for each district, or indeed circuit-wide, what percentage of lawyers practicing in the federal courts concentrate in bankruptcy.

The absence of this baseline information limits the utility of the attorney questionnaire as a tool to measure the participation of women and minorities in bankruptcy cases. Certain observations, however, can be made from the respondent sample. Women and minorities participate at higher percentages in consumer cases than business cases where the amount of the estates and the fees to be earned are greater. When asked who their clients were, the breakdown between debtor and creditor was statistically unremarkable with one exception. Of the total African-American attorneys, 71% generally represented debtors.

Ignoring the overlap problem, the overall representation of minority lawyers who have responded that they concentrate in bankruptcy is 7%. In comparison, approximately 25% of total attorneys responding to the attorney questionnaire identified themselves as a minority. Assuming the representativeness of those who responded to the survey, it appears that minorities are less involved in the practice of bankruptcy than in other areas of federal practice.

C. *Debtor Survey*

The BI Committee believed that any study of the impact of gender on treatment in the federal bankruptcy courts must include the users of the bankruptcy system, that is, persons filing cases in the bankruptcy courts of the Third Circuit. To reach this constituency, the BI Committee, with the assistance of James Waldron, Clerk of the Bankruptcy Court of the District of New Jersey, designed a telephone survey to ascertain whether these users of the bankruptcy system felt that their treatment by the various bankruptcy personnel they encountered had been impacted by their race, ethnicity or gender.

The survey, performed by volunteer members of the bar of the District of New Jersey and Eastern District of Pennsylvania (Philadelphia)⁶⁸ between October 21 and October 23, 1996, questioned consumer debtors who had filed bankruptcy in the District of New Jersey and whose cases were closed in August 1996 after dismissal or discharge. Because of certain anticipated and inherent problems with conducting a survey of this nature, the BI Committee was not confident that it would secure meaningful data. For example, bankruptcy filings did not include the telephone number of the debtor, and the committee had to cross-reference telephone directories. Therefore, in order to refine the investigative procedure, the survey was done on a pilot basis in New Jersey rather than as a circuit-wide project.⁶⁹

1. *Methodology*

From the total closed cases in the sample, telephone numbers were secured where available⁷⁰ and a list was prepared of names,

68. The following attorneys assisted with this project: Alex Angelo, Mairi Luce, Donna Markey Degreza, Marissa O'Connell, Sam Della Fera, Marjorie Reed, Barry Frost, Scott Rever, Patricia Fugee, Andrew Sherman, Karen Giannelli, David Stein, Walter Greenhalgh, Katherine A. Suplee, Bruce Grohsgal, Matthew Tashman, Jim Holman, Lauren Lonergan Taylor, Elizabeth Karolos, Michael Temin, Carol Knowlton, Diane Vuocolo, Lynda Korfmann, Christopher Walsh, James Lawler and Jill Wittenborn. Their contribution to the work of the Task Force is greatly appreciated.

69. The treatment of debtors, specifically poor, single women, was also addressed by an attorney testifying at the Philadelphia public hearing. The attorney specifically noted her perception of the bankruptcy judges' reluctance to involve themselves in domestic relations issues that are matters of state law. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 104-07. Because the issue addresses questions of substantive law, it was beyond the charter of the Task Force which excluded the investigation of such matters.

70. Debtor information was extracted from the Bankruptcy Court Automation Project ("BANCAP") Case Management System on all cases closed within the district in the month of August 1996. BANCAP data included debtor's name, ad-

numbers, Chapter filed under, whether the debtor was pro se, whether the case was business or consumer and whether a discharge was issued. A script and survey form was prepared by committee members and reviewed by Dr. Donald Bersoff.

Volunteer attorney interviewers were secured in New Jersey and Philadelphia to conduct telephone surveys from the lists in the three vicinages of New Jersey. Each location had a coordinator, with a total of 26 attorneys participating in the project. The attorneys were given specific instructions about what to ask and how to record the results. A total of 191 of the 1115 calls made were completed⁷¹ and the results were compiled from the resulting surveys representing 245 contacts with the bankruptcy system.⁷² Of the completed surveys, the following is a breakdown of the race, ethnicity and gender identification of the respondents:

TABLE 75: RACE, ETHNICITY AND GENDER OF DEBTOR RESPONDENTS

Gender	Caucasian/ White	African- American/ Black	Hispanic/ Latino	Asian- American	Other
Male	75	7	3	1	1
Female	83	7	6	0	8

SOURCE: Judge Judith H. Wizmur.

A compilation of debtor contacts, in terms of an identification of the nature of the contact (e.g., Chapter 7 trustee, bankruptcy judge, clerk's office, etc.) as such contacts are broken down by race, ethnicity and gender characteristics, is included as Table 80. The average time for each call (taking into account all calls made, including debtors who could not be reached or refused to answer) was approximately two to three minutes.

dress, social security number, case number and chapter. This information was then uploaded into a Microsoft Access database on a personal computer. Using Windows 3.1 and two software programs, PhoneDisc and Select Phone, debtors were matched with phone numbers, which were entered in the Access database. Once the match-ups were completed, an electronic file of the results was created, from which paper copies were generated. The project was then complete from an automation standpoint. There were 3000 debtor names in the study, and 1154 phone numbers were retrieved.

71. Of the uncompleted calls, 770 numbers were unreachable and 93 respondents refused to participate.

72. The survey asked each debtor to identify their contacts with the bankruptcy system. For each there were four possibilities: Chapter 7 or Chapter 13 trustee (depending on chapter filed under), Bankruptcy Judge, Bankruptcy Clerk's Office or the United States Trustee Personnel.

2. Results

Of the 245 contacts, there were 5 negative or somewhat negative responses, only one of which specifically relates to gender or race.⁷³

Many of the surveys contained anecdotal expression of fair, equal and courteous treatment, particularly by Chapter 7 Trustees who are frequently a debtor's only contact with the bankruptcy system.

We are unable to identify the race, ethnicity and gender composition of the 1115 debtors initially identified for calling, nor do we have any such information for those debtors who refused to complete the survey. Moreover, we do not know the racial, ethnicity and gender composition of consumer debtors in the District of New Jersey itself or in comparison with other districts of the Third Circuit. Absent knowledge of the universe from which we secured our sample, we are unable to generalize the results of the survey to draw conclusions about the debtor population in New Jersey or the other districts in the circuit.

Of the 245 contacts, only 1 debtor suggested that in one contact her racial identity may have impacted upon the treatment she received. We are able to observe from these results that no pervasive, institutionalized disparity in the treatment of debtors on the basis of race, ethnicity or gender, from the vantage point of debtors themselves, has been identified.

D. In Forma Pauperis Filings

In connection with its study of access to the bankruptcy system as it may be impacted by gender, the Committee conducted a comparative study of the *in forma pauperis* and overall individual filings in Chapter 7 cases in the Eastern District of Pennsylvania. Those statistics were then compared to national filing statistics for the same population.

The Eastern District of Pennsylvania is one of 6 pilot districts designated to accept Chapter 7 bankruptcy petitions without a filing fee from debtors who qualify as *in forma pauperis*.⁷⁴ Filers must

73. One African-American female complained of "curt" treatment by the bankruptcy judge, which was possibly based on her race or pro se status. Of the 4 other "negative" responses, 3 Caucasian females and 1 African-American male found treatment by the Chapter 7 Trustee rushed, not as nice as he could be, second class or rude. These same people had positive statements about the other contacts they had.

74. On October 27, 1993, Congress enacted legislation requiring the Judicial Conference of the United States to study the effect of waiving filing fees in Chapter

complete an application showing financial and other information which is presented to the bankruptcy judge to whom the case is assigned for approval.⁷⁵

The number of fee waiver applications filed during fiscal years 1995 and 1996 by individual male debtors, individual female debtors and husband and wife jointly⁷⁶ are shown below. Approximately 93% of fee waiver applications were granted.

TABLE 76: DEMOGRAPHICS OF FEE WAIVER APPLICATIONS FOR 1995 AND 1996 BASED ON GENDER

Type of Filer	Fiscal Year 1995	FY 1996
Individual male	120 (19%)	161 (19%)
Individual female	456 (72%)	608 (71%)
Joint husband & wife	57 (9%)	82 (10%)
Total	633	851

SOURCE: Clerk of the Bankruptcy Court, Eastern District of Pennsylvania.

In comparison, the gender compositions of Chapter 7 nonbusiness cases filed in the Eastern District of Pennsylvania from January through September 1996 is shown below:

7 cases for debtors who are unable to pay their fees in installments. Department of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (1994) (codified as amended in scattered sections of 28 U.S.C.). The legislation further requires that a fee waiver program be implemented and studied in not fewer than six districts. *See id.* The Eastern District of Pennsylvania was selected as one of the six pilot districts, and by Standing Order dated September 30, 1994, the pilot was implemented with Guidelines and Procedures. In connection with the evaluation of the pilot districts, the Federal Judicial Center conducted a survey through the use of form questionnaires and interviews. The preliminary results indicate that the Eastern District of Pennsylvania has the highest percentage of *in forma pauperis* filings (9.7% as compared to the lowest .5% in the Western District of Tennessee). The higher rate of applications in the Eastern District of Pennsylvania was attributable to the availability of legal services and *pro bono* representation of Chapter 7 debtors. Federal Judicial Center, Summary of Interview Findings (November 1995). The pilot is for a three-year term ending October 1997.

75. The filing and miscellaneous fee is \$175.00.

76. Under the Bankruptcy Code, only married persons may file a joint petition. *See* 11 U.S.C. § 302 (1994). Alternatively, one or both of them can file an individual case.

TABLE 77: CHAPTER 7 NON-IN FORMA PAUPERIS/NONBUSINESS
FILINGS FROM JANUARY TO SEPTEMBER (1996)⁷⁷

Chapter 7	Nonbusiness Filings
Individual male	2097 (37%)
Individual female	1819 (32%)
Joint husband & wife	1728 (31%)
Total cases	5644

SOURCE: Clerk of the Bankruptcy Court, Eastern District of Pennsylvania.

The gender composition of general Chapter 7 nonbusiness filings is consistent with the following statistics compiled by Theresa Sullivan, Elizabeth Warren and Jay Westbrook⁷⁸ in their 16-district study of the demographics of consumer bankruptcy filings during the 1991 calendar year. As such, it would indicate that the above non-*in forma pauperis* filing statistics have not been skewed by the availability of the *in forma pauperis* program.⁷⁹

77. Data were not readily available for October 1995 through December 1995 which is the period encompassed by the *in forma pauperis* filing data. Data for October 1996 through December 1996 reflecting the following gender distribution (male, female and joint), however, are consistent with the prior nine-month period:

TABLE 77A: CHAPTER 7 NON-IN FORMA PAUPERIS/NONBUSINESS FILINGS FROM
OCTOBER TO DECEMBER, 1996

	Male	Female	Joint
October	33.94%	30.42%	32.24%
November	31.99%	33.25%	32.75%
December	34.53%	33.07%	29.47%

78. The researchers are noted scholars whose earlier, more geographically limited study of 1500 consumer debtors filing cases in 1981 was the largest empirical study of consumer debtors ever undertaken. Their results were published in *We Forgive Our Debtors*, a primary resource on consumer debt in America. See THERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* (1989).

79. Chi-squared analysis indicates that the gender composition of non-*in forma pauperis* cases filed in the Eastern District of Pennsylvania does not differ from the gender composition of earlier cases filed in the district. The gender composition for current non-*in forma pauperis* cases does differ, however, from that for earlier cases filed in the Middle and Western Districts of Pennsylvania. The statistics for fiscal year 1995 are: E.D. Pa. - Chi-squared = 2.64, n.s.; M.D. Pa. - Chi-squared = 16.42, $p < .01$; W.D. Pa. - Chi-squared = 19.12, $p < .01$. The statistics for fiscal year 1996 are: E.D. Pa. - Chi-squared = 19.27, $p < .01$. Compared to non-*in forma pauperis* cases in the Eastern District of Pennsylvania, more cases are filed by husband and wife and somewhat fewer cases are filed by individual males in the Middle and Western Districts. These analyses assume that the gender composition of non-*in forma pauperis* cases filed in fiscal year 1995 and fiscal year 1996 is proportional to that of non-*in forma pauperis* cases filed in January through September of 1996.

TABLE 78: CONSUMER BANKRUPTCY FILINGS IN THE DISTRICTS OF PENNSYLVANIA (1991)

	E.D. Pa.	M.D. Pa.	W.D. Pa.
Total male	62 (42.8%)	37 (26.2%)	37 (25.2%)
Total female	46 (31.7%)	38 (27.0%)	40 (27.2%)
Total joint	37 (25.2%)	66 (46.8%)	70 (47.6%)
Total cases	145	141	147

SOURCE: SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* (1989).

A comparison of the *in forma pauperis* and non-*in forma pauperis* cases filed in the Eastern District of Pennsylvania reveals a higher single female filing rate and markedly fewer joint filings for *in forma pauperis* cases than non-*in forma pauperis* cases.⁸⁰ While there may be cases where married women file an individual Chapter 7 case, the indigent women filing as *in forma pauperis* are usually single mothers.

The BI Committee also compared statistics compiled by the Consumer Bankruptcy Assistance Project ("CBAP") which provides free legal assistance to indigent persons seeking Chapter 7 relief.⁸¹ To qualify for CBAP assistance, the clients must have income at or below 187% of the federal poverty level.⁸² In fiscal year 1995, the second year it provided service to consumers, CBAP's client base by gender and race was as follows:

80. Chi-squared analysis indicates that the gender composition of *in forma pauperis* cases filed in fiscal year 1995 and fiscal year 1996 differs from that of non-*in forma pauperis* cases (fiscal year 1995: Chi-squared = 403.98, $p < .01$; fiscal year 1996: Chi-squared = 529.48, $p < .01$). These analyses assume that the gender composition of non-*in forma pauperis* cases filed in fiscal year 1995 and fiscal 1996 is proportional to that of non-*in forma pauperis* cases filed from January through September 1996.

81. The Consumer Bankruptcy Assistance Project ("CBAP") is a tax-exempt nonprofit corporation with a volunteer pool of more than 230 attorneys, paralegals, law students and accountants providing *pro bono* legal services in Philadelphia County. In its first two years of operation, it handled more than 600 requests for legal representation. CBAP has been a model for other organizations developing *pro bono* programs to assist consumer debtors. Since its inception, its program has been adopted in other counties in the Eastern District of Pennsylvania.

82. See 61 Fed. Reg. 8286 (1996).

TABLE 79: RACE, ETHNICITY AND GENDER OF CBAP CLIENT BASE

Race/Ethnicity	Male	Female
African-American/Black	67	238
Hispanic/Latino	10	15
Asian-American	1	2
Native American	1	1
Caucasian/White	63	81
Unknown	7	43
Totals	149 (28%)	380 (72%)

Note: Joint cases = 7 - 8; total individual cases = 522.

SOURCE: Project Director, Consumer Bankruptcy Assistance Project.

E. Findings

- The statistics confirm what is obvious to those working in the bankruptcy court system. Minorities do not participate significantly in the bankruptcy system other than in clerical functions. There are no minority bankruptcy judges. Law clerks are overwhelmingly Caucasian. The legal staff of the United States Trustee Office is similarly comprised. Presumably, the reason for this situation is the paucity of minority bankruptcy lawyers from whose ranks these positions are filled.⁸³ The dearth of minority participation in bankruptcy was a concern expressed by the participants in the "Bankruptcy Issues" breakout session at the 1995 Third Circuit Judicial Conference. Women, on the other hand, appear in proportions similar or greater to their numbers in the population. Indeed, they are abundantly represented in nonlawyer chambers positions.
- We cannot state whether, as a general matter, race and ethnicity have any impact upon the treatment of debtors in the administration of bankruptcy cases in the District of New Jersey or in any other district. Nevertheless, given the responses to the survey from debtors willing to complete surveys, we are able to reflect that there is no discernible perception by debtors who have recently participated in the bankruptcy process in the District of New Jersey that their treatment was affected in any way by race, ethnicity or gender.
- An analysis of need-based program (i.e., *in forma pauperis* and CBAP) statistics reveals that women are disproportionately rep-

83. As previously stated, there is no available demographic information relating to the race and ethnicity composition of the attorneys who practice bankruptcy in the Third Circuit. The Report of the Committee on Judicial Appointments of the Race Commission refers to the 1995 national minority law school enrollment average of 19% as a context to evaluate its data.

resented among the neediest debtors.⁸⁴ They compose approximately 72% of this population, whereas men and joint filers compose about 30% of this population. An analysis of the general consumer Chapter 7 population reveals just the opposite. Roughly 30% of the general population are women and 70% consists of men and joint filers. The statistics suggest that where financial need is taken into consideration and financial barriers, such as filing and legal fees, are removed, women enjoy greater access to bankruptcy relief.

F. *Conclusions and Recommendations*

- We believe the bankruptcy system as a whole will benefit from the increased participation of minorities. We concur with the recommendations of the Committee on Judicial Appointments of the Race & Ethnicity Commission as they relate to increasing the number of minority judges and law clerks and interns. Increasing the number of law clerks and interns should impact the number of minority attorneys practicing bankruptcy law as the expertise they acquire working with the bankruptcy court will assist them in securing bankruptcy law positions in private practice. With a larger pool of bankruptcy practitioners, the number of minority applicants for bankruptcy judgeships should likewise increase.
- We also acknowledge and endorse the diversity plan to be implemented by the United States Trustee for Region 3. The participation of a greater percentage of women and minorities as Chapter 7 and Chapter 13 panel trustees is of particular importance because these individuals are often the only “officials” of the bankruptcy system that the consumer debtor encounters.
- Based on the overwhelmingly positive results of the debtor survey interviews, race and gender do not appear to be affecting the treatment of consumer debtors in the administration of bankruptcy cases in the District of New Jersey.
- The Committee on Special Issues in Bankruptcy offers the methodology of its Debtor Survey for the benefit of others who may wish to undertake a similar survey in another jurisdiction. We do not, however, propose to expand the pilot project to other districts within the framework of the Third Circuit Task Force. Given the results of the New Jersey pilot and our view that the

84. This conclusion is supported by the earlier Sullivan, Warren and Westbrook empirical study. See SULLIVAN ET AL., *supra* note 78, at 147-65 (discussing women and bankruptcy).

relevant factors in the District of New Jersey are sufficiently similar to other districts within the circuit, we do not believe that the allocation of resources that is required to expand the project circuit-wide is warranted.

- The experience of the Eastern District of Pennsylvania with its *in forma pauperis* program as it has impacted on women should be reported to those considering the efficacy of the pilot *in forma pauperis* project with a view toward encouraging its adoption as a permanent program implemented in all judicial districts. Additionally, these data should be shared with the appropriate working group of the National Bankruptcy Review Commission which is presently considering legislative recommendations to improve the bankruptcy law and system.⁸⁵
- To help ameliorate the perceived problem of bankruptcy proceedings being conducted with the bankruptcy judge assigned to the Virgin Islands participating by telephone or video-conferencing facilities, if feasible.

TABLE 80: COMPILATION OF DEBTOR CONTACTS IN ALL LOCATIONS

	Caucasian/ White		African- American/ Black		Hispanic/ Latino		Asian- American		Native American		Other	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Chapter 7 trustee	60	61	3	4	1	4	1	0	0	0	3	6
Chapter 13 trustee	9	13	2	3	1	0	0	0	0	0	0	0
Bankruptcy Judge	8	17	1	4	0	0	0	0	0	0	0	1
Clerk's Office	5	7	2	4	0	1	0	0	0	0	0	1
U.S. Trustee's personnel	2	2	0	2	0	0	0	0	0	0	0	0
Other	6	14	0	2	0	0	0	0	0	0	0	0

Note: Contacts = 250. Negative responses = 5 (attached): 3 Caucasian female (Chapter 7 trustee); 1 African-American male (Chapter 7 trustee); and 1 African-American female (bankruptcy judge).

SOURCE: Judge Judith H. Wizmur.

85. The Bankruptcy Reform Act of 1994 authorized the Commission to study the bankruptcy law over a two-year period and recommend changes. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). The Commission's report was due in October 1997.

VIII. REPORT OF THE COMMITTEE ON THE INTERSECTION OF RACE
AND GENDER OF THE GENDER COMMISSION

A. *Introduction*

Although several studies investigating equal treatment in the courts have recognized the “double bind” of multiple discrimination often experienced by women of color,⁸⁶ no judicial task force study has yet to fully consider the particular problems confronting this group.⁸⁷ At the outset, however, the Commission on Gender of the Third Circuit Task Force determined that a committee should be organized to focus on this issue.⁸⁸ The Committee on the Intersection of Race and Gender (“IRG Committee”), which was organized in February of 1995, issued the following Report.

B. *Employee Demographics*

Nonminority women have made substantial advancements in the professional staffing at many of the probation and pretrial services offices and federal defender sites within the Third Circuit. In those offices, however, minority women, or women of color,⁸⁹ are rarely employed above the clerical staff level. As the Committee on Employment and Personnel Practices of the Gender Commission observes, “a large part of understanding any workforce is understanding who actually has authority and who is perceived as having authority.”

86. The American Bar Association’s Multi-Cultural Women Attorneys Network, a joint project of the Commission on Women in the Profession and the Commission on Opportunities for Minorities in the Profession, formed in 1989, concluded: “Multi-cultural women lawyers are considered the most visible and disadvantaged groups within the legal profession.” The Network observed that they encounter “persistent and pervasive and unique barriers to career opportunity, growth and advancement.”

87. At its annual meeting in New Orleans, Louisiana on May 13, 1995, the National Consortium of Task Forces and Commission on Racial and Ethnic Bias in the Courts by resolution urged that “every task force or commission on racial and ethnic bias in the courts address the distinct issues and barriers facing women of color in the justice system.”

88. In addition, the Third Circuit’s Judicial Conference included a breakout session to discuss whether and to what extent women of color who are practicing in the federal courts or are employed by the courts experience unique treatment because of their race or ethnicity *and* gender and to elicit information about the presence of women of color in the federal courts. Judge Donetta W. Ambrose served as moderator of the session and Professor Elizabeth Defeis, a member of the Task Force, acted as reporter. Having noted the low representation of minority women on the federal bench and at the federal bar, the session participants were then invited to consider the reasons for this dearth.

89. The terms “women of color” and minority women are used interchangeably in this report to refer to all nonwhite women.

This Report details many statistics collected and analyzed by the IRG Committee. A comparison is often drawn to the percentage differences between supervisory and nonsupervisory positions. The IRG Committee does not wish to imply that these comparisons can measure the position or success of minority women by their percentage representation in the workforce. Nor do we imply that there are any "correct" percentages to be attained. Rather, we intend to point out the differences that may not otherwise be apparent in the supervisory structure of the Third Circuit workforce.

In 1995, there was a black female Chief of Pretrial Services in the Western District of Pennsylvania who supervised a culturally diverse staff of five professionals. The probation office within that district had 43 employees, including 5 blacks, of whom 2 were male and 3 were female. There were no black, Hispanic or Asian Deputy United States Marshals or Assistant Federal Public Defenders and only 4 Assistant United States Attorneys (3 males and 1 female) out of a staff numbering 40. The District Court Clerk's Office had no supervisors or administrators who were black, and out of a staff of approximately 94, only 7 black females were employed. In the Bankruptcy Clerk's Office, there were 39 staff members, of whom 1 black female was a supervisor.

As of late 1995, a white female held the position of Chief Probation Officer in the District of Delaware, but there were no nonwhite female officers among the 10 departmental staff members. Two black males and 3 other white females were included on the professional staff.

In 1995, the District of New Jersey had no minority female probation officers acting as supervisors and only 4 minority male supervisors out of an officer staff of 79. New Jersey's pretrial services office has 1 minority female supervisor out of 6 possible positions.

A black female became chief probation officer in the Virgin Islands in 1996. Two black females were supervisors of the probation officer staff of 70 in the Eastern District of Pennsylvania. The Middle District of Pennsylvania had only 1 minority female on its probation officer staff.

The IRG Committee compared the statistics gathered regarding the percentage of supervisors who are white with the percentage of supervisors who are minorities (1) by district and (2) in the court of appeals. The results are as follows:

TABLE 81: FEMALE EMPLOYEES BY DISTRICT (1995)⁹⁰

District	Minority Females		White Females	
	Supervisors	Nonsupervisors	Supervisors	Nonsupervisors
D. Del.	10.0% (1/10)	12.5% (5/40)	50.0%	50.0%
D. N.J.	10.0% (7/70)	26.3% (82/312)	37.1%	45.2%
E.D. Pa.	20.5% (9/44)	19.2% (90/468)	34.1%	44.2%
M.D. Pa.	0.0% (0/22)	2.2% (3/135)	54.5%	64.4%
W.D. Pa.	8.7% (2/23)	7.3% (13/178)	43.5%	54.5%
D.V.I.	53.8% (7/13)	78.0% (32/41)	0.0%	4.9%
Ct. App.	15.6% (5/32)	20.4% (19/93)	62.5%	54.8%

SOURCE: All court units.

Further, the IRG Committee compared the percentage of supervisors who are minority women with the percentage of minority women in the total court employee population. In 1995, in the Western District of Pennsylvania, the proportion of supervisors who were minority females was slightly higher than the proportion of nonsupervisors who were minority females. In the Eastern District of Pennsylvania and the District of Delaware, the proportions were roughly equal. The proportion of supervisors who were minority females in the District of the Virgin Islands was 24% less than the proportion of nonsupervisors who were minority females.

In the District of New Jersey in 1995, the percentage of minority female supervisors was less than half of the percentage of nonsupervisory minority females. In New Jersey, 61 minority females had high school diplomas, 5 had associate degrees, 16 had bachelor of arts or bachelor of science degrees and 7 had higher degrees.

The IRG Committee also tracked the percentage of minority women who were supervisors as compared with the percentage of minority women who occupied nonsupervisory positions. The results are as follows:

90. Unless otherwise noted, the statistics were compiled as of August 1995, the time at which they were provided to the Task Force. There may have been changes in individual offices since that time.

1. *District of Delaware*

TABLE 82: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
District Court Clerk's Office	0% (0/4)	19.8%
Bankruptcy Court Clerk's Office	50% (1/2)	18.2%
U.S. Probation/Pretrial	0% (0/4)	7.7%

SOURCE: District of Delaware court units.

In 1995, in the District of Delaware, 84.7% of the eligible work force was white. According to U.S. census data for 1995, minority women comprised about 9.6% of the population, whereas white women comprised 40.8%. Although the overall percentage of supervisors was roughly equal to the overall percentage of nonsupervisory minority women in the District of Delaware, there was 1 minority female out of a total of 9 supervisors. Neither the District of Delaware Clerk's Office nor the Probation Office had a minority female supervisor. One of the minority females who worked in the District of Delaware Clerk's Office had a high school diploma and 1 had an advanced degree. One of the minority females who worked in the District of Delaware Bankruptcy Clerk's Office had a high school diploma, 1 had an associate degree and 1 had an advanced degree. The 1 minority female who worked in the District of Delaware Probation Office had a high school diploma. Six of 50 (or 12%) of the employees in the District of Delaware district court offices were minority females.

2. *District of New Jersey*

TABLE 83: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
District Court Clerk's Office	9.5% (2/21)	19.8%
Bankruptcy Court Clerk's Office	4.5% (1/22)	27.0%
U.S. Probation Office	14.3% (3/21)	30.7%
U.S. Pretrial Services	16.7% (1/6)	30.0%

SOURCE: District of New Jersey court units.

In 1995, 7 of 70 (10%) of the supervisors in the District of New Jersey were minority females. By comparison, the percentage of nonsupervisory employees in the District of New Jersey was twice

that of the percentage of supervisory employees in New Jersey. The percentage of supervisors in probation and pretrial was one-half of the nonsupervisory employees in those offices. The percentage of supervisors in the Bankruptcy Clerk's Office was only one-sixth of the percentage of nonsupervisors in that office. The percentage of supervisors in the District Court Clerk's Office in the district, however, was only slightly less than the percentage of nonsupervisory employees.

According to the U.S. Census Bureau, as of 1990, minority women made up 15.5% of the population of the state of New Jersey and white women comprised 36.9% of the population. Fifteen of the minority females who worked in the District Court Clerk's Office had high school diplomas, 4 had associate degrees and 1 had an advanced degree. In 1995, 22 of the minority females who worked in the New Jersey Bankruptcy Clerk's Office had high school diplomas, 1 had an associate degree, 4 had bachelor degrees and 1 had an advanced degree. During that same period, 21 of the minority females who worked in the District of New Jersey Probation Office had high school diplomas, 9 had bachelor degrees and 4 had advanced degrees. Three of the minority females who worked in the District of New Jersey Pretrial Services Office had high school diplomas, 3 had bachelor degrees and 1 had an advanced degree. Eighty-nine of the 382 employees (23.3%) were minority employees. The Probation and Pretrial Services Offices employed 3 and 1 minority females, respectively, in a supervisory role. There was 1 black male on the probation staff of 84 officers.

3. *Eastern District of Pennsylvania*

TABLE 84: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
District Court Clerk's Office	15.4% (2/13)	14.7%
Bankruptcy Court Clerk's Office	12.5% (1/8)	25.0%
U.S. Probation Office	25.0% (5/20)	25.5%
U.S. Pretrial Services	33.3% (1/3)	38.5%

SOURCE: Eastern District of Pennsylvania court units.

In 1995, in the Eastern District of Pennsylvania, the percentage of supervisors almost equaled the percentage of nonsupervisors in the Probation, Pretrial and District Court Clerk's Offices. On the other hand, in the Bankruptcy Court Clerk's Office, the number of

supervisors was less than half the number of nonsupervisors. Across the offices, 99 of 512 employees in the Eastern District of Pennsylvania (19.3%) were minority employees. There were 9 minority female supervisors out of a total of 44 supervisors in the Eastern District of Pennsylvania. Twenty-seven of the minority women who worked in the Eastern District of Pennsylvania Clerk's Office had high school diplomas, 5 had associate degrees, 7 had bachelor degrees and 5 had advanced degrees. Thirteen of the minority females who worked in the Bankruptcy Clerk's Office had high school diplomas, 1 had an associate degree and 4 had bachelor degrees. Eleven of the minority females who worked in the Probation Office had high school diplomas, 9 had associate degrees, 5 had bachelor degrees and 6 had advanced degrees. Three of the minority females who worked in the Pretrial Services Office had high school diplomas, 2 had bachelor degrees and 1 had an advanced degree.

Census data for 1990 shows that 11.6% of the population of the district were minority females and 40.4% of the population were white females. In 1995, 5 of the probation officer staff supervisors were minority females.

4. *Middle District of Pennsylvania*

TABLE 85: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
District Court Clerk's Office	0.0% (0/9)	2.6%
Bankruptcy Court Clerk's Office	0.0% (0/5)	0.0%
U.S. Probation/Pretrial	0.0% (0/8)	3.6%

SOURCE: Middle District of Pennsylvania court units.

In 1995, none of the 22 supervisors in the Middle District of Pennsylvania was a minority female. Only 2 minority females worked in the Middle District of Pennsylvania Clerk's Office. One had a high school diploma and 1 had a bachelor degree. No minority females worked in the Middle District of Pennsylvania Bankruptcy Clerk's Office. The sole minority female who worked in the Middle District of Pennsylvania Probation Office had an advanced degree. According to 1990 census data, minority women constituted approximately 2.3% of the population of the Middle District of Pennsylvania and white women comprised about 49.15%.

5. *Western District of Pennsylvania*

TABLE 86: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
District Court Clerk's Office	0.0% (0/11)	8.5%
Bankruptcy Court Clerk's Office	16.7% (1/6)	2.6%
U.S. Probation Office	0.0% (0/4)	7.7%
U.S. Pretrial Services	50.0% (1/2)	16.7%

SOURCE: Western District of Pennsylvania court units.

In 1995, there were 2 minority female supervisors out of a total of 23 supervisors in all of the offices in the Western District of Pennsylvania. No minority women supervisors were found in the District Court Clerk's or Probation Offices. One minority female supervisor worked in both the Pretrial Services and Bankruptcy Clerk's Offices. Fifteen of 201 employees (7.5%) were minority females. Census data for 1990 shows that minority women comprised 3.5% of the population. Three minority females who worked in the Western District of Pennsylvania Clerk's Office had high school diplomas, 1 had an associate degree, 1 had a bachelor degree and 3 had advanced degrees. One minority female who worked in the Western District of Pennsylvania Bankruptcy Clerk's Office had a high school diploma and 1 had a bachelor degree. One of the minority females who worked in the Probation Office had a high school diploma, 1 had a bachelor degree and 1 had an advanced degree. One of the minority females who worked in the Western District of Pennsylvania Pretrial Services Office had a high school diploma and 1 had a bachelor degree.

6. *District of the Virgin Islands*

TABLE 87: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Non-supervisors
District Court Clerk's Office	42.9% (3/7)	80.8%
U.S. Probation Office	66.7% (4/6)	73.3%

SOURCE: District of the Virgin Islands court units.

As might be expected in this predominantly African-American and Caribbean district, 72% (39/54) of the employees in the Virgin

Islands were minority women. In the probation office, 66.7% (4/6) of the management positions were held by minority women. In the District Court Clerk's Office, however, that percentage dropped to 42.9%. Therefore, the percentage of minority women who were supervisors in the Clerk's Office was a little less than half of the percentage who were not in management.

7. *Court of Appeals*

TABLE 88: MINORITY FEMALE EMPLOYEES (1995)

Unit	Minority Females	
	Supervisors	Nonsupervisors
Clerk's Office	20.0% (2/10)	18.8%
Staff attorneys	50.0% (3/6)	30.4%
Circuit Executive's Office	0.0% (0/9)	13.6%
Library staff	0.0% (0/7)	18.8%

SOURCE: Court of appeals units.

Out of a total of 32 supervisors in 1995, 5 minority women held supervisory positions in the 4 units of the court of appeals. There were no minority supervisors in either the Circuit Executive's Office or on the library staff. Twenty-four of 125 (19.2%) of the employees in the court of appeals and its units were minority females. Five of the minority females who worked in the Third Circuit Court of Appeals Clerk's Office had high school diplomas and 3 had associate degrees. Four of the minority females who worked in the Third Circuit Court of Appeals Staff Attorneys Office had high school diplomas, 1 had a bachelor degree and 5 had advanced degrees. One of the minority females who worked in the Circuit Executive's Office had a high school diploma and 1 had a bachelor degree. One of the minority females who worked in the library had a high school diploma and 1 had an associate degree.

When districts and offices within districts are combined, the figures read as follows:

TABLE 89: MINORITY FEMALE EMPLOYEES, CLERK'S OFFICE OF EACH DISTRICT (1995)

Clerk's Office	Minority Females	
	Supervisors	Nonsupervisors
D. Del.	0.0%	12.5%
D. N.J.	9.5%	19.8%
E.D. Pa.	15.4%	14.7%
M.D. Pa.	0.0%	2.6%
W.D. Pa.	0.0%	8.5%
D.V.I.	42.9%	80.8%

TABLE 90: MINORITY FEMALE EMPLOYEES, BANKRUPTCY CLERK'S OFFICE OF EACH DISTRICT (1995)

Bankruptcy Clerk's Office	Minority Females	
	Supervisors	Nonsupervisors
D. Del.	50.0%	18.2%
D. N.J.	4.5%	27.0%
E.D. Pa.	12.5%	25.0%
M.D. Pa.	0.0%	0.0%
W.D. Pa.	16.7%	2.6%

TABLE 91: MINORITY FEMALE EMPLOYEES, PROBATION OFFICE OF EACH DISTRICT (1995)

Probation	Minority Females	
	Supervisors	Nonsupervisors
D. Del.	0.0%	7.7%
D. N.J.	14.3%	30.7%
E.D. Pa.	25.0%	25.5%
M.D. Pa.	0.0%	3.6%
W.D. Pa.	0.0%	7.7%
D.V.I.	66.7%	73.3%

8. *Salary Disparities*

The Committee on Personnel and Employment Practices of the Gender Commission has presented data concerning salary differentials between male and female court employees, noting that the salary disparity may be related to the positions in which male and female workers are employed. Locality pay, seniority and job

performance were not included in the calculations, but control factors such as court unit, EEO category and degree were included. The figures below also do not control for grade and step level, because such levels should be identical for all employees at identical levels. Therefore, the salaries reported below do not indicate that two employees in the same court unit at the same grade and step level could have different levels of salary. Rather, they indicate that differing levels of seniority or job performance will impact salaries of employees doing the same job. Notably, more female employees hold secretarial or clerical positions, positions which tend to be the lowest paid positions in the courts.

As noted previously, even where women of color have advanced and attained supervisory positions, these positions tend to be clerical rather than professional supervisory positions. The comparison of adjusted salaries in the Third Circuit showed a statistically significant difference between salaries paid to white male court employees and the salaries paid to African-American female court employees. According to a recent breakout of salaries, the average adjusted salary for white men in the court is \$42,306 and for minority women the average adjusted salary is \$39,462, a difference of \$2844. The average adjusted salary for a white male supervisor is \$68,276, whereas the average minority female supervisor makes \$54,279, a substantial difference of \$13,997. In only one position, nonsupervisory employees of the court of appeals, do minority women on average make more than white men; the difference there is \$1591. As that committee noted, some of this disparity may occur because minority females are more often in clerical positions, even in supervisory roles.

C. *Survey Responses*

The IRG Committee wanted to make certain that all survey instruments include questions that would elicit responses focused on the experiences of minority women. Therefore, the IRG Committee developed questions that would explore the impact of race *and* gender in the work setting of court employees and lawyers practicing in the federal courts. The Commissions on Gender and Race & Ethnicity were sympathetic to the value of receiving information on the experiences of these groups, but concerned about avoiding unfounded perceptions or idiosyncrasies of a few disgruntled respondents. Ultimately, some, though not all, of the proposed inquiries were incorporated into these instruments. We discuss below the responses that they produced.

1. *The Court Employee Questionnaire*

- a. Statistical Results

Of the 86 questions included in the employee survey, 9 specifically addressed the treatment of minority female employees.

Question 26 asked whether minority women are encouraged to attend professional seminars at the same rate as other employees. In total, 8% of the 832 respondents answered "no."⁹¹ This answer was given, however, by 41% of the 85 African-American female respondents, 22% of the 18 Hispanic female respondents, 16.7% of the 12 Asian-American female respondents and 20% of the 10 Native American female respondents. In addition, 93% of the 57 respondents who answered in the negative stated that it is "other employees" rather than minority women who are encouraged to attend professional seminars.

Question 29 asked whether supervisors treat court employees the same, regardless of gender *and* race or ethnicity. Seventy-eight percent of the 896 respondents were Caucasian. The 14% of respondents who answered "no" were then asked: "If he/she [is not treated the same] which group [minority women or other employees] is treated better?" Sixty-one percent picked "other employees," including 92% of the 36 African-American respondents and all 5 of the Hispanic respondents.

Question 32 asked whether rules in the office regarding hours, breaks and time off were applied equally to minority women and other employees. Twelve percent of the 833 respondents stated that the rules were not applied equally. This response was given by 11% of the 413 female Caucasian respondents, 23% of the 86 African-American female respondents, 28% of the 18 Hispanic female respondents, 17% of the 12 Asian-American female respondents and 56% of the 9 Native American female respondents. Of those 94 respondents noting disparate treatment, 54% answered that "other employees" were treated more leniently, including all 22 of the African-American men and women and all 6 of the Hispanic men and women.

Question 35 asked whether, assuming identical job assignments and seniority, minority female employees receive the same amount of work from their supervisors as other employees. Twelve percent of the 837 respondents answered "no," including 28% of African-American female respondents, 22% of the 18 Hispanic fe-

91. All of these percentages have been rounded, therefore, they may total more than 100%.

male respondents and 25% of the 12 Asian-American female respondents. Of those respondents noting a disparity in work assignments, 90% of the 69 Caucasian respondents and 67% of the 24 male respondents answered that "other employees" received more work, while 86% of the 21 African-American female respondents and 2 of the 3 Asian-American female respondents said minority women received more work. In response to question 41, which was worded similarly to question 35, only 2% of the 859 respondents answered that work spaces were also assigned differently to minority female employees than to other employees.

Question 38 concerned respondents' perceptions of the link between compensation and race and ethnicity *and* gender. Eight percent of the 851 respondents stated that minority women with identical job assignments and seniority do not receive the same compensation. Of that group, 72% stated that "other employees" got paid more. This 72% included statistically significant disparities across both gender and race and ethnicity lines.

Question 44 asked whether minority women and other employees who perform the same jobs have the same authority in the office. Thirty-three percent of 83 African-American and 33% of the 12 Asian-American female respondents answered "no," while 73% and 50%, respectively, of their 26 and 6 male counterparts responded "yes." Eighty-five percent of the 52 females who noted disparate authority ascribed greater authority to "other employees" than to minority women. One hundred percent of the 31 African-American and 4 Asian-American respondents agreed. The 1 Hispanic male respondent said minority women possessed more authority, while all 4 of the Hispanic females said "other employees" possessed more authority.

Question 47 asked respondents whether female minority employees receive the same discipline for tardiness and absenteeism as other employees. Twenty-five percent of the 84 African-American female respondents answered that the discipline differed, as did 39% of the 18 Hispanic female respondents, 17% of the 12 Asian-American females and 20% of the 10 Native American females. Of the 13% of the 99 overall respondents who answered this way, 36% stated that minority women received harsher discipline. This answer was given by both of the African-American males responding, 86% of the 21 African-American females and all 6 Hispanic female respondents.

Question 50 asked whether disciplinary action for misconduct was given equally to female minority employees and other employ-

ees. Males and females, as well as Caucasians and African-Americans, differed in their responses. Overall, 12% of the 884 respondents said disciplinary action was given unequally. Of that group, 96% of the 66 Caucasian respondents stated that "other employees" received harsher discipline, while 97% of the 29 African-American respondents and all 5 Hispanic respondents said minority women received harsher discipline. None of these responses was split along gender lines, meaning that there was no disparity among Caucasian males and females, African-American males and females, Asian-American males and females and so forth.

In addition to these 9 questions that specifically included the phrase "minority female," Question 23 asked employees whether their supervisors place extra pressure on them to prove their competence because of their race or ethnicity *and* gender. Five percent of the 821 respondents answered affirmatively, including 21% of the 81 African-American female respondents.

In sum, the information gathered from the employee survey reflects the perception of differential treatment towards minority female employees. Where perceived, this disparity is almost always described as not favoring these employees. These responses came most often from minority respondents, especially females.⁹²

b. Anecdotal Responses

Employees were encouraged to write explanatory comments throughout the questionnaire. The following comments are some of those received. While these comments do not necessarily represent the prevailing views of or about minorities, those who wrote spoke out forcefully about the treatment of black female employees in the federal system. The comments demonstrate the stark, polarized views running largely along racial, more than gender, lines.

At least 6 of 54 minority women respondents felt that their competence was questioned because of either their race or gender.⁹³ Some felt that they were treated as oddities or outsiders in

92. The Report of the Commission on Race's Court System Interaction Committee also noted that the responses to the survey questions on employee treatment reflected

different perceptions of how [Caucasians and minorities] are treated in relation to their colleagues. African-Americans reported they are treated with less respect than their co-workers over six times as often as Caucasians. On average, 20.62% of reporting minorities feel they are treated with less respect than coworkers of a different race or ethnicity. That observation is almost five times as frequent as Caucasians.

93. The comments of another 6 minority female respondents indicated that they had not been treated differently.

their workplaces, which historically have been all male preserves. A few felt they were disadvantaged in terms of advancement because of their race and gender. One explained that the problems in advancement for minority females were, to some extent, a function of the barriers to entry and advancement that have existed historically: "Until recently, no minority female had ever been promoted and promotions of minority males were few. Therefore, there were no role models or mentors in management so minorities were generally ignored or not directed towards promotions."⁹⁴

The perceptions of some respondents who identified themselves as nonminorities, or whose statements clearly identified them as such, were markedly different. One respondent commented on the surveys: "I find your questionnaire particularly interesting as it targets primarily minority females. If anyone in the court system is overly indulged and compensated, it is this group of people. The people who are truly mistreated are white, middle aged (30-50), with school age children."

Nonminority females expressed their belief that minority females were given preference because of their status. One even blamed the Task Force for exacerbating that problem: "I personally believe that when the clerk got wind of this survey he made a big push to promote African-American females into supervisory positions they were not best qualified for."

Other nonminority females suggested that misbehavior and poor performance by minority females were not treated as severely because of race and gender concerns.

2. *The Judge Questionnaire*

Two different types of questions addressed the treatment of minority females. Part B of the survey concerns respondents' observations of actions by the United States Marshals Service, court security officers and other court employees with regard to other judges, litigants, court employees, witnesses, attorneys and jurors. Respondents' observations regarding how United States Marshals treated minority female court employees were the only responses found to be statistically significant. More specifically, minority female court

94. Few of the judges commented on the particular experiences of minority women in the courts. The IRG Committee surmised that this may be because little could be gleaned from the inquiries about the judges' personal experiences, such as respect and treatment of judges by others, because there was only one minority woman judge in the Third Circuit at the time the survey was conducted, and because few minority women actually practice, and therefore interact with, the judges in the federal courts.

employees were observed receiving less respect from United States Marshals than other groups. Readers are warned, however, of the possibility of a significant difference based solely upon the 144 different statistical analyses performed on the data.

Question 38 asked judges whether minority female members on a jury panel are more likely to be excused peremptorily than other jury panel members. Ten of the 100 judges responding answered that it was "more likely," 8% felt it was less likely and 82% answered that there was no difference or that they did not know. No significant differences were found on the basis of the respondents' gender, race or ethnicity or the specific courts to which they belonged.

3. *The Attorney Questionnaire*

a. Statistical Results

Statistically significant differences were found in the responses of minority females and white males regarding treatment of various groups by United States Marshals, judges and judicial officers and other attorneys. In addition, the responses indicate a difference in procedures for and frequency of screening minority females and white males when they enter the court house. These data are analyzed further in the Report of the Committee on Court System Interaction of the Race & Ethnicity Commission.

b. Anecdotal Responses

As was the case with employees, attorneys who wrote comments often had differing perceptions of the court system. A number of attorneys expressed skepticism:

Obviously this whole questionnaire is designed to downgrade the white male and uplift female and ethnic minorities. . . . The white American male and majority taxpayer gets screwed again by the do-gooders and sociologists. . . . I have often seen judges bend over backwards to accommodate and help female and ethnic attorneys. Rarely have I seen a judge do the same for a white male attorney (exception, a newly admitted just out of school attorney). I firmly believe justice must be color blind. We must stop making excuses for attorneys that do not do their research or read rules regardless of gender or ethnic background.

Another attorney stated that:

The system must be race and gender blind if parties are to receive equal treatment. The Courts have become oversensitized particularly in Third Circuit and seems to assume that women and minorities are getting no breaks and that white males are getting breaks. For example, I resent the fact that this questionnaire did not ask if I have seen female judges cut off male lawyers while not subjecting women lawyers to that kind of treatment. This shows a built in bias in the attitudes of those who promoted and developed this questionnaire.

Pointing out another inappropriate behavior not specifically addressed in the questionnaire, one lawyer wrote: "Interesting questions. How about judges being *reluctant* to criticize incompetent attorneys because of race/gender?" Similarly, another respondent commented:

In recent years everyone connected with the judicial system has become extremely cautious not to say or do anything that might be perceived as bias. The fear that an innocent light-hearted or humorous remark might be perceived as bias (where clearly none is intended) has diminished the practice of law.

Some attorneys expressed concern about perceived inequities in the system affecting their clients. One stated that female criminal defendants were treated more leniently than males and another opined that white females get the lightest sentences. One attorney stated: "I have generally found female judges and magistrates more sensitive to my minority female clients."

Other attorneys pointed to the low numbers of minorities in the court system as problematic. One said: "The employees of the Third Circuit are not representative of the community. More specifically, the Eastern District of Pennsylvania's Clerk's Office, Marshals, Security Officers, Pre-trial and Probation Officers do not reflect the population of the community. This creates an atmosphere or environment for the perception of racism." Another attorney commented: "I have very limited experience in Federal Court. However, I have noticed that there are no minority Federal Public Defenders in court when I do go to Federal Court." One attorney summarized her feelings:

I try to limit my contact with the 3rd Circuit because of the general air of hostility I encounter there. I tend to believe

that the hostility is directed at my clients who are usually criminal defendants or consumers in bankruptcy. However, the fact that I am Black and female does little to alleviate the hostility. It is very difficult to point to specific comments being made because most people in the system are too sophisticated to behave in an openly racist or discriminatory manner. The hostility takes more subtle forms; very close scrutiny of filings; or unwillingness to give requested information and forms; constantly being asked what school you graduated from and how long you've practiced.

With regard to treatment by judges, several attorneys said that judges make assumptions that minority male and female attorneys are not as prepared or competent as nonminorities. The following comments of two attorneys reflect this assumption:

Certain judges do assume that minority male and female attorneys are not as prepared or competent as their non-minority [counterparts]. These judges are rude and impatient with minority lawyers but seem more than willing to suffer through the same comments of non-minority attorneys.

I have often heard comments from other lawyers who imply that black attorneys are not quite up to par. I have heard attorneys comment that a minority judge was elected or appointed because of his/her race. I have had counsel treat my black clients with disdain solely because they are poor and black. The same is true as to witnesses. I have heard attorneys make negative comments as to black jurors.

Highlighting the intersection of race with gender, one lawyer noted: "Some female judges give male lawyers a hard time. A few male judges seem to respect female lawyers less. Both are more cautious with minorities." A number of minority women respondents stated that their status as lawyers was questioned. One commented: "Being an African-American female seems to 'surprise' the judge when I try a case. Even though unintentionally, I seem to get overlooked when numerous counsel are present." Another said:

I have observed a tendency among white male attorneys in all situations, not just in the Federal Courts, to assume that women and minorities are *not* attorneys or law clerks.

Once white male attorneys are apprised of the fact that a woman or minority in the courtroom *is* an attorney, I have found that they tend to remain somewhat exclusionary, not necessarily including the woman or minority lawyer in discussions, etc.

Explaining her answer to the survey question: "How often has your own race or ethnicity affected the treatment you received in Third Circuit federal court proceedings?" an African-American female attorney said: "I don't think I was taken seriously."

D. *Focus Groups*

Because there are relatively few minority women in federal practice and on the federal bench, it was likely that randomly distributed surveys would reach few women of color and that even fewer would actually respond.⁹⁵ For this reason, the IRG Committee supported the organization of focus groups as a way to obtain feedback from this constituent group. Focus groups have been used by a number of task forces similar to the Third Circuit's as a means of "allow[ing] constituent groups of the court to explore topics and provide richer and more detailed examples and illustrations of problem situations than hearings, questionnaires, or analysis of court statistics."⁹⁶ They are viewed as an efficient way of gathering detailed anecdotal information. The IRG Committee organized six focus groups, which consisted of one employee group and one lawyer group each in Pittsburgh, Philadelphia and Newark. All of the group sessions were conducted in April and May of 1996, except for the group session in Newark.⁹⁷ Each group was led by a trained facilitator who had been given a set of questions for timed response by the participants. Responses were recorded and transcribed. In addition, a mixed-gender group of persons of color was convened in Trenton by members of the Court Employee Committee of the Race & Ethnicity Commission in August 1996.

95. Of the 9433 surveys sent to attorneys, 1755 useable replies were received. Fifty-four of them (3%) were replies from women of color. An additional 174 minority attorneys responded to a mailing targeted at minority bar groups.

96. See MOLLY TREADWAY JOHNSON, *STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE* 33 (1995) (discussing why low number of survey responses from minority women were expected).

97. It was especially difficult to convene lawyer focus groups in all of the localities, in part because so few women of color actually practice at the federal bar. Therefore, it was nearly impossible to schedule a meeting where a "critical mass" (more than two or three lawyers) could be available at one time. The group in Newark was never able to find such a convenient meeting time during the two months the focus groups were scheduled.

Focus group questions are designed to evoke anecdotal information about the particular experiences of the participants. The information that each participant offers is enriched by the interaction of other participants, who are invited by facilitators to respond to the insights offered by the other participants. Because the information is recognized as qualitative and not necessarily representative, participants need not be randomly drawn. Consequently, the focus group participants were drawn from informal, local networks of personnel and lawyers known or referred by other Gender Commission members to members of the IRG Committee. These participants agreed to come and talk about their experiences anonymously and under a pledge of confidentiality. The information elicited cannot be used to generalize about everyone's "reality," but is useful in establishing common themes. The employee participants were drawn from a mix of probation and pretrial office employees, clerk's office personnel, judicial secretaries, clerical staff, bankruptcy court staff and some managerial representatives. Lawyers in the Pittsburgh and Philadelphia groups included former and current Assistant United States Attorneys, practitioners from federal administrative agencies and lawyers connected with firms that practice in the federal courts.

To protect the anonymity of the participants, the locales from which the responses were drawn are not identified. The information elicited, however, was remarkably similar in each of the groups and parallels much of what has been identified as differing perceptions of the workplace by the Gender Commission's Committee on Employment and Personnel Practices. Common themes and highlights are summarized below.

1. *Court Employees*

The minority employees in the federal system are primarily African-American, and the participants in the focus groups reflected that reality. Each of the groups of employee participants expressed mistrust about the fairness of the federal system. Members of each group asserted that, in their view, women of color need more credentials than other groups of either gender to be hired or promoted. They believed that these women are often hired at lower starting salaries than similarly situated white women. They believed that securing promotions or higher grades within jobs often involved challenges and struggles with management, and that access to mentoring and training was severely limited. They felt that there is a purposeful lack of encouragement, support and training oppor-

tunities for women of color, and that these deficiencies limit their advancement. Conversely, according to the participants, white women receive help, direction, mentoring, extra privileges and advance notice of training opportunities through informal networks of friends in the workplace.

The participants also reported that some job descriptions for promotional opportunities were tailored to specific qualifications unique to a white woman, who was predetermined to be desirable for the position. The participants asserted that requirements for merit raises were not known or openly discussed.⁹⁸ Therefore, women of color were less likely to receive merit raises, while mentors of white colleagues passed information about the programs on to them. Some of the participants believed that under-qualified whites were pushed to apply for promotions in an effort to block persons of color from access to "policy" positions. They felt real resistance to women of color making higher salaries than white women, regardless of their years of service, education or experience. The participants believed that some promotions were the product of secret arrangements with white coworkers. It was observed that, because women of color are kept on the "line level" for most of their careers, it appears that something is lacking in their ability to advance. The participants also felt that once promotion to a senior position occurs, other people of color "need not apply" for other openings for some time.

Further, participants reported that relatives of white employees were sometimes hired, whereas the women in the focus groups believed that their relatives would not be hired. Although some women of color had been promoted in clerical and staff support sections, the focus group participants stated that it was rare to see a professional staff member become a supervisor. They stated that they need to be assertive in pursuing their goals and are often viewed as troublemakers or confrontational when they question the process. For some, however, this has resulted in respectful, though distant, treatment by their fellow employees.

98. In an article appearing in the *Federal Employees News Digest*, the research findings of the Merit Systems Protection Board ("MSPB") were reported. With regard to professional and administrative positions, the MSPB found that minorities receive, on average, lower performance ratings and fewer cash awards than nonminorities. Minorities believe they receive less of a chance to demonstrate their abilities than do nonminorities. While nonminorities in general believe that discrimination is minimal, minorities tend to believe that it is rampant. About 55% of the minorities surveyed by the board saw blatant and subtle discrimination, while only 4% of whites saw the same discrimination. The MSPB recommended that agencies learn more about their promotion patterns and employee attitudes.

The perception among the participants was that there is deep mistrust of the value of women of color, and they are skeptical about whether women of color receive fair treatment. They attributed this mistrust to white women as well as males. A common observation made during the focus groups was that women of color who share information or make decisions on the job are questioned by white males, in particular, about the appropriateness of the judgments exercised and the "believability" or reliability of the information upon which their decisions rest. On the other hand, the focus group participants felt that white women believe that women of color are advantaged by their race, i.e., that they are in fact privileged. This perception, according to the participants, runs contrary to the experiences of women of color. Participants believed that the only reason minority women have been hired is because their departments were under pressure to increase minority staff. Some were explicitly told that the office to which they were assigned needed to increase its minority base or that the office was looking for a black female for the position. The participants felt that this belief was in stark contradiction to the superior qualifications of and performance displayed by women of color.

In discussing minority hiring, women of color reported that there was frequently talk around the office that "they had to lower their standards" because they needed a minority employee. This belief manifested itself in many ways, including a widespread sentiment held by white coworkers that punitive action would never be taken against women of color. This view belied the experiences of the women of color who participated in the focus groups. For example, the participants said that when they did make a mistake on the job, the problem was viewed as "epic," whereas white women's mistakes were handled discreetly and without blemishing an otherwise competent performance.

In addition, the employee participants stated that workloads were assigned differently for white women and women of color. For example, with regard to jobs that require employees to go into the community, the participants indicated that white women seemed to be protected by white male supervisors as if they were too delicate to do work involving clients who are people of color, especially if those clients were African-Americans. In one office, participants claimed that black professional staff officers handled almost exclusively black caseloads. Participants also stated that during informal conversations, white males have stated that the office

does not intend to send white females into “dangerous” situations. The same is not said of women of color.

In at least two focus groups, participants observed that whites have asked minority females to do physical tasks. Some participants said that this and other differences in assignments “plays havoc with one’s self-esteem.”

Some employees also suggested that the atmosphere surrounding clients was racially charged. They heard white employees, who were oblivious to the presence of employees of color, making disparaging and racist comments about clients. White employees have had to be reminded that Puerto Ricans are U.S. citizens. Negative remarks about the quality of work from offices in Puerto Rico were not unusual and appeared to the employee participants as having a racist tinge.

Employees emphasized that they feel the tone and atmosphere for racial tolerance in their offices are set by the judges, particularly by the chief judges.

One employee group observed that the use of formal channels for challenging inequities was not favored by employees because employees felt “exposed” and unsafe under the reporting procedures. For example, the EEO coordinator to whom complaints were to be addressed could be the best friend or close colleague of the wrongdoer, or the actual wrongdoer. One suggestion was to have some kind of informal mechanism where feedback, complaints or examples might be given to judges and staff, even anonymously, to address some of the everyday problems. The participants believed that supervisors were generally oblivious to the issues of inequality that they raised.

More than one of the groups expressed a desire for future opportunities to have sessions where they could speak with their colleagues about common experiences that they perceived as disparate treatment.

2. *Lawyers*

One issue that emerged from each focus group was a sense that women of color are not fully represented in the federal system, particularly as lawyers.⁹⁹ They noted that Hispanic and Asian women of color are virtually nonexistent as members of the federal bar, and that the number of African-Americans is small. Focus group

99. As of 1997, one district court judge and one magistrate judge are women of color in the Third Circuit.

participants offered a number of hypotheses. First, it was suggested that the low number of attorneys in federal practice is related to decisions made in law school to pursue alternatives other than judicial clerkships, a career step which often brings other groups into federal court practice. Second, they suggested that federal legal work goes primarily to the larger law firms, which do not hire many women of color.¹⁰⁰ One other participant observed that some Asian communities are reluctant to use the legal system at all. This reluctance would explain why they are almost absent as plaintiffs and lawyers. To the extent that Asian and Hispanic lawyers practice in the federal system, they are most likely to handle immigration cases. When asked, all participants had trouble naming 6 or more women of color in federal practice in their respective districts.

Another suggested reason for the paucity of women of color in federal practice was that federal practice is considered to be "scholarly," or academically driven. African-American participants did not believe that they would "come to mind" for this kind of "scholarly" work. Some participants reported that when a woman of color is litigating in federal court, cases may be handled differently. For example, a strategic decision might be made to include a white lawyer on the litigation team because some judges are perceived as hostile to people of color.

With regard to social issues, female lawyers of color reported that they were socially isolated. They did not feel included in social plans or in stimulating office discussion. Where there were enough women of color employees to permit social interaction, that interaction sometimes was treated with suspicion. For example, the participants indicated that supervisors may be concerned about congregating lunchtime groups of women of color. One employee group talked about office reassignments being used by supervisors to break up such groupings.

Among the female employees of color, however, connections with other women of color were viewed as important and supportive of their professional development. The focus group participants believed that the presence of women employees of color benefit the women lawyers of color in the system. For example, the employees offer extra assistance if needed, because they want these lawyers to succeed. In general, women of color in the focus groups

100. A frequent path to a position at a large law firm is often through a highly competitive position as a federal law clerk. The Report of the Committee on Appointments by Judges of the Race & Ethnicity Commission analyzes the race of law clerks in the Third Circuit.

felt that whites do not attempt to get to know women of color, relying instead on stereotypes in dealing with them.

Notably, there is no particular kinship between women of color and white women. Interaction with whites, however, was viewed by more than one group as essential to career advancement and to the prevention of job problems. It was felt that membership in legal organizations, such as the ABA, can ease tensions. They believed that contact with judges in these organizations has aided the effort to get judicial support for and encouragement of women of color.

Lawyers talked about the unavailability of relationships outside the courtroom, which are necessary for professional advancement, but to which they do not have ready access. They believe that this is particularly true with respect to securing appointments as mediators and masters because judges usually select people whom they know personally for these positions. Notably, all of the participants were interested in judicially appointed positions, such as CJA positions, but knew little about the process of attaining such appointments. They had the impression that one is invited to seek consideration for these positions only after many years of litigation experience.

As a whole, the attorney group felt that women of color are less likely to be promoted than other group members. One reason for this was that there were so few minority women that there was hardly a pool from which to promote. Several women opined that whites do not want to work for blacks, and that, therefore, firms and other hiring entities do not hire many black lawyers. The focus group believed that those blacks who were hired must be extraordinarily talented so that whites could feel less uncomfortable when reporting to them.

The lawyers reported that their experiences with judges were generally positive and that they were treated with respect. A few participants did mention that some older judges still questioned the ability of women to think and argue. It was also mentioned that occasionally judges assumed that women cannot succeed on their own, so the judges have tried to be "helpful" in ways that undermined the professional competence of African-American women in particular.

The women observed that they "over prepare" because their competence has been questioned at every step. Women of color felt that the "assumption of incompetence factor" with which they often have to deal creates additional, unnecessary stress for them in their work. Many have sought to alter this unspoken assumption by

working hard and gaining respect in court. They also believe that male attorneys are allowed to be more aggressive in court. For example, one female reported that when she tried to be as aggressive as her male colleagues, she was told to sit down and shut up.

One area in which women of color think that race clearly manifests itself is with regard to the difficulty whites have in working with African-Americans. Lawyers expressed the view that whites generally, and white males in particular, respond differently to women of color. Focus group participants said they perceived an inability or unwillingness to comprehend the points of view or explanations of women of color. For example, when a nonwhite employee expressed the same point of view or insight as a white person, the white person was acknowledged as the author, and ideas of whites were embraced as novel while the contributions of minority women were marginalized. In meetings or discussions, the explanations or opinions offered by women of color were either not understood, overridden or discounted. This all contributed to a sense of being invisible or ignored.¹⁰¹ Senior lawyers indicated that they were still asked where they went to law school, and when they responded, they felt patronized by a statement such as "that's a good school." The employee participants reported similar experiences.

According to lawyer participants, it was often difficult for women of color to determine whether they are treated differently or unpleasantly because of their gender or because of their color. One participant opined that men do not seem able to get used to women being lawyers and "invading the courtroom." Because of this attitude, judges and court personnel sometimes seemed to be condescending and patronizing to women of color. A participant believed that judges sometimes treat women of color more harshly when they are novices than a similarly situated white male attorney.

The lawyers indicated that they are treated worse by white judicial staff members, but that they receive better treatment from court staff who are people of color. The employees noted that white lawyers, inside and outside the system, avoid interacting with staff members of color. For example, both lawyer participants and employees observed that white lawyers automatically go to the white clerk for help or information. This was true even if a clerk of color was available and even though the white clerk had to turn to the minority woman for direction.

101. Similar observations are made in the literature about the treatment of women of color generally and in the profession.

Lawyers and employees reported that they have not seen any measures taken to address issues of inequality. One lawyer participant noted that Third Circuit judges refuse to recognize a possibility of gender or racial inequality, presumably because they believe that good intentions abound. She noted that the judges have difficulty opening up to this kind of discussion and may ultimately discount what is said, dismissing the comments as the disgruntled opinions of a few. One participant suggested sensitivity training for judges, although she was doubtful that they would participate. These participants looked forward to learning how the court would respond to any problems uncovered in this study.

E. *Public Hearings*

In the fall of 1996, public hearings were held in eight locations throughout the Third Circuit. Members of the IRG Committee reviewed the transcripts from each of the hearings.

Among those speaking were representatives of various bar associations, including minority bar organizations. In addition to black women's groups, the Hispanic Bar Organization of Pennsylvania was represented in Philadelphia. In New Jersey, the Asian Pacific American Lawyers Association presented testimony. As a result of their interest and outreach efforts, court clerk employees, United States Marshal's Service staff, Assistant United States Attorneys, law professors, court interpreters, pro se litigants, pretrial services staff, federal public defenders, a parent of a defendant and community service organizers participated.

Comments regarding the respectful and fair treatment afforded to individuals in the federal forum were generally favorable. A common theme among the comments was that the judges set the tone for whether or not unequal treatment by personnel can be tolerated in agencies of the court.

Judges were criticized, however, for failing to appoint female magistrate judges, and it was noted that the Third Circuit did not have any minority female magistrate judges until a recent appointment in the Eastern District of Pennsylvania. One presenter argued that Article III judges are in a position to rectify the small number of female magistrate appointments and should make judicial selections that reflect the general population demographics with respect to gender and race.¹⁰² It was pointed out that there was only one

102. See *Public Hearings: Newark, New Jersey*, *supra* note 9, at 125-26 (noting that only judges can cure problem with regard to race and gender).

Article III judge in the Third Circuit who is a woman of color.¹⁰³ No black males or females serve as magistrate judges in the District of New Jersey, and there are no black judges in the Middle District of Pennsylvania. One commentator observed that, as a consequence, the perception of the federal court system is that of a “club” of white males.¹⁰⁴

The paucity of blacks and other minorities may fuel the sense of not being able to secure a fair trial. Compounding this perception is the paucity of nonwhite individuals who are selected to serve on juries. One commentator observed that minority males and females are often excluded through facially neutral challenges.¹⁰⁵ Another said that there is a perception that white jurors do not value the anguish, pain and suffering of a nonwhite litigant in civil litigation in the same way that they do for a person more apparently like themselves.¹⁰⁶

From the presentations made at the public hearings and the data reported here, it is apparent that, except for secretarial staff, minority women are still few in number in the ranks of most probation, pretrial services and federal defender offices. Several hearing participants pointed out the importance of employing personnel who reflect the population at large as an effective way of countering the belief that laws are applied to citizens based on their race, ethnicity or gender.¹⁰⁷

One speaker noted that when, for example, no black United States Marshals are seen and no representatives of administrative agencies or law enforcement groups are minorities, the public may be concerned about the prospect of evenhanded justice. A proposal was made that decision makers and appointers should be more sensitive to race and gender concerns through diversity training.¹⁰⁸ It was stressed that evenhanded treatment in the courtroom should be assured by the judge and that it is important for those who appear in court to observe evenhanded treatment by the judge and counsel to prevent any perception of unfair treatment at trial. Wo-

103. *See id.* at 116 (illustrating that Judge Thompson is only African-American female judge in federal court in New Jersey).

104. *See id.* at 102 (discussing “club” atmosphere of judiciary).

105. *See Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 10.

106. *See Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 9 (noting how nonminority may judge value of minority’s pain and suffering differently).

107. *See Public Hearings: Wilmington, Delaware, supra* note 37, at 45-47, 51, 64, 89-90, 97-99 (noting how perception of fairness is affected by whether court personnel reflect diversity of community).

108. *See Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 32-34 (proposing that some inadvertent bias could be alleviated through training).

men of color commented that they had noticed and appreciated when certain judges let attorneys know that improper conduct or words would not be tolerated in their courtrooms.¹⁰⁹

The themes of the public hearings held in the District of the Virgin Islands reflected the contrasting racial and gender distributions of that region. A female attorney said that male attorneys underestimate female attorneys.¹¹⁰ A federal public defender noted that gender bias exists among judges and clients as well. Male clients in the federal public defender's office sometimes ask for another attorney when assigned a female litigator.¹¹¹ A female defense attorney remarked that a male attorney had made a crass gesture while a female was making an argument in court. There was a reprimand, but many of the male members of the bar and the judiciary took it quite lightly and said: "What does the woman expect, it was a joke."¹¹²

F. Findings

1. General

- On every measure—statistical, anecdotal and testimonial—we found indications that women of color, whether employees or attorneys, experience the double bind that has been noted in the literature. While it is clear that women as a whole have made substantial progress, minority women remain few in number as lawyers practicing in federal court and are among the lowest paid court employees.
- While there is little direct evidence of intentional bias, anecdotal information confirms that some minority women perceive themselves as marginalized, existing at the edge of the system and not included when opportunities for advancement and full participation are made available to other women. A larger proportion of minority women than other women view their employment experiences and practices as unequal to those of others.
- Access to more information can both cure some of the disparities in perception about the evenhandedness of procedures already in place and expose patterns of subtle biases that actually exist and affect women of color.

109. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 38 (noting one judge's intolerance of improper conduct).

110. See *Public Hearings: St. Croix, Virgin Islands*, *supra* note 40, at 74.

111. See *id.* at 40.

112. *Id.* at 74.

- Although there are minor variations from district to district and office to office, women employees of color lag well behind their white female counterparts in the Third Circuit hierarchy of status and authority. Moreover, they are paid substantially less than white male employees at every level of the system except for the nonsupervisory clerical level of the court of appeals.
2. *District Court Clerk's Offices*
 - The Eastern District of Pennsylvania is the only district where the percentage of minority women who are in management approximates the percentage of those who are not.
 - In the Districts of the Virgin Islands and New Jersey, the percentage of minority women compared to other women in supervisory positions is approximately half of the percentage of minority women in the general employee population.
 - In 1995, there were no minority women in supervisory positions in Delaware, the Middle District of Pennsylvania or the Western District of Pennsylvania.
 3. *Bankruptcy Court Clerk's Offices*
 - As of 1995, in the District of Delaware and the Western District of Pennsylvania, minority women supervisors were found in percentages much larger than their numbers in the nonsupervisory employee population. It should be noted, however, that in Delaware this represented one woman of two total supervisors in the bankruptcy clerk's office. The Middle District of Pennsylvania had no minority women supervisors. In the Eastern District of Pennsylvania, minority women supervisors represented half of the percentage of their numbers found in nonmanagement positions. In the District of New Jersey this ratio was one-sixth.
 4. *Probation*
 - In the Eastern District of Pennsylvania and the District of the Virgin Islands, the percentage of minority women found in management positions in 1995 was approximately equal to their representation in the general employee workforce. The District of Delaware, the Middle District of Pennsylvania and the Western District of Pennsylvania had no minority women in management positions in their probation and pretrial services offices. In the District of New Jersey, the percentage of minority women who

were in management was slightly less than half the percentage of their number in the general workforce.

G. *Recommendations*

- Institute a system-wide program to educate judges, employees and other court participants about bias, including the subtle and “double-binding” bias against women of color. In the wake of the work of other Task Forces investigating gender and racial bias, resources for such educational programs are now available from the Federal Judicial Center, AO and elsewhere.¹¹³ Diversity training might include sessions where individuals have the opportunity to share experiences within and across racial and gender groupings.
- Establish a law school liaison or other outreach mechanism to study why women of color and other under-represented groups choose not to enter federal practice and also to expose them to federal practice career opportunities, particularly federal district and appellate clerkships. This is a project which might be undertaken by the Federal Bar Association. Although we were unable here to consider why so few minority women choose federal practice, we believe that such a study is worth undertaking and recommend further outreach to ensure that the choice not to practice in the federal courts is an informed one.
- Advertise judicial and other court-related federal appointments more widely, especially in publications disseminated in minority communities and publications targeted to reach minority and women readers. Utilize existing channels and create new ones for communication with minority bar associations about appointment information and other court-related career opportunities, including the credentials required for consideration.
- Conduct a system-wide review of salary levels and hiring and promotion practices in order to design procedures that eliminate potential disparities and ensure that selection is on the basis of merit-system principles that promote both nondiscrimination and the goal of obtaining a workforce from all segments of society. For example, conduct periodic reviews of job assignments to assure that minority women are not shunted to lower status, nonsupervisory or “minority jobs,” whether in the office or field,

113. For example, the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) sponsors several programs designed for state and federal judges.

affirmatively recruit women of color and promote qualified minority women.

- Post position openings in conspicuous places, including court electronic bulletin boards. Such posting should include the specific educational and other criteria that apply to promotion decisions.
- Provide evenhanded career counseling and notice of training opportunities, and institute formal and informal mentoring opportunities for all employees.
- Provide for full disclosure of criteria for merit increases.
- Define ways of familiarizing the bar with the CJA appointment procedures and practices within each district. Consider implementing ways of attracting a more broadly inclusive pool of candidates, including second seat opportunities and CJA training panels such as those utilized in the Middle District of Pennsylvania.
- Review EEO grievance procedures to make sure that procedures and administrators are fair and are perceived as being neutrally administered. Provide for a neutral location for filing and counseling related to EEOC complaints.

IX. REPORT OF THE COMMITTEE ON COURT SYSTEM INTERACTION OF THE RACE & ETHNICITY COMMISSION

A. *Committee Process*

Concerned with the quality of interactions among attorneys, litigants and employees, the Task Force set out to determine whether the race or ethnicity of various groups affects their treatment in the court system. A central premise for the Task Force was that unequal treatment in the courthouse community, whether intentional or perceived, is unacceptable and can ultimately convey messages which affect professional lives of attorneys, judges and employees, the assessment of claims of litigants and the respect and credibility of the justice system. Thus, the Committee on Court System Interaction (“Interaction Committee”) was charged with investigating and identifying whether participants are treated equally in the federal courts regardless of race, ethnicity or gender.

In order to assess the experiences and perceptions of courthouse participants, the Interaction Committee posed survey questions addressing the general perceptions of participants in the system and their specific experiences and exchanges with various courthouse community members. The Interaction Committee also

reviewed focus group interviews, written comments submitted with the survey and public hearing testimony taken throughout the circuit. The data obtained from the survey responses pertaining to the questions on court interaction have been analyzed for trends and statistically significant responses.¹¹⁴ The anecdotal text has been obtained from the transcriptions of the public hearings held in every district of the circuit and from comments which explain the statistical findings and the experiences of employees and attorneys.

Overall, the quantitative survey results show a majority of participants to be satisfied that they are treated equally in almost all circumstances and interactions. In many categories, however, the data show a statistically significant difference in perception and experience between minorities and nonminorities. Qualitative data gathered through individual comments of respondents, as well as public hearing comments, support the statistical findings. This report will address these issues based upon interactions involving the following persons: U.S. Marshals Service, CSOs, court employees, attorneys and judges.

B. Do Judges and Judicial Officers Treat People Differently Based on Race or Ethnicity?

1. How Do Judges Treat Other Groups?

Attorneys and employees were asked whether they observed judicial officers and judges within the Third Circuit say or do anything to people from various groups which demeaned or disparaged the person. The general consensus among employees reflected that judges rarely indulge in this behavior. Average responses reflected ratings of 6.9 and 7.0, where 7.0 equals never observing such conduct. Although the statistics from the employee survey reflected overwhelmingly that such conduct was rare, there was a relatively small number of employees who had in fact observed disparaging or demeaning conduct. For example, 8 Caucasian employees, 4 African-American employees and 2 Hispanic employees responding to the question indicated that they had observed such conduct by judges toward minority female litigants, but that such conduct was only observed "some of the time."

A few employees also indicated that they had observed demeaning conduct by a judicial officer toward a court employee.

114. The analysis of statistical significance was performed by the Center for Forensic Economic Studies in Philadelphia, Pennsylvania.

Such observations were infrequent. Fifteen Caucasian employees, 3 African-American employees and 2 Hispanic employees reported observing such conduct.

Attorneys reported many more observations of demeaning or disparaging conduct by judges than employees reported. This may be explained by the number of, as well as the types of, interactions between attorneys and judges. The greater number of observations of this conduct involved treatment by judges toward minority attorneys and litigants. For example, 3.4% (21 of 628) of responding employees reported that they had sometimes or frequently seen demeaning or disparaging conduct from judges towards minority male litigants compared to 4% (55 of 1377) of all attorneys responding.

The offending conduct was observed and reported by minority attorneys much more frequently than Caucasian attorneys. Comments on the surveys may explain these results. One Caucasian attorney said: "Some judges address minority defendants and female non-minority defendants with disrespect and curtly—at times one or two judges have been blatantly sarcastic." Similarly, an attorney wrote: "Certain judges do assume that minority male and female attorneys are not as prepared or competent as their non-minority counterparts. These judges are rude and impatient with minority lawyers but seem more than willing to suffer through the same comments made by non-minority attorneys." A minority attorney commented: "One Federal Judge sitting in Newark took pride in placing upon the record that the plaintiff like so many others was a hard-working European immigrant like himself which left me with the impression that the Judge did not think other racial groups were so hard-working." Other comments buttressed the empirical data's reflection that such behavior rarely occurs:

The judges and magistrates have consistently conducted themselves in a courteous manner to all that appear before them. In those instances where a judge or magistrate showed annoyance or irritation, such conduct seemed to be directed at the conduct of the attorneys, litigants or witnesses without regard to the person's gender, minority status or the like. In some instances, the irritation or annoyance of the judge or magistrate was unjustified, but the targets of the Judge's ire were not selected by reason of anything other than their own conduct.

Attorneys were also asked whether judges are more deferential to attorneys of their own race or ethnicity than to attorneys of different racial or ethnic backgrounds. Overall, judges received a 6.2 mean response (with 7.0 equating to "never" observing more deferential treatment). Looking more closely at the demographic background of the respondents, two-thirds (684 of 1,037) of Caucasian attorneys thought judges were never more deferential to attorneys of their own race. More telling, however, is that only 11.5% (9 of 78) of African-American attorneys agreed with their Caucasian counterparts. Overall, over 38% (448 of 1,163) of attorneys responding found that judges were more deferential to attorneys of their own race at least some of the time.

There were statistically significant disparities between responses from Caucasian attorneys and responses from African-American, Hispanic and Asian-American attorneys. Thus, it appears that a large gap in perception exists regarding a judge's deference to attorneys of his or her own race or ethnicity between minority and nonminority attorneys. The survey results appear to support the written comments and public testimony regarding the concern about a predominantly white judiciary held by many minority attorneys.

Attorneys were also asked whether an attorney's race or ethnicity affects the amount of informal access that an attorney has to judges. The premise of the question involved the concern that informal access leads to familiarity with judges and procedures which could affect appointments by the judiciary as well as an attorney's experience in the courtroom.

The results resembled those related above. As Table 92 shows, respondents, as a whole, answered that race or ethnicity does not affect the amount of informal access to a judge. The mean response was 6.1 (with 7.0 equating to "never" affecting access). Again, minority attorneys had a substantially different viewpoint on this matter.

TABLE 92: ATTORNEY RESPONSES TO THE QUESTION: "DOES AN ATTORNEY'S RACE OR ETHNICITY AFFECT THE AMOUNT OF INFORMAL ACCESS TO JUDGES?"

Race	Mean	Number of Responses
All cases	6.1	1009
Caucasian	6.3	892
African-American	4.1	73
Hispanic	4.4	18
Asian-American	4.3	12
Native American	6.7	6
Multiracial	5.5	8

Note: 7 = never, 1 = always.

SOURCE: Attorney Survey Question 17.

While the mean response from Caucasian attorneys rose to 6.3, African-American attorneys responded with a mean of 4.1, Hispanic attorneys responded with a mean of 4.4 and Asian American attorneys responded with a mean of 4.3.¹¹⁵ Similarly, while 69.4% (619 of 892) of Caucasian attorneys felt that race or ethnicity never affected the amount of informal access to judges (responding 7.0), only 17.8% (13 of 73) of African-American attorneys agreed. This stark difference in perception regarding informal access echoes the concerns of minority attorneys regarding the perceived deference given to attorneys of the same race or ethnicity.

Attorneys were also asked how frequently, if at all, they observed judges addressing counsel of a race or ethnicity different than their own in a less professional manner than they address counsel of their same race or ethnicity. This question was designed to elicit the frequency of overt disparate treatment in the courtroom. A large difference in perception persisted between the responses of Caucasian attorneys and the responses of African-American, Hispanic and Asian-American attorneys as illustrated in Table 93.

115. We note, of course, that the low numbers of Hispanic and Asian-American respondents indicate that a few negative responses could substantially lower the mean.

TABLE 93: ATTORNEY RESPONSES TO QUESTION: "HOW FREQUENTLY HAVE YOU OBSERVED JUDGES ADDRESSING COUNSEL OF A RACE OR ETHNICITY DIFFERENT THAN THEIR OWN IN A LESS PROFESSIONAL MANNER THAN THEY ADDRESS COUNSEL OF THEIR SAME RACE OR ETHNICITY?"

Race	Mean	Number of Responses
All cases	6.7	1412
Caucasian	6.8	1273
African-American	5.8	86
Hispanic	6.0	20
Asian-American	6.2	15
Native American	6.3	6
Multiracial	6.9	128

Note: 7 = never, 1 = always.

SOURCE: Attorney Survey Question 20

The mean response for this question was 6.7 for all respondents, 6.8 for Caucasians and nearly 6.0 for all minorities combined. Despite the continuing disparity in responses between minorities and Caucasians, the results demonstrate rare instances of overt discrimination by judges, a conclusion consistent with many public and written comments.

Lastly, attorneys were asked how frequently, if at all, they have personally observed judges singling out counsel of a different race or ethnicity than their own to make disparaging or demeaning remarks to them about their professional competence or performance. This question essentially verifies the results of the previous question—seeking information regarding the frequency of overt acts of discrimination by judges. The results tracked those of the previous question's findings. Specifically, the mean result of all cases was 6.8, the mean for Caucasians was 6.9 and the average mean among minorities was 6.3. Despite the low frequency of overt discriminatory acts as a whole, both results produced statistically significant differences among the responses of Caucasian attorneys compared to the responses of African-American attorneys, Asian-American attorneys or Hispanic attorneys.

Public comments paralleled the statistical results. Few public or written comments alleged explicit or overt acts of discrimination by judges based on race or ethnicity. Instead, comments by minority attorneys addressed more subtle forms of preferences and bias which they perceived as having resulted in a form of ostracism. The

great divide in perception between Caucasian and non-Caucasian attorneys was also echoed in the comments. The Caucasian experience was described very differently by members of the same bar, noting the complete absence of any perceived discrimination. At the public hearing held in Newark, New Jersey, for example, white attorneys stated that the courts were virtually color blind and free of all bias.¹¹⁶ Minority speakers did not necessarily agree.¹¹⁷

The statistical results bear out this trend and demonstrate that many attorneys believe that the judiciary is not immune from the bias and prejudice which currently divides society at large.

2. *How Do Judges Treat One Another?*

In general, judges responding to the survey indicated that they have experienced no discrimination based on race.

In the survey, judges were asked whether their race impacts the degree of respect they are accorded by their colleagues. Of 114 judges responding, 111 judges reported they are treated with the same amount of respect, 2 reported they are treated with less respect and one nonminority female judge reported she is treated with more respect based on her race. Of the two judges who reported they are treated with less respect due to their race, one is nonminority and the other is a minority judge. Thus only one of 103 nonminority judges reported less respect as compared to 1 of 7 minority judges responding. As a whole, however, judges believe they are treated with the same respect regardless of race. One judge wrote: "Demeaning [and] disparaging comments are infrequent in my experience—and those made don't appear to be based on gender, race or ethnicity."

Additionally, judges were asked whether they observed federal judges demeaning other judges based on the race or ethnicity of the other judge. Of 113 responding, 99 had not perceived this conduct, 6 reported "yes" and 4 did not know. One judge noted:

For [many] years, I have lunched with other judges of our court in the court dining room. For [many] years, I have attended our weekly meetings. We do not always agree, and on rare occasion there may be sharp words, but I have never felt that any differences were other than professional and I have never felt that these were disparaging remarks or actions, much less any that were based on race,

116. See *Public Hearing: Newark, New Jersey*, *supra* note 9, at 13.

117. See *id.* at 115, 121.

ethnicity or gender. There may be kidding remarks, but race, ethnicity, and gender—even in kidding—have been avoided.

An attorney noted to the contrary: “Outside a court setting I overheard a Federal District Court Judge agree with a fellow Caucasian male State Court Judge that the sole reason [two particular candidates] were under consideration for nomination to the Federal Bench was that one was black and the other female.”

C. *Do Attorneys Treat People Differently Based on Their Race or Ethnicity?*

1. *How Do Attorneys Treat Others?*

a. *How Do Attorneys Treat Judges?*

Attorneys, judges and employees were also surveyed concerning observations of disparaging or demeaning treatment by attorneys toward various groups of persons based on the race or ethnicity of the person demeaned. Two of the 120 judges surveyed reported that they were treated with less respect by some attorneys. One judge reported:

I have found the conduct of those actors whom the questionnaire covers to be beyond reproach. By contrast, I have not found that every attorney who I have observed has handled himself/herself in a manner that is non-disparaging with respect to gender or race; while the overwhelming majority of attorneys seem to behave in exemplary fashion, there are a few exceptions.

A notable percentage of employees also indicated that attorneys demonstrated less respect toward them.

When asked if any attorney ever saw another attorney disparage a judge who was a white male, overall the vast majority, 90.4% (1267 of 1401) respondents said they had never seen such behavior. In response to the same question regarding the treatment accorded minority male judges by attorneys, of 1343 attorneys who responded, a lower percentage, 83.3% (1119 of 1343) said they had never seen attorneys behaving in a demeaning manner toward minority male judges.

When the same question was asked regarding observations of disparaging or demeaning treatment toward minority female judges by attorneys, of 1309 attorneys responding, 85% (1113) said they never saw demeaning behavior by attorneys toward minority female

judges. Yet, 6.3% (82 of 1309) said they sometimes did see it and 1% (12 of 1309) said they saw it frequently.

b. How Do Attorneys Treat Litigants?

The survey then asked if the attorneys responding had observed other attorneys say or do anything to white male litigants that demeaned or disparaged that person based on his or her race or ethnicity. Of 1376 attorneys responding, 84.4% (1161) said they never observed such behavior, while 5.5% (76) said they sometimes observed attorneys disparage white male litigants.

In regard to the treatment of minority female litigants by attorneys, of 1333 respondents, only 75.1% (1001) said they never observed demeaning or disparaging conduct. Nevertheless, 11.1% (148 of 1333) sometimes observed such conduct. Among African-American attorneys, 25.7% (20 of 78) of the respondents sometimes observed demeaning behavior towards minority female litigants.

Contrasting those responses, when attorneys were asked if they had observed other attorneys demeaning minority male litigants, 74.2% (999 of 1347) of all respondents reported that they had never seen it, while 11.3% (152 of 1347) of those responding sometimes saw such behavior. The groups most often reporting such conduct were African-American attorneys, Hispanic attorneys and Asian-American attorneys. Twenty-nine percent (29.1%, 23 of 79) of African-American attorneys responding said they sometimes observed it and 6.3% (5 of 79) said they frequently observed it, 10.6% (2 of 19) of Hispanic attorneys frequently observed that type of behavior and 40% (4 of 10) of Asian-American respondents saw that behavior occur "sometimes."

c. How Do Attorneys Treat Court Employees?

The statistical response reflected in the employees survey—that they were treated at times with less respect by attorneys—is echoed in the empirical results of the attorney survey.

In response to the question of whether attorneys had observed other attorneys demeaning or disparaging white male court employees, 91% (1235 of 1356) of the respondents never observed any such treatment. A similar percentage, 89.7% (1216 of 1356) said they had never observed demeaning behavior by attorneys to white female court employees, while 3.5% (47 of 1356) sometimes observed that behavior.

The percentages were slightly lower when the question was asked of attorneys whether they had observed any attorneys demean or disparage minority male court employees. Eighty-seven percent (1164 of 1338) of the attorney respondents said they had never observed such behavior, however, 5.6% (75 of 1338) said they sometimes observed such behavior. Seven of 77 African-American attorney respondents said they sometimes observed inappropriate attorney behavior towards minority male court employees and 4 of 18 Hispanic attorney respondents said they sometimes observed such behavior.

Attorneys were asked whether they observed demeaning or disparaging treatment toward minority female court employees by other attorneys. Only 5.8% (77 of 1335) of the respondents had sometimes observed inappropriate behavior by attorneys toward this group. This percentage was increased by the responses of minority attorneys: 8.0% (6 of 75) of African-Americans, 22.3% (4 of 18) of Hispanics and 30% (3 of 10) of Asian-Americans.

d. How Do Attorneys Treat Witnesses?

When attorneys were asked if they had observed other attorneys demean or disparage white male witnesses, 84.2% (1079 of 1281) said that they had never observed it, but 5.7% (73 of 1281) said they sometimes observed it. When attorneys were asked the same question about white female witnesses, 6.9% (88 of 1278) of the responding attorneys said they sometimes witnessed such behavior, but 82.5% (1054 of 1278) said they never had.

Attorneys were further asked about observations of demeaning or disparaging treatment toward minority male witnesses, 75.6% (954 of 1262) of all respondents never observed inappropriate behavior by attorneys; however, 10.7% (135 of 1262) sometimes observed it, and 1.5% (19 of 1262) reported they frequently observed inappropriate behavior toward minority male witnesses. Twenty-eight percent (28.9% or 22 of 76) of African-American attorneys said they sometimes observed such behavior and 5.3% (1 of 19) of Hispanic attorneys said they frequently saw such behavior.

Concerning the treatment accorded minority female witnesses, 76.4% (960 of 1256) of attorneys responding said they never observed disparaging behavior by attorneys toward minority female witnesses, while 10.2% (128 of 1256) responded that they sometimes observed such behavior and 1.8% (23 of 1256) responded that they frequently observed such behavior. These responses indicate that over 100 attorneys who had never seen inappropriate be-

havior by lawyers demonstrated to white male or female witnesses *had* seen such behavior exhibited toward minority male or female witnesses.

e. *How Do Attorneys Treat Jurors?*

By and large, attorneys reported that jurors of any race or gender were not demeaned or disparaged by other lawyers. Further discussion of the treatment of jurors may be found in the Report on Jury Issues.

2. *How Do Attorneys Treat One Another?*

The comments of a minority female attorney at a public hearing clearly illustrate the direct way in which incivility between lawyers may result from racial bias or may be an ill-advised attempt to win a tactical advantage:

[M]inority attorneys feel that there is really no outreach program to try to make them feel more acceptable in the federal system.

For instance, with my first deposition, in preparing for a federal case, and I guess because Delaware is a small State, most of the attorneys knew that was probably my first deposition, so that may have had something to do with it. I think it was a combination of solo practitioner, first time, and my race may have had a play in it, where I was treated very rudely, when I even asked the other attorney what his name was, so that I could confirm that he was an attorney that was qualified to ask my client questions, he refused to do that. When I asked the Court Reporter to read his name for the record, he objected to that.

So that type of rudeness does go on in the Bar system. There are calls made when I'm trying to negotiate certain things. Statements have been made where I've actually been cursed out by other attorneys and, quote, have been told, I don't take any s---t off of young whipper-snappers. And people laugh it off when I make that reference. They said, "Well, you should consider it a compliment, because he called you young." But there is that type of aggravation in the Bar system and it kind of wears you down by the time you get to court.

I think it's overall feeling. The only—I guess objective things that I have tried to do to confirm that's how I'm being responded to is asking other members of the Bar, well, how does this person treat you when you first did this. And some instances—that one—I have heard of no one else being treated in that manner.

Again, in comparing myself with other female litigators, I feel that the rudeness occurs or the overall perception happens more because of [being a] minority, as opposed to [being] female.¹¹⁸

Survey questions pertaining to interactions among attorneys sought information related to the interaction of attorneys with one another and the degree to which race and ethnicity affect those relationships. The survey specifically inquired of attorneys as to the extent they believed their race or ethnicity affected their treatment in the Third Circuit. The results, shown in Table 94, reflected that most minority groups believed that their race had some impact on the treatment they received:

TABLE 94: PERCENTAGE AND NUMBER OF ATTORNEYS WHO FEEL THAT RACE HAS AN IMPACT ON THE TREATMENT THEY RECEIVE

Race/Ethnicity of Attorney	Always	Some of the Time	Never
Caucasian (N=1243)	0.3% (4 of 1243)	2.2% (27 of 1243)	97.6% (1212 of 1243)
African-American (N=65)	9.2% (6 of 65)	30.8% (20 of 65)	60.0% (39 of 65)
Hispanic (N=19)	10.5% (2 of 19)	15.8% (3 of 19)	73.7% (14 of 19)
Asian-American (N=13)	0.0% (0 of 13)	22.1% (3 of 13)	76.7% (10 of 13)
Native American (N=5)	0.0% (0 of 5)	0.0% (0 of 5)	100.0% (5 of 5)
Multiracial (N=10)	0.0% (0 of 10)	0.0% (0 of 10)	100.0% (10 of 10)

Note: N = total number.

SOURCE: Attorney Survey.

Attorneys were asked if they had observed other lawyers saying or doing anything which demeaned or disparaged that person based on his or her race or ethnicity. Out of 1424 responding attorneys, it was reported that 5.5% (78 of 1424) of them sometimes

118. *Public Hearings: Wilmington, Delaware, supra* note 37, at 66-71.

observed such behavior towards white male attorneys but 83.9% (1194 of 1424) of them had never seen such behavior.

In responding to the same question about how attorneys treated white female attorneys, 81.4% (1154) of 1418 attorneys said that they had never seen such behavior, but 7.5% (106 of 1418) said they sometimes saw such behavior. Caucasian attorneys reported that 6.6% (85 of 1288) of them "sometimes" observed such behavior, while 18.1% (15 of 83) of African-American and 15.4% (2 of 13) of Asian-Americans sometimes observed attorneys demeaning nonminority female attorneys. Of 10 attorneys who identified themselves as multiracial attorneys, one reported sometimes observing such behavior.

The percentages changed when attorneys were asked about how attorneys treated other minority male attorneys. Of all attorneys who responded, only 71.0% (990 of 1395) said they had never seen such behavior while, 12.8% (179 of 1395) said they sometimes saw such behavior and 1.4% (20 of 1395) said they frequently saw such behavior. Analyzing this question along racial lines, 36.1% (30 of 83) of African-American attorneys sometimes observe such behavior, 8.4% (7 of 83) of them frequently observed such behavior. Only 41% (34 of 83) of African-American attorneys, 38% (5 of 13) of Asian-American attorneys and 40% (8 of 20) of Hispanic attorneys could report that they had never seen such behavior.

When asked the same question about minority female attorneys, of 1383 attorneys who responded, an even lower percentage, 71.9% (944 of 1383) said they had never observed such behavior, while 13.1% (181 of 1383) said they sometimes observed such behavior. Only 11.3% (142 of 1253) of Caucasian attorneys reported that they sometimes observed demeaning behavior toward minority female attorneys, whereas 29.3% (24 of 82) of African-American attorneys, 30% (6 of 20) of Hispanic attorneys, 42.8% (6 of 14) Asian-American attorneys and 30% (3 of 10) of multiracial attorneys reported sometimes seeing such behavior. Low percentages regarding disparate treatment of female minority attorneys existed throughout all the districts.

These statistical findings are consistent with comments offered at several public hearings held across the circuit. One attorney stated: "Minorities we spoke with stated that they believe that they are often treated differently by opposing counsel. They find this troubling and unsettling. We request that judges let lawyers know

that such conduct will not be tolerated in their courtrooms.”¹¹⁹ One law school dean called for a return to civility in the practice of law and suggested:

As noted by the many task force reports now in print and by the ABA Committee on Professionalism in its recent report on teaching professionalism, education is perhaps the most important and effective contribution our profession can make to the cause of eliminating bias in the judicial process. For many, education is the missing link, the opportunity to confront the reality they did not believe or did not want to believe existed. For others, however, education, assuming it is required, as many commentators have noted it must be, will not be enough to change attitudes. For this reason I encourage the members of the Task Force to join with others in considering the recommendation of changes to the Rules of Professional Conduct applicable to lawyers and judges in an effort to encourage appropriate behavior and in the process promote equal treatment in the courts.

But I think the key here is to recognize that we're dealing with a situation that many people simply are not aware exists, and they have to engage in the educational process in order to be fully apprised of its existence, and then I think once we have cleared that hurdle, as I understand it from what I have read, we end up being in a position where we can make some considerable progress.¹²⁰

D. *Do Court Employees Treat People Differently Based on Race or Ethnicity?*

Approximately 827 employees responded to the questions relating to court interaction. The number of respondents represents approximately 56% of the 1481 persons employed in the federal courts of the Third Circuit. The respondents had the following demographic breakdown:¹²¹

119. *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 55-56.

120. *Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 28-32.

121. No statistics are available that reflect the number of employees who are multiracial.

TABLE 95: DEMOGRAPHIC BREAKDOWN OF THIRD
CIRCUIT EMPLOYEES

Race/Ethnicity	Number of Respondents
Caucasian	1114
African-American	284
Hispanic	68
Asian-American	15
Native American	12
Multiracial	0

1. *How Do Court Employees Treat Other Groups?*

Attorneys and judges were also asked to report whether they had observed court employees treat persons in a manner that was demeaning or disparaging based on the race or ethnicity of those persons. The survey's results reflect that demeaning treatment by court employees was exclusive to other court employees. Observations of such treatment toward attorneys and litigants was reported as well. Sixteen Caucasian employees and 6 African-American employees reported observing such treatment toward minority attorneys "some of the time." Twenty Caucasian employees, 10 African-American employees and 3 Hispanic employees who responded to the survey reported observations of demeaning treatment toward minority litigants.

a. *How Do Court Employees Treat Attorneys?*

In questions directed to attorneys regarding observations of court employee conduct that may demean or disparage a person based on that person's race or ethnicity, of 1383 attorneys responding, over 95% (1324 of 1383) of the attorneys who responded reported they had never seen such conduct by court employees directed toward nonminority male attorneys. A public hearing comment echoed these statistics:

I have not had any problems described by some of my other colleagues being treated poorly. For most of my experiences with the courts and their personnel, it has been good. Any time I have been yelled at it is because I had done something wrong, not because of race or gender.¹²²

When the same question was asked about court employee treatment of white female attorneys, of 1377 attorneys responding, over

122. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 74.

95% (1310) again said they had never seen such behavior directed toward those persons. Overall, 83.3% (15 of 18) of Hispanic attorneys responding said they had never observed that behavior, and 16.7% (3 of 18) said they “rarely” saw it. Perhaps because of the low numbers of Hispanic respondents, the differences were not found to be statistically significant.

Statistically significant differences were found between Caucasian and African-American, and Caucasian and Hispanic responses when asked if they had observed court employees demeaning minority male attorneys based on race or ethnicity. Over 95% (1156 of 1214) of Caucasians said they had “never” observed demeaning behavior, while 11.1% (2 of 18) of Hispanics responded that they observed such behavior “some of the time.” Interestingly, over 25% (7 of 18) of African-American female attorneys noticed demeaning behavior based on race or ethnicity. The same category disparities were noted regarding minority female attorneys. Almost 14% (11 of 79) of African-American attorney respondents “frequently” or “sometimes” saw demeaning behavior directed to minority female attorneys. Over 22% (4 of 18) of Hispanic attorneys frequently or sometimes saw that behavior.

Again, public hearing comments spoke to specific incidences where such treatment was perceived, if not observed: “I’m one of the people who went to the clerk’s office once and inquired about CJA. And they had brushed [me] off, you know, well, we’re not sure, we don’t know. That happened to me several years ago. And that’s how it stood.”¹²³ Affirming the infrequency of such behavior, two attorneys in a joint statement said:

With respect to treatment by court staff. We have spoken with many women about court staff. We are pleased to state that the women who contacted us were pleased with the way in which they have been treated by court staff, including judicial clerks and personnel from the court clerk’s office. The minorities we spoke with had similar comments.¹²⁴

b. How Do Court Employees Treat Judges?

As might be expected of the relationship of a court employee to a judge, over 98% (1293 of 1318) of the attorneys who responded reported that they had never seen court employees treat

123. *Public Hearings: Wilmington, Delaware, supra* note 37, at 125-26.

124. *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 55.

white male judges disparagingly and 97.5% (1266 of 1298) said they have never seen that behavior towards white females either.

Interestingly, the responses of attorneys regarding treatment of minority male judges by court employees showed a statistically significant difference among the responses of Caucasian attorneys and African-American and Hispanic attorneys. While over 97% (1126 of 1152) of Caucasian lawyers said they had never observed such behavior, only 89.2% (66 of 74) of African-Americans and 76.5% (13 of 17) of Hispanics reported they never observed such behavior. Both male and female African-Americans reported similar responses to this question.

When asked the same questions about minority female judges, African-American attorneys reported that 8.4% (6 of 71) of them frequently or sometimes observed disparaging behavior. Interestingly, there was a greater gender difference than racial difference in the responses to this question: 17.3% (4 of 23) of African-American female attorneys reported that they frequently or sometimes saw disparaging behavior toward minority female judges; however, only 2.7% (1 of 37) of African-American males reported such an observation and 97.3% (36 of 37) of them said they never observed such behavior.

c. How do Court Employees Treat Litigants?

When asked if they had observed court employees say or do anything to white male litigants which demeaned or disparaged that person based on his or her race or ethnicity, of 1311 attorneys who responded, 96% (1259 of 1311) of them reported never seeing such behavior. One Native American attorney who responded reported "sometimes" seeing such behavior.

When asked the same question about white female litigants, of 1304 responding attorneys, over 95% (1247) said they never saw demeaning or disparaging behavior toward this group. Seventy-seven percent (10 of 13) of Hispanic male attorneys reported they "never" saw such behavior.

When asked how minority male litigants were treated by court employees, 2 of the 76 African-American attorneys that responded reported they frequently observed demeaning behavior and 1 of the 76 attorneys said he or she always observed such behavior. Of the remaining 73 African-American attorneys, 69 (89.5%) reported that they never or rarely observed such conduct, and 7 (9.2%) reported that they sometimes observed such conduct. Twenty-five

percent (4 of 16) of Hispanic attorneys who responded reported that they “sometimes” or “frequently” observed such behavior.

More Hispanic attorneys, 68.8% (11 of 16), reported that they had never seen such behavior towards minority female litigants. But 4 of the 16 attorneys reported that they “frequently” or “sometimes” saw demeaning behavior toward minority female litigants. Sixteen percent (4 of 25) of African-American female attorneys said they sometimes or frequently observed minority female litigants being disparaged by court employees and 1 of 5 Native American males reported sometimes seeing such behavior.

One female African-American attorney stated: “I try to limit my contact with the Third Circuit because of the general air of hostility I encounter there. I tend to believe that the hostility is directed at my clients who are usually criminal defendants or consumers in bankruptcy.”

d. How Do Court Employees Treat Witnesses?

Attorneys were asked if they had ever observed court employees disparage white male witnesses. The vast majority, 96% (1166 of 1125), reported they had never observed such behavior. Similarly, of 1195 attorneys responding, 93.8% (1121) said they had never observed minority male witnesses being demeaned. Regarding the treatment of minority female witnesses, 93.8% (1119 of 1193) of all respondents reported they never saw such behavior by court employees.

e. How Do Court Employees Treat Jurors?

Of 1047 attorney respondents, 97.4% (1020) of them said they never saw court employees demean or disparage white male jurors, and 97.2% (1104 of 1043) of the respondents said they had never seen such behavior towards white female jurors either. In both questions, Hispanic attorneys seem to indicate that they had observed such behavior, but that it is rare, with 16.7% (2 of 12) of the Hispanic attorneys who responded reporting that they rarely saw such behavior toward nonminority female jurors and 16.7% (2 of 12) reporting that they had rarely seen that behavior directed toward nonminority male jurors. Overall 96.4% (1000 of 1037) of all attorneys said they had never seen demeaning behavior toward minority male jurors by court employees. When asked about the treatment of minority female jurors, 96.2% (995 of 1034) of the responding attorneys said they never observed demeaning behavior by court employees toward this group. Yet, 4.8% (3 of 62) of Afri-

can-American attorneys reported they frequently or sometimes saw such behavior, and 25% (3 of 12) of Hispanic attorneys reported that they had observed such behavior "some of the time."

The judges who responded indicated that they did not observe any discrimination by court employees based on race or ethnicity toward judges, attorneys, litigants, other court employees, witnesses or jurors. The survey comments reflect the esteem in which the judges hold court employees: "Our court employees have displayed racial and ethnic neutrality in treating all persons fairly and professionally, in my view."

2. *How Do Court Employees Treat One Another?*

Survey questions pertaining to employee interactions sought information related to the interaction of court employees with one another and the degree to which race and ethnicity affected those relationships. The survey specifically inquired of court employees as to their general treatment compared to that experienced by coworkers of another race or ethnicity. Employees were asked whether they were treated with more, the same amount or less respect than their coworkers. The results of the responses are set forth in the following table:

TABLE 96: PERCEPTIONS OF EMPLOYEES REGARDING RESPECT THEY RECEIVE IN RELATION TO COWORKERS

Race/Ethnicity of Employee	Amount of Respect		
	More	Same Amount	Less
Caucasian (N=713)	1.7%	92.0%	4.2%
African-American (N=128)	0.0%	71.9%	27.3%
Hispanic (N=28)	0.0%	75.0%	21.4%
Asian-American (N=19)	5.3%	68.4%	21.1%
Native American (N=12)	0.0%	75.0%	25.0%
Multiracial (N=12)	8.3%	83.3%	8.3%
Overall (N=912)	1.5%	87.8%	8.7%

Note: N = total number.

SOURCE: Employee Survey.

As reflected in Table 96, Caucasians and minorities maintain differing perceptions of how they are treated in relation to their colleagues. Table 96 also reflects that minority employees perceive that they are treated with less respect than their white peers. African-Americans reported they are treated with less respect than their coworkers over six times more frequently than did Caucasians. On

average, 20.62% of reporting minorities feel they are treated with less respect than coworkers of a different race or ethnicity.

Written comments on some questionnaires may explain why some minority employees feel this way. One minority participant wrote: "In my office there are times I am not told about some things. When certain things are mentioned that I am not aware of, I feel foolish." A minority female employee wrote: "Lack of inclusion. Complete disregard—was supposed to be involved in procedural meeting—there were three individuals who were not involved, was advised someone from another dept. would advise me—only one race attended."

A white male employee discounted any claims of racial or gender discrimination as unsubstantiated. He wrote: "People who believe they are treated differently, on or off the job, because of their ethnicity or gender are paranoid. They simply look for a scape-goat and the easiest to blame are others."

Consistent with the opinion that employees are in fact treated equally, a representative on behalf of a diverse group of employees from a District Court Clerk's Office stated:

We all hold managerial, technical or professional positions in the Clerk's Office and represent a continuing testament to affirmative efforts made by the Clerk's Office to actively include women and minorities in positions of responsibility and authority. . . . We hope that our appearance here today offers tangible evidence of the positive treatment we have received as employees of the Clerk's Office for the United States District Court for the Eastern District of Pennsylvania.¹²⁵

Similarly, some supervisory employees affirmed their impressions that employees were treated equally: "I've been [in the Clerk's office] for 10 years now as chief deputy, I've never received a complaint of that nature. I'm sure the Clerk hasn't either in that time or he would have spoken to me about it."¹²⁶

The majority of employees indicated that the persons who give them less respect tended to be other court employees. The employees also responded that the other groups of persons who tend to accord them less respect are judges and attorneys. Table 97 shows these responses:

125. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 66.

126. *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 26.

TABLE 97: RESPONSES OF EMPLOYEES REGARDING PERSONS WHO TREAT THEM WITH LESS RESPECT THAN COLLEAGUES OF ANOTHER RACE

Race/ Ethnicity of Employee	Persons Who Treat Them with Less Respect*					
	Employees		Judges		Attorneys	
	Percent	Number	Percent	Number	Percent	Number
Caucasian (N=30)	83.3%	(25/30)	16.7%	(5/30)	10.0%	(3/30)
African- American (N=35)	80.0%	(28/35)	17.1%	(6/35)	28.6%	(10/35)
Hispanic (N=6)	50.0%	(3/6)	16.7%	(1/6)	0.0%	(0/6)
Asian- American (N=4)	50.0%	(2/4)	0.0%	(0/4)	25.0%	(1/4)
Native American (N=3)	100.0%	(3/3)	0.0%	(0/3)	33.3%	(1/3)
Multiracial (N=1)	0.0%	(0/1)	0.0%	(0/1)	100.0%	(1/1)

Note: An asterisk (*) = totals across a column may exceed 100% because respondents could choose more than one response. N = total number.

SOURCE: Employee Survey.

Although the vast majority of Caucasian employees did not report different treatment based on their race, several Caucasian respondents cited fear by their Caucasian supervisors of discrimination claims and enforcement actions as the reason for different treatment from their supervisors directed towards them. They perceived that their treatment was often *harsher* than that directed toward their minority counterparts. Some white employees felt that they had no organized support. One white female wrote: "I am white as are my supervisors. They are so sweet to the blacks in our office but often speak to whites in the most demeaning manner. They are afraid of law suits with the blacks."

On the other hand, comments by minority employee respondents painted a different picture with regard to their general treatment. One minority employee summarized what those who wrote comments generally suggested:

Racial discrimination is prevalent in our court system. I have been employed by the courts for 14 years and it is a reality. For some reason we do not want to acknowledge it and therefore, it is not properly dealt with . . . Minorities in this building are treated differently. We are not given

the same opportunities (learning or training) as our counterparts. There are two sets of rules and standards being enforced in this court system.

Other minority employees reported feeling excluded from meetings and management. One employee wrote: "Blacks have been left out of discussions and other things such as helping with group functions, planning holiday parties." Another minority employee wrote, succinctly, but without specifics: "Not included when superiors ask for opinions on certain matters."

Overall, the anecdotal evidence consisting of both the written comments and the public hearing testimony, indicates that some minority employees believe they experience different treatment than their nonminority counterparts.

Employees were asked whether they observed court employees treat *other* employees in a demeaning or disparaging manner on the basis of race or ethnicity. The responses by employees support the report of "less respect" from other employees. For example, 15.5% (14 of 90) of the responding African-American employees, 18.2% (4 of 22) of the Hispanic employees, and over 30% (4 of 13) of the Asian-American employees reported observing other court employees sometimes treat minority male court employees in a demeaning or disparaging manner. Similar responses were reported by these groups in relation to observations of demeaning conduct toward minority female court employees. In addition to demeaning treatment observed toward minorities, observations of such treatment toward white court employees was also reported.

When the survey asked attorneys whether they observed disparaging or demeaning conduct by a court employee against another court employee, 96% of all attorneys said they had not seen such behavior. There was little variation by the race, ethnicity or gender of the respondents.

E. *Do U.S. Marshals Service Personnel Treat People Differently Based on Race or Ethnicity?*

The United States Marshals Service was established in 1789. It is America's oldest federal law enforcement agency. By statute, as well as the Judiciary Act, the Marshals Service is granted responsibility for the safety and protection of the federal judiciary as well as safety and protection of the extended court family of employees. The Marshals Service is also responsible for providing protection for members of the United States Attorneys Office when appropri-

ate. Additional responsibilities of the Marshals Service include the retention, transportation and housing of federal detainees, responsibility for the Witness Security Program, the Seized Assets Forfeiture Program and the pursuit and apprehension of federal fugitives.

The U.S. Marshals Service provided data regarding the total number of employees in its employ in the Third Circuit. As of July 1996, there were a total of 154 Deputy U.S. Marshals and 50 other U.S. Marshals Service personnel in all of the districts of the Third Circuit. Of the 154 Deputy U.S. Marshals, 19% (30) of the 154 Deputy U.S. Marshals were minority group members, while 18% (9) of the 50 other U.S. Marshal Service personnel were minority group members.

1. *How Do Deputy U.S. Marshals Treat Other Groups?*

Attorneys, employees and judges were surveyed as to whether they observed U.S. Marshals Service personnel (excluding CSOs) say or do anything to people from various groups which they thought to be demeaning or disparaging to the person based on his or her race or ethnicity. The results of this survey question reflect that disparate treatment based on race or ethnicity is rarely perceived by any of the groups, with few results or remarks to the contrary.

Despite the low level of respondent observations of demeaning treatment by the Marshals Service, at least one group, Hispanic female employees, reported observing such treatment, although only rarely, toward minority male witnesses. The responses of Hispanic female employees to the question averaged 6.0, with 7.0 equaling "never."

Comments contained in the survey responses concerning treatment by the Marshals Service reflect a mix of praise and gratitude, with sporadic criticism. For example, three different respondents wrote:

Considering the interaction our marshals have with so many people day to day they are remarkably even-tempered and conscious of dealing with each person with courtesy.

I've never observed any intentional insults toward the above groups. Conflict is usually personal.

Some people in authority are nicer than others but I have seen that they treat everyone according to their personal style regardless of gender or ethnicity.

Criticism included comments by attorneys about overheard conversations between Marshals Service personnel regarding defendants' or witnesses' racial or ethnic backgrounds out of earshot of the person to whom the remarks were directed:

I don't remember any instances of improper conduct to minority persons—cops always talk to prisoners as if they are scum—but I often overheard such comments *about* minority persons between deputy Marshals and secretaries, that is Marshals talking to each other or to secretaries about minority prisoners.

I have observed U.S. Marshal personnel treat minority men and women so much differently from Caucasians.

The responses by the judges regarding the treatment accorded them by the U.S. Marshal Service demonstrated no statistical disparity in treatment. The comments provided by the judges who responded to the survey echoed the praise given by the employee respondents:

Our marshals are extremely courteous and professional, often dealing with stressful circumstances with great tact. Deputy U.S. Marshals are frequently in my court with criminal defendants and witnesses in custody. They are uniformly polite and courteous to all participants in proceedings before me.

My experience has been that the U.S. Marshals Service treats all individuals equally and with respect. Even in situations where litigants have been abusive to them, the U.S. Marshals Service personnel maintain a calm professional demeanor.

One critical comment concerning the Marshals Service was made by a responding judge concerning the treatment of minority prisoners: "Generally, all of them [U.S. Marshals and CSOs] seem to be well-mannered and appropriate. Sometimes, however, they seem to be less so with minority prisoners—but this is in the nature of 'vibrations.'"

Attorneys reported some disparity in treatment by Deputy U.S. Marshals toward various people. Deputy U.S. Marshals were re-

ported to treat minority attorneys differently than they treated white attorneys, although such treatment was observed on "rare" occasions. Attorneys also reported that they observed Marshals Service personnel treat minority judges in a demeaning or disparaging manner; again, such observations were rare. The rare instances in which these observations are made, for the most part, coincided with the judges responses that they had not observed such behavior.

Attorneys also reported that minority litigants were treated in a demeaning or disparaging manner by Marshals Service personnel on rare occasions. Slight disparities were also observed in the treatment of minority court employees, as compared with that of nonminority court employees; however, such treatment was again observed only on rare occasions.

Remarks on questionnaires by a number of attorneys regarding U.S. Marshals Service personnel seemed to criticize the treatment of minority defendants:¹²⁷

Some U.S. Marshals treat criminal defendants with disrespect and can be nasty. This seems limited to minority defendants. [For example, they] snap at defendants who don't move quickly or who try to talk to family in the courtroom.

I have on occasion observed federal marshals make disparaging comments about minority criminal defendants.

In a similar vein, at a public hearing a Caucasian male attorney commented about the Marshals Service:

I was never terribly impressed with the sensitivity either of the U.S. Marshal's Office or the prison authorities with whom we had to interface, and there are still issues that arise where lawyers and sometimes their clients do not seem to be treated the way they should be, particularly when it comes to meeting with their clients.¹²⁸

A female attorney at that same hearing noted:

An issue is the attitude of security guards and marshals towards defense counsel who represent the black or Hispanic defendants. These personnel react to the same attorney differently when the attorney appears with a

127. The treatment of criminal defendants is reviewed in greater detail in the Report on Criminal Justice Issues of the Race & Ethnicity Commission.

128. *Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 7.

white client. There is no overt discourtesy. The conduct such as curtness in conversation, looking away or through the attorney when addressing them and an overall coldness in their demeanor is common. Other seemingly insidious subtleties are difficult to quantify, but they convey an air of disdain that is not apparent when the client is white.¹²⁹

In contrast, however, some attorneys wrote:

I have never observed any racial/ethnicity-based problems with the Marshals Service. I did represent a minority individual who was having what he believed to be race-based problems where he was detained and the Marshals Service investigated and resolved the situation in a professional manner.

...

I would like to add that but for some overly nervous attention to detail right after the Oklahoma City blast, the U.S. Marshals are the most polite and professional security personnel I have had the opportunity to observe.

Always professional in their actions under stressful situations, and on several occasions acted so patiently that I personally found it aggravating that they bent over backwards to avoid an incident.

A female Assistant United States Attorney from the Middle District of Pennsylvania commented about the Marshals Service:

I talked it over with my friends, asking them had they experienced any sort of discrimination of any sort with the court, court personnel, marshals, and it was really refreshing that none of us could think of anything at all.

Everyone that I know of has always been treated fairly and equally. Even in the rumor mill I just have not heard anything negative about the court system.¹³⁰

2. *How Do CSOs Treat Other Groups?*

CSOs are under contract and the direct authority of the U.S. Marshals Service. As part of this contractual responsibility, the CSOs have a primary responsibility for staffing and maintaining the

129. *Id.* at 57.

130. *Id.* at 68.

security checkpoint located at the lobby entrances of the U.S. Courthouses. At these checkpoints, the CSOs operate the magnetometers and x-ray equipment as part of the overall screening procedure for access to the courthouse proper. In addition, the CSOs provide escorts for federal agents and other law enforcement officers producing prisoners at the courthouse. CSOs are assigned other security duties with the courthouse as directed by the United States Marshals Service. There are 183 CSOs in the entire circuit, of whom 14% (26) are minorities.

Although the U.S. Marshals Service and its contract employees, the CSOs, are technically a division of the Department of Justice, the public on the whole, and this committee, considers them part of the courthouse community. Perhaps a central goal of the security they provide is establishing a presence about the building. In almost every district, courthouse participants must interact at some level with the CSOs to gain entry into our courthouses. Thus, the CSOs, at the checkpoints in each courthouse, become the first, introductory encounter a participant will likely experience. Accordingly, this Committee sought to obtain information regarding race and ethnicity from courthouse participants and their perceptions of, and experiences with, this front line in our courthouses.

a. How Do Race and Ethnicity Affect the Screening Procedures Implemented by CSOs?

Security at the courthouses in the Third Circuit involves the screening conducted by CSOs when users of the courthouse enter the building. In almost all districts, persons entering the courthouses must submit to these procedures.¹³¹

The procedures instituted at a courthouse are governed by each court's Judicial Security Committee, composed of judges, staff, clerk personnel and U.S. Marshals Service personnel. The Judicial Security Committee is responsible for assessing the present security needs of its courthouse and developing procedures ensuring that the requisite degree of security is in place. For example, for a number of years attorneys entering the Philadelphia courthouse in the Eastern District of Pennsylvania were permitted to enter by merely showing identification to the security personnel and were permitted to bypass the upright metal detector. In 1993, however,

131. The questionnaires did not ask whether a respondent was allowed to enter without undergoing *any* security procedures. In hindsight, responses to such an inquiry would have produced interesting, if not statistically significant, information.

procedures at the Eastern District courthouse were changed and required *all* persons entering the courthouse to submit to the screening procedures, a clear response by the Judicial Security Committee for the Eastern District of Pennsylvania to increased security needs in a rapidly changing society. A summary of the varying security standards in each district is as follows:

- In the Eastern District of Pennsylvania, all personnel, except sworn law enforcement personnel showing identification, judges and those with access cards to the judge's garage and elevators, must go through the security checkpoint.
- In the Middle District of Pennsylvania, everyone except government employees with federal identification must go through the security checkpoints. This includes some public defenders who are issued IDs.
- In the Western District of Pennsylvania, everyone, except government employees with federal identification, must go through the security checkpoints.
- In the District of New Jersey at Newark, everyone goes through the security checkpoint.
- In the District of New Jersey, both at Trenton and Camden, court personnel with identification do not have to go through the security checkpoint.
- In the District of Delaware, building employees with identification are not screened.¹³²
- In the District of the Virgin Islands at St. Thomas, everyone goes through the metal detector except those persons with access cards to the garage facility.
- In the District of the Virgin Islands at St. Croix courthouse, everyone goes through a metal detector except law enforcement personnel with identification.

There is a minimum level of screening to which all persons must submit—primarily, if not exclusively, electronic screening. For example, all users of each courthouse, except as noted above, must pass through the upright metal detector. Based upon the results of the pass-through, a person may be subjected to additional screening procedures, including removing jewelry, belts, shoes or submitting to an examination by an officer using a hand-held metal detector to pinpoint objects that the upright detector has sensed.

In addition to the pass-through examinations, all users must place their bags and packages on an x-ray machine so that an of-

132. The Wilmington, Delaware courthouse also serves as a federal building, and houses numerous other federal offices including congressional offices.

ficer may examine the contents of the bag or package. The CSO, in their discretion, may request that the contents of a bag or package be examined visually.

The CSOs exercise only limited discretion in the degree and scope of screening instituted at the entrance of the courthouses. Thus, any perception of disparity in the implementation of the screening procedures is less a result of the *kind* of procedure to which a person is subjected and more a function of the *manner* in which the CSOs conduct the screening procedures. The limited discretion in the screening process, nonetheless, leaves some room for disparity in who is subjected to what type and level of scrutiny upon entering a courthouse and may, therefore, affect one's perception of the treatment of employees, lawyers and other users of the court's facilities. The attorney and employee surveys inquired as to the type of screening procedure to which the respondents were subjected and asked for comments concerning the manner in which these procedures were undertaken.¹³³

Overall, there were no immediately obvious differences in the types of screening procedures to which the respondents had been subjected. Comments made in the surveys, and statements made at the public hearings, however, provide the most telling information about court users' perceptions of the manner in which these procedures are carried out.

b. How Do Employees and Attorneys Perceive the Implementation of Screening Procedure Treatment by CSOs?

Employees and attorneys were asked to report the procedures to which they had been routinely required to submit at the time of courthouse entry. Ten procedures were listed in the survey as follows, without consideration of the order of importance, the degree of intrusion or the manner in which the screening was conducted:

133. The Interaction Committee notes that the diversity of individual districts and of courthouse employees may vary widely. As a result, differences in the impact of security measures may be less a function of racial bias than differences in security procedures. Numerous statistically significant disparities were found among the procedures used by various districts. For example, the courthouses on St. Croix and St. Thomas have stricter security requirements for employees than do those in other districts. The employee population on both St. Croix and St. Thomas is predominantly minority. In the Middle District of Pennsylvania, however, the employee population is predominantly white. The district's security procedures are also less stringent. This combination of factors might explain some of the statistical differences. They would not, of course, explain the perceptions noted in anecdotal comments.

- Remove metal objects from your person
- Pass through upright metal detector
- Remove jewelry or other decorative wear
- Submit to examination with a hand-held metal detector
- Have bags and/or packages visually inspected after x-ray
- Place bags, coats, packages or other items on x-ray machine
- Remove belt
- Pass through metal detector again
- Remove shoes or other clothing for a further check
- Have tape recorder or other device held at security desk

Beginning with an analysis of the percentage of respondents who routinely submit to the baseline level of security scrutiny, i.e., the upright metal detector, the survey results reflect that all of the districts generally subject entrants to a pass-through examination using the upright metal detector:

TABLE 98: ATTORNEYS AND EMPLOYEES WHO ROUTINELY SUBMITTED TO EXAMINATION USING UPRIGHT METAL DETECTOR BY DISTRICT

District	Attorneys		Employees	
	Percentage	Number	Percentage	Number
D. Del.	94.6%	123/130	78.9%	45/57
D.N.J.	98.7%	455/461	81.5%	212/260
E.D. Pa.	95.7%	484/506	91.3%	231/253
M.D. Pa.	95.5%	253/265	53.3%	49/92
W.D. Pa.	100.0%	33/33	58.3%	70/120
D.V.I.	96.2%	51/53	85.3%	29/34

SOURCE: Attorney Survey; Employee Survey.

There were no significant differences based on the race of the attorney or employee requested to submit to examination by the upright metal detector. Table 99 details these results.

TABLE 99: ATTORNEYS AND EMPLOYEE RESPONDENTS WHO
ROUTINELY SUBMITTED TO EXAMINATION USING UPRIGHT METAL
DETECTOR BY RACE

Race of Respondent	Attorneys		Employees	
	Percentage	Number	Percentage	Number
Caucasian	96.3%	1367/1420	77.3%	551/713
African-American	98.0%	99/101	85.2%	109/128
Hispanic	90.9%	20/22	85.7%	24/28
Asian-American	100.0%	21/21	78.9%	15/19
Native American	100.0%	6/6	83.3%	10/12
Multiracial	100.0%	13/13	50.0%	6/12

SOURCE: Attorney Survey; Employee Survey.

The second baseline procedure of the security screening involves the screening of bags and packages brought into the courthouses. The import of mandating this procedure is obvious in light of bombing incidents involving federal buildings. The number and percentage of respondents by district reporting that they were subjected to this procedure were as follows:

TABLE 100: PERCENTAGE ROUTINELY SUBMITTED TO EXAMINATION
OF PACKAGES, BAGS, ETC., USING X-RAY MACHINE BY DISTRICT

District	Attorneys		Employees	
	Percentage	Number	Percentage	Number
Ct. App.	61.5%	24/39	72.3%	73/101
D. Del.	80.0%	104/130	10.5%	6/27
D.N.J.	91.8%	423/461	55.8%	145/260
E.D. Pa.	83.4%	422/506	87.0%	220/253
M.D. Pa.	82.6%	219/265	25.0%	23/92
W.D. Pa.	81.8%	27/33	24.2%	29/120
D.V.I.	77.4%	41/53	76.5%	26/34

SOURCE: Attorney Survey; Employee Survey.

Once again, there were no disparities reported based on the race or ethnicity of the respondent. Follow-up procedures involve a variety of additional security procedures, including a second pass-through, removal of jewelry or visual scrutiny of the contents of packages. The percentages of respondents who reported that they were subjected to these follow-up procedures follow:

TABLE 101: OVERALL PERCENTAGE OF RESPONDENTS SUBJECTED TO ADDITIONAL SECURITY PROCEDURES

Procedure	Attorneys (N=1583)	Employees (N=912)
Remove metal objects	83.0%	39.5%
Remove jewelry	31.0%	19.7%
Use of hand-held detector	44.7%	25.3%
Visual inspection of bags	37.0%	18.9%
Remove belt	13.2%	12.0%
Second pass through	46.5%	28.4%
Remove shoes	4.6%	4.2%

Note: N = total number.

SOURCE: Attorney Survey; Employee Survey.

The results of the employee survey reflect that 46% (40 of 87) of African-American female employees were asked to remove metal objects from their persons before entering through the upright metal detector. In contrast, 33.5% (140 of 418) of white female employees were asked to remove metal objects from their persons. It is interesting to note that white male employees reported that they were asked to remove metal objects nearly half of the time, 47.8%, which is a higher percentage even than African-American females.

Because the security procedures in each district vary, not all employees reported that they are asked to pass through the metal detector. Of the employees asked to pass through the upright metal detector, however, there was a statistically significant difference between the number of African-American female employees who were asked to pass through the detector (76 of 87 or 87.4%), and the number of white female employees who were asked to do so (75.6% or 316 of 418 reporting).¹³⁴

Of the employees asked to remove jewelry or other decorative wear before passing through the metal detector, a statistically significant difference was also reported. While only 17.7% (44 of 249 reporting) of white male employees and 18.7% (78 of 418 reporting) of white female employees were asked to remove jewelry, 28.7% (25 of 87 reporting) of African-American female employees were asked to do so. The Interaction Committee is unable to determine whether the cause of this difference is racial bias or a function

134. Interestingly, the statistical significance is a function of gender, not race, because there were no statistically significant differences when the answers of men and women were analyzed together.

of the type and amount of jewelry and other metal worn by different people, such as buttons, hair clips and the like.

Of the employees responding that they had been examined with hand-held metal detectors, there was again a statistically significant difference between the responses of white female employees (23.2% or 97 of 418) and African-American female employees (34.5% or 30 of 87). There were no specific comments to help identify reasons for this difference other than race. Undergarments, shoes, clothing decorated with metal objects or hair ornaments could possibly explain why the detector is activated more frequently by certain people.

Of the employees responding to the question concerning requests to place bags, coats, packages or other items on the x-ray machine, 83.3% (15 of 18) of Hispanic females, 75.9% (66 of 87) of African-American females, 65.4% (17 of 26) of African-American males and approximately half of the 667 white male and female respondents submitted to this procedure. There were statistically significant differences between the responses of white and all other minority respondents.

Of all the employees asked to have bags and/or packages visually inspected after the bags were x-rayed, according to respondents, such examination was requested of slightly more than a tenth (12.9% or 54 of 418) of white female employees, over a quarter (27.6%) of African-American female employees, and over a third (38.9% or 7 of 18) of Hispanic female employees. The percentage of African-American men checked was 26.9% (7 of 26 respondents). White male employees reported visual inspections of bags and packages at a percentage of 21.7% (54 of 249), which is lower than Hispanic and African-American women, but higher than white women.

Of the employees requested to pass through metal detectors a second time, there was once again a statistically significant difference between the responses of white female employee respondents (24.9% or 102 of 418) and African-American female employees (35.6% or 31 of 87). There were no significant differences between the persons asked to remove belts, shoes or other clothing for further checks, or those asked to have tape recorders or other devices held at the security checkpoint.

A sample of handwritten comments on the employee and attorney surveys concerning screening procedures follow:

When going through the metal detectors in the entrance of the courthouse, security examines our witnesses more thoroughly than others.

Men are sometimes given a harder time than women on routine pass-throughs. However, women (including me) have had inappropriate comments made in the “we’re all just friends here” vein.

Comments about a person’s economical class or neighborhood which imply that a certain type of behavior is expected/normal . . . but more so that the identified groups are subject to closer screening. Black court employees have to display credentials more often.

I have observed the CSOs check minorities of both sexes whom they do not know more carefully than non-minority individuals when entering the courthouse through the screening security area.

From a different point of view, another court employee observed: “There are too many people going through the detectors to determine who is a juror, a witness or an employee.”

In addition to questions concerning the implementation of screening procedures, survey questions were posed to employees, attorneys and judges seeking quantitative and descriptive responses regarding interactions with the CSOs. The statistical results were similar to those tracking the U.S. Marshals Service.¹³⁵

Respondents were asked whether the CSOs said or did anything to people from various groups which was demeaning or disparaging to that person based on his or her race or ethnicity. The statistical results tracked those related to treatment by the U.S. Marshals Service described earlier in this Report.

There were, however, statistically significant differences in the responses of male and female Asian-American employees. These employees perceived more disparate treatment of minority employees by the CSOs and reported disparate treatment in an average range of 6.2 and 6.1, respectively (with 7.0 equating to “never” ob-

135. It appears many survey participants may not have made a distinction in their responses concerning interactions with CSOs and the U.S. Marshals Service. The omission of a clear definition in the survey as to the relative responsibilities of each may have been confusing. This could explain the similar results and comments. Regardless of the potential confusion, generally, there was little to no difference in the statistical results concerning disparate treatment by either the CSOs or Deputy U.S. Marshals.

serving disparate treatment).¹³⁶ Aside from these observations, the overall results showed most participants observed little to no difference in treatment by CSOs based on race or ethnicity.

Both the statistical results and the handwritten comments by judges to the question showed that they never observed demeaning or disparaging treatment by CSOs: "I have never seen demeaning or disparaging conduct directed at any person by CSO's on account of race." One judge noted, however, that "many snide remarks" have been made about minorities by CSOs.

Overall, attorneys reported that they rarely, if ever, observed demeaning treatment by CSOs toward various groups of persons. The survey responses also reflect that on rare occasions attorneys have observed disparate treatment by CSOs toward minority female attorneys, although to a lesser degree than that observed toward minority male attorneys.

Comments submitted by three attorneys expressed the following concerns and criticisms about the conduct of CSOs:

Until recently, not everyone who entered federal court in Wilmington had to go through the security monitors. At that time I did notice that the CSOs, using their discretion, were more likely to have minorities dressed in non-professional attire go through the monitors, i.e., if you were white and/or you were dressed in a professional manner, no matter what your race, you were not checked before entering, but blacks and/or other minorities were always checked.

The court security officers are often abrupt, brusque and impolite to just about everyone excepting the judges and jurors (who are identified as such).

I have never seen the security officers treat any person inappropriately, but they have demeaned black persons by their derogatory comments about them, both among themselves and to me. They have been particularly hateful about black police officers and said many Wilmington police retired when a black was appointed to head that force because they would not work for a nigger. They would give a black person directions to the agency they were seeking and then come back to me and sometimes other security officers and make fun of the person.

136. Asian-American female employees reported that they observed disparity in treatment of minority female employees, but the total number of Asian-American female employees responding was 8.

An African-American woman at a public hearing noted:

[T]he perception is of—one of insensitivity towards minorities when you walk through the court[house] building door. I've had complaints from other fellow black lawyers, as far as maybe being searched more than the white attorneys that are going through the same time period they are.

It is a concern when you walk through the door you don't see any minority guards. When you go into the courtroom, you don't see any minority bailiffs or Court Reporters or Judges.

So you feel in a way that there is this perception whether or not there's going to be insensitivity or not, you just feel it.¹³⁷

In stark contrast to the above quotes, other attorneys observed:

I have never seen a court security officer act in any way than completely professional and courteous.

In the U.S. Courthouses in Wilmington, Philadelphia, Camden, Trenton and Newark I have never seen Marshals Service personnel act in anything but a courteous manner. The Court Security officers conduct themselves in a professional and pleasant manner.

Although there are low levels of reported observations of demeaning or disparaging treatment by Deputy U.S. Marshals and CSOs, users of the courts seem to be guided more by perception than actual observations. Comments from public hearing participants demonstrate this perception. A male African-American attorney representing a minority bar association stated:

I would like to start at the time when the federal courts first implemented the scanning for weapons and what have you. That is when I first felt that I was being treated unfairly. However, I think I have gotten over that. But still I think it was not until the recent MOVE case that I felt that the treatment changed when my face was seen everyday in the courthouse.

...

So I think that needs to be looked at. I think the marshals as a whole do an excellent job, but I think there

137. *Public Hearings: Wilmington, Delaware, supra* note 37, at 64.

needs to be some looking at courtesy among some of the marshals and how they deal with the people that are coming in who are faced for the first time with being scanned for weapons.

My experience was when they first brought in the metal detectors—a lot of people don't like metal detectors. A lot of people don't carry weapons. And the intrusion I think was unreasonable at first because I guess the way they had the machines set for myself and other people—I mean, we had to take off our clothes almost in order to get through those machines. I thought it was demeaning that I had to take off my watch, my belt—and I don't min[d] emptying my pockets—but when it gets to a place where it is so sensitive the small metal buckle on a belt—

The Moderator asked: “Do you perceive a difference in the treatment of minority lawyers?” The male African-American attorney responded:

No, I do not. The reason I bring it up, having been a minority all my life, our perception is different. I may not look at a problem immediately as a problem that is affecting everyone. The anger that I may have inside of me or other blacks may have inside of them immediately you may feel like “I am being treated differently.” After you sit back and watch, you say “they do it to everybody.”

The immediate reaction, especially when you have a U.S. Marshal that is not as sensitive to the problem, you think he is doing something to you. But I do not think any of the marshals single out anyone. I think it is a question of the black experience in America and how we may perceive things when we first come to face with them before we have time to think it out and look around and see how it is affecting the body of people who are coming in as a whole.

But I think the major issue would be sensitivity to the fact not every minority person that comes there is a professional person who can look at it logically and say “I am being treated the same as everybody else.” So I think sensitivity to the fact a person coming in may not understand

and take it as just doing your job, and the way they respond to those people I think is important.

The Moderator responded: "Without a doubt. But again, just to reiterate your perceptions, you have stated it is not accomplished in any discriminatory manner?" The attorney stated: "No. As a matter of fact, I have noted in the past my treatment by U.S. Marshals has been exemplary."¹³⁸

A female Assistant United States Attorney in the Virgin Islands spoke positively about both CSOs and the U.S. Marshals Service:

I have the opportunity on a daily basis, to interact . . . with the United States Marshals Office personnel and the court security officers, as well as other court employees and other attorneys.

I must say that my experiences and observations for the most part have all been positive. That is to say I have not personally observed any of these groups that I have mentioned, namely the Marshals Office personnel or court security officers or court employees or other attorneys, say or do anything which I would characterize as demeaning or disparaging to other attorneys or other judges, to litigants, to court employees, to witnesses or to jurors based on their gender, race, or ethnicity . . . I can say that I have not had any negative experiences based on gender or race or ethnicity, notwithstanding the fact that judges [I have appeared before] are from different districts as well as different circuits.

I find that in all cases the judges have been very accommodating, very courteous, and the experience has been a very positive one. . . . And on the whole I find that our court employees treat the judges with the utmost courtesy and respect.¹³⁹

F. Conclusion and Findings

- Interaction among people in general is often an unpredictable experience. When one adds the adversary system on which the courthouse is founded and the necessary sacrifices in personal

138. *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 5-17.

139. Third Circuit Task Force on Equal Treatment in the Courts, *Public Hearings of the Third Circuit Task Force on Equal Treatment in the Courts: St. Thomas, Virgin Islands* 18-20 (Nov. 7, 1996) [hereinafter *Public Hearings: St. Thomas, Virgin Islands*].

privacy required by much needed security measures, courthouse interactions become even more difficult and unpredictable. Despite these pressures, a majority of those responding to the survey reported that they are treated equally in almost all circumstances. Significant quantitative and qualitative differences, however, recurred between minority and nonminority responses.

- Because of the evidence of perceptions and experiences of bias among many minority participants, especially in an institution founded on equality, every conceivable effort must be undertaken to make all who visit the courthouses within the Third Circuit feel welcome and equal.
- Although the combined survey results generally reflect that judges almost “never” treat courthouse participants disparately because of race or ethnicity, minority attorneys perceived disparate treatment by judges more often than their nonminority colleagues. Similarly, minority attorneys were more likely to perceive that judges provide more informal access and deference to attorneys of his or her own race or ethnicity. Public comments coincided with the statistical results of the survey.
- Security procedures instituted by the U.S. Marshals Service and implemented by CSOs are perceived by some people to be, and may actually be, inequitably applied. Respondents reported that the U.S. Marshals Service and CSOs at times, albeit infrequently, accorded witnesses, litigants and defendants different treatment based on their race or ethnicity.
- Racial and ethnic differences among attorneys were not exempt from this incivility. Disparate treatment was reported by minority attorneys, in the survey, as well as comments, with much more frequency than nonminority attorneys.
- As a whole, a majority of court employees report that they received the same amount of respect as their coworkers of a different race or ethnicity. Again, however, significant differences existed between nonminority and minority employee responses. Minority attorneys were five times as likely to perceive less respect than their nonminority counterparts.

G. *Recommendations*

1. *Civility and Racial Bias*

- The Judicial Council of the Third Circuit should ask each district court to adopt a local rule or policy statement expressly encouraging civility in the litigation of matters and prohibiting

racial or ethnic bias in the litigation process. Such local rules should be communicated to counsel at the beginning of all cases.

- The Code of Conduct for United States Judges should be amended to encourage judges to be aware of and alert to the subtle nuances from which racial and ethnic bias can flow.¹⁴⁰ The courts are urged to focus on the need for a standard of appropriate behavior.
- A conference should be sponsored for attorneys of the Third Circuit that would address the issue of civility.
- Educational seminars regarding diversity, such as those currently available from the Federal Judicial Center, should be presented to all employees and judicial officers.
- Educational seminars regarding diversity, such as those currently available from the Federal Judicial Center, should be presented to court employees at every level.

2. *U.S. Marshals Service*

- More information should be provided to users of the courthouses within the circuit to explain the reason for certain security measures at the courthouses and the limited discretion exercised in implementing such procedures. This information could be disseminated by the use of printed handouts or leaflets available at points of entry.
- An effort should be made to educate U.S. Marshals Service personnel and CSOs about the perceptions of bias which are held by some users of the courts. Such training should demonstrate the manner in which the Marshals Service and CSOs can effectively ensure security while being cognizant of, and attempting to minimize, the perceptions of bias held by these courthouse users.

X. REPORT OF THE COMMITTEE ON APPOINTMENTS BY JUDGES OF
THE RACE & ETHNICITY COMMISSION

A. *Introduction*

The charge of the Committee on Appointments by Judges ("Appointments Committee") was "to study . . . the appointment of arbitrators, experts and special masters, and any other appoint-

140. The ABA's Summit on Racial and Ethnic Bias has recommended the adoption of a model rule on judicial conduct which "prohibits racially or ethnically biased conduct."

ments made by judges of the courts, including committees . . . [to assess what consideration is given to race and ethnicity in making those appointments and to determine what impact, if any, such appointments have] on the equality of treatment of participants in the judicial process.”¹⁴¹ The Appointments Committee studied the following five areas of judicial appointments: (1) judicial officers: magistrate and bankruptcy judges; (2) law clerks and law students (interns, externs); (3) judicial staff: secretaries, courtroom deputies and stenographers; (4) other court employees: court clerks, administrators and executives; and (5) court adjunct appointments: arbitrators, mediators, CJA attorneys, special masters and committees.

The Appointments Committee is aware that a judge’s decision concerning whom to hire or appoint is the result of numerous factors, including personal perceptions of which the judge may not even be aware. A person making a hiring decision may find it difficult, if not impossible, to recite *all* the factors on which that decision is based. Therefore, the Appointments Committee determined that an inquiry into relevant criteria used by those charged with making these decisions might provide insight into the intangible factors that may influence a judge’s decision about whom to hire or appoint. The Appointments Committee was also aware that the hiring and appointment process has a direct impact not only upon the quality of the work of a court, but also upon the degree to which courts are viewed as being fair to racial or ethnic groups.

B. *Methodology*

The Task Force utilized surveys, public hearings, interviews and census data to gather information about the process by which judges make appointments. All federal judges within the Third Circuit were asked to complete the Third Circuit Questionnaire for Judges. Of the 164 judges who received the survey, 117 (71.3%) responded. The questionnaire contained 17 questions specifically relating to judicial appointments. Judges were asked how they recruit or select U.S. magistrate judges, U.S. bankruptcy judges, law clerks, arbitrators, mediators, special masters, receivers, court experts, judicial staff, courtroom deputies, court reporters, federal public defenders, clerks of the court, chief probation officers, *pro bono* counsel in civil cases, counsel to indigent defendants under the CJA and members of panel advisory committees and task forces.

141. See *Resolution of the Judicial Council of the Third Circuit* (June 29, 1994).

Judges were also asked about the criteria they used in making these selections.

Attorneys were asked if they had applied for or received appointments from the federal judiciary (e.g., law clerk, CJA panel, Chapter 7 Trustee), and if they believed race or ethnicity had affected whether they received such positions. Those attorneys who had not been appointed were asked their opinion as to why they had not been appointed.

Individual commentary on pertinent issues was also gathered during breakout sessions of the Third Circuit Judicial Conference in West Virginia in 1995 and in the public hearings held across the Third Circuit in the fall of 1996.

We note several limitations on the data requested and obtained. First, several questions on various surveys did not require the respondent to specify the minority group to which the answer referred. For example, judges were asked the number of "minority" clerks they had hired over a given time, but they were not asked to identify the minority groups to which the clerks belonged. This was done, in part, because the law clerks would not be reporting their own choice of ethnic or racial identity. As a result, however, the Appointments Committee's data regarding certain questions are not specific by racial categories (e.g., African-Americans, Hispanic-Americans or Asian-Americans). Therefore, it is impossible to determine if any disparity that may exist is more pronounced with regard to any particular minority group.

In addition, comments from some judges indicate a lack of clarity concerning certain questions. For example, one judge commented:

Questions 7, 11, 13, 16, 19 use the term "EEOC policy considerations" without definition. People perceive the EEOC's policies differently. Does EEOC require affirmative action to favor minorities all things being equal? Or does EEOC require non-favoritism of any group? The judge who tries to do the "right" thing in selection of law clerks and others, as I do, may tend to give a boost to a minority candidate who is not actually the best qualified in all other criteria, but I was not sure how to answer these questions to reflect that.

A different but related concern was expressed by another judge:

As an attorney, I never appeared before a judge (except in a municipal court) who was not a white male as I am. Yet sometimes, I thought the judge was biased against me (this was very unusual but it happened). Obviously, I did not think that gender or race had anything to do with the bias. But if I had been a woman or a minority, I might have thought that race or gender was involved. The point is that the questions seek subjective reactions. Except in those rare cases in which a judge uses words indicating a source of bias, it is not possible to know whether (1) is the judge biased; and (2) if so why?

The Appointments Committee has noted limitations to the data compiled in its discussion of that data.

C. Discussion

During the public hearings, numerous minority attorneys indicated that minorities are not well represented in appointments made by judges within the Third Circuit. They interpreted this lack of representation as bias and suggested that it fostered a perception within minority communities that such bias exists. Such testimony was in stark contrast to numerous positive comments about the absence of bias in the courts of the Third Circuit. A white female attorney from the civil section of the U.S. Attorney's Office in Harrisburg commented: "Everyone that I know of has always been treated fairly and equally. Even in the rumor mill I just have not heard anything negative about the court system."¹⁴² That feeling was shared by many of the white attorneys who testified in other districts throughout the Third Circuit. For example, one white male attorney said: "The bottom line is that I simply have not seen gender discrimination, sex discrimination, race discrimination, ethnic discrimination in the Federal Courts. I have not witnessed it, I am proud to say."¹⁴³ In a similar statement, a white female attorney said: "In this District and in this Circuit I have always had the overwhelming impression that substance, not sex, race, or ethnicity governed the treatment that I and those around me received."¹⁴⁴

Some minority attorneys, however, held a different view. Highly respected attorneys who are members of minority groups testified that racial and ethnic bias are or have been factors within

142. *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 68.

143. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 13.

144. *Id.* at 71.

the courts of this circuit. Even those minority attorneys who felt they had always been treated fairly stressed the fact that the courts are *perceived* as being biased. A black attorney who is a former Chancellor of the Philadelphia Bar Association expressed the following, fairly typical, view:

First, it is my belief that racial, ethnic, and gender bias does exist in the justice system within the Third Circuit.

...

This is not to suggest that every time a person of color is before our judicial system that person will be treated unfairly. However, I am suggesting there is a higher likelihood that a person of color will not receive the same fair and equal treatment we have a right to expect from our court system.

...

I am of the firm belief we will not be able to eliminate racial attitudes and bias from our justice system unless and until we eliminate racial bias in our society. That does not mean we should do little or nothing in the meanwhile. Rather, we must put in place a mechanism to reduce the effects of racial attitudes and bias while people of goodwill work toward the elimination of racial bias inside and outside of the judicial system.¹⁴⁵

A black female attorney who has practiced in the Third Circuit, Delaware, Maryland, New York, Texas and West Virginia stated that "with certain notable exceptions, when I appear [before courts in the Third Circuit] certain assumptions are immediately made by the court which I believe to be based on race."¹⁴⁶ She gave a specific example of a district judge who had immediately accepted the erroneous representation of opposing counsel, who was white, as to the time in which a complaint had to be filed. She also noted the following example:

Or there was a time when a judge was flipping through the initial pleadings . . . and stated to me: "Your client is a black male. How old is he? Why can't he go back to work?" First, I did not believe that race was a relevant factor in a disability case because my client's race was not pled. But secondly, when I told him that my client was a

145. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 95, 99.

146. *Id.* at 86.

white male in his 40s[,] the judge became more attentive to the matter.¹⁴⁷

That attorney and several other speakers attributed such attitudes not to intentional bias, but to lack of “interaction with people of color” outside of the courtroom.¹⁴⁸ Because the attorney had practiced in various jurisdictions, she was asked to compare her experiences in the courts in the Third Circuit to treatment she had received elsewhere. In discussing her experience with racially-based disparate treatment in the federal courts of New York and the Third Circuit, she stated: “Surprisingly . . . in the [S]outhern [D]istrict [of] Texas, I did not experience the racism that I believe I experience within this district.”¹⁴⁹

Furthermore, even those minority attorneys who had never directly experienced treatment that they believed to be racist emphasized that there is a strong perception within minority communities that racism does exist within the judicial system of the Third Circuit. One black attorney, who is a former President of the Philadelphia Chapter of the Federal Bar Association, stated that he had neither experienced bias nor “observed any such conduct.” Nevertheless, he stressed that many litigants and persons involved in the court system have a “major, major, major perception that minorities, particularly black litigants from the Philadelphia area, cannot get a fair trial in federal court.”¹⁵⁰

This perception and the feeling of exclusion that it perpetuates creates the perception of “a private club” that was mentioned by some minority attorneys and summarized by a nationally prominent black attorney in New Jersey:

I would like to say that in many respects the Federal Bar in New Jersey can be viewed in many respects as a club. It is a small club. It is an exclusive club. It is a club that is predominantly white, predominantly male. . . . I do not think the makeup of that club is a result of anybody in the club having a meeting and saying let us try to exclude African-Americans, or let us try to exclude Hispanics. I believe the makeup of that club is the result of historical

147. *Id.* at 87.

148. *Id.* at 88.

149. *Id.* at 89.

150. *Id.* at 20.

consequences, but nonetheless the makeup of the club is predominantly white and predominantly male.¹⁵¹

The feeling that bias exists is not limited to attorneys, nor to attorneys who are themselves minorities. In a survey, one judge commented: "Issues of race and gender are met with denial, paranoia and disregard, as though they do not exist . . ." Such opinions may be reinforced by the low numbers of minority group members in nearly every position that is filled by federal judges of the Third Circuit, as detailed below.

1: *Judicial Officers: Magistrate Judges, Bankruptcy Judges*

a. Magistrate Judges

In 1996, there were 34 magistrate judges sitting within the Third Circuit. One was an African-American woman who was appointed in late 1996. She was the first African-American female ever appointed to the position of magistrate judge in the Third Circuit. No other minority group was represented among the magistrates in the Third Circuit.¹⁵²

Qualifications of magistrate judges are established by statute.¹⁵³ The judges of each district appoint magistrate judges

pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures shall contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of the individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions.¹⁵⁴

Magistrate judges need not belong to the bar of the state in which they are appointed. Candidates also must be less than seventy-one years of age, not be related by blood or marriage "within the degree of first cousin" to a judge in the appointing district court and possess certain "personal attributes."¹⁵⁵

The selection panel recommends the five most qualified applicants to the judges of the district court. In doing so, the panel may

151. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 102.

152. For details by district of the race and gender of all magistrate judges in the Third Circuit as of 1996, see Table 2 of the Task Force Report.

153. *See* 28 U.S.C. § 631(b) (1968).

154. 28 U.S.C. § 631(b)(5) (1994).

155. *Id.*

rank the candidates. The magistrate judge is then selected by a majority vote of the district judges. The nominee must undergo an FBI full-field investigation and an IRS tax check before appointment. Public notice of an impending appointment or reappointment of a magistrate judge must be published in the newspaper and, if practicable, the bar journal, newsletters or other local legal periodicals.

Several attorneys and a former Chief Deputy United States Marshal complained about the lack of minority magistrate judges in the Third Circuit at the public hearings held in Newark, New Jersey, Pittsburgh and Harrisburg, Pennsylvania and St. Thomas, Virgin Islands. These commentators stated that this shortage creates the perception of inequality, contributes to the discomfort of minority attorneys and litigants and causes them to question the fairness with which they are treated in court.

A former Chief Deputy U.S. Marshal from the U.S. Virgin Islands, where a majority of the population is black, stated: "In our area the chief judge is white. Both magistrates are white. . . . Federal offices surely can and must reflect the colors, culture, history and future of America and what it stands for especially in our courts of law."¹⁵⁶

An attorney who spoke on behalf of the American Civil Liberties Union (ACLU) of New Jersey emphasized the particular significance of the disparity in magistrate judge appointments that was felt by many members of the minority bar:

What has not changed at all is the magistrate judges. In a way that is more distressing than the lack of minority representation among the judges themselves, because it's the judges who hire magistrate judges, and that process is a process by application. You don't need a Senatorial endorsement. . . . There are no minority magistrate judges. That is distressing.¹⁵⁷

b. Bankruptcy Judges

In 1996, there were 21 bankruptcy judges sitting in the Third Circuit. Thirteen of the 21 were white males and the remaining 8 were white females. There were no minority bankruptcy judges in

156. *Public Hearings: St. Thomas, Virgin Islands, supra* note 139, at 80-81.

157. *Public Hearings: Newark, New Jersey, supra* note 9, at 125.

the Third Circuit.¹⁵⁸ Although the Appointments Committee could not obtain specific information on the number of minority attorneys practicing bankruptcy law, experience suggests that this number is small relative to the number of minority attorneys practicing in other areas of the law.¹⁵⁹

The AO of the U.S. Courts has issued a recommended selection process for bankruptcy judges entitled "The Selection and Appointment of United States Bankruptcy Judges." Under that process, the Chief Judge of the court of appeals appoints a selection committee that determines the distribution for the vacancy announcement, reviews all applications submitted and decides who shall be interviewed. Following the interviews and reference checks, the committee recommends five candidates, in rank order, to the Judicial Council. The Council then determines which of the five candidates it will interview and recommends three candidates, in rank order, to the court of appeals. The court of appeals, as the appointing authority, makes the final decision. Subsequent to that court's decision, the candidacy is submitted for public comment, after which FBI and IRS investigations are conducted.

The Circuit Executive staff examined a sampling of bankruptcy judge interviewees who were interviewed at the selection committee and the Judicial Council or court of appeals levels from 1992 through 1995. The sampling reveals that of the persons interviewed at the selection committee level during that period, 22 were female and 35 were male. Of the 22 females, 20 were white, 1 was African-American and 1 was Asian-American. Of the 35 males, 32 were white and 3 were African-American.

During the same four-year period, 24 persons were interviewed at the Judicial Conference or court of appeals level. Eighteen of those interviewees were males and 6 were females. Only 1 of the males, an African-American, was a member of a racial or ethnic minority. All of the females interviewed at this level were white.

158. There were still no minority bankruptcy judges in the Third Circuit as of August 1997.

159. According to the attorney questionnaires received, of the 329 attorneys whose federal practice includes commercial bankruptcy, 6 are African-American. Of the 300 attorneys whose federal practice includes consumer bankruptcy, 18 are African-American. The other minorities represented in each of these practice areas, respectively, include: Hispanics (4, 4); Asian-Americans (3, 3); and Native Americans (2, 2).

c. Factors in the Selection and Recruitment of Magistrate and Bankruptcy Judges

The Appointments Committee analyzed survey responses to determine what factors judges consider most significant in appointing magistrate and bankruptcy judges. The survey asked judges to rank various factors on a scale from 1 ("not at all important") to 10 ("of utmost importance"). The following table shows the top ten factors overall and the breakdown of responses by minority and nonminority judges.

TABLE 102: TOP 10 CRITERIA IN SELECTION OF MAGISTRATE AND BANKRUPTCY JUDGES IN ORDER OF IMPORTANCE TO ALL RESPONDING JUDGES

Criteria	Overall Mean (N=56)	Mean: Nonminority Judges (N=49)	Mean: Minority Judges (N=6)
Prior employment	8.5	8.4	8.7
Judicial colleague's opinions	7.6	7.4	8.2
Recommendations	7.5	7.4	8.5
Personality	7.1	7.0	7.7
Prior personal experience	6.7	6.5	7.8
Academic achievement	6.6	6.5	7.5
Participation in legal activities	6.1	6.0	7.0
Law review	5.2	5.0	6.5
Scholarly publications	5.1	4.8	6.3
Reputation of law school	4.8	4.7	5.2

Note: Two judges responding to this question did not identify themselves by gender or race. SOURCE: Judges Survey.

Although an applicant's race or ethnicity was not considered very important to this appointment decision (a mean score of 3.08), minority judges ranked that factor significantly higher than their nonminority colleagues. The mean score for race or ethnicity among minority judges was 6.33. The mean score for this factor among nonminority judges was 2.67. Minority judges also ranked gender and participation in community activities higher than nonminority judges.

Judges were asked to rate on a scale from 1 ("always") to 7 ("never") whether and how often certain recruitment methods are used in recruiting applicants for these judicial appointments.¹⁶⁰

160. The recruitment methods referred to included referrals from law schools, minority judges, women's bar associations, nonminority judges, female judges, minority bar associations, minority lawyers, state and local bar associations and nonminority lawyers. They also included advertisements directed to minority

The 26 responding judges suggest that judges do not regularly use any method of recruitment. Of those methods occasionally used, advertising “in house” was the most frequently used method (mean response, 5.29), followed by contacting state and local bars (mean response, 5.96) and contacting minority bar associations (mean response, 6.08). The other recruitment methods listed (e.g., advertising in legal publications and on-line advertising) had mean responses ranging from 6.1 to 6.6, indicating that they are rarely if ever used. We note that advertising such appointments is generally a function of the Clerk’s Office or appropriate staff member.

2. *Law Clerks and Law Students (Interns, Externs)*

a. Racial Composition

i. Law Clerks

The only available data on the past and current racial composition of law clerks and law students throughout the Third Circuit were those received in the judges survey.¹⁶¹ These data were useful, but several limitations should be noted. The total number of clerks and interns listed by judges as having been hired does not equal the sum of the individual categories, i.e., male or female minority and male or female nonminority. The discrepancy arises because judges responding to the survey sometimes supplied the total number of clerks or interns hired, but not their gender or racial identity. Therefore, for purposes of the following discussion, “total” numbers refer to the numbers that judges listed in the “total” column on the questionnaire. In contrast, “subtotal” numbers refer to the sum of the individual categories in which the gender or minority status was supplied on the questionnaire. Percentages have been derived by using these “subtotals.”

Because the survey defined “minority” as “non-Caucasian,” responding judges did not specify the minority groups of which their clerks or interns were members. Because the numbers of “minority” clerks hired cannot be further delineated within any particular minority group, this report cannot respond to the specific concerns that members of any particular minority group may have about the degree to which their group is represented among law clerks and interns in the courts of the Third Circuit.

readers through on-line services, legal publications, in-house publications, magazines and periodicals.

161. Although judges have been required to report the race and gender of applicants interviewed and chosen to the AO, this requirement appears to have been honored in the breach.

According to the responding judges, the total number of law clerks hired in the past ten years is 1517. As Table 103 indicates, however, the subtotal of clerks, i.e., those whose ethnic status is known, is 1330. Of that subtotal, 124 were minority, giving an overall minority hiring rate of 9%. Table 103 also shows that in the individual districts and the courts of appeals, the minority hiring rate varied from a low of 1% in the Middle District of Pennsylvania, to 13% in the courts of appeals, to 56% in the Virgin Islands.¹⁶² District and bankruptcy judges reported hiring minorities at an overall rate of 7%. Magistrate judges had a higher rate of 13%.

TABLE 103: RESPONSES OF JUDGES REGARDING RACIAL & ETHNIC BACKGROUNDS OF THEIR LAW CLERKS: PAST 10 YEARS AND CURRENT BY COURT

Court	Law Clerks in the Past Ten Years				Current Law Clerks			
	Total	Minority Total	Percent Minority	U.S. Avg.: Minority Students in J.D. Programs	Total	Minority Total	Percent Minority	U.S. Avg.: Minority Students in J.D. Programs
Ct. App.	308	41	13%	14%	41	8	20%	19%
D. N.J.	369	29	8%	14%	45	6	13%	19%
E.D. Pa.	363	36	10%	14%	52	6	12%	19%
M.D. Pa.	98	1	1%	14%	15	0	0%	19%
W.D. Pa.	120	7	6%	14%	24	2	8%	19%
D. Del.	56	1	2%	14%	4	1	25%	19%
D.V.I.	16	9	56%	14%	7	5	71%	19%
Totals	1330	124	9%	14%	188	28	15%	19%

Note: The "totals" are the sum of the individual race/gender categories. The numbers for each district include law clerks appointed by that district's bankruptcy judges and magistrate judges.

TABLE 104: RESPONSES OF JUDGES REGARDING RACIAL & ETHNIC BACKGROUNDS OF THEIR LAW CLERKS: PAST 10 YEARS AND CURRENT BY TYPE OF JUDGE

Type of Judge	Law Clerks in the Past Ten Years				Current Law Clerks			
	Total	Minority Total	Percent Minority	U.S. Avg.: Minority Students in J.D. Programs	Total	Minority Total	Percent Minority	U.S. Avg.: Minority Students in J.D. Programs
Ct. App.	308	41	13%	14%	41	8	20%	19%
Dist. Ct.	821	60	7%	14%	105	13	12%	19%
Bankruptcy	107	8	7%	14%	19	2	11%	19%
Magistrates	126	16	13%	14%	27	5	19%	19%

SOURCE: Judges Survey.

162. This includes the law clerks of district court, bankruptcy and magistrate judges.

Certain data relating to the schools from which the courts of appeals clerks were drawn are available. The Appointments Committee compared these rates to the percentage of minority students enrolled in J.D. programs in ABA-accredited law schools in the United States. According to statistics maintained by the ABA, over the last 10 years, 14% of the students enrolled in ABA-approved J.D. programs were members of a minority group.¹⁶³

The ABA's data are broken down into the following specific minority groups: black American, Mexican-American, Puerto Rican, other Hispanic-American, American Indian or Alaskan Native and Asian or Pacific Islander. This differs from the judge survey's "non-Caucasian" definition of "minority." The breadth of the ABA's categories, however, is sufficiently coextensive with the "non-Caucasian" definition to permit comparison. The number of clerks and interns identified as "non-Caucasian" on the judge survey is compared with the total minority group numbers in the data maintained by the ABA.

Over the last 10 years, the clerks of Third Circuit Court of Appeals have come from 57 schools.¹⁶⁴ These schools comprise all of those in the Third Circuit. Many are from nearby areas and are schools of particular national prominence. All are shown below with their median minority enrollment over the last 10 years and the number of clerks that have come from each school.¹⁶⁵

163. See generally Rick L. Morgan, *A Review of Legal Education in the United States*, in AMERICAN BAR ASSOCIATION, A.B.A. SECTION ON LEGAL EDUCATION & ADMISSION TO THE BAR (1995) (examining minority enrollment in law schools).

164. Precise data on the law schools of clerks for the other courts in this circuit are not available.

165. The number of clerks from these lists amount to 340, while the number of court of appeals clerks for the last 10 years was reported as 368.

TABLE 105: 1987-1996 LAW SCHOOLS ATTENDED BY COURT OF APPEALS LAW CLERKS

	Median Percentage of Minority Enrollment	Hired Law Clerks
Widener	3.5	4
Dickinson	4.5	1
Duquesne	5.0	5
Villanova	6.5	5
Western New England	6.5	1
Dayton	7.0	1
Marquette	7.0	1
St. Louis	7.5	1
Benjamin Cardozo	8.0	2
Univ. of Pittsburgh	8.0	19
Case Western	8.5	7
Emory	8.5	2
Albany	9.0	1
Catholic Univ.	10.5	2
Univ. of Cincinnati	11.0	1
George Mason	11.0	1
Marshall-Wythe	11.0	3
Akron	11.5	2
Univ. of Oklahoma	12.0	1
Univ. of Virginia	12.0	12
Duke	12.5	7
Pepperdine	13.0	2
Univ. of Chicago	14.0	12
Hofstra	14.0	1
Univ. of San Diego	14.0	1
Vanderbilt	14.0	1
Univ. of Minnesota	14.5	1
Notre Dame	14.5	4
Fordham	15.0	2
Ohio State	15.0	1
Brooklyn	15.5	5
George Washington	15.5	5
Syracuse	15.5	1
Temple	15.5	13
Boston College	16.5	3
Seton Hall	16.0	4
American Univ.	17.0	3
NYU	17.0	32
Northwestern	17.0	4
Seattle Univ.	17.0	1
Univ. of Michigan	18.0	10
Boston Univ.	18.5	2
SUNY	19.5	1
Univ. of Pa.	19.5	27
Cornell	21.0	1
Univ. of Iowa	21.0	2
Northeastern	21.0	2
Yale	22.5	32
Columbia	23.5	24
Georgetown	24.5	9
Harvard	25.0	34
Hastings	25.5	3
Univ. of Washington	25.5	3
Rutgers	27.5	7
Stanford	30.0	7
Berkeley	31.0	2
Howard	84.0	1
Ten-Year Overall Median	15.0	

SOURCE: Rick L. Morgan, *A Review of Legal Education in the United States*, in AMERICAN BAR ASSOCIATION, A.B.A. SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR (1995); American Bar Association; court of appeals phone lists.

The 10-year median minority enrollment in these schools is 15%. Sixty-five percent of the court of appeals clerks, however, have come from a handful of eleven "feeder" schools whose overall 10-year median minority enrollment is 18%, which is higher than the national median. Those schools are as follows: Columbia (23.5%), University of Chicago (14%), Duke (12.5%), Georgetown (24.5%), Harvard (25%), New York University (17%), University of Pennsylvania (19.5%), University of Pittsburgh (8%), Temple University (15.5%), University of Virginia (12%) and Yale (22.5%).¹⁶⁶

The ABA does not maintain data on the academic ranking of the various ethnic groups for which it maintains enrollment data.¹⁶⁷ Accordingly, it is impossible to be certain about the percentage of minority law students within the pool of law students whose academic credentials would merit serious consideration for a clerkship. Of the responding judges, both white and minority judges indicated that academic standing was the most significant factor in their selection of law clerks.

In the current class of clerks within the Third Circuit, the overall minority hiring rate has increased. The total number of clerks is 210. The minority or nonminority status is known for 195. Of that subset, 28 are members of a minority group, thus comprising 14% of the clerks currently in the federal courts within the Third Circuit. Table 103 shows that the rate of minority clerks hired in the district courts and the courts of appeals varied from 0% in the Middle District of Pennsylvania, to 20% in the courts of appeals, to 71% in the District Court of the Virgin Islands. As a group, district and bankruptcy judges had minority hiring rates of 12% and 11%, respectively. Magistrate judges had a rate of 19%.

The Appointments Committee compared these rates to the 1995 national minority enrollment average of 19%.¹⁶⁸ Again, magistrate judges, Virgin Islands judges and court of appeals judges hired minority clerks at percentages that met or exceeded the national average. The remaining courts did not. Although there has been an increase in the hiring rates of minority law clerks that mirrors the national upward trend in minority enrollment, the overall

166. The median minority enrollment for each school during the past 10 years appears in the parentheses.

167. Individual law schools contacted by Task Force staff would not disclose class standings by race or ethnic background either.

168. See AMERICAN BAR ASSOCIATION, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 69 (1995) (showing median 1995 minority enrollment of pool of 57 schools listed above is 18%). The current median minority enrollment of the eleven "feeder" schools identified above is 23%. See *id.* at 67-70.

hiring rate in the Third Circuit lags behind the national average of minorities enrolled in ABA-approved J.D. programs.¹⁶⁹

Judges responding to the Task Force survey differed in their views of the importance of diversity among the clerks in a judge's chambers. The attitude of some judges is represented by the judge who commented: "I would never want a staff of clerks all of whom were white male. Race becomes important in creating a diversified chambers. It also helps the mix of ideas." Another judge stated: "I am actively seeking minority applicants and believe diversity of race is an important [and] legitimate consideration in choosing clerks and interns." Such judges obviously consider diversity when making offers for law clerks. Two other judges noted:

Among equally qualified applicants, I would like to give the opportunity to clerk to a minority applicant.

Every applicant is seriously considered without regard to race or ethnicity. I do, however, regard diversity of background and point of view among my clerks as valuable to my personal development as a jurist and to the quality of my decisions and opinions. If a choice must be made between equally, or nearly equally qualified applicants (in terms of intellect, writing ability and ability to relate with people) and one would be more likely to contribute such diversity because of his or her race or ethnicity, he or she would get the nod.

The opinion of judges who expressed a concern for a representative mix of ideas among law clerks is also exemplified by the following comment: "I actively seek qualified minority applicants to promote pluralism and diversity within the profession. I aggressively seek out clerks from groups which have been historically excluded from participation in the federal judiciary."

Other judges who consider diversity are motivated, at least in part, by the fact that minority groups have been under-represented in the past. One such judge commented: "I would like to give minority law school graduates an opportunity that is often denied

169. The Task Force report notes that this goal may become even more difficult to achieve. Recent legislation and judicial determinations in California and Texas have resulted in a dramatic reduction of the enrollment of African-American students in law schools within those states. See Applebome, *supra* note 10, at A1 (examining minority enrollment at Boalt School of Law). According to a recent newspaper report, Boalt School of Law (U.C. Berkeley) expects to enroll one African-American student in its entering class of 270 in the fall of 1997. See *id.* This compares to 20 black students in the previous year's entering class. See *id.*

them.” Another judge expressed that considering diversity was appropriate “[t]o give others an opportunity—relevant but not dispositive.”

Generally, however, judges’ comments reflected a greater concern for gender diversity than ethnic or racial diversity. Moreover, judges did not all agree on the importance of ethnic diversity. In expressing concern over the nature of the Task Force’s inquiry, one judge noted:

I find this questionnaire to be troublesome because the weighted value and the nature of the questions do not accurately portray the character, traits and values of the responder. For example, I appoint law clerks annually with the goal to appoint the best qualified applicant. I have had an African-American female clerk. On line for 1997 is [a minority] woman appointee. They were selected because of their competence. This year I interviewed 22 women and 8 males for future clerkships. I have hired an equal number of women and men to past clerkships. I don’t need to solicit minority groups for candidates of merit. Nor will I ever hire a clerk or otherwise any person whose competence level is below the standards I set for these chambers regardless of race/ethnicity or gender. I am not engaged in righting perceived past injustices. I am engaged in a search for quality. Unfortunately, your questionnaire didn’t provide sufficient opportunity to explain my rationale as to why I couldn’t care less about EEOC policy considerations in law clerk selection. While academics may have a field day with these answers—you angered many people of good intentions.

Of course, a clerkship applicant must accept an offer in order to be counted as having been a minority clerk. Therefore, it is necessary to consider offers extended, as well as the number of applicants who actually accept. As Table 106 indicates, a “subtotal” of 964 interviews were extended by the judges of the courts within the Third Circuit.¹⁷⁰ Of these, 123 minority students were interviewed (13%) and 841 nonminority applicants were interviewed (87%). Of the 635 offers¹⁷¹ extended to this group of 964 interviewees, 51

170. The “total” number of interviews granted was 1457. The minority status was known, however, for only 964 of these interviewees.

171. The “total” number of offers extended was 663. The minority numbers were known, however, for only 635 of the offers.

(8%) went to minorities while 584 (92%) went to nonminorities. In other words, 69% of nonminority applicants who were extended interviews also received offers, but only 41% of minorities who were interviewed, received offers. It is noteworthy that, although only 8% of all offers are extended to minorities, minorities make up 15% of current clerks. This apparently results because of minorities' higher acceptance rate, 55%, as compared to the much lower acceptance rate of nonminorities, 29%.

It is interesting to note that the ratio of minority applicants interviewed does not comport with the percentage who ultimately received offers. This may be due to cultural differences which contribute to an unease and lack of comfort on the part of some nonminority judges with minority candidates. On the other hand, this may also be due to the efforts of some judges to increase the diversity of their chambers by interviewing minority candidates whose potential is not necessarily reflected by the traditional criteria of class rank or law review. Because the Appointments Committee was unable to determine what, if any, importance the ratio of interviews to offers may have, we make no findings about these data.

Some responding judges expressed a belief that minority applicants for clerkships apply disproportionately to minority judges. One judge stated: "I rarely receive clerkship applications from blacks since most seem to apply to black judges. If any apply, they will be considered especially carefully. I would like to have a black clerk but will not give a preference." Similarly, another judge noted: "I would be amenable to hiring minority law clerks but simply get very few applicants. I did extend an offer to a minority student from Harvard but never received a response." The same judge expressed concern over the qualifications of the minority applicants he or she had received, noting that the "few" minority law students who did apply "simply did not have qualifications comparable to the pool of candidates." On the other hand, at least one court of appeals judge has been very impressed with the quality of minority applicants and rates them as competitive with the applications received from white applicants, although far fewer in number. Some of the judges who do view diversity as a factor in hiring law clerks stated that it is often difficult to identify which law clerk applicants are members of a minority group.¹⁷²

172. Due to an ambiguity in the question, some of the data relating to the number of offers extended may relate to next year's class of incoming clerks, rather than the current class. Nevertheless, because the number of clerks hired

TABLE 106: COMPARISON OF MINORITY AND NONMINORITY APPLICANTS FOR LAW CLERK POSITIONS

	Applicants Interviewed	Offers	Percent Receiving Offers	Accepted Offers	Percent of Offers Accepted
Nonminority Applicants	841	584	69%	167	29%
Minority Applicants	123	51	41%	28	55%
Total Applicants	964	635	66%	195	31%

SOURCE: Judge Survey.

Numerous persons who testified during the public hearings across the Third Circuit expressed concern over the perceived lack of representation of minorities among judicial law clerks and interns. One prominent attorney noted:

In terms of how you open up that club . . . I believe one of the most important things that can be done is for the federal judges, both at the District Court level and at the Appellate Court level, is that they make affirmative efforts to try and hire minority law clerks, . . . African-Americans, Asians and Hispanics. . . . I think the law clerk route has proven to be one of the surest ways to gain admission to the club.¹⁷³

Similarly, the National Chair of the Black Law Students Association emphasized the lack of representation of black law clerks and its impact on the profession:

I think it is no secret that there are great disparities with regard to the number of law clerks in the federal judiciary, and it is quite alarming, in particular in cities such as Newark which have a high population of black individuals, both male and female, and I want to point out something that I don't think has been stated by those who have come to the mike [sic] before me, and that is that it begins before the person is asked to be a clerk. . . . I think that I am correct in saying that the number of judicial interns or ex-terns that sit in the various judges' chambers are also very disparate. . . . There are a number of individuals na-

from year to year is stable and because any year-to-year change in minority hiring is likely to be small, this number was compared to the current class of clerks.

173. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 102.

tionally, and in my position I know for a fact that there are a number of people nationally who are just never made aware of the opportunity¹⁷⁴

ii. Legal Interns

The Appointments Committee's information on legal interns covers the last ten years.¹⁷⁵ The "subtotal" of legal interns hired during the past ten years is 1687.¹⁷⁶ Of that number, 302 (or 18%) were minorities. This figure is nearly on par with the current 19% national average of minority enrollment in ABA-accredited law schools.

The breakdown of minority interns by type of judge and district are as follows:

TABLE 107: BREAKDOWN OF MINORITY INTERNS

By Type of Judge:		By District:	
Court of Appeals	16%	D. Del.	0%
U.S. District	18%	D.N.J.	18%
Bankruptcy	17%	E.D. Pa.	20%
U.S. Magistrate	21%	M.D. Pa.	0%
		W.D. Pa.	18%
		D.V.I.	38%

These regional variations may be due in part to the fact that interns tend to come from local schools whose minority enrollment rates may vary greatly from the national average.

b. Recruitment and Selection Process of Law Clerks

Judges were asked to rate on a scale of 1 ("always") to 7 ("never") the methods they use to recruit law clerks.¹⁷⁷ Fifty-six judges responded to this question. Their responses suggested that no overall method is used to any great extent, with the exception of contacting law schools for referrals. That method's mean response was 4.88, which indicates that judges employ it "some of the time."

¹⁷⁴. *Id.* at 135, 137.

¹⁷⁵. Because interns are frequently selected or screened by law schools, judges may have less input into their selection than the selection of law clerks.

¹⁷⁶. The sum of the individual minority and gender categories in this case actually exceeds the amount in the "total" column by 25.

¹⁷⁷. The methods referred to included referrals from law schools, minority judges, women's bar associations, nonminority judges, female judges, minority bar associations, minority lawyers, state and local bar associations and nonminority lawyers. They also included advertisements directed to minority readers through on-line services, legal and in-house publications, magazines and periodicals.

All of the other methods had mean responses greater than 6.4, indicating that they are rarely, if ever, used. Because most federal judges are “flooded” with applications for clerkships from law students from all over the country, one judge noted: “I guess I don’t ‘recruit’ law clerks; resumes pile in [and] I make my selection.” Despite the annual “avalanche” of applications for clerkships, one judge commented: “I have made tentative plans to consult with a minority judge from our circuit when I next recruit a judicial law clerk. I last recruited a clerk in 1993.”

Judges were also asked about their criteria for selecting law clerks. Judges were given a list of 21 different factors and asked to rank them from 1 (“not at all important”) to 10 (“of utmost importance”) in order of importance to that selection.¹⁷⁸ Judges reported that the most important considerations included academic achievement in law school, personality, law review, prior employment & work experience, computer literacy and writing sample. There were, however, some differences of note between these groups. Minority judges rated the following criteria as more important than nonminority judges: race, participation in community activities and gender.

As noted above, a number of judges explained that race and ethnicity, while not an important criteria in selecting law clerks, are considered a “plus” when deciding between two equally qualified candidates. One judge went further and stated:

[F]or over 20 years, I have attempted to provide women and minorities with the opportunity to obtain employment in the federal judicial system. I offer no apology for the fact that I favor affirmative action in hiring and promotion and I will continue to do so in my sphere of influence. [We must recognize that we] are all in this together [or] no one will get out of this alive.

178. The factors included reputation of law school, academic achievement in undergraduate school, participation in community activities; participation in school activities, judicial colleagues’ opinion of applicant, race or ethnicity, personality, family situation or responsibilities, EEOC policy considerations, scholarly publications, prior experience with applicant, academic achievement in law school, participation on law review, prior employment and work experience, gender, reputation and recommendation from others, LSAT score, outside interests, writing sample, computer literacy and the applicant’s judicial philosophy.

3. *Judicial Staff: Secretaries, Courtroom Deputies, Court Reporters*

a. Racial Composition

Judges responding to the Task Force survey reported that they have hired 182 secretaries and judicial assistants, 139 courtroom deputies and 52 court reporters during their collective tenure (averaging 11.9 years).¹⁷⁹ Sixteen (8.8%) of the 182 secretaries and judicial assistants have been minority, and all were female. Of the 140 courtroom deputies, 18 (12.7%) were minority.¹⁸⁰ Of these, 16 were minority females and 2 were minority males. Of the 52 court reporters, 11 (21.2%) were minority. Of these, 9 were minority females and 2 were minority males. Five persons fell into the “other” judicial staff category, and 1 of the 5 was a minority female.

Census data for the 1990 “eligible work force” is available on a state-by-state basis. The Appointments Committee is unable to compare this data with the information on judicial staff hiring because information about minority hiring is not available on a state or district-wide basis, and the demographics of New Jersey, Delaware, Pennsylvania and the Virgin Islands vary tremendously. We do note, however, that comments made at the public hearings suggest that the rate of minority hiring may vary significantly from district to district and that in certain districts there may be a perception that qualified minorities have not been hired. For instance, an Associate Judge of the Municipal Court of Wilmington, Delaware, commented:

I realize that the lack of a minority member of the judiciary is beyond the control of the Chief Judge. And that’s something that’s dealt with at a higher level. But I do believe there should be a concerted effort made to give at least a better appearance of diversity in the total system. . . . [I]n my 35 years, I’ve never seen one support person in a courtroom, although I know every Judge—and I don’t have a single complaint against any one of them. But I’ve never seen a black Court Reporter or a black bailiff or a black clerk or a black support person. . . . Even when you come into the doors, when you come in the—the entrance, there isn’t even a black person down there

179. Judges were not asked whom they hired for their judicial staff within a particular time frame, merely “during your tenure.”

180. Many employees noted that certain employees were “steered” to particular judges. For a further discussion of employment practices in the Third Circuit, see the Report of the Committee on Court Employment.

to check out the people. And there's a need to think about that.¹⁸¹

b. Recruitment and Selection Process

Judges were asked to rate the importance of 15 factors on a scale from 1 ("not at all important") to 10 ("of utmost importance") in their selection of judicial staff.¹⁸² Judges could also write in any additional factors on their questionnaires. Judges considered employment and work experience, personality, own prior experience with applicant. Reputation and recommendations from others, however, were considered the most important criteria in hiring their judicial staff. These criteria appeared in roughly the same order across gender and race lines among the judges. Race and ethnicity did not appear high on any category of judges' ranking; minority or nonminority, and male and female judges generally considered this factor relatively unimportant.

About 70 judges responded to the inquiry about recruitment of judicial staff. These responses suggest that no method is regularly used. Still, some are used occasionally, and they include contacting prior employers, advertising in legal publications and advertising in local newspapers.

4. *Other Court Employees: Federal Public Defender, Clerk of the Court, Chief Probation Officer*

a. Racial Composition

With the exception of the Virgin Islands, the positions of Federal Public Defender, Clerk of the Court and Chief Probation Officer in each district within the Third Circuit in 1997 are held by white employees. In the Virgin Islands, the Clerk of the Court and the Federal Defender are black males, and the Chief Probation Officer is a black female. These numbers have not changed much in the last decade. In the past ten years, 13 different individuals have held the positions of Clerk of the Court and Chief Probation Officer within this circuit.¹⁸³ Only 1 of the 13 clerks of the court has

181. *Public Hearings: Wilmington, Delaware, supra* note 37, at 45-46, 50.

182. These criteria included academic achievement, EEOC policy considerations, reputation and recommendations from others, gender, personality, performance on skills tests, writing skills, applicant's family situation or responsibilities, employment and work experience, opinion of your judicial colleagues, participation in community activities, race or ethnicity, outside interests, seniority and any prior experience with the applicant.

183. The court of appeals does not have a chief probation officer.

been a minority and that is the black male currently in the position in the Virgin Islands. He was appointed in 1979.¹⁸⁴ Three of the 13 chief probation officers have been African-American.¹⁸⁵ In the past 10 years, 10 individuals have held the position of Federal Defender in this circuit, one of whom was a minority. As is the case of Clerk of the Court, that person is a black male, currently filling the position in the Virgin Islands.

Comments from the public hearings suggest that one effect of a lack of representation of minorities at the top levels of court offices may be that few minorities are employed in lower levels of employment.¹⁸⁶ For example, a white female attorney who practices in Pittsburgh commented:

In the 22 years of its existence, the Federal Public Defender [in Pittsburgh] has had only four minority employees, three of whom were secretaries, one Native American, one African/American and one Spanish-speaking. The office has had only one minority lawyer, and has never had an African/American lawyer.¹⁸⁷

Table 108 outlines the racial demographics of the unit heads in each district for the past eleven years.

TABLE 108: 1987-1997 RACIAL, ETHNIC AND GENDER DEMOGRAPHICS OF EACH COURT UNIT IN THE THIRD CIRCUIT

Court of Appeals											
	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
Clerk of Court	WF*						WM				
Staff Attorney	WM						WF				
Circuit Executive ¹⁸⁸	WM	WM					WF				
Chief Librarian	WF+	WF			WF						

Note: WF = white female, WM = white male. An asterisk (*) means appointed in 1980. A plus symbol (+) means appointed in 1979.

184. Nine have been white males and 3 have been white females.

185. Nine have been white males and 1 has been a white female.

186. For an analysis of the staff of the Federal Public Defender's Office in each district, see the Report on Criminal Justice Issues of both the Race and Gender Commissions.

187. *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 70.

188. Appointed by the Judicial Council.

TABLE 108 (CON.): 1987-1997 RACIAL, ETHNIC AND GENDER DEMOGRAPHICS OF EACH COURT UNIT IN THE THIRD CIRCUIT

District of Delaware

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
District Court Clerk	WM*								WM		
Bankruptcy Court Clerk	WF										
Chief Probation Officer	WM+						WF				

Note: WM = white male, WF = white female. An asterisk (*) means appointed in 1980. A plus symbol (+) means appointed in 1985. The District of Delaware does not have a pretrial services agency.

District of New Jersey

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
District Court Clerk	WM										
Bankruptcy Court Clerk	WM*										
Chief Probation Officer	WM								WM		
Chief of Pretrial Services	WM								WM		

Note: WM = white male. An asterisk (*) means appointed in 1984.

Eastern District of Pennsylvania

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
District Court Clerk	WM										
Bankruptcy Court Clerk	Not applicable								BM*		
Chief Probation Officer	WM	BM					WM				
Chief of Pretrial Services	WM+										

Note: WM = white male, BM = black male. An asterisk (*) means position created in 1995. A plus symbol (+) means appointed in 1985.

TABLE 108 (CON.): 1987-1997 RACIAL, ETHNIC AND GENDER DEMOGRAPHICS OF EACH COURT UNIT IN THE THIRD COURT

Middle District of Pennsylvania

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
District Court Clerk	WM*			WM				WF+			
Bankruptcy Court Clerk	WF										
Chief Probation Officer	WM			WM							

Note: WM = white male, WF = white female. An asterisk (*) means appointed in 1973. A plus symbol means all nine previous clerks appointed since 1901 were white males. The Middle District of Pennsylvania does not have a Pretrial Services Agency.

Western District of Pennsylvania

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	
District Court Clerk	WF*					WM			WM			
Bankruptcy Court Clerk	WM											
Chief Probation Officer	WM+								WM			
Chief of Pretrial Services	BF									BF		

Note: WF = white female, WM = white male, BF = black female. An asterisk (*) means appointed in 1986. A plus symbol (+) means appointed in 1982.

District of the Virgin Islands

	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
District Court Clerk	BM*										
Chief Probation Officer	BM									BF	

Note: BM = black male, BF = black female. An asterisk (*) means appointed in 1979. The District of the Virgin Islands does not have a Bankruptcy Court Clerk's Office or a Pretrial Services Agency.

SOURCE: Unit Heads.

b. Recruitment and Selection Process

Judges participate in the selection of the Federal Public Defender (in some districts), the Clerk of the Court and the Chief

Probation Officer.¹⁸⁹ The judges survey asked judges to rank certain factors in order of importance to the selection process for these offices.

i. Federal Public Defender

Judges ranked prior employment and work experience, reputation and recommendations from others as the most important criteria in selecting a Federal Public Defender. Race and ethnicity appeared higher in the rankings of minority judges than in the rankings of their nonminority colleagues. Even minority judges, however, considered that factor relatively less important than factors such as personality, participation in community activities and writing skills. Overall, minority judges ranked race and ethnicity eleventh among the 17 factors provided.

ii. Clerk of the Court

According to judges responding to the survey, the most important criteria in selecting the Clerk of the Court were prior employment and work experience, reputation and recommendations from others, prior professional contact with candidate, personality, opinions of their judicial colleagues and computer literacy. The order within these 6 top considerations was similar regardless of the gender or race of the judge. Overall, female judges rated gender, race and ethnicity higher than their male colleagues. Those factors were last in the ranking of male judges (i.e., sixteenth and fifteenth, respectively) but ninth and eighth, respectively, for female judges. The same pattern was true of the responses given by nonminority male judges as compared to those given by nonminority female judges.

iii. Chief Probation Officer

Responding judges ranked the factors that they consider most important in selecting a Chief Probation Officer. Overall, judges considered the most important factors to be prior employment and work experience, opinions of judicial colleagues, reputation and recommendations from others, personality, prior professional contact with candidate and graduate or undergraduate academic achievement.

189. See 28 U.S.C. § 751 (1994) (stating judges' role in choosing Clerk of Court); see also 18 U.S.C. § 3602 (1993) (stating judges' role in selecting Chief Probation Officer).

5. *Court Adjunct Appointments: Arbitrators, Mediators, Special Masters and CJA Appointments*

a. Racial Composition

Data for the number of appointments to each of these positions were obtained for the period of 1991 through 1995. Some of this data, however, may be based upon estimates.¹⁹⁰ Judges reported that they had appointed a total of 52 special masters. One minority male and no minority females were appointed. Two hundred sixty-nine mediators reportedly were appointed. Twenty-seven of the 269 were members of a minority group. No member of a minority group was among the 23 receivers and 5 "other" appointments made by judges. Some information is available on the current number and minority group status of attorneys appointed under the CJA.¹⁹¹

TABLE 109: RACIAL AND ETHNIC COMPOSITION OF CJA PANELS BY DISTRICT (1997)

District	Total Minority	African-American	Hispanic/Latino	Asian-American
D. Del. (N=35)	0	0	0	0
D.N.J.		Not available		
E.D. Pa. (N=185)	16	10	5	1
M.D. Pa. (N=214)	4	4	0	0
W.D. Pa. (N=103)	1	0	0	0
D.V.I.		*Not applicable		

Note: An asterisk (*) means all members of the bar in the District of the Virgin Islands are required to accept CJA appointments. N = total number.

SOURCE: Federal Public Defender's Offices (Del., E.D. Pa. and M.D. Pa.); Wendell Freeland (W.D. Pa.)

The Appointments Committee was unable to obtain a demographic breakdown of the attorneys on the CJA panel list for New Jersey. The District Court Clerk's Office of New Jersey, however, provided the Appointments Committee with statistics on the number of CJA vouchers paid from August 1, 1993 to July 30, 1995. There were 927 total vouchers paid in the two-year period. Fifty-four (5.8%) were paid to minority attorneys. Of the 54, 19 vouch-

190. Judges were asked to report the number of minority and nonminority special masters, court-appointed experts, mediators, receivers, arbitrators and "other" they had appointed "[f]rom 1991 through 1995 (or since you were appointed to your current position, if appointed to the bench after 1991)."

191. The race and ethnicity of 2 of the members on the panel in the Eastern District of Pennsylvania is unknown.

ers were paid to African-American attorneys and 35 to Hispanic attorneys. It should be noted, however, that the Appointments Committee is unable to determine if the number of attorneys paid is represented by the number of vouchers. That is, one attorney may have received numerous appointments and numerous vouchers.

The reports of the attorneys who completed and returned our questionnaire are consistent with the numbers in the above table.¹⁹² Five African-Americans, 2 Hispanics and no Native Americans or Asian-Americans reported that they were currently on CJA panels. Of the African-American attorneys who completed the questionnaire, 11.9% had applied for appointment to the CJA panel list and 67% of those were accepted. Of the Asian-American attorneys surveyed, 14.3% had applied for this appointment, and, of those, 33% were accepted. All of the 9.1% of Hispanic attorneys responding that they had applied for appointment to the CJA Panel were accepted. Most attorneys reported that they had successfully obtained the appointments they sought,¹⁹³ and those who had been unsuccessful generally did not attribute their lack of success to race or ethnicity.¹⁹⁴

A perceived lack of diversity in CJA appointments was frequently mentioned during the public hearings. The following sentiments of a black attorney from Newark were typical of the concern expressed over how these appointments are made:

There is a great disparity in how you get CJA appointments. You are told to write a letter to the judge and let him know who you are and what your credentials are, what your background is. However, those appointments never seem to come. They only go to the same people who get them all the time. The impact on the economics of your practice is crucial. . . . The second thing that never appears to come to African-American attorneys is trusteeships. It is just a matter of adding them. I'm certain there

192. The Appointments Committee notes that the survey respondents may not reflect the demographics of all attorneys practicing in the Third Circuit.

193. The percentage by race of respondents who had been unsuccessful were as follows: Caucasians (2.7%), African-Americans (6.8%), Hispanics (6.3%), Asian-Americans (6.7%) and Native Americans (16.7%).

194. The number of respondents for this question was quite low. The one African-American who responded reported that he was "never" treated differently based on race or ethnicity with regard to those appointments that he had not received. The 16 white attorneys who responded generally reported that they almost never were treated differently based on race and ethnicity. Yet, the one Hispanic who responded reported that he was "always" treated differently.

are African-American attorneys who would make good trustees and would be reputable in that area. Again, [the] impact is economic and crucial to the survival of the practice of an African-American.¹⁹⁵

The Appointments Committee's figures support this attorney's comment in that 2% (2 of 101) of the African-American attorneys responding had applied for appointment to the Chapter 7 Trustee Panel, and none had been accepted. Also, none of the 11.1% (1 of 9) of Asian-Americans who applied for that position was accepted. Similar concerns were expressed over appointments of masters. One black attorney commented that if a team picture were taken

of all the federal mediators and all the special masters and all of the escrow agents that the judges appoint in the course of their duties . . . it would not be a pretty picture from a diversity point of view. . . . This is something that the Court can address directly because it is within the Court's powers.¹⁹⁶

One judge, however, wrote:

The absence of minority appointees to mediate i[s] a reflection on the pool of potential mediators (a non-compensated position). Of 62 lawyers on the authorized mediation panel, only 2-3 are minority lawyers. This is further reflective of the relatively few minority lawyers in the bankruptcy bar (especially the business bar), a concern identified in the Bankruptcy Break-out [at the 1995 Judicial Conference].

It appears that some judges are aware of this and make a deliberate effort to address this problem in their appointments. For example, another judge commented: "I make a conscious effort to include minorities and females in assignments—There are not as many on the list to choose from." In some jurisdictions within the Third Circuit, particular appointments are beyond the control of a particular judge. One judge explained:

Assignment[s] [are] made by the Clerk of the Court. I am not familiar with the procedures used to make attorney appointments, other than the Clerk has a list of qualified attorneys and selects attorneys from that list. I assume this

195. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 97-98.

196. *Id.* at 126-27.

is partially based on attorney availability to accept the assignment.

b. Recruitment and Selection Process

The Gender Commission's Report of the Committee on Appointments by Judges details the selection process for members of the CJA, arbitration and mediation panels for each district within the circuit. The United States Code governs the appointment of CJA attorneys,¹⁹⁷ and 28 U.S.C. § 636 and Rule 53 of the Federal Rules of Civil Procedure govern the appointment of special masters.¹⁹⁸ Local rules govern the other categories of appointments.

There is no circuit-wide standard or process for making these appointments.¹⁹⁹ Each district, however, requires that attorneys have certain minimum qualifications to be considered for any of these positions. Most districts employ an application process for selecting attorneys to serve in these positions, and in some districts, attorneys are solicited for these positions. Many districts utilize selection panels to review the applications and recommend candidates for the various positions to the judges or chief judge of the district.²⁰⁰

In their survey, judges were asked to rate the importance of 17 factors on a scale of 1 ("not at all important") to 10 ("of utmost importance") for the appointment of arbitrators, mediators, special masters, receivers and court-appointed experts.²⁰¹ Judges considered employment and work experience, reputation and recommendations from others, prior personal experience with applicant and opinions of their judicial colleagues as the most important factors in making these selections. Once again, race and ethnicity were more important to female judges than to male judges, and more

197. See 18 U.S.C. § 3006A (1994).

198. See 28 U.S.C. § 636 (1994); see also FED. R. CIV. P. 53.

199. The Task Force staff examined the appointment process in each district from which responses on this subject were received. The practices of the courts of appeals were not included.

200. In the District of New Jersey, there is no committee or other body that assesses the CJA applications. Those who apply and who appear to meet the qualifications are simply added to the panel of possible CJA attorneys, resulting in huge and unmanageable panels in each vicinage.

201. The factors included academic achievement in law school, law review, opinions of your judicial colleagues, reputation of appointee's law school, appointee's family situation or responsibilities, race or ethnicity, EEOC policy considerations, scholarly publications, prior personal experience with applicant, academic achievement as an undergraduate, employment and work experience, reputation and recommendation from others, participation in community activities, gender, personality, outside interests and participation in legal activities.

important to minority judges than to nonminority judges. Minority judges ranked race and ethnicity eighth in importance, while nonminority judges ranked it seventeenth. Female judges ranked race and ethnicity twelfth, while male judges ranked it seventeenth.

Judges were also asked to rank factors considered in appointing attorneys to serve as pro bono counsel in civil cases and counsel to indigent defendants under the Criminal Justice Act.²⁰² The criteria considered most important were prior professional contact with the attorney, prior employment and work experience, reputation and recommendations of others, position on appointment list, opinions of judicial colleagues and personality. Female judges generally considered the race or ethnicity of the potential appointee and the race or ethnicity of the client more important than their male colleagues. When asked later in the questionnaire, “[h]ow frequently, if at all, does race/ethnicity of attorneys on the CJA Panel list have an influence on the number of cases assigned to individual CJA Panel list members,” the 65 judges who responded to this question reported that race or ethnicity “close to never” influences these appointments.²⁰³

Finally, judges were asked to rate the importance of 16 different factors to their selections of attorneys to serve on panels, advisory committees and task forces.²⁰⁴ Once again, the criteria that ranked as most important were prior employment and work experience, prior professional contact with candidate, reputation and recommendations of others, personality and opinions of judicial colleagues.

202. The factors included your prior professional contact with candidate, law school academic achievement, law review participation, prior employment and work experience, family situation or responsibilities, reputation or recommendation from others, personality of candidate, computer literacy, gender of criminal defendant or pro se litigant, reputation of candidate's law school, undergraduate academic achievement, participation in community activities, gender of candidate, opinions of your judicial colleagues, race or ethnicity of candidate, outside interests, race or ethnicity of criminal defendant or pro se plaintiff and position on appointment list.

203. Judges were asked to give a response on a sliding scale from 1 (“always”) to 7 (“never”). One judge did note that he or she tries to appoint minority judges from CJA panels.

204. The factors included prior professional contact with the candidate, law school academic achievement, law review participation, prior employment and work experience, family situation or responsibilities, reputation and recommendations from others, personality of candidate, computer literacy, reputation of candidate's law school, undergraduate academic achievement, participation in community activities, gender of candidate, opinions of judicial colleagues, race or ethnicity of candidate, outside interests and writing sample or scholarly publications.

D. Findings

The entire court system benefits when judicial appointments reflect a diversity of thought, background and culture. When we increase the representation of minority groups, the entire process of adjudication becomes richer and more reflective of the society in which we live. We recognize, however, that factors which have previously played a significant role in appointments (i.e., familiarity with the candidate and prior employment within a given office) may have the unintended consequence of perpetuating past patterns of exclusion. We must ensure that our recruitment, application and appointment processes do not exclude candidates due to factors unrelated to their ability.

1. General

- The Appointments Committee finds significant lack of minority representation in certain areas of judicial appointments.²⁰⁵
- Within the minority communities throughout the Third Circuit, there is a widely held belief that bias does infect the courts in the circuit. This perception is reinforced by the low number of minority attorneys in some judicially appointed positions, especially in those locations that include a significant minority population. One cannot fully appreciate the impact of judicial appointments and hiring decisions upon the greater community without realizing that these stark differences in the perception of bias within the court system exist.

2. Judicial Officers: Magistrate and Bankruptcy Judges

- The frequency with which members of racial and ethnic minority groups have been appointed to the positions of magistrate judge and bankruptcy judge is exceeding low.
- Heavy reliance upon prior experience with the applicant tends to perpetuate the existing network of "insiders" and the perception of exclusion it fosters. The vacancy will not be filled by the candidate who can make the greatest contribution to the court unless we ensure that we are reaching all qualified persons who may be interested in applying.

205. The Appointments Committee's data suggest that this lack of representation has resulted from a number of causes. Therefore, the Appointments Committee cannot draw conclusions about the extent to which judicial bias contributes to this lack of representation.

3. *Law Clerks and Legal Interns*

- The rate at which minority law students are offered, and accept, positions as law clerks and interns varies greatly from district to district and from judge to judge.
- Some judges suggested that they emphasize diversity among the interns in their chambers.
- The data suggest that even those minority law students who are invited for interviews and presumably have the requisite credentials receive fewer offers than white students.

4. *Judicial Staff*

- The Appointments Committee does not have sufficient information on the appropriate pool of qualified candidates to state findings about the diversity within chambers.

5. *Federal Public Defender, Clerk of the Court and Chief Probation Officer*

- There is a significant lack of minority representation as federal public defenders, clerks of court and chief probation officers.²⁰⁶
- Where past hiring practices have created a lack or total absence of minority employees in an office, hiring from within that office will not effectively address the past imbalance. Those responsible for hiring decisions must recognize the subtle and unintended manner in which the historical lack of representation of minority groups is institutionalized and perpetuated in hiring practices. It is meaningless to broaden the pool of applicants by recruiting applications from outside existing staff if the ultimate hiring decision gives undue preference to those already in a particular office. Well qualified candidates from the minority community will continue to be excluded if such "insider" preference continues in offices where minority attorneys and professionals are rare. Further, the perception of exclusion will be reinforced and past hiring inequities will continue.

6. *Court Adjunct Appointments: Arbitrators, Mediators, Special Masters and CJA Appointments*

- Although appointment methods vary across the Third Circuit, the result has been a lack of representation of minority attorneys in these positions.

²⁰⁶ The Appointments Committee is aware that these are prestigious positions which are not often vacant.

- Certain districts, such as the Middle District of Pennsylvania, utilize ongoing mediation training programs. Such programs not only ensure the quality of existing mediators, but can also expand the pool of qualified attorneys.
- Certain regions within the Third Circuit may have such a small minority bar that it will be particularly difficult to achieve diversity. It may be necessary to take extra steps to maximize the likelihood that the applicant pool is not monolithic.
- Membership on, and selection from, CJA panels caused concern throughout the Third Circuit. There are two phases in the CJA appointment process. The first involves being placed on a list of eligible attorneys. The second is being selected from that list. Neither phase reflects a level of diversity that is desirable or consistent with a perception of an open court system.
- The Western District of Pennsylvania is addressing membership on the CJA panel in a manner that could serve as a model to other jurisdictions within the Third Circuit. The panel of eligible CJA attorneys is being reconstituted. The district is advertising, soliciting applications from all qualified members of the bar and encouraging women and minorities to apply. The district has decided to limit the size of the CJA panel so that those on the list will be assigned more cases and will acquire greater expertise, thereby raising the level of representation.
- The Western District of Pennsylvania also has a training program that permits interested attorneys to serve as uncompensated “second chairs” in criminal cases. This allows attorneys an opportunity to gain valuable experience and training so that they can then qualify for compensable appointments from the CJA list. In addition, all CJA attorneys are required to participate in training sessions yearly. This has an added benefit of raising the quality of representation supplied by all members of the panel.
- The process of appointment once an attorney is actually on a CJA panel varies from district to district. Some districts tend to use the same handful of attorneys repeatedly in spite of the availability of other attorneys on the panel.

E. *Recommendations*

1. *Judicial Officers: Magistrate and Bankruptcy Judges*

- While some barriers to appointment may be beyond judicial control, such as the small number of minorities practicing bankruptcy law, the judiciary can ensure that efforts to fill vacancies

include recruitment of a diverse pool of candidates including members of minority bar associations.

- The Appointments Committee recommends that judges ensure that the merit selection committees for magistrate and bankruptcy judgeships reflect the diversity of the legal communities involved.
- Districts should preserve demographic information about the selection process, including the composition of the applicant pool, those interviewed and those ultimately appointed. This would help to measure the progress toward diversity in the courts because it is impossible to evaluate the success of efforts to broaden the applicant pools without measuring the ethnic and racial composition of applicants.

2. *Law Clerks and Legal Interns*

- Judges who consider diversity a relevant consideration in selecting law clerks should make their interest known to the minority student associations within the various law schools in their area and to those law schools that have supplied a significant number of clerks to the judge, or the court, in the past.
- Judges who have had minority interns whose work evidenced the ability to successfully complete a clerkship should encourage such interns to apply for a clerkship.
- Judges should remain sensitive to any subconscious effects of differences in culture, experience and background that may impact upon the rapport between the judge and the interviewee.

3. *Judicial Staff*

- Information regarding vacancies for and the hiring of secretaries, courtroom deputies and court reporters should be made available on a district or state-wide basis.
- Vacancies should be advertised in publications of general circulation as well as publications that have a high circulation within minority communities in a particular location. In addition, appropriate nonprofit and community organizations should be contacted.
- Where candidates for appointment are prescreened or preselected by the clerk of court, judges should be specific about the criteria which the judge wishes the clerk to consider and should indicate if diversity is a factor to be considered.

4. *Federal Public Defender, Clerk of Court and Chief Probation Officer*

- Meaningful efforts should be made to attract all qualified persons who may be interested in applying for such positions. Such vacancies should be announced internally and advertised in such a manner as to maximize the likelihood that the minority community is aware of the vacancy. This includes contacting minority bar associations and any publications that circulate in the professional minority community.

5. *Court Adjunct Appointments: Arbitrators, Mediators, Special Masters and CJA Appointments*

- Districts that solicit candidates for these positions should obtain applicants by a well-advertised application process. Such a process will broaden the pool of potential appointments.
- Districts should attempt to ensure that the pool from which the applicants are drawn is sufficiently diverse to reflect the membership of the local bar. These efforts could include advertising, ensuring that all qualified members of the bar are solicited and contacting minority bar associations and law journals.
- In districts with few minority lawyers, consideration should be given to soliciting willing attorneys who practice in more than one jurisdiction and taking steps to ensure that minority lawyers seek such appointments.
- Each district should keep the list of CJA attorneys to a manageable size and implement a training program, such as the one in the Western District of Pennsylvania, to maintain the quality of the panel attorneys and permit the court to appoint attorneys from the panel on a rotating "wheel" basis as assignments arise.

XI. REPORT OF THE COMMITTEE ON COURT EMPLOYMENT AND
PERSONNEL ISSUES OF THE RACE & ETHNICITY
COMMISSION

A. *Committee History and Purpose*

The Third Circuit Task Force on Equal Treatment in the Courts was empowered to study, *inter alia*, "the selection, retention, promotion, and treatment of [court] employees." The Judicial Council further directed the Task Force to "make recommendations to the Judicial Council appropriate to correct any inequities."

The Committee on Court Personnel & Employment Practices ("Employment Committee") was formed by the Race & Ethnicity Commission of the Task Force. The Employment Committee was

charged with examining the possible relationships between race and ethnicity and the hiring, promotion, discipline and work environment of employees of various units of the courts within the Third Circuit.²⁰⁷ The court units whose employment practices were examined by the Committee include district court and bankruptcy court clerks' offices, U.S. probation offices and pretrial services offices in each district and the four units of the court of appeals, i.e., the Clerk's Office, Staff Attorneys' Office, Circuit Executive's Office and Library.

The Employment Committee gathered data and information from the employing units and employees to determine both the objective status of racially and ethnically distinct subgroups of employees and the impressions and beliefs of both minority and nonminority employees about the effects of minority status on employment within the court system. Each of the various court units responded to data requests asking for the numbers of minority employees in the office as a whole and in various specific positions. The court units also provided information on the racial and ethnic identities of new applicants for employment, as well as those of current employees who had applied for promotions, received promotions or had been subject to discipline or termination within the 1994 and 1995 fiscal years. Census data for the pertinent geographical areas were reviewed to determine the relationship between court hiring patterns and the racial and ethnic composition of the applicable hiring pools. Responses to questionnaires were received from employees in all court units within the Third Circuit.

The following discussion will begin with a background profile of the racial and ethnic characteristics of the workforces of relevant geographical areas and the comparable workforces of the Third Circuit as a whole and each particular court unit. The Employment Committee will then present the information determined during its study concerning minority employees in supervisory positions, the hiring, promotion and salary of minority and nonminority employees, the discipline and termination of minority and nonminority employees and the effects, if any, of minority status upon such aspects of the work environment as racial or ethnic hostility, EEO complaints and grievances and provision of training or education to employees.

207. The Employment Committee did not examine or report on the special issues pertinent to women of color. Those issues are fully treated in the Report of the Committee on the Intersection of Race and Gender.

B. *Employment and Hiring Practices in the Third Circuit*

1. *Racial and Ethnic Identities of the General Workforce and of Third Circuit Employees*

The racial and ethnic composition of the Third Circuit's workforce is meaningful only in comparison to the racial and ethnic composition of the available pool of employees in the relevant geographical area. Therefore, the Employment Committee gathered and analyzed statistical information to facilitate various comparisons of the actual workforce of the Third Circuit and its court units with (1) the overall racial and ethnic composition of the relevant general population; (2) the racial and ethnic composition of the pool of persons with particular levels of education; and (3) the racial and ethnic composition of certain noncourt categories of federal employees.

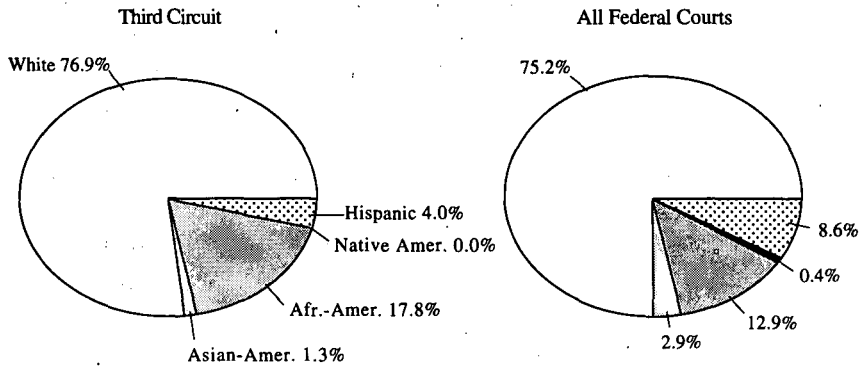
Some recent data, for fiscal year 1995, are available on the percentages of African-American employees in the federal government as a whole and in various individual agencies. As of fiscal year 1995, 17% of all federal employees were African-Americans, a higher percentage than the 10.7% of African-American employees in the private sector. The percentages of African-American employees in particular agencies, however, varied enormously. At the high end of representation, African-Americans comprised 47.8% of EEOC employees, 36.8% of Education Department employees and 32.0% of employees at Department of Housing and Urban Development (HUD). Some of the agencies with the lowest percentages of African-American employees were the Transportation Department (10.9%), the Agriculture Department (9.9%) and the Interior Department (6.2%).

By comparison, in the 1995 fiscal year, the federal courts employed African-Americans at a rate slightly higher than those agencies employing the lowest percentages of this racial group. Nationwide, the courts also employed noticeable percentages of Hispanic and Asian workers during the 1995 fiscal year, with a racial and ethnic distribution of employees as shown in Figure 6.²⁰⁸ In the Third Circuit, the 1995 fiscal year employment data, when measured against the data for all federal courts, illustrates a higher rate

208. These figures include employees classified as judges' chambers staff. Data collected directly by the Task Force from Third Circuit court units excluded chambers staff and, therefore, may reflect different absolute numbers and percentages.

of employment for African-Americans, but lower rates for other minority groups.²⁰⁹

FIGURE 6: RACIAL/ETHNIC BREAKDOWN IN THE THIRD CIRCUIT AND IN ALL FEDERAL COURTS



SOURCE: AO of the United States Courts (1995).

In addition to comparisons between the Third Circuit workforce and employment in the courts as a whole, it is useful to examine the relationship of the racial and ethnic composition of the Third Circuit workforce by geographic location. The staff of the Task Force derived the following percentages of population by race and ethnicity for each geographical region within the circuit.

TABLE 110: DISTRICTS WITHIN THE THIRD CIRCUIT: PERCENTAGES OF GENERAL POPULATION BY RACE AND ETHNICITY

District	Caucasian/ White	African- American/ Black	Hispanic/ Latino	Asian/ Pacific Islander	Native American
D. Del.	77.5	17.8	2.7	1.7	0.3
D.N.J.	70.4	14.1	10.8	4.4	0.2
E.D. Pa.	79.4	15.3	3.3	1.8	0.1
M.D. Pa.	95.2	2.6	1.0	0.7	0.1
W.D. Pa.	93.4	5.3	0.5	0.5	0.1
D.V.I.	12.4	71.7	14.5	[other: 1.5]*	

209. The figure "0.0%" for Native Americans should not be misconstrued as suggesting there are no Native American employees in the Third Circuit. In fact, 12 employee respondents identified themselves as Native Americans. This number, however, is too small to be reflected when the racial and ethnic distribution of circuit employees is expressed in percentages.

Note: The percentages for the three Pennsylvania districts and the Virgin Islands are derived from actual 1990 census figures. The percentages for the Districts of Delaware and New Jersey are estimates of the 1994 population made by the Census Bureau based on 1990 actual figures. An asterisk (*) means statistics regarding Asians and Native Americans are included under the Hispanic category.

SOURCE: United States Census Bureau.

In addition, relying on 1990 census figures, the Task Force was able to determine the relative proportions of particular racial and ethnic groups among the high school educated workforce. These figures may be relevant because a high school diploma generally is a minimum requirement for entry-level jobs in all court units.

TABLE 111: STATES/TERRITORY WITHIN THE THIRD CIRCUIT:
PERCENTAGES BY RACE OF WORKFORCE WITH HIGH SCHOOL DEGREES
(OVER 25 YEARS OF AGE)

State/ Territory	Caucasian/ White	African- American/ Black	Hispanic/ Latino	Asian/ Pacific Islander	Native American
Del.	84.7	11.8	1.4	1.4	0.3
N.J.	79.8	9.6	5.3	3.5	0.2
Pa.	90.7	6.9	0.9	1.0	0.1
V.I.	26.2	66.2		["other": 7.5]	

SOURCE: United States Census Bureau (1990 figures).

Several conclusions from the above general data should be noted before proceeding to examine the racial and ethnic nature of the workforce of the Third Circuit itself. First, the populations of the various districts differ widely in their racial and ethnic compositions. For example, the more populous and urbanized areas have higher percentages of African-American residents and sometimes of minority residents generally; compare the District of New Jersey and Eastern District of Pennsylvania, with 14.1% and 15.3% African-American populations, respectively, to the Middle and Western Districts of Pennsylvania, with 2.6% and 5.3% African-American populations, respectively. Second, the District of the Virgin Islands is unique within the circuit because groups designated in this report as "minorities" actually comprise the largest component of the population, with 71.7% of the islands' residents being African-American, 14.4% Hispanic and only (relative to the other districts) 12.4% white.

Third, in most districts, the white, nonminority population attains an advantage in the pool of eligible prospective employees from the fact that whites comprise a higher percentage of the high school educated population than they do of the overall population.

For example, whites are 77.52% of the overall population in the District of Delaware and 70.42% of the overall population in the District of New Jersey. In the high school educated population of each district, however, the percentage of whites increases to 84.69% and 79.80%, respectively. Conversely, the most numerous minority group, African-Americans, are 17.8% of the overall population of Delaware and 14.13% of the overall population of New Jersey; but are only 11.77% of the high school educated population of Delaware and 9.64% of the high school educated population of New Jersey.

With this background in mind, we may proceed to examine the proportions of minority employees at various levels of the individual court units. The following charts are derived from data collected by the Task Force from each court unit in each district in late 1995 and early 1996. Overall, all court units employed, excluding chamber staff, approximately 1480 employees in 1996, of whom 75.1% were white, 19.3% African-American, 4.6% Hispanic, 1% Asian and 0.0% Native American. In order to draw more meaningful comparisons concerning the relation of the Third Circuit's racial and ethnic employment profile to the available workforce, the charts give separate percentages for each district. Moreover, to facilitate comparing the racial/ethnic composition of, for example, clerks' offices and probation offices, separate charts are given for employees of the court of appeals, the District Court Clerks' Offices, the Bankruptcy Court Clerks' Offices, United States Probation Offices and United States Pretrial Services Offices.

Finally, because it is crucial to examine whether the general employment of minorities also translates into the appointment of minorities to meaningful management positions, for each unit in each district, the charts give separate percentages for the racial/ethnic distributions of all employees and of "nonsupervisory" and "supervisory" employees as separate subgroups. Unfortunately, when the data are broken down to this level of detail, the relatively small numbers of Asian and Native American employees do not yield meaningful percentages. Therefore, the following charts give percentage figures limited to four subgroups: (1) white, (2) African-American, (3) Hispanic and (4) "other."

TABLE 112: PERCENTAGES OF RACIAL AND ETHNIC DISTRIBUTIONS
OF ALL EMPLOYEES, SUPERVISORY EMPLOYEES AND NONSUPERVISORY
EMPLOYEES BY COURT UNIT AND DISTRICT

Court of Appeals—All Units				
Employees	Caucasian/ White	Minorities		
		African- American/ Black	Hispanic/ Latino	Other
Total (N=125)	76.8	16.0	1.6	5.6
Supervisory (N=32)	81.3	15.6	0.0	3.1
Nonsupervisory (N=93)	75.3	16.1	2.2	6.4

Note: N = total number within each category.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

TABLE 112 (CON.): PERCENTAGES OF RACIAL AND ETHNIC
DISTRIBUTIONS
OF ALL EMPLOYEES, SUPERVISORY EMPLOYEES
AND NONSUPERVISORY EMPLOYEES BY COURT UNIT AND DISTRICT

Office of the Clerk; United States District Court					
District	Employees	Caucasian/ White	Minorities		
			African- American/ Black	Hispanic/ Latino	Other
D. Del.	Total (N=20)	90.0	10.0	0.0	0.0
	Supervisory (N=16)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=4)	87.5	12.5	0.0	0.0
D.N.J.	Total (N=112)	75.0	17.0	8.0	0.0
	Supervisory (N=21)	85.7	9.5	4.8	0.0
	Nonsupervisory (N=91)	72.5	18.7	8.8	0.0
E.D. Pa.	Total (N=298)	79.5	14.1	4.7	1.7
	Supervisory (N=13)	84.6	7.7	7.7	0.0
	Nonsupervisory (N=285)	79.3	14.4	4.6	1.7
M.D. Pa.	Total (N=87)	97.7	2.3	0.0	0.0
	Supervisory (N=9)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=78)	97.4	2.6	0.0	0.0
W.D. Pa.	Total (N=105)	92.4	6.7	0.0	0.9
	Supervisory (N=11)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=94)	91.5	7.4	0.0	1.1
D.V.I.	Total (N=33)	9.1	81.8	9.1	0.0
	Supervisory (N=7)	14.3	57.1	28.6	0.0
	Nonsupervisory (N=26)	7.7	92.3	88.5	3.8

Note: N = total number within each category.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

TABLE 112 (CON.): PERCENTAGES OF RACIAL AND ETHNIC DISTRIBUTIONS OF ALL EMPLOYEES, SUPERVISORY EMPLOYEES AND NONSUPERVISORY EMPLOYEES BY COURT UNIT AND DISTRICT

		Office of the Clerk; United States Bankruptcy Court			
District	Employees	Caucasian/ White	Minorities		
			African- American/ Black	Hispanic/ Latino	Other
D. Del.	Total (N=13)	69.2	30.8	0.0	0.0
	Supervisory (N=2)	50.0	50.0	0.0	0.0
	Nonsupervisory (N=11)	72.7	27.3	0.0	0.0
D.N.J.	Total (N=122)	68.9	24.6	5.7	0.8
	Supervisory (N=22)	90.9	4.5	4.5	0.1
	Nonsupervisory (N=100)	64.0	29.0	7.0	0.0
E.D. Pa.	Total (N=76)	75.0	22.4	2.6	0.0
	Supervisory (N=8)	75.0	25.0	0.0	0.0
	Nonsupervisory (N=68)	75.0	22.1	2.9	0.0
M.D. Pa.	Total (N=34)	100.0	0.0	0.0	0.0
	Supervisory (N=5)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=29)	100.0	0.0	0.0	0.0
W.D. Pa.	Total (N=45)	93.3	6.7	0.0	0.0
	Supervisory (N=6)	83.3	16.7	0.0	0.0
	Nonsupervisory (N=39)	94.9	5.1	0.0	0.0
D.V.I.		N/A			

Note: N/A = Bankruptcy Court Clerk's Office is merged with the District Court Clerk's Office. N = total number within each category.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

TABLE 112 (CON.): PERCENTAGES OF RACIAL AND ETHNIC DISTRIBUTIONS OF ALL EMPLOYEES, SUPERVISORY EMPLOYEES AND NONSUPERVISORY EMPLOYEES BY COURT UNIT AND DISTRICT

		United States Probation Offices			
District	Employees	Caucasian/ White	Minorities		
			African- American/ Black	Hispanic/ Latino	Other
D. Del.	Total (N=17)	82.4	17.6	0.0	0.0
	Supervisory (N=4)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=13)	76.9	23.1	0.0	0.0
D.N.J.	Total (N=122)	63.9	26.2	9.0	0.9
	Supervisory (N=21)	81.0	19.0	0.0	0.0
	Nonsupervisory (N=101)	60.4	27.7	10.9	1.0
E.D. Pa.	Total (N=122)	63.1	29.5	7.4	0.0
	Supervisory (N=20)	70.0	30.0	0.0	0.0
	Nonsupervisory (N=102)	61.8	29.4	8.8	0.0

M.D. Pa.	Total (N=36)	97.2	2.8	0.0	0.0
	Supervisory (N=8)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=28)	96.4	3.6	0.0	0.0
W.D. Pa.	Total (N=43)	86.0	11.6	2.3	0.1
	Supervisory (N=4)	100.0	0.0	0.0	0.0
	Nonsupervisory (N=39)	84.6	12.8	2.6	0.0
D.V.I.	Total (N=21)	0.0	81.0	19.0	0.0
	Supervisory (N=6)	0.0	83.3	16.7	0.0
	Nonsupervisory (N=15)	0.0	80.0	20.0	0.0

Note: N = total number within each category.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

TABLE 112 (CON.): PERCENTAGES OF RACIAL AND ETHNIC DISTRIBUTIONS OF ALL EMPLOYEES, SUPERVISORY EMPLOYEES AND NONSUPERVISORY EMPLOYEES BY COURT UNIT AND DISTRICT

United States Pretrial Services Offices		Minorities			
District	Employees	Caucasian/ White	African- American/ Black	Hispanic/ Latino	Other
D. Del.		N/A			
D.N.J.	Total (N=26)	61.5	26.9	11.5	0.0
	Supervisory (N=6)	83.3	0.0	16.7	0.0
	Nonsupervisory (N=20)	55.0	35.0	10.0	0.0
E.D. Pa.	Total (N=16)	37.5	43.8	18.8	0.0
	Supervisory (N=3)	66.7	33.3	0.0	0.0
	Nonsupervisory (N=13)	30.8	46.2	23.0	0.0
M.D. Pa.		N/A			
W.D. Pa.	Total (N=8)	50.0	50.0	0.0	0.0
	Supervisory (N=2)	0.0	100.0	0.0	0.0
	Nonsupervisory (N=6)	66.7	33.3	0.0	0.0
D.V.I.		N/A			

Note: N/A = United States Pretrial Services is merged with the United States Probation Office. N = total number within each category.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

The foregoing data indicate that, generally, most court units employ minorities at a rate commensurate with the racial and ethnic composition of the high school educated workforce in the relevant geographical areas. This sometimes results, however, in somewhat of an over-representation of whites compared to the general population in more populous districts. For example, whites constitute 90% of the workforce in the District of Delaware's Clerk's Office, but only 77.52% of the Delaware population. Similarly, whites comprise 75% of the workforce in the District of New

Jersey Clerk's Office, but only 70.42% of the New Jersey population. Further, minorities are represented in higher percentages in the bankruptcy clerks' offices, probation offices and pretrial services offices than they are in district court clerks' offices. For example, Delaware's District Court Clerk's Office employs 10% minorities, the Bankruptcy Clerk's Office employs 30.8% minorities and the Probation Office employs 17.6% minorities. The same pattern holds true in New Jersey: District Court Clerk's Office, 25% minorities; Bankruptcy Clerk's Office, 31.1% minorities; Probation, 36.1% minorities; and Pretrial, 38.5% minorities. In the Eastern District of Pennsylvania: District Court Clerk's Office, 20.5% minorities; Bankruptcy Clerk's Office, 25.0% minorities; Probation, 36.9% minorities; and Pretrial, 62.5% minorities.

Additionally, minorities are often under-represented in supervisory positions when compared to their percentages of the overall court workforce. For example, in the District of New Jersey Clerk's Office, minorities are 25% of all employees, but only 14.3% of supervisors. Similarly, in Probation offices, minorities comprise 17.6% of total employees in Delaware, but 0% of supervisors and 36.1% of total employees in New Jersey, but only 19% of supervisors. This pattern of minority under-representation holds true even in the Clerk's Office of the District of the Virgin Islands; despite the numerical dominance of African-Americans and Hispanics in the islands' overall population, in the district's Clerk's Office whites are only 7.7% of nonsupervisors, but nearly double that percentage of supervisors (14.3%).

In addition to understanding the objective data of the numbers and percentages of minority employees within the Third Circuit workforce, it is also important to understand how both employees and members of the public perceive the racial and ethnic characteristics of the court workforce. Such perceptions were revealed at public hearings held by the Task Force.²¹⁰ In both Delaware and New Jersey, private practitioners repeatedly commented on the low numbers of minority court staff, and particularly of African-Americans, whom the public encounters in dealings with the

210. Eight hearings were held in principal cities in each district: Philadelphia on October 24, 1996; Pittsburgh on October 24, 1996; Harrisburg on November 18, 1996; Newark on October 30, 1996; Camden on October 2, 1996; Wilmington on November 20, 1996; St. Thomas on November 7, 1996; and St. Croix on November 8, 1996.

courts.²¹¹ At the hearing in Wilmington, Delaware, a private practitioner who is also a municipal judge noted that in 35 years of practice in the federal courts, he has not seen an African-American court reporter, bailiff, clerk or support person.²¹² Another Wilmington practitioner noted that because the district court has only two African-American employees, this creates a perception that the court is not friendly to people of color or Hispanics.²¹³

In Newark, New Jersey, a practitioner noted that minority litigants will doubt the fairness of court proceedings if they see only white court personnel. He therefore recommended that the court should re-examine its process of selecting employees and should aggressively recruit minorities to fill vacancies.²¹⁴ Similar observations about few or no minority employees were made concerning the court staffs and related federal offices of the Middle and Western Districts of Pennsylvania.²¹⁵

2. Hiring

Further data concerning the hiring²¹⁶ of minority employees in the Third Circuit are the figures comparing the rates at which members of various racial and ethnic groups are interviewed, with the rates at which they are hired. Data for interviewing and hiring of minorities by all federal courts, as well as concomitant data for the Third Circuit as a whole, is available from annual reports required by the Judicial EEO Plan.

211. See *Public Hearings: Wilmington, Delaware, supra* note 37, at 45-50, 64-65, 89-90; see also *Public Hearings: Newark, New Jersey, supra* note 9, at 62-65, 69, 115-18, 129, 136.

212. *Public Hearings: Wilmington, Delaware, supra* note 37, at 45-50.

213. See *id.* at 89-90.

214. *Public Hearings: Newark, New Jersey, supra* note 9, at 115, 118.

215. *Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 8; see also *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 58.

216. The Task Force received information about recruiting, interviewing and hiring minority applicants from the court units' responses to requests for data from the fiscal years 1994 and 1995. Hiring issues were also addressed in the questionnaire distributed to all Third Circuit employees by the Task Force, in testimony at the various public hearings, and in a focus group attended by minority employees. Information concerning promotions was gathered from all the foregoing sources and from an article concerning the status of African-American federal employees as of fiscal year 1995. Salary information was subjected to statistical analysis for significant racial/ethnicity-based disparities in a study performed for the Task Force by the Center for Forensic Economic Studies, Philadelphia, Pennsylvania. That analysis of salaries was augmented by data from court units about cash awards and step increases given to employees in fiscal years 1994 and 1995; and by the perceptions of employees as expressed in the focus group and the employee questionnaires.

TABLE 113: 1995 FISCAL YEAR—PERCENTAGES BY RACE AND ETHNICITY OF CANDIDATES INTERVIEWED FOR AND APPOINTED TO POSITIONS, ALL FEDERAL COURTS

Race/ Ethnicity	Interviewed	Appointed
Caucasian/white*	76.5	79.5
African-American/black	12.1	9.4
Hispanic/Latino	7.3	6.3
Asian/Pacific Islander	3.9	4.6
Native American	0.2	0.2

Note: An asterisk (*) means these percentages are estimates based on the numbers published by the AO for all other races/ethnicities. Percentages may total more than 100% due to rounding.

SOURCE: AO of the United States Courts.

TABLE 114: 1994 AND 1995 FISCAL YEARS—THIRD CIRCUIT PERCENTAGES BY RACE AND ETHNICITY OF CANDIDATES INTERVIEWED FOR AND APPOINTED TO POSITIONS

Race/Ethnicity	Interviewed N=2390	Appointed N=580
Caucasian/white	75.6	81.5
African-American/black	19.0	11.5
Hispanic/Latino	3.6	3.3
Asian/Pacific Islander	1.8	3.6
Native American*	0.0	0.0

Note: An asterisk (*) notes that some employees did identify themselves as Native Americans. Percentages may total more than 100% due to rounding.

SOURCE: AO of the United States Courts.

The above figures for federal courts nationwide and for all courts of the Third Circuit indicate that only whites and Asians are generally employed at percentages greater than those of their representation in the interview pool. Conversely, African-Americans and Hispanics are generally hired at lower percentages than the rates at which they are interviewed.

Similar information concerning the racial and ethnic distribution of candidates hired and interviewed was sought from the clerks' offices of the district courts and court of appeals in the Task Force's data requests. The following chart presents this information for fiscal years 1994 and 1995 in terms of numbers of applicants, rather than percentages.

TABLE 115: 1994 AND 1995 FISCAL YEARS—NUMBERS OF APPLICANTS, BY RACE AND ETHNICITY, INTERVIEWED AND HIRED BY CLERKS' OFFICES

District		Caucasian/ White	African- American/ Black	Hispanic/ Latino	Asian/ Pacific Islander
Ct. App.	Interviewed	64	30	0	0
	Hired	7	1	0	0
D. Del.	Interviewed	34	10	1	1
	Hired	8	2	0	0
D.N.J.	Interviewed	46	9	1	3
	Hired	10	3	0	1
E.D. Pa.	Interviewed	18	8	1	1
	Hired	6	1	0	1
M.D. Pa.	Interviewed	65	3	2	1
	Hired	7	0	0	0
D.V.I.	Interviewed	2	11	1	0
	Hired	1	1	0	0

Note: No Native Americans were hired or interviewed by the clerks' offices within the relevant time period. No data on minority hiring was available in the responses of the Western District of Pennsylvania.

SOURCE: Responses from data requests from all Third Circuit districts.

Generally, the hiring and interview figures for minorities in the Districts of Delaware and New Jersey and the Eastern District of Pennsylvania are consistent with the minority populations of those areas, with the exception of the figures for Hispanic candidates in New Jersey, where only 1 of 59 persons interviewed in 1994 and 1995 was Hispanic, despite a statewide Hispanic population of 10.8% (see Table 101, above). In the Middle District of Pennsylvania, while six minority candidates were interviewed, none were hired. That district has the lowest minority population in the circuit. For the Clerk's Office of the Court of Appeals, nearly one-third of the candidates interviewed were African-American, but only 1 of 8 persons hired was African-American. The court of appeals did not interview any Hispanic or Asian candidates in fiscal years 1994 or 1995. The Employment Committee was unable to evaluate the relative qualifications of the applicants.

To ascertain the likely audiences being reached by notices of court employment opportunities, the Task Force asked each clerk's office how openings were announced and advertised. Most of the district courts and the court of appeals publicize positions through local newspapers, through colleges and universities, by posting notices in the courthouses and federal buildings and, where appropriate, in specialized court and legal publications. Only the

Eastern District of Pennsylvania makes a special effort to bring openings to the attention of minority applicants, by notifying a variety of minority organizations during the recruiting process.

Several items in the Task Force's employee questionnaire sought information on how current employees learned of job openings. Employees were asked to indicate which of the following ten alternatives represented ways in which they had learned of their current jobs: (1) city/local newspaper; (2) radio/TV; (3) school placement office; (4) supervisor; (5) in-house publication; (6) word-of-mouth; (7) posting in courthouse; (8) legal periodical/journal; (9) office of Personnel Management job listing; and (10) "other." Responses demonstrated some differences among particular court units. For example, a relatively high percentage of employees learned of their jobs through local newspapers in the Middle District of Pennsylvania (39.1%) and in the Virgin Islands (32.4%); but few employees had relied upon newspapers in the Eastern District of Pennsylvania (7.5%) and in the District of New Jersey (13.5%). School placement offices were a relatively common source of employment information for the court of appeals (33.7%) and Eastern District of Pennsylvania (22.9%), but an uncommon source in the District of Delaware (5.3%), Middle District of Pennsylvania (4.3%) and District of the Virgin Islands (5.9%). The District of New Jersey had the highest percentage of employees learning of positions by word of mouth (51.2%). The lowest percentages of reliance on word of mouth information occurred in the court of appeals (37.6%) and District of Delaware (35.1%), but even in those courts this informal "insider" method accounted for over one-third of current employees.

The only method of obtaining job information that reached significantly different audiences according to race or ethnicity was the use of school placement offices. Asian employees demonstrated the greatest reliance on this source (52.6%); white employees showed moderate reliance on school placement offices (17.1%); and African-American and Hispanic employees were relatively unlikely to have learned of their jobs through school placement offices (8.6% and 3.6%, respectively). Reliance upon word of mouth information did not differ very significantly among racial and ethnic groups, as it was a source for 45.9% of all employees, 46.4% of white employees and 42.2% of African-American employees. Word of mouth notice was relatively more frequent among Hispanic employees (60.7%) and relatively less frequent

among Asian employees (31.6%), but the actual numbers in these categories were quite small.

Employees were asked to indicate to what extent they believed their court units had advertised positions in media directed toward minority communities, on a scale of 1 (always) to 7 (never). Minority employees, as compared to white employees, were more likely to believe that jobs had not been advertised to minority communities, as 30.4% of African-American respondents and 32.1% of Hispanic respondents said that their court units “never” advertised job openings to minority communities. Only 8.1% of white respondents answered “never.”

Employees were also asked whether current methods of advertising jobs were effective in reaching minority communities. Responses to this question revealed a significant disparity between the views of white and African-American employees. Among white respondents, 24.7% thought current methods “always” reach minority communities, and only 1.7% thought such methods “never” reach minority communities. Among African-American respondents, 10.5% thought current methods “always” reach minority communities, but 23.4% thought such methods “never” reach minority communities. Finally, employees were asked whether they thought it is important for court units to recruit minority applicants for employment. While a bare nonminority, 54.4%, of whites felt that minority recruiting is important, overwhelming majorities of African-Americans (91.1%), Hispanics (92.9%) and multiracial employees (91.7%) felt that minority recruiting is important.

Narrative comments about hiring practices made by employees in the questionnaires and in the focus group revealed different perceptions on the part of minority and white employees who commented. Minority employees often felt that minorities were disfavored by the structure of the hiring process. One minority employee at the focus group noted that his court unit tends to hire by word of mouth, which tends to favor nonminority-group job candidates. A minority respondent to the questionnaire saw a pattern of appointing new African-American employees at unfairly low levels: “Upon inquiry, many African-American women . . . experienced a similar interview scenario where each was . . . promised a higher grade or step . . . and were hired at lower grades and/or steps [when compared to less qualified white women].” An employee located in an urban area with a sizeable minority

population noted the contrast between the racial/ethnic makeup of court employees versus the area's residents:

It is alarming to see the lack of minorities working in this building[,] especially when this community is predominantly Hispanic and Black! It's hard to believe that there are no "qualified" minorities in this city! But because jobs are not properly advertised and are geared toward "whites," we have such a poor representation of this community in our work force.

Some white court employees, however, believe that favoritism in hiring is shown to minorities: "It seems that some supervisors are becoming intimidated by race and gender. Some decisions are made out of fear of suit and charges."

3. *Salary*

Data on the salaries of employees was collected by the Task Force and then analyzed for possible effects of race and ethnicity upon salary levels. The Center for Forensic Economic Studies ("Center") performed regression adjustments on salary figures to compensate for differences in district, unit, supervisory status, EEO job classification and education. Thus, the Employment Committee was able to compare the average salaries of white and minority employees. In addition, based on the Center's work, the Employment Committee was able to compare the salaries of white workers with the hypothetical average salary figures minorities would obtain *if* the minority group had the same distribution as to education, supervisory status, etc., as the nonminority group.

The results of the comparisons revealed that in nearly all instances the average salaries of minority court employees were less than the average salaries of white employees. When the average unadjusted and adjusted salaries of supervisory, nonsupervisory and all employees were examined for every district and the court of appeals, the general salary disadvantage of minorities was statistically significant for nearly 40% of the comparisons. On an adjusted basis, minority supervisors in the District of New Jersey, for example, earned almost \$10,000 less than white supervisors. The following table reveals the pay disparities among white and nonwhite supervisors in the circuit between 1995 and 1996.

TABLE 116: ADJUSTED THIRD CIRCUIT AVERAGE SALARIES FOR WHITE AND NONWHITE SUPERVISORS

District	White Supervisors	Nonwhite Supervisors
Ct. App.	\$59,844	\$43,164
D. Del.	\$64,301	N/C
D.N.J.	\$58,190	\$48,406
E.D. Pa.	\$59,185	\$54,535
M.D. Pa.	\$59,630	N/C
W.D. Pa.	\$56,340	N/C
D.V.I.	N/C	\$55,806
OVERALL	\$58,848	\$52,544

Note: These figures control for court unit, EEOC category and degree, but not for grade level, seniority or job performance. N/C = no comparison was made if three or fewer persons were in the category due to salary confidentiality.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

Some figures for adjusted average salaries also reveal disparities, although the adjustments eliminate, for example, the effects of minority under-representation at higher ranks of employment. Thus, in the Western District of Pennsylvania, the adjusted average salary of minority nonsupervisory employees was \$7308 less than the average salary of nonsupervisory whites. The following table shows the average salaries for nonsupervisory employees in each district between 1995 and 1996.

TABLE 117: ADJUSTED THIRD CIRCUIT AVERAGE SALARIES FOR WHITE AND NONWHITE NONSUPERVISORY EMPLOYEES

District	White Employees	Nonwhite Employees
Ct. App.	\$36,457	\$36,201
D. Del.	\$36,184	\$36,339
D.N.J.	\$36,777	\$35,009*
E.D. Pa.	\$39,660	\$37,938
M.D. Pa.	\$39,898	N/C
W.D. Pa.	\$41,846	\$34,538*
D.V.I.	N/C	\$37,108
OVERALL	\$39,135	\$37,014*

Note: These figures control for Court unit, EEOC Category and degree, but not for grade level, seniority or job performance. An asterisk (*) indicates average nonwhite salary is statistically significantly less than the average white salary. N/C = no comparison was made if three or fewer persons were in the category due to salary confidentiality.

SOURCE: Data obtained from all court units, as analyzed by the Center for Forensic Economic Studies (1996).

The Employment Committee is aware that differences in seniority or job performance, which may not be accounted for in a statistical model, may be responsible for part or all of these disparities.

Comments on questionnaires by minority employees indicated that they were more concerned than white employees about the possibility of unequal compensation. The employee questionnaire asked whether employees who do the same work receive the same compensation regardless of race or ethnicity. Only 6% of whites who responded to the questionnaire thought that compensation might vary because of race or ethnicity. In contrast, 27.8% of African-American respondents and 25% of Hispanic respondents perceived that compensation for the same work can vary because of race or ethnicity.

In comments on the employee questionnaire and in the focus group, several minority employees complained that salary disparities can arise because of discrimination against minorities in the application of grades and steps of the employment ladder. One employee noted on the questionnaire: "If I were not African-American I am fully persuaded that promises of being paid at [a higher grade and level] would have been kept." Similarly, in the focus group, minority employees noted that more educated and more experienced minorities were appointed at the same level as less educated and less experienced whites, with a concomitant detrimental effect on the salaries of the minority employees.

C. *Management of Court Employees*

1. *Promotions*

In the federal government as a whole, during the 1995 fiscal year, 19.4% of all promotions were awarded to African-Americans.²¹⁷ In the Third Circuit as a whole, 19.47% of promotions were awarded to minority employees in fiscal year 1994, and 20% of promotions were awarded to minorities in fiscal year 1995. Of the 1995 Third Circuit promotions, 15.4% went to African-American employees, 2.6% to Hispanic employees and 2% to Asian employees.

Bankruptcy and District Court Clerks' offices were asked to set forth the racial and ethnic identifications of all employees who applied for promotions in fiscal years 1994 and 1995. Unfortunately the information reported by some courts was unclear as very few promotion opportunities were listed for the applicable time period. Throughout all clerks' offices in the circuit, it appears that there were five promotions of employees within fiscal years 1994 and

217. See Lisa Daniel, *Black & White in Government*, FED. TIMES, Aug. 26, 1996, at 1.

1995. Of 24 total applicants for these five promotions, 1 applicant was Hispanic, 2 were African-American, and 21 were white. No conclusions concerning the effects of race or ethnicity on promotions can be drawn from this small number of examples.

Despite this paucity of hard data, there is no lack of strong opinions about the subject of promotions on the part of both minority and white employees who commented.²¹⁸ No subject received more attention in the responses and comments to the employee questionnaire, in the focus group or in public hearings. Much of the problem with the promotion issue results from historical hiring patterns. The federal system is seniority based, however, and thus the last hired normally have a longer wait for supervisory positions. There are some exceptions mentioned in the employee comments. For example, some newly hired employees have jumped over their more senior colleagues in various offices. There is great debate among court employees about who is doing the jumping.

Many minority employees who commented believed that their advancement in their respective offices was being restrained by racial considerations:

There are no black minority supervisors and yet the blacks overall have the experience, . . . [the] education and . . . the management experience.

This office is dominated by white males in positions of authority.

I had more prior experience and more education than any of the white co-workers who applied for supervisory and other promotional positions. I firmly believe that those in charge of promotions are uncomfortable with promoting a black male. There is no other valid reason that I can think of for being passed over for promotions. Certain people are recommended for certain Judges. Caucasians are sent up for interviews with Caucasian judges.

Overall, I am treated fairly in the court system. However, as a minority, I strongly feel there is no room for advancement Managers are usually required to have a college degree. Yet there are a number of non-minorities in man-

218. Of course, the opinions of those employees who commented may not reflect the opinions of those who did not.

agement with no degree while there are a number of minorities with degrees in positions with no opportunity for advancement that have the same experience and/or seniority as those promoted. The promotions, for the most part, are limited to non-minority men with or without a college education.

White employees, particularly white males, have a different perception. Many believe that minorities are promoted faster than their white counterparts and are generally less qualified:

Some people like to believe that the reason they don't get promoted is because of their race or gender. It has been my experience that they are not qualified and could not do the job. Instead of furthering their education and asking for training in the work place, they walk around with a chip on their shoulders[,] blaming it on the fact that they are black or Spanish or whatever or because [they are] women. Competent people always get promoted!

On one occasion a minority female with much less experience and seniority was promoted to fill an unwritten quota.

If you are a white male, you have no future in this system. Jobs should be given according to ability only.

A black male received the promotion and it is my belief that I was the stronger candidate in every respect. I was forewarned by my co-workers (some of whom are supervisors) that this position was set aside for minority appointment.

Both minority and nonminority employees perceived subjectivity and favoritism regarding promotions by management. This issue, coupled with failure to post job notices, appeared to be a recurring theme as recounted by employees of the Clerk's Office in the Eastern District of Pennsylvania. As one questionnaire respondent noted: "Jobs are filled without ever being posted or announced. There seem to be no requirements for some jobs other than [the Clerk] liking you. His entire top management staff positions were never announced." Two other employees commented:

I just feel that the Clerk plays favoritism among those that are considered "in the group." Promotions among his friends are overwhelming.

Positions are created for his favorites, and then lately, the position is posted to general staff. Within the last year, the staff has been receiving notice of openings only because employees were filing suits against him for discrimination.

Two nonminority employees of the Clerk's Office stated:

I didn't have negative experiences based upon my gender or race, but I feel compelled to let you know about what I perceive to be a very racist situation in the Clerk's office. It is common knowledge among Clerk's office employees (and the cause of low morale down there) that the inroads to a deputy clerk position or a management level position are *only* through being in [the Clerk's] office. You must be one of his anointed, which means that you must be a white male, like him.

I think the biggest gripe among the Clerk's Office employees is that there is discrimination in promotion. However, that discrimination is not always based on race or gender. It depends on who the Clerk likes Additionally, the Clerk is the EEOC Officer. How does that promote any equality in employment?

There were 20 additional respondents who commented negatively. Approximately 37% of the 60 respondents from the Eastern District of Pennsylvania District Court Clerk's Office wrote comments.

Focus group participants noted how the favoritism of managers can adversely affect minorities because minorities are relatively under-represented at the decision-making levels. For example, a minority woman commented that managers will give positions to "who[m]ever they like."

A focus group consisting of minority employees in the District of New Jersey raised several concerns regarding perceived racial bias in the Bankruptcy Court Clerk's Office. A college-educated minority Bankruptcy Clerk's Office employee, with tenure in excess of a decade, reported that the employee had received neither a merit pay increase nor a promotion, which the employee attributed to racial bias. The employee also reported training other newer employees, who were promoted to supervisory positions. Both of those promoted had high school degrees.

Similarly, there was a report of a minority employee with a college degree being hired at the same grade (salary) as two white

employees who were not college graduates. Certain minority employees believed that unfairness in their offices is obvious because their greater experience and seniority is ignored while other white employees with less experience and inferior qualifications are promoted.

Several additional employees at the focus group noted that they had filed EEO complaints against the Bankruptcy Clerk's Office alleging discriminatory treatment in both the Newark and Trenton vicinages in 1991. These employees felt that no appropriate remedial action had been taken, and that the problems were still ongoing.

Perceived subjectivity and favoritism in promotion decisions was also emphasized by two speakers at the Task Force's public hearing in Philadelphia. An employee of the Eastern District of Pennsylvania Clerk's Office alleged that the promotion system in that office used inaccurate information and that promotions sometimes were awarded without prior announcement, thus depriving employees of the opportunity to compete fairly for positions.²¹⁹ Another employee of the same office reiterated that not all vacancies are open or advertised to all court employees; and, in general, there is an absence of ethnic representation at the supervisory or management levels.²²⁰ This opinion was contrary to that expressed by another speaker on behalf of ten other employees, including minority supervisors, of the same office.²²¹

2. *Work Environment*

In addition to analyzing possible effects of race and ethnicity on the courts' hiring, promotion and discipline or termination of employees, the Employment Committee examined three aspects of the day-to-day atmosphere in which court unit employees must work: (1) general conditions as related to race/ethnicity and presence of a hostile environment; (2) training and education of employees; and (3) availability of effective mechanisms for EEO complaints.

a. *General Working Conditions and Hostile Environment*

Issues of daily working conditions were explored both in the employee questionnaire and in the minority-employee focus group. The questionnaire asked employees whether they are treated with

219. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 68-69.

220. See *id.* at 75-76.

221. See *id.* at 66.

more, less or the same amount of respect as coworkers of other races or ethnicities. Only 4.2% of white employees who responded to the survey felt they were treated with less respect on the basis of race or ethnicity; however, about a quarter of all minority respondents perceived less respectful treatment: 27.3% of African-Americans, 21.4% of Hispanics, 21.1% of Asians and 25.0% of Native Americans.

Employees were asked if supervisors treated employees the same regardless of race or ethnicity, whereas only 10.3% of white respondents said no, however, a greater proportion of African-American (35.4%), Hispanic (22.2%), Asian (36.8%) and Native American (45.5%) respondents said no. Of employees who thought treatment by supervisors could vary on account of race or ethnicity, most white respondents, 69.7%, thought minorities are treated better, and all (100%) African-American respondents thought nonminority employees are treated better.

The minority employee respondents viewed the assignment of workloads as unequal. When asked if, assuming identical job assignments and seniority, minority and nonminority employees receive the same amount of work from their supervisors, only 10.4% of white respondents perceived an inequality in workload, but 27.0% of African-Americans and 25.0% of Hispanics perceived such inequality. Of those employees perceiving an inequality of workload, white respondents overwhelmingly believed that nonminorities receive more work (97.3%), whereas African-American and Hispanic respondents overwhelmingly believed that minorities receive more work.

Most employees (89.4%) did not think they have ever been subjected to a hostile environment²²² in the workplace because of their race or ethnicity. For example, a far greater proportion of minority workers, e.g., 24.2% of African-Americans, 25.0% of Hispanics and 10.5% of Asians, than of white workers, 4.2%, felt they have experienced, at some point in their court employment, such an environment. In the minority-employee focus group, one speaker noted that minority employees undergo a process of self-censorship in the workplace. He felt that minority employees are less able to express their opinions than white employees, because of fear of repercussions.

222. The employee survey intentionally did not provide a definition of this term, preferring to allow respondents to use their own experiences as a guide.

b. Training and Education

Training and education are essential to career advancement in most federal offices. Seminars are conducted periodically to provide employees with advanced techniques for analyzing problems and formulating practical solutions to daily situations. The discussion of recent trends within the field and changing laws broadens the knowledge of the employee. Ideally, employees become better workers as a result of the creativity gained from the collective reflection which occurs in the seminar environment.

Employees were asked whether they had ever had the chance to request training or education in the past five years, and if so, whether the requests were granted or denied. The responses to this question did not reflect any disparity between minority and nonminority employees in training and educational opportunities. There were also no written comments about training and education.

c. EEO Complaints

The Third Circuit had two pending complaints of discrimination at the beginning of fiscal year 1995, and four new discrimination complaints were received during that year. In response to the Task Force's data requests, no EEO complaints within the past five years were reported by the district court clerks' offices, bankruptcy court clerks' offices or court of appeals units.

In testimony at the Task Force's public hearings and in comments by employee respondents, several persons called attention to the inherent difficulties presented when employees are expected to make EEO complaints to managers or supervisors in their own offices. At the hearing in Wilmington, Delaware, the Clerk of the District of Delaware indicated that he would be the person to receive EEO complaints within his own office; he indicated that employees could, alternatively, bring such complaints to the EEO coordinator in the Probation Office.²²³ In turn, the EEO Coordinator indicated that she would not review an EEO complaint from her own office, but would refer it to the Chief Judge.²²⁴ The coordinator also noted, however, that complaints would be brought first to an employee's supervisor in the normal course of events.²²⁵

In the Philadelphia hearing, employees of the District Court Clerk's Office noted that employees must bring their EEO com-

223. See *Public Hearings: Wilmington, Delaware, supra* note 37, at 20-21.

224. See *id.* at 25.

225. See *id.* at 32.

plaints to the Clerk. It is not possible for the employees to have a grievance reviewed by a outside party.²²⁶

In written comments to the employee questionnaire, several respondents stated that EEO complaint procedures are either organizationally unsound or are administered poorly:

Grievance mechanisms don't bring settlement quickly enough. . . . A judge who heard a grievance 2 years ago has yet to make a determination. If you do file a grievance, it diminishes your chances for any future consideration for promotion. Again we are held to a higher standard and average whites move ahead financially.

If you have a complaint you have to complain to the person who the complaints are about. I believe this has intimidated employees into not complaining . . . any employee who complains about a position or promotion or policy is thereafter "labeled." He or she will not be promoted out of that position for the duration of their employment . . . regardless of their qualifications. In some instances the employees who complain are *laterally* moved to a less desirable position.

The comments reflect a dissatisfaction which may require a closer evaluation of EEO complaint procedures.

3. *Discipline and Termination*

Sources of information concerning the experiences of minority and nonminority employees relative to employee discipline and termination include: (1) data from twenty-four court units on the number of and racial or ethnic characteristics of employees disciplined and/or terminated during the period of 1990 through 1995; (2) responses to items from the employee questionnaire dealing with perceived relationships between employee discipline and racial/ethnic characteristics; and (3) comments included in response to the questionnaire.

All court units of the Third Circuit reported a total of 17 instances of employee discipline and termination from 1990 through 1995. These instances involved 9 white employees, 7 African-American employees and 1 Hispanic employee. Nine events involved discipline only, and the other 8 events involved discipline that resulted

226. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 70-72.

in termination. The 8 persons who were terminated included 4 whites, 3 African-Americans, and one Hispanic.

In the employee questionnaire, employees were asked whether minority employees received the same discipline for tardiness and absenteeism as nonminority workers; and, if discipline differs, which group received harsher discipline. Whereas 12.9% of white employee respondents thought that discipline differed according to minority/nonminority status, higher proportions of African-American (28.2%), Hispanic (28.6%), Asian (21.1%), Native American (25.0%) and multiracial (16.7%) employee respondents believed that discipline varied according to race/ethnicity. Further, of those who believed that discipline varied, the vast nonminority perceived discipline as falling most harshly upon their own group. Thus, 92% of white respondents thought that nonminorities received harsher discipline; conversely, 88.6% of African-American respondents and 71.4% of Hispanic respondents thought that minorities received harsher discipline.

Employees were also asked whether disciplinary action for misconduct was equally imposed upon minority and nonminority workers, and, if unequally, whether nonminorities or minorities received harsher discipline. While only 11.9% of white respondents thought disciplinary action was handled unequally, larger proportions of African-Americans (26.6%), Hispanics (21.4%) and Asians (21.1%) perceived inequality according to minority or nonminority status. Once again, a high preponderance of all employees who thought discipline was unequal felt that their own groups were disadvantaged. Of whites responding, 95% thought that nonminorities receive harsher discipline, whereas 90% of African-American respondents thought that minorities receive harsher discipline.

It appears that few minority employees included any narrative comments regarding discipline and termination on the employee questionnaire. More frequent were comments by nonminority-group employees, who focused on their perception of lax disciplinary treatment of minorities:

“Punishment” is not harsher for non-minorities, minorities just get away with more.

Two African-American men walk in late routinely and are not required to put in [leave slips]. White employees are immediately approached. . . . [D]isparity in treatment is very obvious.

A male minority worker is not held accountable for anything, tardiness . . . breaks, time off, etc.

Minority men and women are never confronted about time and attendance or quality of work. Non-minority persons are singled out if they are late for work, not at their desks or if they don't have their work done in a timely manner.

Occasionally, respondents commented on a possible relationship between the perceived lower standards of discipline and minority employees' greater difficulties in getting hired and their lower status in the workforce:

There is definitely a fear that a minority employee may bring a law suit or a complaint against a supervisor. Therefore, the minority employees appear to run rampant without discipline that others may receive. Due to this fear, the hiring process for race and ethnicity is greatly compromised; minorities don't get hired although they are interviewed.

[M]inorities are treated easier when they first are hired and are in low paying positions. This means minorities are not reprimanded for lateness, leaving the building, etc., as are white employees.

While the foregoing discussion suggests some perceptual problems relating to disparity in the administration of discipline, those problems do not appear to be endemic. A majority of all racial and ethnic groups, between 50% and 71.4%, indicated that they believed discipline was distributed equally. Overall, approximately 16% of employees responding believed that there was inequity in the dispensing of discipline and that their group (i.e., minority or nonminority) received harsher treatment.

In narrative comments, while nonminority respondents did not indicate that they were being unfairly disciplined, many made clear that they felt minorities were not being disciplined at all or in the same fashion as nonminorities for the same type of behavior.

D. Findings

- Specific educational requirements for employment generally result in a smaller pool of available minority candidates, while enhancing the size of the pool of white candidates.

- There are higher percentages of minority employees in the bankruptcy clerks' offices, probation offices and pretrial services offices than in the district court clerks' offices.
- There is a perception among some employees, both minority and nonminority, that a system of favoritism exists in employment practices within the District Court Clerk's Office in the Eastern District of Pennsylvania and the Bankruptcy Clerk's Office in the District of New Jersey.
- Minorities generally are under-represented in supervisory positions relative to their representation in the overall court workforce.
- Some lawyers with significant experience practicing in the federal courts perceive that minorities, and especially African-Americans, are under-represented on the court staff.
- The percentage of newly hired employees who are African-American and Hispanic is less than the percentage of African-Americans and Hispanics in the interview pool. The percentage of newly hired employees who are Asian is greater than the percentage of Asians in the interview pool.
- Many minorities believe current methods of job announcements are ineffective in reaching minority applicants. The Eastern District of Pennsylvania is the only court within the Third Circuit that targets some advertising of job openings to minority groups.
- In some court units, word of mouth information is an important source of knowledge about job openings and promotional opportunities.
- Perhaps due to the impact of seniority, minority employees tend to earn lower average salaries than white employees, even after adjustments for differences in district, unit, supervisory status, EEO job classification and education.
- There is great disagreement among some minority and nonminority employees as to which group may be advantaged in promotion.
- There is a perception among some minorities that minorities are treated with less respect than nonminority employees.
- There is a perception among many employees, both minority and nonminority, that discipline is not applied uniformly.
- Many employees will not bring EEO complaints to a supervisor within their own unit.

E. *Recommendations*

- All court units should advertise job openings to local minority organizations, as is presently done in the Eastern District of Pennsylvania.
- All promotional opportunities within an office should be posted in several locations accessible to employees and sent by electronic mail to workstations of all employees in the relevant court unit. Each posting should include requirements for the positions in terms of relevant education, experience or training.
- After selecting a candidate for promotion, managers should promptly send a memorandum to all internal applicants announcing the selection and the candidate's general qualifications. Managers should attempt to conduct postselection interviews with all internal candidates interviewed, but not selected for the promotion, to offer constructive suggestions on improving opportunities for advancement in the future.
- Each unit head should examine the supervisory/nonsupervisory status and the salary of each minority employee and take steps to correct any unwarranted disparities.
- Unit heads should delineate the conduct which may result in disciplinary action. All disciplinary measures should be uniformly applied. Supervisors should discuss with all employees the perception that minorities are "favored" in discipline or promotions and should work to eliminate that perception.
- Employees should be given the opportunity to report EEO complaints to a supervisor from outside the employee's office. There should be an alternative EEO officer designated to serve in all cases where the complaint is against the EEO officer.
- All court employees, including chambers staff and unit heads, should participate periodically in diversity training seminars such as those offered by the Federal Judicial Center.
- Court units should incorporate into the evaluation of unit heads an element which reviews the diversity of that office.
- Written criteria should be developed for selecting employees to attend appropriate educational or training programs. All qualified employees should have the opportunity to attend, on a rotating basis, an educational or training program which provides information helpful to career advancement.
- All district court clerk's offices should make good faith efforts to broaden the employee applicant pool and hire qualified diverse candidates.

- The court should review the practices and procedures in the District Court Clerk's Office in the Eastern District of Pennsylvania and the Bankruptcy Court Clerk's Office in the District of New Jersey with a goal of addressing the perceptual problem related to favoritism in employment practices.

XII. REPORT OF THE COMMITTEE ON CRIMINAL JUSTICE ISSUES OF THE RACE & ETHNICITY COMMISSION

A. *Committee Process*

The Committee on Special Issues in Criminal Justice of the Race and Ethnicity Commission ("Justice Committee") was to study particular issues unique to the criminal process. The Justice Committee's work began with guidance from a break-out session held at the 1995 Third Circuit Judicial Conference, entitled "Special Issues of Race and Ethnic Bias in the Criminal Justice System." The session discussed the following: (1) whether racial considerations affected strategy in criminal cases (including questions regarding criminal juries); (2) the effect of race and ethnicity on pretrial release; (3) the effect of race and ethnicity on sentencing decisions; and (4) whether there is disparate treatment of defendants and witnesses²²⁷ based on race and ethnicity.

Based on the Judicial Conference discussion and the direction of the Third Circuit Task Force on Equal Treatment in the Courts, the Committee on Special Issues in Criminal Justice decided to focus on the areas listed above. The Task Force resolution mandated that the Justice Committee examine only those areas within the domain of the Third Circuit rather than on issues that could not be altered or influenced by the Third Circuit. Substantive law issues were excluded from consideration.

The Justice Committee obtained information from the following sources: (1) the AO of the United States Courts; (2) surveys sent to judges, court employees and attorneys (all three surveys contained questions about litigants); (3) focus groups conducted by the committee focusing on the intersection of race and gender; (4) federal defender offices and United States Attorneys Offices; (5) a survey of convicted defendants developed by the committee with the guidance of a social scientist; and (6) transcripts of public hearings conducted throughout the Third Circuit.

²²⁷. For a discussion of the treatment of witnesses, see the Reports of the Committees on Court System Interaction of both the Race and Gender Commissions.

B. *The Effect of Race and Ethnicity on Pretrial Release and Detention of Defendants in the Third Circuit*

1. *Source of Information*

The Justice Committee obtained data from the AO of the United States Courts on 13,570 cases activated in the Third Circuit between September 1993 and September 1996. The data were derived from Pretrial Services Agency reports regarding each defendant arrested and charged in any district court in the Third Circuit. The reports included information about the defendant's criminal history, current charges and demographic characteristics. These data were utilized by Dr. Jane Siegel, an assistant professor of criminal justice at Widener University, to examine what role, if any, gender, race or ethnicity plays in decisions about a defendant's pretrial release.

2. *Demographics of Defendants*

Dr. Siegel reported that most of the defendants in this sample were males (84%). The largest racial groups were Caucasians (54%) and African-Americans (41%). People of Hispanic origin accounted for 17% of the sample.²²⁸ For purposes of data analysis, the small number of defendants classified as American Indian or Alaskan Native (54) were grouped together with Asian or Pacific Islanders into the category "Asian/Other," which was 5% of the sample.

Fifty-four percent of defendants were employed and 69% had no more than a high school education. The majority were unmarried, and most single defendants reported they were never married. Although 24% reported owning their homes, defendants typically lived in a rented residence. Seventy-seven percent of the defendants reported no substance abuse problems. Those who did report substance abuse most frequently indicated cocaine as their drug of choice.

Fifty-five percent of defendants had a criminal record, although at the time their cases were activated, nearly 7 of 10 (69%) either had no criminal record or, if they did have a prior record, had no criminal matters pending. Seven percent had questionable immigration status and 24% were either on probation, parole, pretrial release or had an arrest warrant pending. The most

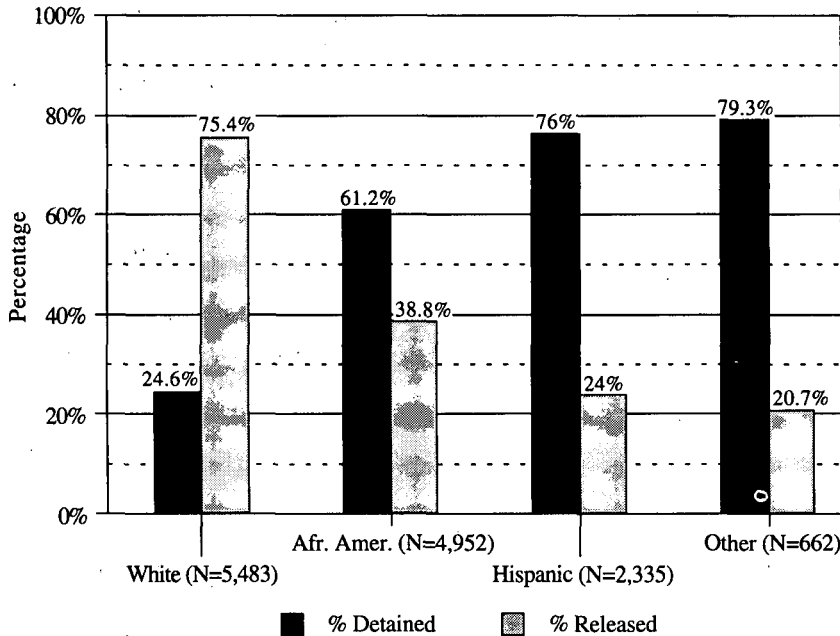
228. The ethnicity (Hispanic/non-Hispanic) included both Caucasians and African-Americans; the ethnicity of 6% of the sample was unknown.

common offenses with which defendants were charged were the sale or manufacture of illegal drugs.

3. *The Impact of Race and Ethnicity on Detention*

Dr. Siegel's analysis showed that nearly two-thirds of defendants were released prior to trial. The rates of release differed, however, either at the initial hearing or at a subsequent detention hearing, by gender, race or ethnicity.²²⁹ Figure 7 shows this differentiation.

FIGURE 7: RELEASE AND DETENTION STATUS OF THIRD CIRCUIT



SOURCE: AO of the United States Courts.

Figure 7 shows a pronounced and statistically significant difference between Caucasians and racial and ethnic minorities. Minority defendants were detained at rates at least one-and-a-half times greater than the detention rates of Caucasian defendants. Figure 7 represents combined figures for the four years from 1993 to 1996. Over the four-year period, although the total number of cases remained relatively constant, a greater percentage of all defendants were detained. The disparities between genders and races remained fairly consistent. Thus, in 1995 and 1996, an average of

229. For a more detailed discussion of the role of gender on detention, see Report of the Committee on Criminal Justice Issues of the Gender Commission.

36% of those defendants who had detention hearings were detained, compared to 31% of defendants who were detained during the first two years of the period. The following tables show the breakdown by year of (1) the total number of people within each racial or ethnic category; (2) the number and percentage of defendants within each category who had detention hearings; and (3) the number detained following the detention hearing and the percentage of the total number of people within that racial or ethnic category who were detained.

TABLE 118: RACE AND ETHNICITY ANALYSIS OF PRETRIAL DETENTION

Twelve-Month Period Ending September 30, 1993					
Race/ Ethnicity	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Caucasian	1425	273	19%	195	14%
Black	1302	693	53%	555	43%
Hispanic	567	332	59%	283	50%
Asian/other	135	48	36%	39	29%

Twelve-Month Period Ending September 30, 1994					
Race/ Ethnicity	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Caucasian	1336	240	18%	175	13%
Black	1293	571	44%	478	37%
Hispanic	552	330	60%	263	48%
Asian/other	129	68	53%	54	42%

Twelve-Month Period Ending September 30, 1995					
Race/ Ethnicity	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Caucasian	1335	229	17%	151	11%
Black	1245	650	52%	535	43%
Hispanic	594	410	69%	334	56%
Asian/other	231	208	90%	201	87%

Twelve Month Period Ending September 30, 1996

Race/ Ethnicity	Total	Detention Hearings Held		Detention Ordered	
		Number	Percentage of Total	Number	Percentage of Total
Caucasian	1383	271	20%	191	14%
Black	1110	559	50%	450	41%
Hispanic	621	440	71%	369	59%
Asian/other	167	135	81%	126	75%

SOURCE: AO of the United States Courts.

According to Dr. Siegel, the disparities between racial and ethnic groups may be explained if one group is more likely than another to possess legally relevant characteristics which are more likely to lead to detention. For example, if Hispanics are more likely than other defendants to commit an offense with a presumption of detention, that would explain why Hispanics were significantly more likely to be detained. Therefore, the next step in Dr. Siegel's analysis was to determine whether the differences between racial and ethnic groups persisted once these other variables had been factored out of the equation. To investigate this issue, Dr. Siegel created multivariate statistical models which controlled for such factors. Table 119 lists those characteristics:

TABLE 119: CHARACTERISTICS TAKEN INTO ACCOUNT FOR PRETRIAL DETENTION ANALYSIS

Personal Characteristics	Legally Relevant Characteristics
<ul style="list-style-type: none"> • Age • Citizenship status • Employment status • Ethnicity • Length of residence • Marital status • Psychiatric treatment status • Substance abuse status • Gender • Type of resident (owner, renter, etc.) 	<ul style="list-style-type: none"> • Current criminal status • Primary current offense charged²³⁰ • Prior number of arrests and convictions (felonies, misdemeanors, violent offenses and drug offenses) • Prior record of failures to appear in court • Prosecutor's recommendations with respect to disposition (detention, release on financial bond or release on recognizance)

The judicial district and year in which the case was brought were also included as variables in Dr. Siegel's analysis in order to see if there were differences over time or place in detention decisions. Dr. Siegel used the data to review two outcomes. The first

230. There were 191 different offenses listed as the major offense with which defendants were charged. These were grouped into eleven different categories. Classification of offenses was guided by the categories listed in the U.S. Sentencing Commission Guidelines.

model examined all those defendants who were ultimately released, either at their initial hearing or at a subsequent detention hearing. Of the 12,563 defendants for whom this information was available, 64% were released, including 6822 defendants released at their initial hearing. The second model examined only those defendants who were detained at their initial appearance and thus had a subsequent detention hearing. Nearly one-quarter (23%) of the 5844 defendants who had a detention hearing were released following this second hearing.

Results of the analysis indicated that race and ethnicity continued to affect the likelihood of a defendant's release prior to trial once legally relevant factors and personal characteristics were included in the analysis. Caucasians had a greater likelihood of release relative to all racial or ethnic minorities.

Compared to Caucasians, defendants of Hispanic ethnicity had the lowest odds of being released. Those categories of "Asian/Other" as well as African-American defendants also faced lower odds of release in comparison to Caucasians, but the magnitude of the difference for these two groups was less pronounced than between Hispanics and Caucasians. In addition, the effect of race or ethnicity varied somewhat by gender. Thus, while the odds of release were significantly lower for both Caucasian and African-American males of Hispanic origin, compared to the average odds that a defendant would be released, Hispanic females were no less likely than average to be released. Caucasian males and African-American females of non-Hispanic origin enjoyed somewhat better than average odds that they would be released.

Other personal characteristics were related to the likelihood of release. Citizenship was a more important predictor of release than a defendant's race or ethnicity. As might be anticipated, American citizens and legal aliens were released far more often than illegal aliens. Those defendants who were employed, married and owned a home were significantly more likely to be released than those who were unemployed, single or whose residence was classified as "other" (i.e., neither renting nor homeless).

Five of the legally relevant variables included in the model were also significant predictors of release. The most important legally relevant variable—indeed, the most important of *all* the factors in the analysis—was the prosecutor's recommendation about a defendant's status. Without a recommendation of detention, the likelihood that a defendant would be detained was less than 0.05.

The offense with which a defendant was charged was also a significant factor in predicting the likelihood of release. The odds of release were the lowest for those charged with immigration offenses, such as illegal entry or re-entry or fraudulent citizenship, followed by serious offenses that involved property (e.g., robbery, burglary or extortion), serious violent offenses (e.g., murder, manslaughter or aggravated assault) and drug offenses that involved sale or manufacture. Defendants charged with income tax offenses had the highest odds of release.

The odds of release decreased as a function of the number of times a defendant had been previously convicted of a felony; other specifics of a defendant's prior criminal record did not affect the odds of release. Those with no pending criminal matters had significantly higher odds of release, while those whose immigration status was being questioned were less likely to be released. As might be expected, the likelihood of release decreased as a function of the number of times that a defendant had failed to appear for required court proceedings in the past.

Using the factors noted above, this statistical model was able to correctly predict the outcome of 90% of the cases.

The second part of Dr. Siegel's analysis examined the factors that affected release following a detention hearing. This restricted the number of cases analyzed to 5193. Asians were no longer at significantly higher risk of detention than Caucasians, although Hispanics and African-Americans were. Both white and black Hispanic males had a significantly higher likelihood of detention than average, while non-Hispanic black females continued to have a slightly lower than average risk of detention.

The prosecutor's recommendation at the detention hearing continued to be an extremely strong predictor of detention. Those with no pending criminal matters beyond the current charge had a greater than average chance of release, while those with a pending immigration question were more likely to be detained. Following a detention hearing, the likelihood of detention increased as the prior number of both felony arrests and convictions increased, although prior history of failures to appear was no longer a significant predictor of detention. Drug offenders were not at increased risk of detention at this stage although those charged with serious offenses involving property, immigration offenses and serious violent offenses were.

Among the personal characteristics that affected the odds of detention at this stage, citizenship status continued to be an impor-

tant factor, as did employment status. In addition, substance abuse problems were a significant predictor of detention at this stage. Those who had either an alcohol or marijuana problem were significantly more likely than average to be released, while those with a cocaine problem were more likely to be detained.

When evaluating the finding reported above, it should be borne in mind that the statistical procedure utilized in this analysis produced estimates of the amount that each factor included in the model contributes to the overall risk of detention. For a given individual, all factors would have to be taken into account to determine the overall odds of release for that person. For example, the increased risk of detention that a Hispanic defendant might face compared to a Caucasian defendant would be mitigated if he or she possessed other characteristics, such as current employment, that increased the odds of release. The fact that questionable citizenship status and a current charge related to an immigration offense reduced the odds of release, therefore, would place Hispanic defendants at increased risk of detention, because these two factors are disproportionately associated with Hispanics in this population. Conversely, the decrease in the odds of release faced by a Hispanic man would be offset if he or she were an American citizen or legal alien, because the odds of release increase substantially for defendants with such citizenship status.

It should also be noted that information about certain other factors that may be relevant to pretrial release decisions because they may indicate increased risk to the community—such as the extent of injuries sustained or use of a firearm—was not available for this analysis.

C. *Treatment of Criminal Defendants*

1. *Demographics of the Defendant Population*

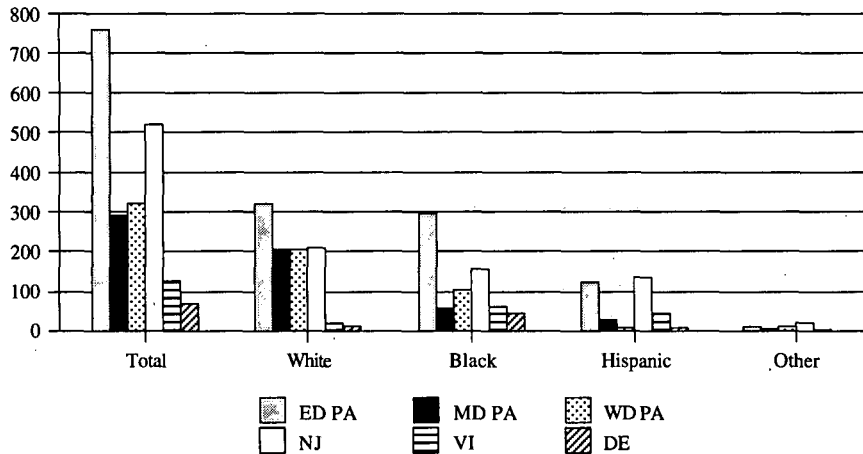
The defendants in the Third Circuit are primarily male and often non-Caucasian. The following table and figure depict the racial and ethnic makeup of sentenced defendants in the various districts of the Third Circuit:

TABLE 120: NUMBER OF DEFENDANTS AND THEIR PERCENTAGE OF ALL DEFENDANTS SENTENCED IN FISCAL YEAR 1995

District	Caucasian/ White		African- American/ Black		Hispanic		Other	
D. Del. (N=67)	13	19.4%	46	68.7%	8	11.9%	0	0.0%
D.N.J. (N=520)	211	40.6%	156	30.0%	135	26.0%	18	3.5%
E.D. Pa. (N=756)	324	42.9%	298	39.4%	123	16.3%	11	1.5%
M.D. Pa. (N=293)	204	69.6%	57	19.5%	28	9.6%	4	1.4%
W.D. Pa. (N=324)	205	63.3%	104	32.1%	7	2.2%	8	2.5%
D.V.I. (N=126)	21	16.7%	59	46.8%	43	34.1%	3	2.4%
Total (N=2086)	978	46.9%	720	34.5%	344	16.5%	44	2.1%

Note: N = total number within each category.
SOURCE: U.S Sentencing Commission, 1995 Annual Report.

FIGURE 8: DEFENDANTS SENTENCED IN THE THIRD CIRCUIT (FISCAL YEAR 1995)



SOURCE: U.S. Sentencing Commission, 1995 Annual Report.

The judges, court employees and attorneys of the circuit were asked whether they had observed U.S. Marshals Service employees, CSOs, judges, 3 court employees or attorneys saying or doing anything that they thought demeaned or disparaged litigants based on the race or ethnicity of the litigant. The Justice Committee has interpreted "litigants" to include criminal defendants, and indeed, many of the comments handwritten on the attorney surveys addressed the treatment of defendants. Judges and court employees had fewer comments concerning litigants. The surveys asked respondents to answer on a continuum of 1 to 7, with 7 being "never"

and 1 being “always.” The data were analyzed by social scientists and the responses reported have been determined to be “statistically significant” unless otherwise noted.

In general, judges did not see any mistreatment of litigants within the system. Attorneys also indicated that they had never observed litigants being mistreated by judges, U.S. Marshals Service employees, CSOs, court employees or attorneys. Overall, more than 90% of the respondents to the survey (minority or nonminority) did not feel that nonminority litigants faced disparaging treatment.²³¹ This percentage was over 80% with regard to the treatment of minority litigants.

It is noteworthy, however, that when minority responses were isolated from Caucasian responses, there were some statistically significant differences reported between the two groups. For example, a far greater percentage of African-American attorneys than Caucasian attorneys responding indicated that they had occasionally seen or heard demeaning or disparaging treatment by CSOs towards minority (male and female) litigants. These results are discussed in further detail below.

2. *Treatment of Defendants by U.S. Marshals Service Personnel*

Ninety-three percent of Caucasian attorney respondents had never observed any disparaging or demeaning treatment by U.S. Marshals to minority males based on race or ethnicity. In contrast, only 79% of African-Americans had never witnessed such behavior, and only 70.6% of Hispanics indicated they had never witnessed disparaging or demeaning treatment. Of African-Americans, 11.9% indicated that they had rarely observed such activities and 6% said that they observed it sometimes. Of Hispanics, 5.9% observed it rarely and 23.9% observed it sometimes.

Eighty-two percent of African-American attorney respondents had never observed disparaging or demeaning treatment of minority women and 10.6% observed it “rarely.” This compares to 94.6% of Caucasian attorneys who had never observed such treatment and 3.4% who had rarely seen it. Of Hispanics, 76.5% “never” observed disparaging or demeaning treatment and 5.9% “rarely” observed it, but 17.7% “sometimes” did.

231. One exception was that with regard to how attorneys treat nonminority female litigants, a significant number of African-American women felt that nonminority female litigants received disparaging treatment. Of African-American females, 66.7% responded “never.” By comparison, 85.1% of Caucasian females said “never.”

The explanatory comments by attorneys were mixed. A number commented on the positive way in which U.S. Marshals Service personnel treat all prisoners. One male Caucasian attorney commented that he had “never observed any racial/ethnic based problems with [the] Marshal’s Service. I did represent a minority individual who was having what he believed to be race-based problems where he was detained and the Marshal’s service investigated and resolved the situation in a professional manner.” Another attorney echoed this attitude regarding all the courthouses within the Third Circuit: “In [the] U.S. Courthouse in Wilmington, Philadelphia, Camden, Trenton, and Newark, I have never seen [the] Marshal Service act in anything but a courteous manner.” A male Latino attorney commented that the “[U.S. Marshals] Service for the E.D. of Pa. has always been polite, professional and helpful.”

On the other hand, some attorneys commented that they had witnessed problematic behavior by U.S. Marshals Service personnel. One male Caucasian attorney commented:

I once had a client (minority male) brought to the courthouse for a medical exam. The Marshal was extremely rude and uncooperative in allowing us to accomplish this simple task.

Frequently, the U. S. Marshals will assume that *all* persons of color (whether attorney or jury or a witness) are criminal defendants. This is deplorable and inexcusable.

One female Caucasian attorney stated:

Some U.S. Marshals treat criminal defendants with disrespect and can be nasty—this seems limited to minority defendants, e.g., snap at defendants who don’t move quickly or try to talk to family in [the] courtroom. . . . At times, U.S. Marshals treat minority defendants with gruffness and less respect than non-minority defendants.

Three attorneys noted inappropriate comments made about litigants by U.S. Marshals Service employees:

I observed (overheard) race based remarks re Black male defendant and his witness.

I have on occasion observed Federal Marshals make disparaging comments about minority defendants.

I don’t remember any instances of improper conduct to [a] minority person—cops always talk to prisoners as if

they are scum—but I often have overheard such comments *about* minority persons between deputy marshals and secretaries (that is, marshals talking to each other or to secretaries about minority prisoners).

3. *Treatment of Defendants by CSOs*

Attorneys were also asked about the conduct of CSOs in regard to litigants. Again the vast majority of respondents had not seen any demeaning or disparaging behavior. But once again, of those who had observed the few reported incidents, more were minority attorneys. Of Caucasian attorneys, 94.6% said that they had never seen any disparaging or demeaning behavior. In contrast, 83.1% of African-American attorneys said that they had never seen any type of disparaging treatment, while only 76.5% of Hispanics answered that they never had. Twelve-and-a-half percent of African-Americans and 5.9% of Hispanics said they “rarely” observed it. Of African-American attorneys, 2.8% “sometimes” observed disparaging treatment, compared to 17.6% of Hispanic attorneys. The same types of reporting differences existed regarding incidents involving minority women.

A few attorneys specifically noted the behavior of CSOs as well as Deputy United States Marshal (DUSM) personnel as reported in this comment: “If by ‘litigants’ you mean criminal defendants, I have seen/heard CSO and DUSM make the occasional disparaging remark—not sure it’s racial, just as likely to be certain disdain for criminal defendants.” One employee noted that CSOs had treated a Hispanic defendant with less respect and attributed that to his ethnicity.

4. *Treatment of Defendants by Judges*

When asked about the treatment of minority male litigants by judges, 94.9% of the Caucasian attorneys responding stated that they had never seen judges make remarks or act in a demeaning or disparaging manner. Only 64.9% of African-Americans answered “never.” Of African-Americans, 9.1% responded “rarely” and almost one-quarter, 23.4%, responded “sometimes.” Of Hispanics, 65% said “never,” 5% said “rarely,” 20% said “sometimes” with 10% saying they saw it “frequently.”

When asked about minority females’ treatment by judges and judicial officers 95.2% of Caucasians said “never.” Only 67.9% of African-American respondents answered “never.” While 11.5% an-

swered “rarely,” 17.9% “sometimes” and 2.6% “frequently.” Of Hispanics, 70% stated they “never” saw it, 5% stated they “rarely” saw it, 15% said they “sometimes” did and 10% stated they saw it “frequently.”

There were some positive comments regarding the actions taken by judges toward litigants, but there were also a few comments such as the following: “I have seen and heard a particular senior (perhaps now-retired) judge make comments that a particular foreign national defendant should not be given certain privileges afforded U.S. Citizens.” Another respondent states: “Judge turns his back on minority litigants and other witnesses while they testify.” A female attorney commented:

Some judges address minority defendants and female non-minority defendants with disrespect and curtly—at times one or two judges have been blatantly sarcastic. As for my clients—those individuals who mistreat or are rude to my clients—are generally rude and obnoxious. Because my clients are “criminals” they become targets for these individuals’ mistreatment. Fortunately only a few judges and U.S. Marshals fit this category.

One attorney from the Virgin Islands recollected that: “‘White’ judges were routinely thrown off during criminal voir dire by some defense counsel, who asserted to the court (on the record!) that it was their ‘privilege’ to exclude ‘Whites’ on the basis of their race.” This same attorney went on to note, however, that in recent years he had “[a]lmost never heard any one of our courthouse family—judges, AUSAs, defense counsel, witnesses, jurors—say anything racist or sexist—at all.”

5. *Treatment of Defendants by Court Employees*

Survey responses concerning the treatment of litigants by court employees showed statistically significant differences between the responses of Hispanic and Caucasian men regarding nonminority and minority male litigants. It should be noted, however, that only 13 Hispanic male attorneys responded to the survey. Of Hispanic males, 76.9% answered that they “never” saw disparaging or demeaning treatment of nonminority males and 23.1% “rarely” saw it. In contrast, 96.2% of Caucasian males stated that they “never” saw disparaging treatment of nonminority males. Of Hispanic, 76.9% males believe nonminority females were disparaged by court employees.

Seventy-six percent of African-American women said there were “never” demeaning or disparaging statements or conduct toward minority males by court employees. Specifically, of the women responding, 4% said “rarely,” 12% said “sometimes” and 8% said it “frequently” occurred.

As for minority females, African-American female and Hispanic male attorneys reported that there were disparaging or demeaning comments or actions by court employees to an even greater extent. Sixty-one-and-a-half percent of Hispanic males and 80% of African-American female attorneys responded that they had “never” seen such behavior.

One white employee noted that whites think blacks are “given a break” and blacks think whites are treated better in criminal matters.

6. *Treatment of Defendants by Attorneys*

All groups of survey respondents tended to see attorneys act or comment disparagingly to both minorities and nonminorities more than any other category of persons. Of all responding attorneys, 84.4% “never” saw such activity, whereas for most other court actors the low to mid 90% range was the average response rate.

Just over half (54.4%) of African-American attorney respondents never observed minority males disparaged by attorneys. Slightly over ten percent (10.1%) saw such behavior “rarely,” 29.1% “sometimes” did and 6.3% “frequently” saw it. Of Asian-Americans, 60% said they “never” saw it, while 40% “sometimes” did. Of Hispanic attorneys, 57.9% said that it “never” occurred, 15.8% “rarely” saw it, 10.5% “sometimes” did and 10.6% “frequently” observed disparaging and demeaning treatment of litigants by other attorneys.

Similar responses were received regarding the treatment of minority women defendants. Of African-American respondents 55.1% “never” observed demeaning or disparaging treatment, 12.8% “rarely” saw it, 25.7% “sometimes” saw it and 6.4% “frequently” did. Of Hispanic attorneys, 57.9% “never” observed such behavior, 15.8% “rarely” did, 10.5% “sometimes” did and 10.5% “frequently” observed disparaging or demeaning behavior. Of Asian-American respondents, 60% “never” observed it, while 40% “sometimes” did.

D. *Survey of Defendants*

1. *Methodology*

The Justice Committee undertook to obtain some input from defendants²³² involved in criminal cases throughout the circuit. With the assistance of Dr. Jane Siegel, the Justice Committee designed an uncomplicated survey to be sent to persons convicted of crimes in the district courts of the Third Circuit. Survey instruments were sent to 50 convicted defendants from each district. The names were initially selected from the files of each U.S. Probation Office within that district. In order to obtain a sufficient variety of respondents, efforts were made to ensure that incarcerated defendants were included. A special effort was also made to ensure that an adequate number of female defendants was reached.

A total of 300 survey instruments were mailed by the Justice Committee along with a cover letter from Penny Marshall, Assistant Federal Public Defender, and a prepaid return envelope. Again, anonymity was assured. A second survey and reminder letter were mailed several weeks later. Fifty-eight surveys were returned with incorrect addresses, primarily from the Virgin Islands, which had previously alerted the Justice Committee to a potential problem with addresses. Therefore, a total of 242 surveys was presumed to be delivered. Of those, 94 (38.8%) were returned, many of which contained written comments. The results were analyzed by Dr. Siegel.

The survey asked respondents to provide details about various aspects of their case, the charge of which they had been convicted, the year of their conviction, the sentence received and the race and gender of those persons who had participated in their case (including the prosecution, judge and defense attorney). The survey also asked if the race or gender of those persons had made a difference in the respondent's treatment. In addition to responding to the survey questions, respondents were given the opportunity to provide comments in their own words about their perceptions of the way in which they were treated in court during their criminal cases.

2. *Demographics of Respondents*

Data from the U.S. Sentencing Commission indicate that during the period of October 1, 1990 through September 30, 1994,

232. The Justice Committee initially endeavored to obtain comments from victims. Because many of the crimes in federal court do not have specific victims, and an appropriate statistical sample of victims would have been quite difficult to contact, this task was not accomplished.

47% of defendants sentenced in the Third Circuit were Caucasian and 16% were female. By contrast, 66% of respondents to this survey were Caucasian, and 36% were female. Thus African-American, Hispanic and male defendants were under-represented in this survey. In addition, slightly more than half (54%) of the survey respondents reported that they were sentenced to probation alone, whereas the Sentencing Commission data showed that fewer than 4 of 10 convicted defendants sentenced between 1990 and 1994 were sentenced to probation alone. In view of such differences, the results reported here cannot be generalized to the entire population of defendants in the circuit.

Of the 94 surveys that were completed and returned, 34 (36%) were from females, and 60 (64%) were from males. The respondents' ages ranged from 19 to 74; the average age of all respondents was 43; men were, on average, six years older (45 versus 39 years old). Although a larger percentage of men than women had at least some college education, the difference in educational level between the sexes was not statistically significant.

The respondents had been convicted of a variety of offenses, including: income tax violations, drug offenses, bank robbery, immigration offenses, car-jacking, gender offenses, firearms, forgery, money laundering, mail fraud, accessory to murder and counterfeiting charges. Most of the defendants who responded to the survey were represented by Caucasian male attorneys (76%) followed by Caucasian females (11%) and African-American males (8%). The remainder of the defense attorneys of these respondents included 1 Hispanic and 3 African-American women and 1 Hispanic male. Eight of 10 respondents had been convicted within the last 3 years (1994-1996) and more than half of all respondents were sentenced to probation. Fifteen respondents reported they were currently incarcerated. Prisoners included a disproportionately large percentage of African-Americans and females. Of prisoners, 53% were women, and 53% were African-Americans. The disproportionately large number of African-Americans (and disproportionately small number of Caucasians) in prison was a statistically significant finding, but it should be noted that legally relevant variables such as prior prison record and conviction offense, which were not available for this analysis, may have accounted for this finding. In addition to the disparity in current incarceration status, African-Americans were also significantly more likely to report having been detained prior to trial: half the African-Americans were detained, compared to 29% of Caucasians and 21% of Hispanics.

3. *Survey Results*

Respondents to the survey²³³ were asked to indicate whether they had seen or heard any of the various court personnel do or say anything they believed “was disrespectful or insulting to any person based on race, ethnic background or sex.” A large majority (81%) indicated they had not. Men and women shared similar perceptions of how court personnel interacted with others, but a larger proportion of minorities than Caucasians believed that they had witnessed disrespectful treatment. Prisoners in particular believed that they had witnessed insulting treatment in the court: controlling for age, gender, race and education, minority males in prison were six times more likely to report that someone was treated with disrespect. Hispanics and African-American males, regardless of their current incarcerated status, were also significantly more likely than everyone else to report seeing such behavior.

Respondents who reported having witnessed what they perceived to be insulting behavior by court personnel were asked to identify who they felt was doing the insulting and who was insulted. The most common response among the seventeen people who reported observing insulting treatment was that they were the ones insulted, followed by witnesses and family members. Judges and prosecutors were most frequently identified as those who were disrespectful or insulting, followed by pretrial officers.

Defendants were also asked if they believed that they were treated better, the same as or worse than a person of a different race would have been treated. A series of questions also asked if they believed that their race played a role in the decision about their pretrial release, sentence or, where applicable, a finding that they were in violation of their probation.

Most defendants did not believe that race was a factor in the way they were treated in court or in the decisions made about their case. Eight of 10 (80%) felt that they were treated the same as a person of a different race would have been treated. Among those who believed differently, most felt that they were treated worse than those of another race or ethnicity would have been. Only three people, all of whom were white, felt they were treated better. Thirteen of the 15 people who believed their race caused them to be treated worse than others were minorities, including 9 African-Americans and 4 Hispanics. These differences in perceived treat-

233. For the results concerning gender, see the Report of the Committee on Criminal Justice Issues of the Gender Commission.

ment between Caucasian and minority defendants were statistically significant for the group responding. All but 1 of those who felt that they were treated worse believed their race was a factor in their sentencing and 7 of 10 felt the decision about their pretrial release was affected by race. When asked to identify the court personnel that they believed took race into account in their decision making, defendants most often named judges and prosecutors, followed by probation officers.

One-fourth of respondents felt that their race either affected the way they were treated (for better or worse) or played a role in one of three decisions (sentence, pretrial release or probation violation) made about their case. There was, however, considerable variation in the percentages within racial groups who felt that way. Nearly half (46%) of the African-Americans and more than half (57%) of the Hispanics felt race played some role in their case, compared to only 13% of the Caucasians. Controlling for the age, educational level and gender of the respondents, analysis showed that the odds that African-American and Hispanic men as well as prisoners perceived that race affected their treatment in court were significantly higher when compared to Caucasians, women and those not currently incarcerated.

Respondents were also invited to comment on their perceptions about their treatment in the court. More than half (54%) did so. Of those who commented, half expressed negative feelings about their experiences in court, but an equal number indicated that they were generally satisfied with the way they were treated. A small number of surveys contained both positive and negative comments.

Among the positive comments, several respondents said that persons in the court system acted in a professional manner. A number of Caucasian males made positive comments. A Caucasian male who received prison and probation for a drug offense responded that "everyone was very professional and generally did a good job." A Caucasian male charged with wire fraud said that he was "treated fairly by all court personnel." Another Caucasian male sentenced to probation said he felt he "was dealt with in good order" and that "the court took everything in consideration." One Caucasian male, however, felt that he was discriminated against because of his Italian heritage.

Some minority defendants also commented that they had been treated fairly. An African-American male sentenced to probation for a conspiracy offense felt he was "treated fairly in all proceed-

ings” and his probation officer had been honest and fair. One Hispanic female charged with drug possession who received probation said the system was fair and that she learned through probation about the negative impact drugs had on her life and that her “life is very different now.”

A few individuals indicated that while the court system treated them fairly, law enforcement officers and jail personnel did not. One person who did not feel that race was a factor in his court experiences expressed concern about being treated as an individual and not, as he put it, “a statistic.” One Hispanic female charged with a drug offense, who did not feel her race or ethnicity was a factor, commented that “[p]unishment should be a constructive lesson and not a destruction of your life already established. Each individual is a different case with different backgrounds and goals.”

Some expressed a concern that their particular circumstances as a minority were ignored. One person wrote:

It[']s wonderful what you have in your heart to try to do, but would an American judge take into consideration the hardships of a Dominican, Puerto Rican, Columbian etc., of course not, he's only interested in a conviction and “fighting crime” not into the specifics of a person who ran into trouble.

Some defendants were even more aggrieved. A minority woman charged with carjacking felt that the judge who sentenced her was “prejudiced” and did not take into consideration some of her personal circumstances. An African-American female convicted of drug possession felt the judge who sentenced her was racist because he imposed a sentence which was greater than that recommended both by the probation officer and the plea bargain with the government. She also noted that the sentence of a Caucasian female charged with embezzlement of a significant amount of money had been less than hers. A Hispanic defendant convicted of a drug possession charge said:

One of the court reporters asked if I was going to trial or pleading out, I told him that I was pleading out, he said you're better off because there hasn't been a Hispanic who has won a case when he took it to trial. In reality it[']s hidden, not spoken, but real sense that if you're not Caucasian Anglo Saxon you are not going to get any respect.

A person of Rastafarian descent felt that he was “mistreated by court personnel” because of his race and religion. He felt that he was stereotyped and that the court tried to “give the jury hints” to make him look guilty.

There were also comments about other specific actors in the court system. On a positive note, one African-American male said probation officers in the Virgin Islands treat defendants “like human beings who need help in certain areas.”

Another African-American male said the U.S. Marshals Service “treated him with respect but if [I] never see [the] judge and prosecutor again it would be alright by me.” This individual, who was serving a prison sentence, had been sentenced to probation and prison and felt that the judge had been disrespectful of him and that the disrespect had a racial basis. Conversely, a white male wrote that while the federal court personnel had “treated [him] with nothing but respect,” the United States Marshals treated him “the exact opposite.”

One African-American man, convicted of conspiracy to distribute drugs (and whose survey was received after the results had been analyzed), wrote extensive comments. He noted that his experience with the “criminal process in the Federal District Court for the Eastern District of Pennsylvania was an extremely difficult ordeal.” He felt that his trial judge had a “bias” against African-Americans that “infected his trial.” He said that trial observers also felt that the judge’s comments were “overtly discriminatory and his rulings indicated a distinct racial animus.” He said that “off color remarks” by the prosecutor and federal agents were overheard by his family members. He further noted:

To my great pain and sorrow and that of my family, it was the court, the prosecutor and the law enforcement agents who interjected race into my case. Referring to me as no longer an American citizen, deserving of inalienable rights, but as a hyphenated person, a Black-Man destined to become a criminal, despite all his efforts to succeed. The racial slurs and undertones in the courtroom came as a shock and insult to me and my family.

This defendant had not previously felt that “White society was out to get the Black man” but now he felt that prosecutory zeal had “corrupted the system of our nation and racism has become part and parcel of this evil . . . changing [those who began with good intentions.]”

E. *Representation of Defendants and the Federal Defender Offices*

1. *Data Compiled*

The Justice Committee determined that it would study the demographics of those undertaking the representation of criminal defendants throughout the Third Circuit,²³⁴ in order to assess the equality of such representation along racial and ethnic lines. Because the federal defender offices fall within the parameters of the U.S. courts, the Justice Committee sought an analysis of those personnel. With the cooperation of the Executive Office for United States Attorneys, statistics for the six United States Attorneys Offices within the Third Circuit were also compiled. Although United States Attorneys Office personnel are employees of the Department of Justice, and thus within the executive branch of the federal government, the Justice Committee felt that a comparison of the demographics of those persons both prosecuting and defending within the circuit would be valuable. Therefore, this report addresses personnel within both the Federal Public Defender and United States Attorneys Offices.

The data collected from each Federal Public Defender and United States Attorneys Office were organized into tables,²³⁵ in an effort to numerically assess the racial, ethnic and gender status of the employees according to job title and responsibility. The parallel job titles are as follows:

TABLE 121: COMPARISON OF JOB TITLES AT FEDERAL PUBLIC DEFENDER OFFICES AND UNITED STATES ATTORNEYS OFFICES

<u>Federal Public Defender (FPD) Offices</u>	<u>United States Attorney Offices (USAO)</u>
•FPD	•U.S. Attorney
•Assistant FPD	•Assistant U.S. Attorney
•Supervisory Assistant FPD	•Supervisory Assistant U.S. Attorney
•FPD supervisory support personnel	•USAO supervisory support personnel
•FPD support personnel	•USAO support personnel
•FPD supervisory paralegals and staff investigators	•USAO supervisory paralegal and staff investigators
•FPD paralegals, staff investigators and law clerks	•USAO paralegals, staff investigators and law clerks

234. For a complete report evaluating the Third Circuit attorney appointments under the CJA along racial and ethnic lines, see the Report of the Committee on Appointments by Judges of the Race & Ethnicity Commission.

235. The tables may be found in their entirety at the end of this Report.

2. *Comparison of Office Personnel: Public Defenders and Prosecutors*

a. *Federal Public Defenders and United States Attorneys*

The Justice Committee compared the demographics of the United States Attorneys to the Federal Public Defenders within the 6 districts of the Third Circuit. While recognizing that the United States Attorneys are presidentially-appointed executive branch positions, the Justice Committee thought it would be helpful to use these appointments as a benchmark to compare the court-appointed Federal Public Defenders. As of 1997, a total of 5 persons were employed as Federal Public Defenders throughout the Third Circuit.²³⁶ One, in the District of the Virgin Islands, was nonwhite. In the District of Delaware, there is a black female Assistant-in-Charge who is technically assigned to the District of New Jersey.²³⁷ Because the Assistant-in-Charge is not a court-appointed position, for the purposes of this analysis, that position has been included in the following section reviewing supervisory assistants. Of the 6 United States Attorneys in the Third Circuit, one is African-American (16.7%).

The Federal Public Defender in the Virgin Islands noted the lack of minority heads of offices in Federal Public Defender Offices nationally.²³⁸ From a 1994 report provided by the Defender Services Committee of the Administrative Office of the Courts, he noted that there were 2 minority Federal Public Defenders nationally: himself and 1 Hispanic in the District of Puerto Rico.²³⁹ In 1997, that number increased by one.

Nationwide, Federal Public Defender appointments show fewer minority appointees than in the Third Circuit. The same is true of United States Attorney appointments. Table 113 below outlines the comparison between Third Circuit appointments and national statistics overall.

236. The Chief Federal Defender in the Eastern District of Pennsylvania is an employee of the Defender Association of Philadelphia: Federal Court Division, appointed by their Board of Directors.

237. The District of Delaware office is currently a branch of the New Jersey office.

238. See *Public Hearings: St. Croix, Virgin Islands*, *supra* note 40, at 43.

239. See *id.*

TABLE 122: RACE AND ETHNICITY OF PUBLIC DEFENDERS AND U.S. ATTORNEYS: THIRD CIRCUIT AND NATIONAL COMPARED (1997)

Position	Third Circuit			National		
	Total	White	Nonwhite	Total	White	Nonwhite
Federal Public Defender	4	3 (75%)	1 (25%)	50	47 (94%)	3 (6%)
Community Public Defender*	1	1 (100%)	0 (0%)	13	13 (100%)	0 (0%)
United States Attorney	6	4 (67%)	2 (33%)	93	82 (88%)	11 (12%)

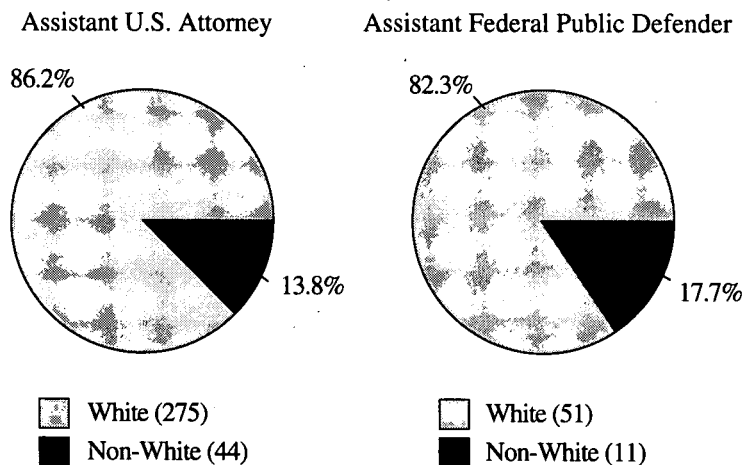
Note: An asterisk (*) indicates community-appointed public defenders are not court appointed, however, these individuals have the same responsibilities as the Federal Public Defenders.

SOURCE: Executive Office of U.S. Attorneys; AO of the U.S. Courts.

b. Assistant Federal Public Defenders and Assistant United States Attorneys

Those attorneys serving as Assistant Federal Public Defenders and Assistant U.S. Attorneys are hired by the Federal Public Defender and U.S. Attorney, respectively. The figure below shows the comparative numbers of prosecutors and public defenders employed across the circuit.

FIGURE 9: COMPARISON OF ASSISTANT U.S. ATTORNEYS AND ASSISTANT PUBLIC DEFENDERS IN THE THIRD CIRCUIT, 1996



SOURCE: Executive Office for U.S. Attorneys; AO of the U.S. Courts.

In 1996, the balance between white and nonwhite attorneys was roughly similar in the Federal Public Defender and United States Attorneys Offices. There were, however, no racial or ethnic minorities employed in the Federal Public Defender Offices in the District of New Jersey or the Middle or Western Districts of Pennsylvania. Nor were any minority attorneys employed in the United States Attorneys Office in the Middle District of Pennsylvania.

Attorneys participating in the public hearings throughout the circuit discussed their experiences with the evolution of the ethnic and racial demographics of the Federal Public Defender and U.S. Attorney Offices throughout the Third Circuit. At the public hearing in Newark, it was noted that in recent years the U.S. Attorneys Office there has diversified considerably. It was reported that 13 of the 113 attorneys were minorities.²⁴⁰ According to a noted Newark attorney and former National Association for the Advancement of Colored People (NAACP) general counsel, the Garden State Bar Association and the NAACP had expressed concerns about the demographics of federal prosecutor offices because that is a common path for attorneys hoping to practice in federal court.²⁴¹

More diversity in the demographics of the Eastern District of Pennsylvania United States Attorneys Office was noted by a public hearing participant who had practiced since 1977.²⁴² He remarked that the active use of minorities and women in the hiring process was an appropriate and helpful tool in identifying individuals who would be an asset to the office.²⁴³

As one minority attorney noted in a survey response, however: "I have noticed that there are no minority Federal Public Defenders in court when I do go to Federal Court." This respondent would like to see an active search for Hispanic Federal Public Defenders and Assistant United States Attorneys.

The importance of such diversity was explained by the President of the Asian Pacific-American Lawyers Association of New Jersey. She noted the gap that may occur when an attorney does not appreciate the ethnic background of a client. She noted the difficulty of explaining to an Asian client, whose experience in his native county had been that a judge conducted the investigation of

240. *Public Hearings: Newark, New Jersey*, *supra* note 9, at 58.

241. *See id.* at 107.

242. *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 19.

243. *See id.*

criminal cases, that discovery depends upon the skill of his attorney and the court's cooperation.²⁴⁴

Similarly, an Assistant Federal Defender stated that minority defendants often feel that there is no justice when everyone around them looks different from themselves.²⁴⁵ That perception is fueled where a defendant's personal representative does not share the experience of being a non-Caucasian.

At the public hearing in the Western District of Pennsylvania, a representative from the Women's Bar Association indicated that the Association had never seen nor heard of any African-Americans having been employed at the Pittsburgh Federal Defenders Office.²⁴⁶ The current Federal Public Defender for the Western District of Pennsylvania regrettably confirmed the lack of minorities in that office and noted that in twenty-two years of existence the office had only one minority attorney and had never had an African-American attorney.²⁴⁷

This speaker, who became the first female defender in the district in 1995, had been advised that historically: "[H]iring often occurred by word of mouth and by who happened to walk through the door when the vacancy occurred. Until five years ago, jobs were not routinely advertised."²⁴⁸

Efforts to correct the imbalance between the staff and the clients have not been as successful as she had hoped.²⁴⁹ In filling a recent vacancy, announcements were sent to many minority organizations and publications (e.g., National Law Journal, the affirmative Action Register, the National Association of Black Women Attorneys and the American Indian report). In addition, the federal defender's office consulted employment specialists. Although this expenditure of additional time and money resulted in only one minority applicant, the federal defender stated that while she was discouraged, she was neither "daunted nor defeated."²⁵⁰ She commented:

I remain determined to double my efforts. This process has only reminded me that equal opportunity and fairness do not flow naturally merely from the absence of discrimi-

244. *Public Hearings: Newark, New Jersey, supra* note 9, at 88.

245. *Public Hearings: Wilmington, Delaware, supra* note 37, at 98-99.

246. *Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 70.

247. *See id.*

248. *Id.*

249. *See id.* at 71.

250. *Id.*

nation. That the imbalances and inequities in our system will not be corrected simply by our collective agreement that they are wrong. Rather, we must each consciously commit to specific and monumental actions which will push the creation of the diverse community we all need and desire.²⁵¹

The Federal Public Defender from the Virgin Islands, who spoke about the national picture, found the lack of minorities in some offices and as Chief Defenders “absurd.”²⁵² Five Federal Public Defender Offices and 1 Community Defender Office did not employ any minorities according to the 1994 Defender Services Report.²⁵³ This Federal Public Defender noted that there appears to be a fear of affirmative action, minorities and quotas.²⁵⁴ He suggested that it should be made “clear to Federal Defenders and the judges at the Circuit level that appoint Federal Defenders, that there is an expectation that that office will, or should reflect the reality [sic] of the community and/or society that we live in and/or serve.”²⁵⁵

c. Supervisory Assistant Federal Public Defenders and Supervisory Assistant United States Attorneys

As of November 1996, there were 5 Supervisory Assistant Federal Public Defenders in the Third Circuit. They are generally attorneys who supervise other attorneys within their respective offices. They are career government service positions and these supervisors are often promoted from within the office. In the summer of 1997, there was 1 minority assistant federal defender occupying this position, a black female Assistant-in-Charge in the District of Delaware.

Of the 52 persons employed as Supervisory Assistant United States Attorneys throughout the Third Circuit, 47 (90%) are Caucasian. There are no minorities in any supervisory positions in the United States Attorneys Offices in the Middle and Western Districts of Pennsylvania. The United States Attorneys Offices in the District of New Jersey and the Eastern District of Pennsylvania employ 1 of 21 (5%) and 2 of 17 (11%), respectively.

251. *Id.*

252. *Public Hearings: St. Croix, Virgin Islands, supra* note 40, at 43.

253. *See id.*

254. *See id.* at 47.

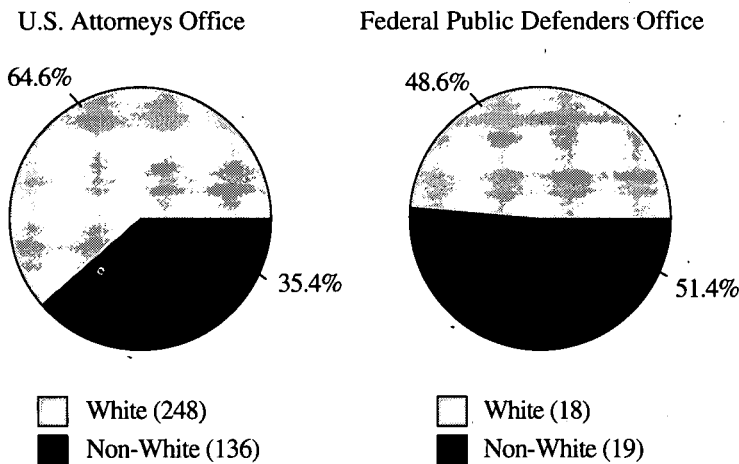
255. *Id.* at 48.

Clearly, in light of the few minority attorneys practicing in both United States Attorney and Federal Public Defender Offices, a comparison of rates of promotion to rates of overall hiring would be unproductive. Because internal office experience and seniority are often prerequisites for advancement within an office, and because most of the current minority Assistant United States Attorneys and Assistant Federal Defenders are relatively new to their offices, even fewer minority attorneys are found in supervisory positions. As the Committee on Court Appointments of the Race & Ethnicity Commission reports, comments from the Task Force public hearings suggest that one effect of a lack of representation of minorities at the top levels of court offices may be that few minorities are employed in lower levels of employment.

d. Support Personnel

Support personnel in both the Federal Public Defender and United States Attorney Offices are secretaries and administrative assistants who are hired directly by their respective offices. As of November 1996, of the 37 persons employed in this capacity in the Federal Public Defender Offices throughout the circuit, 19 were non-Caucasian. The Federal Public Defender Office for the Western District of Pennsylvania reported no minorities employed as support personnel.

FIGURE 10: RACE AND ETHNICITY OF SUPPORT PERSONNEL IN THE THIRD CIRCUIT: NOVEMBER 1996



SOURCE: Executive Office for U.S. Attorneys; AO of the U.S. Courts.

e. Supervisory Support Personnel

Supervisory support personnel are those persons who oversee the smooth functioning of the support personnel in both the Federal Public Defender and United States Attorneys Offices. There are 11 persons employed in this capacity in the Federal Public Defenders Offices throughout the circuit. Five are non-Caucasian. Of the 25 persons so employed in the United States Attorney's Offices throughout the Third Circuit, 9 (36%) are non-Caucasian. Minority support personnel appear to be promoted in proportions similar to their representation in their respective offices.

f. Paralegals, Staff Investigators and Law Clerks

Paralegals, staff investigators and law clerks occupy paraprofessional positions in both the Federal Public Defender Offices and the United States Attorneys Offices. Because they are often professionally trained law students, paralegals or investigators, they have specialized training in law, accounting or criminal procedure. They are hired as career employees by their respective agencies. Table 123 compares the racial breakdowns of this category for the two offices.

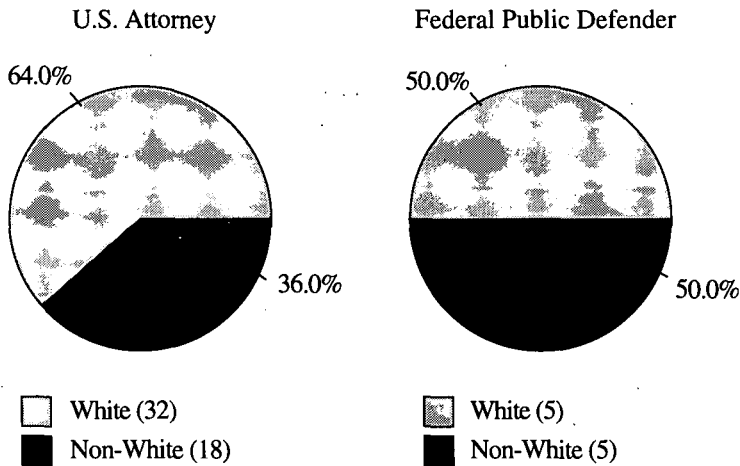
TABLE 123: RACE OF PARALEGALS, STAFF INVESTIGATORS AND LAW CLERKS (NOVEMBER 1996)

Position	Total	White	Minority
FPD paralegals, staff investigators and law clerks	10	5 (50%)	5 (50%)
USAO paralegals, staff investigators and law clerks	51	34 (67%)	17 (33%)

SOURCE: Executive Office for U.S. Attorneys; AO of the U.S. Courts.

As of late 1996, in the Middle District of Pennsylvania, none of the 7 positions for paralegals, staff investigators or law clerks was filled by minorities in either the Federal Public Defender Office or the United States Attorneys Office. In the Western District of Pennsylvania, one position was filled by a nonminority in the Federal Defender Office. One of 6 employees is a minority in the United States Attorneys Office.

FIGURE 11: RACE AND ETHNICITY OF PARALEGALS, STAFF INVESTIGATORS AND LAW CLERKS IN THE U.S. ATTORNEYS AND FEDERAL PUBLIC DEFENDERS OFFICES OF THE THIRD CIRCUIT



SOURCE: Executive Office for U.S. Attorneys; AO of the U.S. Courts.

g. Supervisory Paralegals and Staff Investigators

Supervisory paralegals and staff investigators are also appointed by the United States Attorney and Federal Public Defender of each office. These positions are analyzed separately from the professional attorneys as well as the standard clerical positions because paralegals and investigators require specific professional training. There are no such supervisory positions in the Federal Public Defender and United States Attorneys Offices throughout the Third Circuit, with the exception of the Federal Defenders Office in the District of New Jersey, where 1 white male is employed in this capacity, and in the U.S. Attorneys Office in the Eastern District of Pennsylvania, where 1 black female is employed in this capacity.

F. *The Effect of Race and Ethnicity on Sentencing in the Third Circuit*

1. *Introduction and Source of Information*

In 1994, the U.S. Sentencing Commission was established pursuant to the Sentencing Reform Act of 1984²⁵⁶ to create sentencing guidelines for all federal courts to apply in criminal cases.

In November 1987, the U.S. Sentencing Commission issued guidelines. Today, virtually all Third Circuit defendants are sen-

256. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3559 (1994)).

tenced pursuant to the federal sentencing guidelines. A primary purpose of the guidelines was to reduce any sentencing disparities which existed either nationally or within districts for similarly situated criminal defendants. The Sentencing Commission was to create a guideline scheme and appended policy statements, both of which were to be neutral as to "race, sex, national origin, creed and socioeconomic status of offenders."²⁵⁷

The sentencing guideline format assigns numerical points to the various federal offenses and to convictions making up a defendant's criminal history. Determination of the offense level and criminal history results in a range from which district courts are to impose sentence.

According to the guidelines, an individual's offense level may increase because of the particular characteristics of an offense. For example, the role a defendant played in the offense, the type of victim harmed or whether a firearm was involved may all increase the offense level. The offense level may also be reduced under certain circumstances. Accepting responsibility for the offense and entering a guilty plea may result in a reduction of the offense level. When a defendant has a certain number of prior criminal convictions which involve drug, weapon or violent offenses and his or her instant offense also involves such charges, his or her offense level is often increased substantially.

In certain circumstances, after the offense level and criminal history score are determined, there may be upward or downward departures. Downward departures are given primarily for substantial assistance to authorities.²⁵⁸

As was the case with regard to pretrial detention, the Justice Committee was restricted to issues over which the courts have direct control. Analysis of substantive law issues was excluded from the parameters of the Task Force mandate.

As a result, this Committee's report concentrated only on: (1) the demographics of sentenced defendants; (2) whether substantial disparities in sentencing within guideline ranges existed within racial or ethnic groups; (3) whether disparate treatment existed in granting acceptance of responsibility point reductions; and (4) whether upward and downward departures were granted differently.

257. 28 U.S.C. § 991(b)(1)(B) (1994).

258. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1995); see also 18 U.S.C. § 3553(b).

Because the U.S. Sentencing Commission maintains the data necessary for these areas of study, the Task Force asked for a report on the data available with regard to sentences imposed in the Third Circuit. A paper entitled "Guideline Sentences in the Third Circuit: Report Prepared for the Third Circuit Task Force on Equal Treatment in the Courts" was prepared by Susan Katzenelson and Kyle Conley of the U.S. Sentencing Commission.²⁵⁹

2. *Results*

The Katzenelson-Conley Report described the racial and ethnic composition of sentenced defendants in the Third Circuit from October 1992 through September 1995. The initial compilation of this data showed substantial racial and ethnic disparities among defendants sentenced for the same offense. The authors then performed a multivariate analysis of the offenses of Third Circuit defendants using data from two fiscal years (1994 and 1995) to determine if the apparent racial and ethnic differences in sentences persisted when controls were introduced for certain "legally relevant" factors.²⁶⁰ The factors included role adjustment, weapon enhancement, criminal history, armed career criminal status, acceptance of responsibility and substantial assistance or other upward or downward departures. Their statistical model termed race an "irrelevant factor."

For the period of October 1, 1993 through October 1, 1995, the Katzenelson-Conley Report also provides data on upward and downward departures and acceptance of responsibility rates in guilty pleas according to race and ethnicity. The Report found that the racial and ethnic composition of Third Circuit defendants includes whites, blacks, Hispanics and other racial and ethnic groups. The combined figures of the various racial and ethnic groups differ according to district.

Third Circuit defendants were sentenced less on drug and immigration cases than the rest of the nation, with corresponding higher rates of fraud (and slightly more robbery and tax cases).

In absolute numbers, black and Hispanic defendants received higher sentences than white defendants. According to the Katzenelson-Conley Report, "the majority of sentencing differences were explained by a set of legally relevant factors." Most often,

259. The authors of the Katzenelson-Conley Report have indicated that their paper represents the views of the authors, not those of the U.S. Sentencing Commission.

260. The review included 4254 Third Circuit cases.

those factors were criminal history and offense and offender characteristics. The authors note that this finding is limited by the extent of the data and the availability of information about major relevant factors. The study did not examine whether race and ethnicity affects the presence or absence of legally relevant variables.²⁶¹ For example, the effect of one minority group receiving acceptance of responsibility less often than another was reported, but its effect was not analyzed within the multivariate study.

The nonwhite defendants studied in the Katzenelson-Conley Report from 1993 to 1995 had acceptance of responsibility rates slightly lower than those of whites. In addition, departure rates differed according to ethnic group. Hispanics received substantial assistance downward departures most frequently. Whites received "other" downward and upward departures more frequently than any other race or ethnic group. Black defendants were most likely to receive a sentence within the guideline range.

G. Findings

1. Pretrial Release

- Disparities exist in the rate of pretrial release when comparing the release rates of men and women and when comparing the release rates of ethnic minorities and Caucasians. In addition, the odds of detention were affected by a combination of a person's race or ethnicity and gender.
- The extent of the disparities is reduced when certain legally relevant factors, such as criminal history, failure to appear or current offense and permissible personal characteristics such as citizenship status, employment status and substance abuse have been considered. The most important factor concerning release or detention was the prosecutor's recommendation about a defendant's status. Other substantial factors were immigration status and the seriousness of the offense.
- Multivariate analysis of release decisions which controlled for legally relevant characteristics and permissible personal characteristics still placed Caucasian and black men of Hispanic origin at lower than average odds of being released. Black women did not have lower odds of being released.
- A similar analysis controlling for legally relevant characteristics and personal characteristics of those who were subject to a de-

261. The authors caution that their study does not examine other parts of the criminal justice system such as charging decisions, the effect of plea negotiations and law enforcement practices.

tion hearing also showed that black and white men of Hispanic origin defendants had higher than average odds of detention.

2. *Sentencing*

- The Katzenelson-Conley Report suggests that race does not play a significant role in the sentencing process. The raw data reveal striking racial disparities in sentencing for the same types of offenses and within criminal history categories. On the other hand, the multivariate analysis employed by the study concludes that “[t]he majority of those sentence differences [differences among racial and ethnic groups, both overall and within specific offense categories] were explained by a set of legally relevant factors, most often associated with characteristics of the offense and criminal history of the defendant.” Further study, which takes additional factors into account and examines whether the “legally relevant factors” are themselves influenced by race, is necessary to determine whether race, in fact, influences sentencing in a statistical sense.

3. *Federal Personnel*

- Where Federal Public Defenders Offices are not diverse, but represent significant numbers of racial and ethnic minorities and also interact with minority witnesses and family members, some may regard the federal court as being unjust. The Justice Committee regards this to be an unsuitable circumstance that deserves attention.
- Some Federal Defenders Offices in the Third Circuit lack racial and ethnic diversity. Of a total of 8 persons in supervisory Federal Public Defender positions throughout the Third Circuit in 1996, 2 were non-Caucasian (located in Delaware and the predominately non-Caucasian Virgin Islands). The Middle and Western Districts of Pennsylvania had no racial or ethnic minorities as Assistant Federal Defenders, supervisory or otherwise.
- In general terms, there is some representation of racial and ethnic minorities employed as supervisory support personnel in most offices. In the Federal Public Defenders Offices in the Middle and Western Districts of Pennsylvania, however, no minorities hold supervisory support positions. An evaluation of the data reveals, in generalized terms, a varied representation of racial and ethnic minorities as support personnel in all of the Fed-

eral Defender Offices except the Middle District of Pennsylvania, where there are no minority persons so employed.

4. *Treatment of Defendants*

- The defendants' survey yielded both positive and negative responses. Several of the respondents commented that they were pleased to have an opportunity to voice their concerns. Although some comments were generalized complaints, many were focused on the issues of concern to the Justice Committee.
- While a majority of all defendants who responded to this survey felt that their race was not a significant factor in their treatment by court officials, African-Americans nevertheless were more likely than Caucasians to believe that in fact they were treated differently than people of other racial or ethnic backgrounds. Given the limitations of the survey sample, it would be imprudent to generalize these findings to all defendants in the Third Circuit, but further consideration and study would be appropriate given the differences in perceived treatment among the races.

H. *Recommendations*

1. *Pretrial Release*

- It appears that the recommendation of the prosecutor plays the most significant role in the determination of whether a defendant is released before trial. Because controlling for the wide range of permissible factors that may justify detention or release still results in some racial and ethnic groups being at greater risk than average of detention, the Justice Committee encourages judges to remain vigilant in independently ensuring that pretrial detention decisions are appropriately based.
- The Justice Committee also recommends that the Third Circuit periodically review release statistics to determine if the detention and release figures are tied to the factors specified in the statute governing pretrial detention.

2. *Sentencing*

- While the Katzenelson-Conley Report finds that apparent differences in racial and ethnic group sentences may be explained by legally relevant factors, further study is warranted. The Judicial Council should determine methods to periodically review the data to ensure that sentencing is based on appropriate considerations.

3. *Federal Public Defenders and Assistant Federal Public Defenders*

- The demographics of some of the Third Circuit Federal Public Defenders Offices reveal that minority representation is absent or sparse. Attorneys speaking at public hearings commented on the need for more minority attorneys in federal court. The Federal Public Defenders Offices (who represent significant numbers of the Third Circuit's defendants) would benefit by ensuring that there is diversity among their ranks.
- In order to make those Federal Public Defenders Offices with limited or no minority representation more diverse, specific steps should be taken to publicize open positions.
- There should be nationwide advertising for lawyers so that a wide range of applicants, including minorities, can be seriously considered. Selection criteria should be evaluated to remove the unintended consequence of excluding minorities.
- Targeted advertising would also assist diversity. Advertisements should be sent in a manner designed to reach minority bar organizations and publications, Black Law Students Associations and minority law school faculty.
- To the extent there are minorities in Federal Public Defenders Offices, they should be encouraged to participate in hiring procedures and in suggesting outreach activities.
- Racial and ethnic minorities from the bar should be included in training activities of Federal Public Defenders Offices.

4. *Support Personnel and Supervisory Support Personnel*

- In order to promote racial diversity among support personnel, the Justice Committee suggests targeted advertising for support personnel (state offices, etc.).
- Offices should generally encourage training opportunities and cultivate the skills of entry level employees to improve their qualifications when opportunities for advancement become available.
- Advertising targets should include business schools, evening schools and predominately minority schools.
- Minority employees should be solicited regarding advertisement methods and encouraged to participate in the search for applicants.

5. *Defendant Issues*

- Defendants, as participants in the court process, have a unique perspective on the criminal justice system. They should be sur-

veyed periodically for the court to assess their experiences with and treatment by the criminal justice system. A further circuit-wide study should be considered.

TABLE 124: ASSISTANT FEDERAL PUBLIC DEFENDERS

District	Total #: Assistant FPDs	Total #: Nonwhite Assistant FPDs	Total #: Female Assistant FPDs	Race of Female Assistant FPDs						Race of Male Assistant FPDs										
				1	2	3	4	5	6	1	2	3	4	5	6					
D. Del.	2*	1	1	1																
D.N.J.	17		6	6																
E.D. Pa.	25	6	10	7	3															
M.D. Pa.	7		2	2																
W.D. Pa.	6		2	2																
D.V.I.	5	4	3	1	2															

Note:

1= White/Caucasian

2= Black/African-American

3= Hispanic/Latino

An asterisk (*) Delaware shares an additional Assistant with New Jersey.

SOURCE: AO of the United States Courts (11/96).

4= Asian-American/Pacific Islander

5= American Indian/Alaskan Native

6= Other

TABLE 125: SUPERVISORY ASSISTANT FEDERAL PUBLIC DEFENDERS

District	Total #: Supervisory Assistant FPDs	Total #: Nonwhite Supervisory Assistant FPDs	Total #: Female Supervisory Assistant FPDs	Race of Female Supervisory Assistant FPDs						Race of Male Supervisory Assistant FPDs											
				1	2	3	4	5	6	1	2	3	4	5	6						
D. Del.	1	1	1																		
D.N.J.	2																				
E.D. Pa.	1		1																		
M.D. Pa.	1		1																		
W.D. Pa.																					
D.V.I.																					

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 SOURCE: AO of the United States Courts (11/96).

4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other

TABLE 126: FEDERAL DEFENDER OFFICE (FDO) SUPPORT PERSONNEL

District	Total #: FDO Support Personnel (excludes paralegals and staff investigators)	Total #: FDO Nonwhite Support Personnel (excludes paralegals and staff investigators)			Total #: FDO Female Support Personnel (excludes paralegals and staff investigators)	Race of FDO Support Personnel (excludes paralegals and staff investigators)											
		1	2	3		1	2	3	4	5	6						
D. Del.	2	1			2	1	1										
D.N.J.	12	7			11	5	5	2	1		1						
E.D. Pa.	12	8			8	1	3	4			3						1
M.D. Pa.	3				3		3										
W.D. Pa.	5				5		5										
D.V.I.	3	3			3						3						

Note:

1= White/Caucasian

2= Black/African-American

3= Hispanic/Latino

4= Asian-American/Pacific Islander

5= American Indian/Alaskan Native

6= Other

SOURCE: AO of the United States Courts (11/96).

TABLE 127: FEDERAL DEFENDER OFFICE SUPERVISORY SUPPORT PERSONNEL

District	Total #: FDO Supervisory Support Personnel (excludes paralegals and staff investigators)	Total #: FDO Nonwhite Supervisory Support Personnel (excludes paralegals and staff investigators)	Total #: FDO Female Supervisory Support Personnel (excludes paralegals and staff investigators)	Race of FDO						
				Female Supervisory Support Personnel (excludes paralegals and staff investigators)			Male Supervisory Support Personnel (excludes paralegals and staff investigators)			
D. Del.	1	1	1	1						
D.N.J.	5	2	5	3	2					
E.D. Pa.	4	2	4	2	1	1				
M.D. Pa.	1		1	1						
W.D. Pa.	1		1	1						
D.V.I.										

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other

SOURCE: AO of the United States Courts (11/96).

TABLE 128: FEDERAL DEFENDER OFFICE PARALEGALS, LAW CLERKS AND STAFF INVESTIGATORS

District	Total #: FDO Paralegals, Law Clerks and Staff Investigators		Total #: FDO Female Paralegals, Law Clerks and Staff Investigators		Race of FDO Female Paralegals, Law Clerks and Staff Investigators														
	Staff Investigators	Nonwhite Paralegals, Law Clerks and Staff Investigators	Staff Investigators	FDO Female Paralegals, Law Clerks and Staff Investigators	1	2	3	4	5	6	1	2	3	4	5	6			
D. Del.	1	1															1		
D.N.J.	8	2		5	3	1	1										2	1	
E.D. Pa.	19	3		11	10	1											6	1	1
M.D. Pa.	5			2	2													3	
W.D. Pa.	3																	3	
D.V.I.	4	4		2															2

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other

SOURCE: AO of the United States Courts (11/96).

TABLE 129: FEDERAL DEFENDER OFFICE SUPERVISORY PARALEGALS, LAW CLERKS AND STAFF INVESTIGATORS

	Total #: FDO Supervisory Paralegals, Law Clerks and Staff Investigators		Race of FDO Female Supervisory Paralegals Law Clerks and Staff Investigators						Race of FDO Male Supervisory Paralegals Law Clerks and Staff Investigators					
	Total #: FDO Supervisory Paralegals, Law Clerks and Staff Investigators	Total #: FDO Nonwhite Supervisory Paralegals, Law Clerks and Staff Investigators	1	2	3	4	5	6	1	2	3	4	5	6
D. Del.														
D.N.J.	1													1
E.D. Pa.														
M.D. Pa.														
W.D. Pa.														
D.V.I.														

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 SOURCE: AO of the United States Courts (11/96).

4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other

TABLE 130: ASSISTANT UNITED STATES ATTORNEYS(AUSAs)

District	Total #: AUSAs	Total #: Nonwhite AUSAs	Total #: Female AUSAs	Race of Female AUSAs						Race of Male AUSAs								
				1	2	3	4	5	6	1	2	3	4	5	6			
D. Del.	13	1	7	7								5	1					
D.N.J.	113	13	37	32	5							68	4	3				1
E.D. Pa.	109	17	47	39	6	1	1					53	6	3				
M.D. Pa.	25		6	6								19						
W.D. Pa.	40	4	12	11	1							25		3				
D.V.I.	19	9	5	2	3							8	5					1

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other
 SOURCE: Executive Office for United States Attorneys (12/96).

TABLE 131: UNITED STATES ATTORNEYS AND SUPERVISORY ASSISTANT UNITED STATES ATTORNEYS (AUSAS)

District	Total #:		Total #: Nonwhite		Total #: Female		Race of Supervisory Female AUSAs						Race of Supervisory Male AUSAs					
	Supervisory AUSAs	Supervisory AUSAs	Supervisory AUSAs	Supervisory AUSAs	Supervisory AUSAs	Supervisory AUSAs	1	2	3	4	5	6	1	2	3	4	5	6
D. Del.	1												1					
D.N.J.	21		1		5		5						15	1				
E.D. Pa.	17		2		5		4		1				11	1				
M.D. Pa.	3				1		1						2					
W.D. Pa.	6				2		2						4					
D.V.I.	4		2										2	2				

Note:

1= White/Caucasian

2= Black/African-American

3= Hispanic/Latino

4= Asian-American/Pacific Islander

5= American Indian/Alaskan Native

6= Other

SOURCE: Executive Office for United States Attorneys (12/96).

TABLE 132: UNITED STATES ATTORNEYS OFFICE (USAO) SUPPORT PERSONNEL

District	Total #: USAO Support Personnel (excludes paralegals and staff investigators)	Total #: USAO Nonwhite Support Personnel (excludes paralegals and staff investigators)						Total #: USAO Female Support Personnel (excludes paralegals and staff investigators)						Total #: USAO Male Support Personnel (excludes paralegals and staff investigators)					
		1	2	3	4	5	6	1	2	3	4	5	6	1	2	3	4	5	6
D. Del.	29	7						18	6	1									
D.N.J.	112	60						35	35	20	2								
E.D. Pa.	123	44						61	33	4									
M.D. Pa.	44							31											
W.D. Pa.	54	8						35	4	1	1								
D.V.I.	22	17						4	11	5	1								

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 SOURCE: Executive Office for United States Attorneys (12/96).

4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other

TABLE 133: UNITED STATES ATTORNEYS OFFICE (USAO) SUPERVISORY SUPPORT PERSONNEL

District	Total #: USAO Supervisory Support Personnel (excludes paralegals and staff investigators)	Total #: USAO Nonwhite Supervisory Support Personnel (excludes paralegals and staff investigators)	Total #: USAO Female Supervisory Support Personnel (excludes paralegals and staff investigators)	Race of USAO Support Personnel (excludes paralegals and staff investigators)						
				1	2	3	4	5	6	
D. Del.										
D.N.J.	11	5	8	3	2	3	3			
E.D. Pa.	10	2	7	5	2		3			
M.D. Pa.	1									1
W.D. Pa.	1		1	1						
D.V.I.	2	2	2			1	1			

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other
 SOURCE: Executive Office for United States Attorneys (12/96).

TABLE 134: UNITED STATES ATTORNEYS OFFICE (USAO) PARALEGALS, LAW CLERKS AND STAFF INVESTIGATORS

District	Total #: USAO		Total #:		Race of USAO Female						Race of USAO Male					
	Paralegals, Law Clerks and Staff Investigators	Nonwhite Paralegals, Law Clerks and Staff Investigators	Paralegals, Law Clerks and Staff Investigators	USAO Female Paralegals, Law Clerks and Staff Investigators	1	2	3	4	5	6	1	2	3	4	5	6
D. Del.	3	1	3	3	2	1										
D.N.J.	18	8	15	15	8	5	2				3					
E.D. Pa.	15	5	14	14	9	5					1					
M.D. Pa.	6		5	5	5						1					
W.D. Pa.	6	1	5	5	5							1				
D.V.I.	2	2	2	2	1	1	1									

Note:

- 1= White/Caucasian
- 2= Black/African-American
- 3= Hispanic/Latino

- 4= Asian-American/Pacific Islander
- 5= American Indian/Alaskan Native
- 6= Other

SOURCE: Executive Office for United States Attorneys (12/96).

TABLE 135: UNITED STATES ATTORNEYS OFFICE (USAO) SUPERVISORY PARALEGALS, LAW CLERKS AND STAFF INVESTIGATORS

District	Total #: USAO		Race of USAO Female						Race of USAO Male						
	Supervisory Paralegals, Law Clerks and Staff Investigators	Nonwhite Supervisory Paralegals, Law Clerks and Staff Investigators	Supervisory Paralegals, Law Clerks and Staff Investigators	1	2	3	4	5	6	1	2	3	4	5	6
D. Del.															
D.N.J.															
E.D. Pa.	1	1													
M.D. Pa.															
W.D. Pa.															
D.V.I.															

Note:
 1= White/Caucasian
 2= Black/African-American
 3= Hispanic/Latino
 4= Asian-American/Pacific Islander
 5= American Indian/Alaskan Native
 6= Other
 SOURCE: Executive Office for United States Attorneys (12/96).

XIII. REPORT OF THE COMMITTEE ON LANGUAGE ISSUES OF THE RACE & ETHNICITY COMMISSION

A. *Committee Process*

The Committee on Language Issues ("Language Committee"), a part of the Race & Ethnicity Commission of the Third Circuit Task Force on Equal Treatment in the Courts, has examined the issues related to bilingual or non-English-speaking parties, employees, lawyers and others affected by the operation of the federal courts. Language issues were addressed in nearly all the public hearings held in each district by the Task Force. In addition, questionnaires addressed to judges, court employees and lawyers elicited responses on language issues. The Clerk's Office of each district responded to the Language Committee's data requests concerning the use of interpreters in court proceedings. Finally, the Language Committee gathered additional information from law review articles and from materials provided by the United States Administrative Office of the Courts, the State of New Jersey Administrative Office of the Courts and the National Center for State Courts.

The use of interpreters in court proceedings, particularly in all stages of criminal proceedings involving non-English-speaking defendants, was the most important language issue to witnesses at the public hearings and to survey respondents. There were two categories of concerns raised about interpreters: (1) the availability of interpreters, particularly for counsel for indigent defendants; and (2) the adequacy of interpreters' qualifications. Another language issue of note is the availability or absence of signs, written instructions or bilingual court personnel to assist non-English-speaking persons who come into contact with the courts.

B. *Common Language Issues Within the Federal Courts*

Throughout the Third Circuit, the lack of readily available interpreters for certain languages is a problem at times. This problem is particularly evident in the Virgin Islands because of the islands' geographical remoteness. A related problem throughout the Third Circuit is the inability to find fully credentialed interpreters. Aside from efforts to provide interpreters, the courts of the Third Circuit generally do not make many accommodations to assist non-English-speaking users of the courts.

1. *Use of Interpreters*

a. *Statutory and Administrative Provisions Governing Federal Court Interpreters*

Since 1978, the use of interpreters in the federal courts has been governed by the Court Interpreters Act as amended by the Judicial Improvements and Access to Justice Act of 1988.²⁶² The Court Interpreters Act mandates that the Administrative Office of the Courts establish a program for identifying “certified” and “otherwise qualified” interpreters. The program is designed to provide interpreters in “judicial proceedings instituted by the United States,” “for the hearing impaired . . . and persons who speak only or primarily a language other than the English language.”²⁶³ The legislative history of the Court Interpreters Act makes clear that “[t]his statutory right applies in any federal civil or criminal proceeding[,] but only when such proceeding is initiated by the United States.”²⁶⁴ So long as the action is one initiated by the United States, the costs of an interpreter’s services are to be paid by the government, regardless of whether or not the person requiring such services is indigent.

The Court Interpreters Act creates a procedural scheme whereby a non-English-speaking party may enforce his or her rights under the statute. For example, such a party, including a defendant in a criminal case, may bring a motion requesting provision of an interpreter, which the court must resolve by determining whether the party (or a witness) “speaks only or primarily a language other than . . . English . . . or . . . suffers from a hearing impairment.”²⁶⁵ The party may also move to have interpreted proceedings tape recorded. For most proceedings, the presiding judicial officer is empowered to determine whether or not recording is necessary. In a grand jury proceeding, however, the presiding judicial officer is required by the Court Interpreters Act to order the sound recording of interpreted portions upon the motion of the

262. See Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, §§ 702-710, 102 Stat. 4642, 4654-57 (1988).

263. Prior to passage of the Court Interpreters Act, federal courts could appoint interpreters in criminal or civil actions, respectively, under the authority of Rule 28 of the Federal Rules of Criminal Procedure or Rule 43(f) of the Federal Rules of Civil Procedure. See FED. R. CRIM. P. 28; see also FED. R. CIV. P. 43(f). Those provisions, however, of the criminal and civil rules, which remain in effect, make the provision of an interpreter entirely discretionary, and do not address the issue of an interpreter’s qualifications.

264. H.R. REP. NO. 95-1687, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4652, 4657.

265. 28 U.S.C. § 1827(d)(1) (1994).

accused.²⁶⁶ Although the Court Interpreters Act applies to both criminal and civil actions initiated by the United States, the use of interpreters primarily affects defendants in federal criminal cases. Languages for which interpreters are needed can be determined by the Director of the AO, by requests from the Judicial Conference or by the judicial council of a circuit. The Court Interpreters Act further directs that certified interpreters are to be used unless not reasonably available.²⁶⁷ A judge should appoint a “qualified interpreter” only when no certified interpreter is reasonably available.²⁶⁸ Each clerk of the court is required to maintain a list of AO-certified interpreters and make the list available upon request.²⁶⁹ The AO’s lists are updated about every two years and are sent to probation offices, U.S. Attorneys Offices and Federal Public Defenders Offices as well as to the courts.

The application of the Court Interpreters Act is to be guided by the Interim Regulations of the Director of the Administrative Office of the United States Courts implementing the Court Interpreters Amendments Act of 1988 issued by the AO on November 16, 1989 and presently remaining in effect. The Interim Regulations mandate that certification will be by written and oral examinations that are “criterion-referenced,” i.e., graded against an absolute standard rather than by the relative performance of examinees. An exception to the usual examination process is made for sign-language interpreters, who are accepted for AO certification if they hold a Legal Specialist Certificate from the Registry of Interpreters for the Deaf, Inc.

The Interim Regulations also define the standards by which the AO will classify interpreters who have not attained certification as “otherwise qualified.” “Otherwise qualified” interpreters include two categories, “professionally qualified” interpreters and “language skilled” interpreters. Generally, “professionally qualified” interpreters are those having either prior employment with the State Department, United Nations or related agencies, or those who are members of professional interpreters’ associations that require experience and sponsorship for admission. The category of “language skilled interpreters” is much more loosely defined, being comprised of those interpreters “who can demonstrate to the satisfaction of the court the ability to interpret court proceedings from

266. *See id.* § 1827(d)(2).

267. *See id.* § 1827(b)(2).

268. *See id.* § 1827(d)(1).

269. *See id.* § 1827(c)(1).

English to a designated language and from that language to English.”

Because the Court Interpreters Act was intended to foster confidence in the abilities of court interpreters, the Interim Regulations set forth a step-by-step procedure for obtaining the most competent interpreters available. First, a court is to give preference to those AO-certified interpreters who are employed as court staff interpreters. If staff interpreters are not available, courts should seek a locally available AO-certified interpreter. The next preference delineated is a certified interpreter from another district. The Interim Regulations explicitly provide that courts may use a “professionally qualified” interpreter only if the above alternatives fail to yield a reasonably available certified interpreter. “Language skilled” interpreters shall not be used if a “professionally qualified” interpreter is reasonably available.

In Appendix 2 to the Interim Regulations, the AO sets the fees for freelance contract interpreters, according to the interpreters’ levels of qualification. “Certified” and “professionally qualified” interpreters receive the same rate of compensation: \$250.00 per full day, \$135.00 per half day and \$35.00 per hour for overtime. “Language skilled” interpreters are compensated at approximately half the foregoing rates, i.e., \$125.00 per full day, \$65.00 per half day and \$20.00 per hour for overtime.

The written and oral tests required for AO certification are very rigorous; therefore relatively few interpreter candidates are able to achieve full certification.²⁷⁰ The written and oral sections of the examination are administered on separate occasions, and a candidate must pass the written examination before taking the oral examination.²⁷¹ For example, the Spanish examination written component is a two-and-a-half-hour multiple-choice test covering English and Spanish segments, with 20% of the test devoted to reading comprehension, 60% to vocabulary and 20% to usage (grammar and idioms).²⁷² The oral test covers the two modes of interpretation most frequently used in court proceedings: (1) the consecutive mode, in which the source-language speaker pauses so that the interpreter can render the statements into the target language (this is the typical mode of interpreting a non-English-speak-

270. This description applies to the tests for languages which exist in both oral and written form.

271. SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 36 (1990).

272. *See id.* at 37.

ing witness's testimony into English); and (2) the simultaneous mode, usually employed to interpret the court proceedings to a non-English-speaking defendant at counsel table.²⁷³ Further, a brief portion of the oral examination consists of the sight translation of English and foreign-language documents of the type usually encountered in court proceedings, e.g., police reports, deposition transcripts or expert reports.²⁷⁴

This rigorous testing program results in a 96% overall failure rate for federal AO certification candidates.²⁷⁵ As of 1996, the Spanish certification tests had been administered 13,643 times in the previous ten years; but a total of only 558 Spanish interpreters had been certified.²⁷⁶ As of early 1997, there are 643 certified Spanish interpreters on the AO's list.

The AO presently certifies interpreters in only three languages: Spanish, Haitian Creole and Navajo. The AO, however, has endeavored to provide some indicia of the competence of interpreters in a few additional languages. In 1994, the AO administered a written English examination for interpreters of the following nine languages: Arabic, Cantonese, Hebrew, Italian, Russian, Korean, Mandarin, Mien and Polish. While there is still no complete certification process for those languages, the AO has distributed to the courts a list of the names of those interpreters who have passed the English portion of the examination. Records compiled annually by the AO on the use of interpreters in all circuits indicate that Spanish is by far the most frequently interpreted language. For example, in fiscal year 1995, Spanish interpreters were used 96,217 times in the federal courts; Cantonese and Vietnamese were the two next most frequently interpreted languages, and required interpreters 1415 and 1007 times, respectively.²⁷⁷

273. *See id.* at 38-39. There is also a "summary mode" of interpretation, in which the interpreter distills or condenses the original statements. *See id.* at 39. The summary mode is not generally used in court interpreting. *See* H.R. REP. NO. 95-1687, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4659 ("The Committee anticipates that the summary mode of translation will be used very sparingly.").

274. *See* BERK-SELIGSON, *supra* note 271, at 39.

275. *See id.* at 216.

276. Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 317 n.459 (1996).

277. The AO counts the use of each language by the number of separate "docketable events." For example, if an interpreter is used for an arraignment, a hearing, a guilty plea, and a sentencing, each use counts as a separate event even though all are in a single case.

b. Analogous Interpreter Programs in State Courts

In recent years, state courts have initiated extensive measures to improve the quality of court interpreting in their proceedings. These programs offer valuable assistance and suggestions for federal courts as well. The rights of non-English-speaking parties, particularly those of criminal defendants, are protected by constitutional provisions in New Mexico and California; and by statute in at least nine states, Arizona, California, Colorado, Illinois, Massachusetts, Minnesota, New Mexico, New York and Texas.²⁷⁸ In all, 24 states provide for court interpreters; most do so by administrative or judicial regulations rather than by statute.²⁷⁹

To effectuate the foregoing rights, several states have formed a State Court Interpreter Certification Consortium under the auspices of the National Center for State Courts.²⁸⁰ As of 1996, the Consortium's member states included Delaware, Maryland, Minnesota, New Jersey, New Mexico, Oregon, Utah, Virginia and Washington; Illinois was in the process of seeking membership.²⁸¹ The objective of the Consortium is to permit states to share the costs of developing testing and other components of an interpreter certification program. For example, Minnesota and Oregon are underwriting costs of the Consortium's organization, development of testing models and new tests in Russian and Hmong. The National Center for State Courts provides administration, acts as a repository for tests, takes applications from states and will establish a national registry of certified court interpreters. All member states are bound to compliance with the Consortium's standards for test preparation and administration, test security, minimum educational standards for interpreters and financial support.²⁸²

New Jersey has some of the most advanced programs for improving the quality of court interpreting.²⁸³ The impetus for New Jersey's interpretation program arose from a 1985 report of the New Jersey Supreme Court Task Force on Interpreter and Transla-

278. See BERK-SELIGSON, *supra* note 271, at 26-27.

279. See *id.* at 27.

280. See Grabau & Gibbons, *supra* note 276, at 319. See generally Catherine Gill & William E. Hewitt, *Improving Court Interpreting Services: What the States Are Doing*, 20 ST. CT. J. 34 (1996).

281. See Gill & Hewitt, *supra* note 280, at 34, 36.

282. See Grabau & Gibbons, *supra* note 276, at 319; Gill & Hewitt, *supra* note 280, at 41.

283. See WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS, NATIONAL CENTER FOR STATE COURTS 90-91 (1995).

tion Services. That Task Force found that most court interpretation in New Jersey was being provided by unqualified persons. As a result, the New Jersey Administrative Office of the Courts created a Court Interpreting, Legal Translating and Bilingual Services Section ("Court Interpreting Section" or "Section"). The Section was charged with responsibility for developing testing and training programs for court interpreters.

New Jersey has since made notable progress in improving court interpreting and has become a model for other states. In the absence of court staff interpreters for a given language, the New Jersey Superior Court must now select interpreters only from the Court Interpreting Section's "Registry of Free-Lance Interpreters and Interpretation/Translation Agencies." The Section has developed tests for interpreter candidates in nine languages: Egyptian Colloquial Arabic, French, Haitian Creole, Italian, Mandarin, Polish, Portuguese, Russian and Spanish. Candidates must attend a seminar on the Code of Professional Conduct for Interpreters, Transliterators and Translators (approved by the New Jersey Supreme Court and effective December 1, 1994) before being permitted to interpret.²⁸⁴ After completing the seminar, candidates take a qualifying examination in simultaneous interpreting and must achieve a score of 50% or higher to take the remaining two portions (sight and consecutive interpreting) of the exam. Persons achieving the highest scores on examinations are registered as "Master Interpreters" and those achieving at the next highest level are registered as "Journeyman Interpreters." If no interpreter in those categories is available, the courts may use "conditionally approved interpreters" who have completed the tests, but have not passed all sections. In rare circumstances when none of the foregoing levels of interpreters are available and the proceedings are perfunctory or nonsubstantive, "eligible unapproved interpreters," those who performed just below "conditionally approved interpreters" on the qualification tests, may be used.

The New Jersey program highlights the need for audio recordings of foreign-language interpretations and videotaping of sign

284. In addition to New Jersey, states that have adopted a code of professional responsibility for interpreters include California, Maryland, Massachusetts, Minnesota, Oregon, Utah, Virginia and Washington. As of 1996, Hawaii, Nebraska and Nevada were considering the adoption of such codes. See Gill & Hewitt, *supra* note 280, at 38. The National Center for State Courts has produced a Model Code of Professional Responsibility for Interpreters in the Judiciary as a guide for legislation or rulemaking by individual states. For the text of the Model Code, see Hewitt, *supra* note 283, at 199-210.

language testimony; recording may be needed to preserve an effective record for appeal. In capital cases, such sound recording or videotaping of interpreted proceedings is mandatory under all circumstances. In proceedings "where the consequences may be serious," sound or video recordings should be made "whenever possible." In other cases, sound or video recording is left to the discretion of the judicial officer.

Two aspects of New Jersey's program are particularly notable. First, the use of registered interpreters effectively precludes the casual use of a party's family members or friends to interpret in any New Jersey Superior Court proceeding. Second, the registry system, combined with New Jersey's Code of Professional Conduct for Interpreters, Transliterated and Translators, prohibits counsel for a party from acting as an interpreter in either judicial or nonjudicial proceedings.

c. Uses and Regulation of Interpreters Within the Third Circuit

In the Third Circuit, as in all federal courts, Spanish is by far the most frequently interpreted language. In fiscal year 1995, the number of instances of usage for Spanish and other frequently encountered languages in the courts within the Third Circuit, were as follows:

TABLE 136: FREQUENCY OF USAGE OF INTERPRETERS BY LANGUAGE IN THE THIRD CIRCUIT DURING FISCAL YEAR 1995

Language	Amount of Use
Spanish	1535
Mandarin	43
Korean	33
Haitian Creole	31
Turkish	28
Cantonese	25
Foochow	25
Russian	24
Portuguese	20

SOURCE: AO of the United States Courts (1995).

Of the districts within the Third Circuit, the District of New Jersey is by far the most frequent user of interpreters, with 1180 uses in fiscal 1995. The next most frequent users are the Eastern District of Pennsylvania (288, of which 262 uses were for Spanish) and the District of the Virgin Islands (277, including 196 uses of Spanish and fairly frequent uses of Haitian Creole (30), French

Creole (19) and Mandarin (18)). The districts using interpreters relatively less often are the District of Delaware (50), the Middle District of Pennsylvania (38) and the Western District of Pennsylvania (22).

As is consonant with its greater frequency of use of interpreters, the District of New Jersey has the most elaborate program in the circuit for obtaining interpreters and determining their qualifications. Where warranted, any district may use its allocated interpreting funds to hire a staff interpreter, as well as to pay contract interpreters. Thus, New Jersey employs a Supervisory Interpreter on staff who provides more than half of the District's services for Spanish interpreting. The District of New Jersey Supervisory Interpreter also arranges for the services of contract interpreters and generally oversees the district's program for assessing interpreters' qualifications.

As required by the Court Interpreters Act and the AO's Interim Regulations, each district in the Third Circuit uses the AO's list of certified interpreters for pertinent languages, i.e., Spanish, Haitian Creole and Navajo. In addition, each district maintains a list of noncertified interpreters. New Jersey maintains separate lists of "qualified interpreters" and "Language Skilled Interpreters," who generally possess a lesser degree of expertise than do qualified interpreters. The districts vary in assigning the responsibility for choosing an interpreter in a particular case. In New Jersey, the selection is made by the Supervisory Interpreter; in Delaware, by the Financial Administrator of the Clerk's Office; in the Eastern District of Pennsylvania, by counsel (which may be the prosecutor or defense counsel); in the Western District of Pennsylvania, by judges; in the Middle District of Pennsylvania and in the District of the Virgin Islands, by courtroom deputies.²⁸⁵

i. Availability of Interpreters

Problems regarding the availability and selection of interpreters were frequent issues arising in the hearings conducted by the Task Force.²⁸⁶ For example, at the Philadelphia hearing, a board

285. In August 1995, the Task Force requested a variety of data on employment, juries and interpreters from the Clerks' Offices of each district and of the circuit court and, where appropriate, from other court units such as bankruptcy clerks' offices, probation offices and pretrial offices. The information cited above is from responses by Clerks' Offices to the Task Force's questions concerning interpreters.

286. Eight hearings were held in principal cities in each district: Philadelphia on October 24, 1996; Pittsburgh on October 24, 1996; Harrisburg on November 18, 1996; Newark on October 30, 1996; Camden on October 2, 1996; Wilmington

member of the Hispanic Bar Association of Pennsylvania testified that the prosecutor is entrusted with the task of selecting the interpreter in criminal cases in the Eastern District of Pennsylvania. It was therefore suggested that the court should be responsible for the selection of interpreters, in order to avoid the appearance of partiality.²⁸⁷

An Assistant Federal Public Defender in the District of New Jersey testified that she had seen her clients treated with insensitivity when matters had to be postponed because no interpreter was available.²⁸⁸ A probation officer from the District of Delaware, while noting that interpreters usually were "readily available," recalled having difficulty once in locating an interpreter for a Chinese dialect.²⁸⁹ A private practitioner in Delaware expressed dissatisfaction with the interpreter assigned to a particular case; in the lawyer's view, this interpreter was not able to understand the particular dialect spoken by the client.²⁹⁰ A Delaware Assistant Federal Public Defender expressed the view that it would be useful to have an interpreter assigned to the public defender's office, due to the frequency of use of interpreters to communicate with their clients.²⁹¹ This attorney also noted the difficulties inherent in obtaining interpreters for infrequently encountered languages; he cited an instance in which he represented a Filipino client who spoke a rare dialect.²⁹²

The most notable example of a lack of available interpreters was supplied by an Assistant Federal Public Defender who testified at the St. Thomas hearings. During the previous six months, she had represented several groups of Chinese defendants charged with illegal entry; each group was comprised of anywhere from 7 to 19 persons. Many of these defendants, even within a single group, spoke different dialects. No Chinese interpreter was available within the Virgin Islands, so interpretations had to be done via telephone by an interpreter in New York. The attorney cited poor telephone transmission, lack of privacy and an inability to treat each client as an individual, as some of the problems and concerns raised

on November 20, 1996; St. Thomas on November 7, 1996; and St. Croix on November 8, 1996.

287. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 55.

288. See *Public Hearings: Newark, New Jersey*, *supra* note 9, at 46-47.

289. See *Public Hearings: Wilmington, Delaware*, *supra* note 37, at 33-34.

290. See *id.* at 65-66.

291. See *id.* at 101.

292. See *id.*

by this situation.²⁹³ The availability of interpreters for Virgin Islands defendants is further exacerbated by the lack of federal detention facilities in the Virgin Islands. Defendants are therefore held in Puerto Rico. Even when defense counsel travels to Puerto Rico, it is difficult to obtain satisfactory Spanish interpreters. Moreover, it is impossible to communicate with Chinese defendants while they are held in Puerto Rico.²⁹⁴

At the Harrisburg hearings, an AO-certified interpreter who often works in the federal courts throughout Pennsylvania offered valuable insights into the issues concerning interpretation from the court interpreter's point of view.²⁹⁵ Specifically, he illustrated the scarcity of properly credentialed interpreters. He noted that some defense lawyers use prison guards as interpreters when conferring with incarcerated clients because the lawyers lack the funds to pay interpreters. Because this practice creates an obvious conflict of interest and breach of confidentiality, the certified interpreter urges that it be stopped.²⁹⁶ He noted that many defense lawyers are unaware that they can get a court interpreter to translate letters, and therefore they fail to answer letters from Spanish-speaking clients.²⁹⁷ This speaker believed that he was the only AO-certified Spanish interpreter residing in Pennsylvania. He was generally able to contact other interpreters to assist him or to serve when he was unavailable; however, he has had to serve as sole interpreter for as many as eight defendants in a single case. He suggested that in long cases with many witnesses, at least two interpreters should be used, so they can alternate shifts and avoid becoming overtired.²⁹⁸

This speaker also provided several salient observations on the need to educate judges, counsel and other participants in litigation about the proper use of interpreters.²⁹⁹ He emphasized that all participants in a trial must speak distinctly to assist the interpreter. He commented with approval on the Middle District of Pennsylvania's practice of requiring the judge or prosecutor to state for the record that the proceeding is being interpreted and remind everyone to be conscious of that fact and not present arguments in a manner that the interpreter cannot follow.³⁰⁰ He also suggested

293. See *Public Hearings: St. Thomas, Virgin Islands*, *supra* note 139, at 46-50.

294. See *id.* at 54, 56.

295. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 36-49.

296. See *id.* at 41-42.

297. See *id.*

298. See *id.* at 42-46.

299. See *id.* at 37-39.

300. See *id.* at 37-38.

that, if a judge has had little or no experience with cases using an interpreter, it is helpful for the judge to meet with the interpreter in chambers prior to the proceeding. The interpreter can then explain to the judge how the process works and what accommodations may need to be made in the usual courtroom routine.³⁰¹

The Task Force distributed questionnaires addressing issues of the availability of interpreters to judges, court employees and lawyers. Of the 112 judges responding to the pertinent questions on the judges' survey, over 74% (83 judges) had used an interpreter within the last five years. Only 2 of these 83 judges were appellate judges; it is clear that there would very seldom, if ever, be a need for interpreters in appellate proceedings, and therefore, it may be that the two appellate judges with affirmative responses had used interpreters in another context, perhaps in prior positions as trial judges.³⁰² Judges were asked to rate the frequency of using interpreters for particular languages, on a scale of 1 to 7, with 1 signifying "frequently" and 7 signifying "never." Spanish was the most often interpreted language, with a mean frequency of 2.64 (between "sometimes" and "frequently"). The second most often interpreted language was Chinese, with a mean frequency of 5.77 (between "rarely" and "never"). Only one judge reported ever refusing a request for the use of an interpreter. Nevertheless, when judges were asked if they had ever been unable to obtain an interpreter, 21 of 107 judges responding indicated there had been such occasions of unavailability. Judges were also asked what alternatives they might pursue if no interpreter were available for a criminal defendant; they were able to check any of seven alternatives, plus "none of the above." Judges indicated that they had used the alternatives listed in Table 137.

301. *See id.* at 39.

302. In fact, one appellate judge responding to the judges' survey specifically noted that he or she had never used an interpreter as a circuit judge, but frequently had used interpreters as a trial judge. Several other respondents also noted that the issue of availability of interpreters is not relevant to the court of appeals.

TABLE 137: RESPONSES OF JUDGES REGARDING USE OF INFORMAL INTERPRETERS DURING FISCAL YEAR 1995

Option Used	Frequency of Judges' Responses
Postpone proceeding	63
Other court personnel	16
Bilingual counsel	15
Family member	14
Friend of defendant	13
Probation officer	10
Another defendant	1

SOURCE: Judges Survey.

Eighty-one percent of the responding judges felt interpreters were generally available when needed. Three percent disagreed and 16% said they did not know.

The questionnaire addressed to employees also solicited information on the need for and the availability of interpreters. Employees were asked what languages other than English they encounter frequently in the workplace. They were instructed to indicate on a scale from 1 (least frequently encountered) to 10 (most frequently encountered) the frequency of their workplace encounters with the following languages: Spanish, Russian, Haitian Creole, Japanese, Italian, Arabic, Navajo, French, Vietnamese, Chinese, German, Greek and Polish.

Of employees responding to this question, 65% listed Spanish as the language encountered most frequently. Less frequently encountered languages were Haitian Creole, Korean, French and Chinese. There were some geographical differences in the frequency of encountering particular languages. Two languages, Haitian Creole and French, were more frequently encountered in the Virgin Islands than in other districts. Chinese was more frequently encountered in the Virgin Islands, Delaware and New Jersey than in any of the three districts of Pennsylvania. There were also some significant differences in the rates at which certain groups of minority employees encounter languages other than English. Asian-American employees indicated that they encountered Chinese and Korean more frequently than did other employees. African-American employees encountered Haitian Creole more frequently than other employees.

Employees were asked whether their court's system for using interpreters provides them in a timely fashion. Fifty-three percent of the employee respondents did not know; over 43% said "yes"; and 3.7% said "no." There were some significant differences in re-

sponses based on geography, in that a higher percentage of negative responses was given in the Virgin Islands (6.1%), the Middle District of Pennsylvania (5.6%) and the Eastern District of Pennsylvania (5.3%).

The employee questionnaire also inquired whether employees themselves had ever been asked to serve as interpreters. A great majority of all employees, over 96%, responded that they had not been asked to serve as interpreters. Responses, however, were notably different for Hispanic employees, Asian-American employees and multiracial employees. A majority of Hispanic employees, 75%, reported that they have been asked to serve as interpreters.³⁰³ Of Asian-American employees, 15.8% have been asked to serve as interpreters and 8.3% of employees who are multiracial have been asked to serve as interpreters.

There were also differences based on geography. The percentage of employees asked to serve as interpreters was higher in the Virgin Islands (14.7%) and, to a lesser extent, in New Jersey (6.3%), than in other districts. Of those employees who have been asked to serve as interpreters, over 90% indicated that this sometimes or always has affected their ability to perform their assigned jobs. In comments on the employee questionnaire, several respondents noted that bilingual employees, and particularly Spanish-speaking employees, were often called upon to interpret in informal situations. One Hispanic respondent noted that her request to be compensated for the extra duty of interpreting had been denied, and therefore she would be unwilling to perform this function in the future.

The questionnaire for lawyers asked what, if any, languages other than English the respondents encounter frequently within the federal courts of the Third Circuit. As with employees and judges, the most frequently encountered language was Spanish; other languages encountered in order of decreasing frequency were: Haitian Creole, Portuguese, Arabic, Chinese, Korean, Russian, Cambodian, Japanese, Polish, French, Vietnamese, German and Greek. When lawyers were asked whether they had handled any federal cases in the prior three years in which a party needed an interpreter, 17.1% of all respondents replied that they had handled such a case. A significantly higher percentage of Hispanic lawyers,

303. The employee questionnaire did not define "interpreters" in the context of these questions. Presumably, most of the instances in which employees are used as "interpreters" involve informal settings such as dealing with non-English speakers who telephone or visit a clerk's office for information, rather than use of noninterpreter employees in court proceedings.

54.5%, had handled cases requiring interpreters. Overall, of those lawyers who had participated in cases needing interpreters, 12.9% had sometimes been unable to obtain an interpreter when needed. Moreover, 22.3% of respondents reported that, in their experience, interpreters were not available when needed. In comments, several respondents to the lawyers' questionnaire noted difficulties in obtaining interpreters for out-of-court events such as depositions or client interviews.

Several respondents also noted a failure to supply interpreters in bankruptcy proceedings. Insofar as bankruptcy proceedings are not initiated by the United States, however, and, therefore, are not within the purview of the Court Interpreters Act, the courts are not in a position to offer assistance with this problem.

Lawyers were asked what alternatives they had seen a judge take when interpreters were required but unavailable. Respondents could select from the same alternatives that judges were given. The responses of lawyers are listed in Table 138:

TABLE 138: RESPONSES OF ATTORNEYS REGARDING USE OF INFORMAL INTERPRETERS DURING FISCAL YEAR 1995

Option Selected	Frequency of Attorney Responses
Postpone proceedings	121
Family member	45
Bilingual counsel	39
Friend of defendant	35
Other court personnel	33
Probation officer	23
Another defendant	12

SOURCE: Attorneys Questionnaire.

Spanish, French and German are the only languages for which interpreters consistently are available in each of the six districts of the Third Circuit. Otherwise, the availability of interpreters tends to reflect the frequency of use in particular districts. The District of New Jersey has interpreters available in 43 languages; the District of Delaware has interpreters available in 13 languages; both the Eastern District and Western District of Pennsylvania report availability of interpreters in 12 languages; and the Middle District of Pennsylvania and District of the Virgin Islands report the availability of interpreters in, respectively, 7 languages and 6 languages. In addition, during the period of 1990-1995, the Eastern District of Pennsylvania used interpreters in 21 other spoken languages in addition to the 12 languages for which it reports interpreters as available.

Ordinarily, the appointment of an interpreter is initiated by a party's lawyer or, in the case of recent arrestees, by the United States Marshals Service. The court then arranges for the provision of an interpreter. In the instances of long trials or multiple-defendant cases, four districts (the exceptions being the District of the Virgin Islands and the Middle District of Pennsylvania) indicate that they will employ more than one interpreter in a single case. Delaware has a specific policy of hiring two interpreters for any proceedings estimated to last over two hours or which will involve the presence of two or more defendants.

Each district maintains its own local roster of interpreters in addition to the list of certified interpreters that is distributed by the AO. Five of the districts, i.e., Delaware, New Jersey and the three Pennsylvania districts, update their local rosters whenever an interpreter is added. The District of the Virgin Islands updates its local roster every six months. Only the Western District of Pennsylvania incorporates information regarding the interpreter's level of experience in the roster. The Eastern District of Pennsylvania maintains its local roster in the Clerk's Office and does not distribute it. In the Western District of Pennsylvania, Middle District of Pennsylvania, District of New Jersey and District of the Virgin Islands, the local roster is available only to court personnel and judges. In contrast, the District of Delaware makes its local roster available to any lawyer requesting interpreter information, including U.S. Attorneys, CJA panel members, the Federal Public Defender and private counsel.

Each district recognizes that there may be emergency circumstances in which no interpreter certified by the AO or listed on the local roster is available and a substitute interpreter must be used. Two districts, the Eastern District of Pennsylvania and District of the Virgin Islands, under exigent circumstances, will sometimes permit family members, friends, bilingual counsel or court personnel to interpret. The Western District of Pennsylvania, Middle District of Pennsylvania and District of Delaware, however, indicate that they would never permit interpretation to be performed by family members, friends, counsel and noninterpreter court employees. In addition, most districts stipulate that a proceeding will not go forward if an interpreter is necessary, but not available. The responsibility for locating an interpreter in this situation may be assumed by the court, the prosecution or defense counsel.

ii. Qualifications of Interpreters

It appears that despite significant efforts of the AO and individual districts, fully credentialed interpreters (i.e., interpreters with AO certification) are chronically in short supply. Given the shortage of certified interpreters, "qualified interpreters" are usually used for relatively common languages. Procedures within individual clerk's offices for determining the qualifications of interpreters range from fairly strict to relatively casual. It appears that the standards applied by individual districts do not always correlate with the standards set forth in the AO's Interim Regulations. At the public hearings, counsel for criminal defendants complained, on several occasions, of the inadequate quality of the interpreters available to assist their clients.

The Philadelphia public hearing included extensive testimony about the importance of properly qualified interpreters from a lawyer who is a board member of the Hispanic Bar Association of Pennsylvania and the Executive Director of the Police-Barrio Relations Project.³⁰⁴ In the opinion of this speaker, the Third Circuit needs to develop a system to ensure that the threshold standards of the Court Interpreters Act are complied with in all proceedings. He stated that the standards of the Court Interpreters Act generally are not met in the Eastern District of Pennsylvania, where only two federally-certified Spanish interpreters are available and, therefore, most interpretation for Spanish-speaking persons is being done by uncertified interpreters. According to this speaker, excessive reliance upon uncertified interpreters undermines the right to a fair trial, the right to confront adverse witnesses and the right to communication with counsel for Spanish-speaking persons. He also noted that the demand for certified Spanish interpreters will increase because Latinos will be the largest minority group in the United States in the next century. This speaker suggested that the courts of the Third Circuit should work with local institutions of higher education to prepare people to take the federal certification test for Spanish interpreters.³⁰⁵

The foregoing concerns were reiterated in the Harrisburg testimony of an AO-certified Spanish interpreter noted previously.³⁰⁶ He noted that most people who take the Spanish certification examinations are sufficiently expert to pass the English part, but not the Spanish part. The written part of the examination is less diffi-

304. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 54-58.

305. See *id.* at 54-58.

306. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 36-49.

cult than the oral part, which involves interpreting under simulated court conditions. This speaker formerly taught a course to prepare interpreters at Wilson College; of four students whom he sent to take the federal certification tests, only two were able to pass.³⁰⁷

The inadequate qualifications of some interpreters were the subject of testimony by several criminal defense lawyers. A private practitioner testifying at the Wilmington hearing described an incident in which an uncertified interpreter could not understand the dialect spoken by the client. The problem was exacerbated because, due to the use of the interpreter, the prosecutor and probation officers incorrectly assumed the client was understanding the proceedings.³⁰⁸ At the St. Thomas hearing, an Assistant Federal Public Defender noted that, beyond the language difficulties per se, it is difficult to explain basic concepts of the American legal system to persons accustomed to other cultures and other forms of government.³⁰⁹

At the St. Croix hearing, several private practitioners, an Assistant Federal Public Defender and a Sergeant from the Virgin Islands Police Department all testified about the great need for court interpreters and the relative scarcity of interpreters with proper qualifications.³¹⁰ Some 75% of the population of St. Croix consists of migrants from other locations, particularly persons from Eastern Caribbean islands (40%) and Hispanic residents (35%).³¹¹ Nonetheless, despite this large number of persons whose comprehension of English may be limited, court interpreters tend to be persons who may be bilingual, but who have no formal training as interpreters.³¹² In particular, there are difficulties in finding interpreters skilled in the regional differences reflected in the native languages of some criminal defendants. Spanish court interpreters sometimes are not fully conversant with, e.g., the Spanish colloquialisms used by Puerto Ricans, Colombians or Santo Dominicans.³¹³ One practitioner noted that a French interpreter was inexperienced in the language of a French speaker who had lived in Africa.³¹⁴

307. See *id.* at 48-49.

308. See *Public Hearings: Wilmington, Delaware, supra* note 37, at 65-66.

309. See *Public Hearings: St. Thomas, Virgin Islands, supra* note 139, at 49.

310. See *Public Hearings: St. Croix, Virgin Islands, supra* note 40, at 21-23, 36-37, 64, 79, 116-17.

311. See *id.* at 20-21.

312. See *id.* at 22, 36, 64, 116.

313. See *id.* at 79, 117.

314. See *id.* at 117.

The deficiencies of interpreters are most apparent during trials. One practitioner described an instance in which a client had understood that she owed a sum of \$1500, but did not realize that she had consented to a judgment in the amount of \$4000. This speaker noted several problems arising from the use of unqualified interpreters: some cannot clearly and precisely translate legal terminology; or they may not know how to interpret the full message conveyed by a witness. He emphasized that, to be an effective interpreter, it is not sufficient that one know the language involved; one must also know the legal terminology and vocabulary of the court.³¹⁵

In a similar vein, it is notable that the St. Thomas hearing included testimony from a representative of the East Indian community, the President of the India Association.³¹⁶ This speaker reported that members of his Association had often served as uncompensated interpreters of Indian languages in court proceedings. They had performed this function on a few dozen occasions in the past six or seven years.³¹⁷ The proceedings in which these Indian interpreters appeared pro bono were usually arraignments and pleas; no trials were involved.³¹⁸ While this pro bono service is certainly commendable, it indicates that the courts in the Virgin Islands do not have access to a professional or certified interpreter for Indian languages.

As discussed earlier, 75% of Hispanic employees report that they have been asked to serve as interpreters during the course of their employment; 15.8% of Asian-American employees and 8.3% of multiracial employees likewise have been asked to perform interpreting duties. Further, 14.7% of court employees in the District of the Virgin Islands and 6.3% of court employees in the District of New Jersey have been asked to serve as interpreters. These responses suggest that a lack of certified interpreters may have resulted in the reliance upon bilingual court employees who are not formally trained as interpreters.

The judges' questionnaire sought the opinions of judges about the training and fluency of interpreters who have appeared before them. When judges were asked if interpreters were well trained, 80% of 98 respondents said "yes"; 1% said "no"; and 19% said they did not know. When judges were asked if court interpreters were

315. *See id.* at 21-23.

316. *Public Hearings: St. Thomas, Virgin Islands, supra* note 139, at 28-36.

317. *See id.* at 31.

318. *See id.* at 34-35.

fluent in both English and the interpreted language, 71% of 98 respondents said "yes"; 2% said "no"; and 27% said they did not know. A few respondents noted in comments to the judges' questionnaire that interpreters may have difficulties with specific dialects or with technical legal terminology. One respondent appeared to be unfamiliar with the provisions and requirements of the Court Interpreters Act: "Where parties agree that an interpreter is qualified and the interpreter appears to communicate properly, that should be sufficient. There are no court approved official interpreters to my knowledge."

Similarly, when lawyers were asked if, in their experience, interpreters were well trained, 92.5% of respondents replied "yes." Significantly fewer, however, Hispanic lawyers (63.6%) than Caucasian lawyers (93.5%) thought that interpreters were well trained. Lawyers were also asked if, in their experience, interpreters were fluent in both English and the interpreted language. While 84.8% of the overall respondents and 88.6% of Caucasian respondents found interpreters to be fluent, only 33.3% of Hispanic respondents found interpreters to be fluent. Lawyers who made comments on questions pertaining to interpreters noted several deficiencies in their work: (1) an inability to interpret in the simultaneous mode; (2) a failure to interpret everything that was said; (3) a lack of understanding of legal proceedings or legal terminology; and (4) an inability to translate in particular dialects.

While every district uses the AO's lists of "certified" interpreters where appropriate, it appears that each district has slightly different criteria for identifying "otherwise qualified" interpreters. The District of New Jersey requires a "qualified" interpreter to have a year of court experience (state or federal) and familiarity with the Code of Professional Responsibility. Interpreter candidates must pass a security check and their qualifications are verified by the Supervisory Interpreter. Sign language interpreters must hold a Legal Specialist Certificate from the Registry of Interpreters of the Deaf. The District of New Jersey also maintains lists of Language Skilled Interpreters, who do not meet the criteria specified by the district for Qualified Interpreters. The District of Delaware has no specific criteria to determine whether an interpreter is qualified and generally relies on other districts and state courts for interpreters of languages that are not tested by the AO.

The Middle District of Pennsylvania considers the education and experience of an interpreter, but does not have any specific established standards. In the Middle District of Pennsylvania, court-

room deputies or judicial officers decide whether an interpreter may be placed on the court's roster. The Virgin Islands considers the educational background, nationality and experience of the interpreter to determine his or her qualification. The decision whether to place a candidate on the roster ultimately is made by the clerk and magistrate judges. The Western District of Pennsylvania generally uses qualified interpreters from local schools, and their placement on the roster is determined by the clerk following an interview with the candidate. The Eastern District of Pennsylvania requires no in-court experience of its interpreters and does not interview roster candidates. The District of Delaware discusses the performance of a new interpreter with the courtroom deputy after the interpreted proceeding. The Western District of Pennsylvania reports that it verifies the qualifications of interpreters, but it does not explain the procedure used. The Eastern and Middle Districts of Pennsylvania and the District of the Virgin Islands have no formal method of verifying the qualifications of an interpreter. Most districts require an interpreter to list the modes of interpretation at which he or she is skilled; only the Eastern and Middle Districts of Pennsylvania do not routinely compile this information.

No district mandates that interpreters have any training in confidentiality or in professional or ethical issues. The District of New Jersey, however, does make some effort to assure that its court interpreters will observe norms of professional responsibility. The District of New Jersey's Supervisory Interpreter encourages all interpreters to attend free seminars on the code of ethics and professional responsibilities.

The Western District of Pennsylvania is the only district that has specific procedures for tracking complaints about the performance of interpreters and removing incompetent interpreters from the court's roster. The other districts will accept complaints that are brought to their attention and will review complaints informally. Usually, it is left to the discretion of the court to prevent the future use of interpreters who have not performed adequately.

2. *Assistance for Non-English-Speaking Users of the Courts*

Aside from examining the issue of the availability and competence of interpreters for non-English-speaking parties and witnesses, the Language Committee also sought information on existing and possible uses of aids for non-English-speaking users of the courts generally. The principal forms of assistance considered were bilingual or multilingual signs; bilingual or multilingual writ-

ten instructions; and bilingual or multilingual court employees. The Language Committee learned that only the District of Delaware uses bilingual signs in its courthouse, in English and Spanish. Otherwise, no district of the Third Circuit presently makes any specific accommodations for non-English-speaking users of the courts.

Possible efforts to make the courts compatible with the needs of non-English speakers were addressed in several of the public hearings. The Hispanic Bar Association representative who testified in Philadelphia stated that there is a need for bilingual signs in courthouses and a need for Spanish-speaking personnel, particularly security personnel at courthouse entrances and employees in the Clerk's Office and Probation Office.³¹⁹ This speaker also endorsed making materials for pro se litigants available in languages other than English. He believes it would be useful to conduct a cultural-awareness training program for all court personnel.

One reason cited for the importance of properly qualified interpreters was that even jurors fluent in the pertinent non-English language are required to accept a court interpreter's translation as the controlling version of testimony.³²⁰ In this regard, a panel member and a speaker at the Newark hearing noted that Spanish-speaking jurors may be excused from serving in the trial of a Spanish-speaking defendant if they are unable to swear that they will accept the official interpretation of testimony.³²¹ This suggests that the scope of deliberations may be different for bilingual jurors and jurors who speak only English, in that the English-speaking jurors are free to read into testimony what they feel they have heard; whereas the bilingual jurors are not permitted to exercise that discretion when considering testimony presented in a language other than English.³²²

Finally, general cultural differences between persons of different ethnic and linguistic traditions were explored in the St. Thomas testimony of an Assistant Federal Public Defender.³²³ She noted the difficulty of explaining aspects of the American legal system to persons from other countries.³²⁴ She also noted that West Indian

319. See *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 57-58.

320. See *id.* at 55.

321. See *Public Hearings: Newark, New Jersey, supra* note 9, at 50-51.

322. See *id.* at 51. Jurors in the federal courts are required by statute to be able to speak English and to be able to read and write English sufficiently to complete a juror qualification form. See 28 U.S.C. § 1865(b)(2)-(b)(3) (1994). For a further discussion of jury issues, see the Report of the Committee on Jury Issues.

323. See *Public Hearings: St. Thomas, Virgin Islands, supra* note 139, at 49, 53-54.

324. See *id.* at 48-49.

defendants who are housed at the NDC in Puerto Rico encounter problems because of cultural differences concerning, e.g., diet and religion, as well as language.³²⁵

Responses to the Task Force's employee questionnaire, as noted above, indicated fairly frequent encounters with Spanish-speaking users of the courts and less frequent, but still notable, encounters with speakers of Haitian Creole, Korean, French and Chinese. Employees were asked to indicate which of the following items would help in directing persons of limited English proficiency in the courthouse: bilingual or multilingual directional signs; written bilingual or multilingual instructions; bilingual or multilingual maps or floorplans; bilingual or multilingual persons on staff in Clerk's Office; bilingual or multilingual CSOs in courthouse lobby; "none of the above"; or "other." Over 42% of responding employees thought signs would be helpful; over 40% thought bilingual or multilingual persons on the Clerk's Office staff would be helpful; and approximately 39% thought bilingual or multilingual CSOs would be helpful. Less frequently endorsed aids were written instructions (28%) and maps or floorplans (19%). Hispanic and Asian-American employees were more likely than employees as a whole to think that signs, CSOs and maps or floorplans would be helpful. Hispanic and African-American employees were more likely to consider bilingual or multilingual clerk's staff to be helpful to persons of limited English proficiency. Multiracial, Hispanic and African-American employees were more likely to consider bilingual or multilingual written instructions to be helpful. In comments to the employee questionnaire, several respondents expressed the view that the courts should not assist non-English speakers by providing any assistance in other languages. Other employees, however, suggested such additional aids as multilingual information available by computer or language courses provided to interested employees.

C. *Literature Review*

Many commentators have addressed the various problems encountered by non-English-speaking parties in the American judicial system. The following review of this literature is selective, focusing upon one seminal book-length study, five of the most important and widely-cited law review articles and three reports of state supreme court committees which addressed the problems encoun-

325. *See id.* at 53-54.

tered by non-English speakers in the courtroom. Several recurring themes may be noted in these various studies: (1) the possibly dispositive effects of interpreting styles or errors on judicial fact-finding; (2) the acute need for more highly qualified court interpreters; (3) the need to avoid wherever possible the use of bilingual persons who are not trained as interpreters; (4) the need to preserve a tape recording of foreign-language testimony for meaningful appellate review; and (5) the need to make court information and documents accessible to the growing non-English-speaking public.

1. *Book and Law Review Articles*

a. Effect of Foreign Language Interpretation on Judicial Decision Making

In Susan Berk-Seligson's book, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, she combines a background on the state of interpreting services in both federal and state courts with empirical research on the effects of certain aspects of interpretation on mock jurors.³²⁶ Berk-Seligson also analyzes tape recordings of actual judicial proceedings involving Spanish-English interpretations. Her main conclusion is that interpreters are unaware of how the pragmatic features of language (e.g., use of active or passive voice, markers of politeness, differences in level of formality) may influence judicial decisionmakers, particularly jurors.³²⁷ Berk-Seligson particularly notes that the use of friends or relatives of the non-English-speaking party results in a poor quality of interpreting.³²⁸ She recommends several steps to ameliorate the problems uncovered by her research: (1) interpreter certification examinations should focus more on pragmatics in the development of test items; (2) training programs are needed to upgrade existing court interpreters and supply additional qualified interpreters; (3) courts need to provide their staff interpreters with guidelines for proper performance of their functions; and (4) all non-English testimony should be tape recorded (or, in the case of interpreting for the deaf, videotaped) and transcribed for use in appeals.

326. See BERK-SELIGSON, *supra* note 271, at 2-3.

327. See *id.* at 2-3, 53, 202-17.

328. See *id.* at 9.

b. Bilingual Jurors and the Official Court Record

Two law review articles³²⁹ discussed the issue of bilingual jurors in view of the United States Supreme Court decision in *Hernandez v. New York*.³³⁰ In *Hernandez*, the Supreme Court upheld a trial prosecutor's decision to exclude two Hispanic bilingual jurors based on his asserted fear that they would not be able to accept the official translation of Spanish-language testimony.³³¹ In their respective articles, Perea and Clasby disagree with the result in *Hernandez*, arguing that excluding jurors based solely on their ability to speak and understand another language is too restrictive a measure.

Implicit in the prosecutor's concern in *Hernandez* is the possibility that the interpreter's "official" English version of Spanish-language testimony will be materially different from the actual Spanish-language testimony.³³² The authors contend that an official translator is incapable of rendering a completely objective interpretation. Interpreters often make alterations of testimony by making it more or less polite, more or less formal, by changing the tense of a verb or by omitting verbal pauses and hesitation of a witness. These alterations can affect a listener's perception of the witness's truthfulness, certainty or competence.³³³

The authors expressed concern that no record of foreign-language testimony is preserved. Only the English interpretation of any foreign-language testimony is recorded by a court reporter.³³⁴ Thus, it is usually impossible to challenge effectively on appeal the accuracy of an English interpretation of foreign-language testimony. One author suggests that audio tape recording all witness testimony, no matter what language is involved, would make possible a substantive appellate challenge to the accuracy of an interpretation.³³⁵

Both authors suggest that certification of court interpreters can reduce the risk that official court interpretation may be inaccurate. Few states, however, have certification programs comparable to that of the federal courts. Furthermore, some errors and modifi-

329. See generally Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Sarah B. Clasby, Note, *Understanding Testimony: Official Translation and Bilingual Jurors in Hernandez v. New York*, 23 U. MIAMI INTER-AM. L. REV. 515 (1992).

330. 500 U.S. 352 (1991).

331. *Id.* at 372.

332. See Perea, *supra* note 329, at 21.

333. See *id.* at 24; Clasby, *supra* note 329, at 532.

334. See Perea, *supra* note 329, at 34; Clasby, *supra* note 329, at 533.

335. See Perea, *supra* note 329, at 35.

cations are inherent in interpretation, even among the most competent.³³⁶ Finally, the authors propose that the perceived *Hernandez* problem may be overcome if jurors who disagree significantly with the official translation of testimony are permitted to bring the matter to the attention of the court once the witness is finished testifying.³³⁷

c. Interpretation and the Rights of Criminal Defendants

In his article, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, Michael B. Shulman contends that court interpretation is an imprecise process and the result of this imprecision may be an unfair trial for the non-English-speaking defendant.³³⁸ He states that the right to an interpreter is "fully protected" only if: (1) the judge recognizes that an interpreter is needed; (2) there is a certification test for the interpreters of the defendant's native language; and (3) a certified interpreter can be found.³³⁹

The author points out several factors which contribute to unfairness for the non-English-speaking defendant in the court system. Trial judges are faced with the conflict of making timely disposition of trials and selecting a cost effective, yet competent interpreter. Unless a judge is fluent in the language to be interpreted, the judge may not be able to accurately determine the competency of a given interpreter. There is no basis to review non-English language testimony because it is not written into the record. A defendant cannot correct an error in translation because his actual testimony is not on the record.³⁴⁰

Shulman makes several proposals to reform interpretation. First, he suggests that the Court Interpreters Act be extended to state courts, as a means of improving the competency of interpreters in a cost-effective manner.³⁴¹ Second, Shulman notes that the courts should take steps to attract more qualified people to become court interpreters by providing salaries competitive with the private sector.³⁴² Third, he states that some form of certification should be

336. See *id.* at 22-23.

337. See *id.* at 45; Clasby, *supra* note 229, at 536.

338. See Michael B. Shulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 177 (1993).

339. See *id.* at 183.

340. See *id.* at 184-86.

341. See *id.* at 191-92.

342. See *id.* at 195.

made available for interpreters for additional languages, perhaps by an examination combining the English portion of the federal certification examination with a test of a candidate's knowledge of general principles of court interpretation.³⁴³ Finally, Shulman proposes that checks should be developed for the work of court interpreters, either by having a second interpreter in the courtroom or by tape recording all non-English testimony.³⁴⁴

d. Appellate Issues Relating to Interpretation

In *Errors in Interpretation: Why Plain Error Is Not Plain*, Debra L. Hovland focuses on inaccurate interpretation and the inherent problems of appellate review of such error.³⁴⁵ Although federal and state court systems generally provide for the appointment of an interpreter for non-English-speaking defendants and witnesses, there is often no guarantee that the interpretation provided will be entirely accurate. The author describes several common errors in interpretation; e.g., inaccurate word choices, summaries of questions, embellishing or downplaying a question or leaving out profanity in testimony.³⁴⁶ Unless the trial judge is bilingual and can monitor the interpreter's performance, it is almost impossible for that judge to tell if the interpretation is accurate.³⁴⁷ The judge must rely on complaints from witnesses, attorneys and parties to detect any problems with an interpreter. These courtroom actors, however, may not be able to detect inaccuracies in interpretation.³⁴⁸

Generally, the only evidence of inaccurate interpretation that appellate courts will accept is confusing or unresponsive testimony by non-English-speaking witnesses or objections made to interpretation at the time of testimony.³⁴⁹ It is often difficult, however, for counsel to object to inaccurate interpretations. The defendant may speak little or no English and may not know that the interpretation is inaccurate. Unless the lawyer is bilingual, he or she will probably be unaware of inaccuracies in the interpretation and will not object. Often the only option for the defendant is to try to prove that there were obvious errors in interpreting because translated testimony is

343. *See id.* at 192-93.

344. *See id.* at 192-94.

345. *See* Debra L. Hovland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 *LAW & INEQ. J.* 473 (1993).

346. *See id.* at 476.

347. *See id.* at 479.

348. *See id.* at 480.

349. *See id.* at 488.

unresponsive or confusing.³⁵⁰ Even if the appellate court waives the requirement of a timely objection, that court may decide that the interpretation errors not objected to at trial are “harmless” and refuse to overturn the conviction or grant a new trial.³⁵¹

Hovland suggests several possible remedies for the perceived problems in the appellate process. First, she argues that appellate courts should either waive the requirement of timely objection to an interpretation error or use a less demanding standard of review than the “plain error” doctrine.³⁵² Moreover, she believes that interpretation errors at trial would largely be avoided and the likelihood of correction of remaining errors on appeal would be enhanced, if a second interpreter were routinely present and if proceedings involving interpreters were tape recorded.³⁵³

e. Overview of Current Trends in Court Interpreting

In *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, Charles M. Grabau and Llewellyn Joseph Gibbons provide an extensive summary of all pertinent aspects of court interpreting, including both legal and practical aspects.³⁵⁴ The article is largely descriptive rather than analytical, but because of its broad scope and recent date, it may be particularly helpful to judicial officers or court personnel who are not familiar with the problems presented by interpreting. Co-author Charles M. Grabau is an Associate Justice of the Massachusetts Superior Court, and the article provides considerable information on the effective use of interpreters in the courtroom.³⁵⁵ The authors also discuss the work of Susan Berk-Seligson at some length, emphasizing the need to guard against problems of jury bias that can arise from unprofessional interpretation.³⁵⁶ The article also includes extensive appendices of model legislation, a model code of professional responsibility for interpreters, jury instructions and voir dire questions.³⁵⁷

2. State Inquiries into Language Problems

Reports of three state supreme court committees, the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial

350. *See id.* at 491.

351. *See id.*

352. *See id.* at 493.

353. *See id.* at 497-98, 501.

354. *See* Grabau & Gibbons, *supra* note 276, at 227.

355. *See id.* at 276-79, 283-87, 294-97.

356. *See id.* at 311-16.

357. *See id.* at 337-74.

System ("Oregon Task Force"),³⁵⁸ the Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System ("Georgia Commission")³⁵⁹ and the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System ("Minnesota Task Force")³⁶⁰ are widely available as published in law reviews. The three state committees addressed the difficulties encountered by minorities in their individual court systems, including the special obstacles faced by non-English speakers. Their reports included findings and recommendations regarding two specific needs of the non-English-speaking public: access to the courts and qualified interpreters.

a. Assistance for Non-English-Speaking Users of the Courts

An important issue addressed by these state committees was the lack of information about the court system available to non-English speakers. The Georgia Commission stated that there are misunderstandings about the court system, especially among immigrants and the poor, that lead to mistrust of the courts and ultimately to restricted access to the courts.³⁶¹ It recognized the need to better educate potential court users as to the court system, court proceedings and individual rights. The Georgia Commission recommended that informational brochures and videotapes be made to explain general court information to the public. These materials were to be presented in an easily comprehensible format and, in counties with large minority populations, were to be translated into Spanish, Vietnamese and Korean. The informational packets would be updated as required and made available at courthouses and legal clinics.³⁶²

The Oregon Task Force issued similar recommendations to make court information accessible to non-English speakers.³⁶³ It suggested creating a document that addresses essential issues, such as the function and organization of the court system, the roles and responsibilities of court litigants and other participants, and appeal procedures. A civil law version and a criminal law version of the document should be translated into the languages most frequently

358. See *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823 (1994) [hereinafter *Oregon Task Force Report*].

359. See *Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System*, 12 GA. ST. U. L. REV. 687 (1996) [hereinafter *Georgia Task Force*].

360. See *Symposium on Racial Bias in the Judicial System: Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 HAMLIN L. REV. 611 (1993) [hereinafter *Minnesota Task Force Report*].

361. See *Georgia Task Force Report*, *supra* note 359, at 737-38.

362. See *id.* at 738.

363. See *Oregon Task Force Report*, *supra* note 358, at 840.

spoken in the state. A videotape version should also be made available in all pertinent languages.³⁶⁴

Another area of concern was that most legal documents are available only in English. The Georgia Commission noted that non-English speakers do not have the opportunity to read for themselves court documents that are generally provided to other litigants.³⁶⁵ The Georgia Commission requested that commonly used court forms and documents be made available in the most frequently requested languages so that non-English speakers could complete them without the need for a translator.³⁶⁶ The Oregon Task Force also recommended that commonly used court forms be available in other languages, and these forms should include a question as to whether an interpreter is needed.³⁶⁷ The Minnesota Task Force directed that court forms be drafted in easily translatable English and translated into additional languages as needed.³⁶⁸ These translations are to be made by approved legal translators, and the translations should be of a quality equal to that of the corresponding English versions.³⁶⁹

The state supreme court committees recognized that non-English speakers' problems with understanding the court system are exacerbated by the fact that courthouses are not equipped with signs in languages other than English. The Georgia Commission recommended that courthouses be equipped with appropriate signs in relevant languages so that court users can easily be directed to specific locations.³⁷⁰ The Oregon Task Force suggested that, in counties with significant minority populations, trial court administrators should post signs in appropriate foreign languages.³⁷¹

In addition to providing signs, forms and brochures in languages other than English, the three state supreme court committees recommended that the courts look into ways to increase the number of bilingual or multilingual court personnel. The Minnesota Task Force suggested that its court system adopt policies to attract, employ and retain sufficient numbers of bilingual and bilingual/multicultural court support personnel.³⁷² The Minnesota

364. *See id.*

365. *See Georgia Task Force Report, supra* note 359, at 739.

366. *See id.*

367. *See Oregon Task Force Report, supra* note 358, at 840-41.

368. *See Minnesota Task Force Report, supra* note 360, at 622.

369. *See id.*

370. *See Georgia Task Force Report, supra* note 359, at 743.

371. *See Oregon Task Force Report, supra* note 358, at 841.

372. *See Minnesota Task Force Report, supra* note 360, at 622.

Task Force also said the courts should require continuing professional education of present and future court personnel who provide bilingual/multicultural support services.³⁷³ The Georgia Commission recommended that the courts and associated agencies make efforts to hire bilingual employees, especially in positions which involve a good deal of contact with the public.³⁷⁴ Court-houses should be equipped with a bilingual or multilingual information officer to direct or give information to non-English speakers.³⁷⁵ The Oregon Task Force suggested that the courts pay tuition for employees and judges who are willing to take foreign language courses if the language skills that are learned can be used at work.³⁷⁶ It also recommended recruiting bilingual court personnel and providing financial incentives to employees who speak a second language when dealing with the public.³⁷⁷

b. Use of Interpreters

The reports of the individual state supreme court committees also focused on interpreters in the courts and related agencies. These committees explored such topics as need, availability, training, certification and professional ethics of court interpreters. They also reviewed issues that arise when interpreters are required in trial proceedings, such as accuracy, jury instructions and responsibility for providing court interpreters.

The Oregon Task Force recognized that the number of non-English-speaking litigants was growing at a rapid rate and that interpreters were often unavailable in the court system.³⁷⁸ The Georgia Commission reported both a lack of availability of adequate court interpreter services and a lack of awareness of the need for interpreters.³⁷⁹ The Minnesota Task Force stated that judges, attorneys and court personnel have no training on the use of interpreters.³⁸⁰ It also noted that public defenders and county attorneys did not have qualified interpreters to assist them with non-English-speaking persons.³⁸¹ The findings of all three state supreme court committees showed that there was no standard of training for interpreters

373. *See id.*

374. *See Georgia Task Force Report, supra* note 359, at 743.

375. *See id.*

376. *See Oregon Task Force Report, supra* note 358, at 841.

377. *See id.*

378. *See id.* at 839.

379. *See Georgia Task Force Report, supra* note 359, at 745.

380. *See Minnesota Task Force Report, supra* note 360, at 621.

381. *See id.*

in their court systems and recommended that such criteria be established.

There was also concern about the professional conduct of court interpreters. The Minnesota Task Force recommended that the State Supreme Court should adopt a code of ethics that would be binding upon all court interpreters.³⁸² The Oregon Task Force recommended that a committee be appointed to draft a court interpreters' code of ethics.³⁸³ The Georgia Commission suggested that a standard oath be developed for foreign language interpreters for use in all courts.³⁸⁴

The state committees also studied problems with interpretation in the courtroom. The Georgia Commission reported complaints about interpreters who had made inaccurate translations and had summarized rather than translating exactly as spoken.³⁸⁵ This commission recommended that judges ensure that trial proceedings are translated verbatim. It said that parties should also have the right to hire their own interpreters to ensure accurate interpretation.³⁸⁶ The Oregon Task Force suggested that uniform trial court jury instructions be drafted regarding interpreted testimony.³⁸⁷ These instructions should inform the jury that one or more of the parties or witnesses do not speak English and will be assisted by a court interpreter. The instructions, which would be administered immediately after the jury was empaneled, would direct that interpreted testimony be evaluated in the same manner as English testimony and be given equal weight upon consideration of that testimony.

D. Findings

- Pursuant to the Court Interpreters Act, the AO maintains lists of certified interpreters in three languages: Spanish, Haitian Creole and Navajo. The AO also provides lists of persons who have passed the English portion of a certification examination for the following nine languages: Arabic, Cantonese, Mandarin, Hebrew, Italian, Korean, Polish, Russian and Mien.
- Spanish is the language for which interpreters are most frequently needed in the courts of the Third Circuit. Other lan-

382. *See id.* at 622.

383. *See Oregon Task Force Report, supra* note 358, at 841.

384. *See Georgia Task Force Report, supra* note 359, at 746.

385. *See id.* at 749.

386. *See id.*

387. *See Oregon Task Force Report, supra* note 358, at 842.

guages for which interpreters are needed on a fairly regular basis are Cantonese, Foochow, French Creole, Haitian Creole, Korean, Mandarin, Portuguese, Russian and Turkish. Most judges who responded to the Task Force survey, i.e., over 74%, have used an interpreter within the last five years.

- In addition to using the AO's lists of certified interpreters, each district maintains a list of noncertified, but otherwise qualified interpreters; the District of New Jersey also maintains a list of interpreters in a third category, "Language Skilled Interpreters." The districts vary in the criteria applied to determine the level of skill needed for a "qualified interpreter."
- The districts vary considerably in assigning responsibility for selecting an interpreter for a particular case, with the following personnel having this responsibility in one or more districts: Supervisory Interpreter; Financial Administrator; prosecutor or defense counsel; judges; courtroom deputies.
- The districts' lists of various categories of interpreters and the procedures for finding interpreters in some respects do not conform to the AO's Interim Regulations.
- Many defense lawyers across the circuit noted that interpreters were not always available when needed. The availability of interpreters has been a particular problem in cases involving clients who speak less common languages, such as some Chinese dialects. Further, availability is a more acute problem for lawyers in offices of the Federal Public Defenders, who represent substantial numbers of non-English-speaking clients.
- In the Virgin Islands the difficulty of defense counsel's communication with non-English-speaking clients is greatly exacerbated because Virgin Islands defendants must be detained in Puerto Rico.
- A scarcity of properly qualified interpreters has occasionally led to the use of substitutes such as prison guards, family members, friends of defendants, probation officers or lay pro bono interpreters from the community.
- Employees who may be bilingual, particularly Hispanic employees and, to a lesser extent, Asian-American and multiracial employees, report having been called upon to act as interpreters in addition to performing their usual assigned work. Most of those serving as interpreters have also reported that this affects their job performance.
- The scholarly literature on court interpreting, as well as the experience of some state courts and certain provisions of the

Court Interpreters Act, support the use of sound or video recording of interpreted proceedings where necessary to preserve an adequate record for appeal.

- Of the six districts within the Third Circuit, only the District of Delaware makes its local roster of interpreters available to any lawyers who request it. Only the Western District of Pennsylvania incorporates information regarding the interpreter's level of experience in the local roster.
- Although most districts have a policy of postponing proceedings if an interpreter is necessary but not available, under such circumstances individual judges have occasionally allowed in-court interpretation to be performed by other court personnel, bilingual counsel, family members or friends of a defendant, a probation officer or even a co-defendant.
- According to testimony presented at the public hearings, the shortage of certified Spanish interpreters is particularly acute in the Eastern District of Pennsylvania, where only two AO-certified interpreters are available, and in the Middle District of Pennsylvania, where only one AO-certified interpreter is available.
- With the exception of the District of New Jersey, where the Supervisory Interpreter encourages all interpreters to attend free seminars on professional responsibility, no district requires or offers any training in confidentiality or professional and ethical issues for interpreters.
- Presently, only the District of Delaware uses bilingual signs in its courthouse. Speakers at the public hearings and some employees responding to the Task Force's questionnaire recommended the provision of additional bilingual/multilingual signs, as well as bilingual/multilingual instructions for pro se litigants, bilingual/multilingual CSOs and Clerk's Office staff and cultural awareness training for employees.

E. *Recommendations*

- The Third Circuit Judicial Council should review whether any additional languages commonly encountered in the courts of the circuit should be included among the languages for which the AO is to establish a certification program. The Court Interpreters Act permits the judicial council of a circuit, with the approval of the Judicial Conference of the United States, to request that the AO certify additional languages. Accordingly, the Judicial Council should institute such a request if needed

and should express to the AO its support for completing the certification programs presently in progress.

- Each district should recruit additional certified interpreters by contacting local colleges and universities and perhaps, in areas of greatest need, by encouraging those institutions to offer training courses to prepare interpreters for AO certification. The Judicial Council should present to the Judicial Conference and the AO a recommendation that fees for court interpreters be increased to a level commensurate with interpreters' compensation in the private sector.
- The District of the Virgin Islands should track the frequency of need for interpreters of Chinese dialects. If the increased need of the recent past should persist, that district and the circuit should consider whether certified or qualified interpreters of Chinese dialects may be made available on site in the Virgin Islands.
- The Clerk of each district court should make certain that policies for the qualifications and selection of interpreters conform in all respects to the AO's Interim Regulations.
- In each district, the selection of interpreters for individual cases should be done by the most knowledgeable personnel available. In districts without a staff interpreter, this selection should be made by a judicial officer, where necessary with consultation of other judges or magistrate judges who have used interpreters for the desired language, and bearing in mind that most judicial officers have limited and indirect knowledge of the skills of particular interpreters. Selection of interpreters should not be left to courtroom deputies or other Clerk's staff. In particular, each district must assure that prosecutors do not select interpreters for criminal defendants.
- All judicial officers should be reminded of the policy that proceedings for non-English-speaking parties must be postponed if an interpreter is needed, but is not available. Use of untrained court personnel, probation officers, relatives of parties or other laypersons as interpreters should be prohibited, except in emergency situations. Under no circumstances should a lay person, including defense counsel, be used to interpret in trials, sentencings, substantive motions, guilty pleas or other critical proceedings.
- Assuming that there will sometimes be emergencies requiring the use of noninterpreter employees as interpreters for court proceedings, each district should take steps, whether by testing,

continuing education or similar means, to assure that only the most competent bilingual employees are called upon for this function.

- All judicial officers should be apprised of the provisions of the Court Interpreters Act allowing for the recording of interpreted proceedings when the presiding judicial officer may determine such recording is necessary.
- Each district should prepare written guidelines for counsel representing non-English-speaking parties discussing the availability of interpreters from the court's roster to translate correspondence and attend attorney-client meetings and noting the main features of the certification system established by the Court Interpreters Act and the AO's Interim Regulations.
- Each district should include some basic information about interpreters' credentials in its local roster and shall make the roster available to other agencies, such as the Probation Office and Federal Public Defender's Office, which have frequent need of interpreters.
- Each district should provide copies of the Model Code of Professional Responsibility for Interpreters in the Judiciary to all persons hired as freelance interpreters; districts which do not now do so should also consider conducting seminars on professional responsibility for freelance interpreters or referring such interpreters to existing seminar programs.
- In those districts where court employees may be called upon frequently to interpret in informal circumstances, i.e., in responding to questions from members of the public in person or by telephone, efforts should be made to eliminate increased burdens on Hispanic, Asian-American or multiracial employees. Repeated use of employees as informal translators should be factored into those employees' workloads and compensation.
- Each district should maintain a record of complaints about interpreters and establish a system for assessing the frequency of complaints. Districts should ask counsel and defendants to fill out forms evaluating the performance of interpreters. Defendants should be supplied with such forms written in their dominant languages.
- All courts within the circuit should explore the possibility of obtaining bilingual/multilingual signs for courthouses in areas with significant non-English-speaking populations.
- The United States Marshals Service is encouraged to recruit CSOs and Clerks are encouraged to recruit staff who are fluent

in those languages other than English which are spoken by a significant percentage of the area's population.

- Districts should also provide those written materials which are made available to the general public in translations for users of such locally significant languages.
- Districts should consider the need for and availability of cultural-awareness training for court personnel.

XIV. REPORT OF THE COMMITTEE ON JURY ISSUES OF THE RACE & ETHNICITY COMMISSION

A. *Committee Process*

The Commission on Race & Ethnicity created the Committee on Jury Issues ("Jury Committee") to study issues relating to the race and ethnicity of jurors. The Jury Committee proposed to study two general areas: (1) treatment of jurors on the basis of race and ethnicity and (2) the racial and ethnic composition of the jury pool and juries in each district or jury division as compared with the composition of the population in each district or jury division. In addition, the Jury Committee proposed to study these areas with regard to the gender of jurors. The Race & Ethnicity Commission approved of the Jury Committee's proposal.

The Jury Committee obtained the following information and data: sections of reports dealing with jury issues from the State of Iowa, the Supreme Court of Idaho, the Supreme Judicial Court of Massachusetts and the New York State Judicial Commission on Minorities; recent law review literature concerning the racial, ethnic and gender composition of juries; data compiled from the judges, court employees, attorneys and juror questionnaires distributed by the Task Force; transcripts of public hearings held in each district in the Third Circuit; the Jury plans of each district court in the Third Circuit; statistical reports on the jury pool compiled by each District Court Clerks' Office; and 1990 and 1994 census information compiled by the U.S. Census Bureau.

B. *Results*

1. *The Treatment of Jurors on the Basis of Race, Ethnicity and Gender*

The first area studied by the Jury Committee was the treatment of jurors on the basis of race, ethnicity and gender. To analyze observations about the treatment of jurors, the Committee reviewed the responses to the judges, court employees, attorneys and juror questionnaires. In addition, the Jury Committee reviewed the tran-

scripts of the public hearings held by the Task Force in each district of the Third Circuit.

The survey responses show that judges and court employees felt that jurors were treated fairly on the basis of race, ethnicity and gender. In response to questions asking if the respondent had observed United States Marshals Service personnel, CSOs or court employees treat jurors disparagingly on the basis of race, ethnicity or gender, the average answer for each group of judicial and court employee respondent was either 6.9 or 7.0 on a scale of 1 to 7, with 1 representing "always" and 7 representing "never."

Attorneys' responses to similar questions show that, in general, attorneys also felt that jurors were treated fairly by judicial officers and court employees in the courts in the Third Circuit. Indeed, the average answer to each question on this issue was between 6.8 and 7.0.

With regard to attorneys' treatment of jurors on the basis of race and ethnicity, the average answer was 6.6—still between "rarely" (6.0) and "never" (7.0), but not so clearly as with treatment by judicial officers and court employees. Male and female attorneys of all identified racial and ethnic groups generally indicated that they had not observed other attorneys act in a manner that demeaned nonminority jurors on the basis of gender.

Several comments to the attorney questionnaire elaborated on these responses. Some attorneys indicated that they had heard other attorneys comment on the cognitive ability of jurors based on racial stereotypes. One attorney had observed racially and ethnically offensive behavior by attorneys, including mocking jurors' accents and imitating African-American slang in an offensive manner, but noted that "they normally choose to pick on ethnic and racial minorities regardless of gender." Another attorney commented that "once or twice a judge has treated female jury panel members as silly or irresponsible" based on concerns the juror expressed regarding personal safety or child care problems while serving as a juror.

Other attorneys indicated that jurors themselves may be a source of bias. One attorney commented that while serving on a jury, other jurors made "racial remarks/gender remarks . . . in consideration of a criminal case." Finally, more than one attorney commented that attorneys will value a case differently based on the racial and ethnic composition of a jury and that this valuation may stem from concerns about juror bias or perhaps from the attorney's own bias.

The responses to the jurors' questionnaire show that those jurors surveyed overwhelmingly believed that they were treated fairly by judicial officers, court employees and attorneys in the Third Circuit.³⁸⁸ Only 2 of the 761 juror responses indicated that a judicial officer, court employee or attorney acted in a manner that insulted the juror on the basis of race or ethnicity. Only 1 juror indicated that he or she had observed a judicial officer, court employee or attorney act in a manner that may have insulted another juror on the basis of race or ethnicity. Similarly, only 3 jurors who answered the survey felt that a judicial officer, court employee or attorney had acted in a manner that may have insulted the juror based on his or her gender, and only 1 respondent felt that he or she had observed conduct that may have insulted another juror on the basis of gender. Jurors are, however, somewhat more likely to feel that they have been mistreated on the basis of race, ethnicity or gender by another juror, as 13 responding jurors indicated that they had observed such conduct.

Some of the responding jurors indicated in comments that offenses of other jurors on the basis of race, ethnicity or gender were primarily based on the conduct of a single juror. Five respondents, each of whom served in the same district, wrote that a single juror had made offensive remarks to other jurors. Two of these comments identified the offending juror by the same number (the others did not indicate the juror's number), and 2 indicated that after the matter was brought to the trial judge's attention, the judge excused the juror prior to deliberations.

Other comments indicated that some jurors who provided affirmative answers did so on the basis of the substance of the case or conduct by attorneys that the juror may have misunderstood as being motivated by racial, ethnic or gender bias. One juror commented that his or her affirmative answers were based on testimony elicited during the trial. Another juror indicated that a "witness referred to defendants in a racial manner." One other juror stated that the defense presented the case "as a prejudiced case." A juror in the Western District of Pennsylvania wrote: "The attorneys from one side seemed to look the jurors up and down making judgments about their clothing or possibly checking out the females."

The Jury Committee also reviewed the record of the public hearings conducted by the Task Force for comments relevant to the

388. The jurors' questionnaire was distributed to the 1021 jurors who sat in the Third Circuit between September 3, 1996 and October 15, 1996. Of these, 761 jurors responded, yielding a return rate of 74.53%.

treatment of jurors on the basis of race, ethnicity or gender.³⁸⁹ There were no statements regarding issues relating to the gender of jurors. Moreover, no one commented regarding any specific incidents of jurors being in any way mistreated on the basis of race or ethnicity or regarding any specific instances where jurors mistreated others on the basis of race or ethnicity. An African-American speaker in the Middle District of Pennsylvania, however, did state that jurors had stared at her and had asked who she was and why she was in the courtroom.³⁹⁰ The speaker felt that this behavior may have reflected a racial bias and speculated that perhaps such bias is not often seen in the Middle District because few minorities appear in federal court in that district.

2. *The Racial and Ethnic Composition of Juries*

The second area the Jury Committee studied was whether the composition of jury pools and juries reflects the racial, ethnic and gender composition of the population in the district or jury division in which the jury is impaneled. The subject of racial and ethnic composition of jury pools and juries was raised in public hearings in each district in the Third Circuit and discussed by several speakers. Indeed, it was one of the issues most often raised at the public hearings. There was, however, no similar level of concern about the gender composition of juries—there were no statements in any of the public hearings regarding the gender composition of jury pools and juries.

a. *Perceptions That Minorities Are Under-Represented in the Jury Pool*

Many speakers at the public hearings throughout the Third Circuit expressed their impressions that racial and ethnic minorities were under-represented in the jury pool. In Delaware, 5 speakers stated that the percentage of minorities on federal juries under-represents the percentage of minorities in the population and 7 speakers so commented in Philadelphia. In the Middle District of Pennsylvania, an attorney stated that there is a perception that although the Middle District “is very non-diverse . . . the jury pool

389. Eight hearings were held in principal cities in each district: Philadelphia on October 24, 1996; Pittsburgh on October 24, 1996; Harrisburg on November 18, 1996; Newark on October 30, 1996; Camden on October 2, 1996; Wilmington on November 20, 1996; St. Thomas on November 7, 1996; and St. Croix on November 8, 1996.

390. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 20.

. . . [is] even less diverse.”³⁹¹ An interpreter in the Middle District noted that, although he had been working in federal court since 1981, he did “not recall ever seeing an Hispanic among the jurors.”³⁹² In the Virgin Islands, an attorney who spoke at the public hearing in St. Croix noted that the population of St. Croix is racially heterogeneous, but that juries did not appear to reflect the island’s racial diversity.³⁹³ In particular, the attorney observed that Hispanics rarely appeared in the jury pool even though St. Croix has substantial Puerto Rican and Dominican populations.³⁹⁴

Another attorney observed that the percentage of minority defendants greatly exceeds the percentage of minorities in the jury pool.³⁹⁵ One speaker, a criminal defense attorney, argued that the jury pool should represent the percentage of litigants, not simply the population in the district.³⁹⁶

Several speakers commented that a particular problem with an under-representative jury pool is that it leaves minority litigants with the perception that the federal court is unfair. Some attorneys emphasized that they did not believe the make-up of juries affected verdicts, but that the problem is primarily one of a perception among minority litigants that the court system is unfair.³⁹⁷ An attorney in Delaware noted that minority defendants who are convicted by juries they perceive to be under-representative believe their conviction is “the system’s fault,” and that the defendants therefore may not make their “focus . . . more internal.”³⁹⁸ A Federal Public Defender in New Jersey reported that a young African-American client had surveyed an all-Caucasian, predominately middle-aged, middle-to-upper-class male jury and asked, “[W]here is my peers?”³⁹⁹

One former Assistant United States Attorney explained that the perception of unfairness is not simply a complaint about unfair results, but about a lack of knowledge and understanding of the life experiences of poor and minority litigants, particularly in the con-

391. *Id.* at 16.

392. *Id.* at 38-39.

393. *See Public Hearings: St. Croix, Virgin Islands, supra* note 40, at 36.

394. *See id.*

395. *See Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 57.

396. *See Public Hearings: Pittsburgh, Pennsylvania, supra* note 26, at 66-67.

397. *See Public Hearings: Wilmington, Delaware, supra* note 37, at 99.

398. *Id.* at 99.

399. *Public Hearings: Newark, New Jersey, supra* note 9, at 47.

text of relations with law enforcement officials, by those hearing their cases.⁴⁰⁰

Some speakers stated that they believed that under-representation not only created a perception of unfairness, but that under-representation also leads to unfair results. One of these speakers said that nonminority jurors do not value the pain and suffering of minority plaintiffs as highly as minority jurors do.⁴⁰¹

Several speakers stated that minorities were under-represented on voter registration lists, a principle source list for the jury pool. A speaker in Delaware stated: “[T]here simply is no question that the minority community . . . does not register at the same rate the majority community does.”⁴⁰² An attorney in the Middle District of Pennsylvania agreed that minorities are under-represented on voter registration lists.⁴⁰³ A speaker in the Western District of Pennsylvania commented that African-Americans, Hispanics, the young and the poor register to vote at rates significantly lower than the rest of the population and that the unsupplemented use of such source lists causes under-representation of minorities.⁴⁰⁴

A number of speakers suggested that additional source lists be used to select the jury pool. One speaker stated that more than 30 states supplement their voter lists with names obtained from driver’s license lists, telephone directories, tax rolls, town resident lists and utility customer lists.⁴⁰⁵ Another speaker stated that using voter registration lists and driver’s license lists as sources would be insufficient because minorities are under-represented in both such lists.⁴⁰⁶ He recommended supplementing the jury pool with lists such as welfare lists, unemployment compensation lists, utility consumer lists, city wage and property tax lists.⁴⁰⁷ Another speaker observed that many experts have studied the issue of the racial and ethnic composition of jury pools and recommended that such experts be consulted regarding possible changes.⁴⁰⁸ An attorney in St. Croix recommended consulting with representatives of the

400. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 20.

401. See *id.* at 7-8.

402. *Public Hearings: Wilmington, Delaware*, *supra* note 37, at 49.

403. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 57.

404. See *Public Hearings: Pittsburgh, Pennsylvania*, *supra* note 26, at 66-67.

405. See *id.*

406. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 52.

407. See *id.*

408. See *Public Hearings: Pittsburgh, Pennsylvania*, *supra* note 26, at 66-67.

under-represented groups to determine how to increase their representation in the jury pool.⁴⁰⁹

Attorneys surveyed further reflected this perception regarding the racial composition of juries and the jury pool and the corollary that there is no similar perception regarding gender. Table 139 shows the response of attorneys to a question inquiring whether, in their experience in the district in which they practice, the jury panels contained a number of persons of different race and ethnicity to reflect the population in that district. Although attorneys of all racial and ethnic backgrounds perceived some degree of under-representation, minority attorneys perceived that under-representation occurred more frequently. Male and female attorneys of the same racial and ethnic group were equally likely to perceive racial and ethnic under-representation. There were no significant differences in responses among the districts in the circuit.

TABLE 139: ATTORNEYS' RESPONSES TO QUESTION: "DO JURY PANELS CONTAIN A REPRESENTATIVE NUMBER OF PERSONS OF DIFFERENT RACE AND ETHNICITY?"

Race and Gender of Responding Attorneys (N= Number of Respondents)	Average	Percentages of Responses						
		Always 1	2	3	4	5	6	Never 7
All attorneys (N=532)	3.4	11.1%	28.8%	16.0%	18.6%	12.6%	7.9%	5.1%
Caucasian male (N=400)	3.1	12.8%	32.0%	15.8%	19.3%	11.5%	7.0%	1.8%
Caucasian female (N=70)	3.6	7.1%	21.4%	21.4%	20.0%	17.1%	8.6%	4.3%
African-American male (N=28)	4.6	7.1%	14.3%	17.9%	3.6%	17.9%	7.1%	32.1%
African-American female (N=14)	5.4	0.0%	7.1%	7.1%	14.3%	14.3%	28.6%	28.6%
Asian-American male (N=3)	5.3	0.0%	0.0%	0.0%	33.3%	0.0%	66.7%	0.0%
Asian-American female (N=1)	4.0	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Hispanic male (N=7)	4.9	0.0%	28.6%	0.0%	14.3%	14.3%	0.0%	42.9%
Hispanic female (N=3)	3.3	33.3%	0.0%	0.0%	33.3%	33.3%	0.0%	0.0%

SOURCE: Attorney Survey, Question 32.

409. See *Public Hearings: St. Croix, Virgin Islands*, *supra* note 40, at 36.

As Table 140 shows, attorneys have a similar perception regarding the composition of actual juries. Again, all attorneys generally perceived that juries had a lack of representation "sometimes." Once again, minorities were more likely to perceive under-representation than Caucasian attorneys, but the respondent's gender and district of practice did not significantly change his or her answer.

TABLE 140: ATTORNEYS' RESPONSES TO QUESTION: "DO ACTUAL JURIES CONTAIN A REPRESENTATIVE NUMBER OF PERSONS OF DIFFERENT RACE/ETHNICITY?"

Race and Gender of Responding Attorneys (N= Number of Respondents)	Percentages of Responses							
	Average	Always 1	2	3	4	5	6	Never 7
All attorneys (N=533)	3.6	9.4%	22.1%	18.6%	19.7%	15.4%	9.2%	5.6%
Caucasian male (N=401)	3.4	10.5%	25.7%	18.5%	19.7%	15.0%	8.7%	2.0%
Caucasian female (N=70)	3.8	7.1%	11.4%	27.1%	21.4%	22.9%	4.3%	5.7%
African-American male (N=28)	4.9	7.1%	14.3%	7.1%	14.3%	3.6%	17.9%	35.7%
African-American female (N=14)	5.1	0.0%	7.1%	14.3%	14.3%	14.3%	21.4%	18.6%
Asian-American male (N=3)	5.3	0.0%	0.0%	0.0%	33.3%	0.0%	66.7%	0.0%
Asian-American female (N=1)	4.0	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Hispanic male (N=7)	5.3	0.0%	14.3%	0.0%	14.3%	28.6%	0.0%	42.9%
Hispanic female (N=3)	3.3	33.3%	0.0%	0.0%	33.3%	33.3%	0.0%	0.0%

SOURCE: Attorney survey, Question 33.

With regard to the gender composition of jury panels and pools, Table 141 demonstrates that attorneys did not perceive as great a degree of under-representation. The average answer among all attorneys to a question asking whether the gender composition of jury pools agrees with the population was 2.6 on a scale of 1 to 7, with 1 representing "always" and 7 representing "never." There were no statistically significant differences based on the race or ethnicity of the attorneys. In addition, there were no statistically significant differences among the districts with regard to the gender composition of jury panels. In fact, the only statistically signifi-

cant difference regarding the gender composition of actual juries was that attorneys who practice in Delaware were slightly more likely to believe that juries were representative of the gender of the population than were attorneys in other districts.

TABLE 141: ATTORNEYS' RESPONSES TO QUESTION: "DO JURY PANELS CONTAIN A REPRESENTATIVE NUMBER OF MEN AND WOMEN?"

Race and Gender of Responding Attorneys (N= Number of Respondents)	Average	Percentages of Responses						
		Always 1	2	3	4	5	6	Never 7
All attorneys (N=506)	2.6	26.5%	35.2%	13.0%	9.5%	8.3%	6.7%	0.8%
Caucasian male (N=382)	2.6	28.5%	34.6%	13.1%	8.4%	8.4%	6.3%	0.8%
Caucasian female (N=64)	2.8	20.3%	34.4%	14.1%	14.1%	7.8%	9.4%	0.0%
African-American male (N=26)	3.0	23.1%	30.8%	11.5%	7.7%	11.5%	11.5%	3.8%
African-American female (N=14)	2.7	7.1%	64.3%	0.0%	14.3%	7.1%	7.1%	0.0%
Asian-American male (N=3)	2.7	33.3%	0.0%	33.3%	33.3%	0.0%	0.0%	0.0%
Asian-American female (N=1)	4.0	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Hispanic male (N=7)	2.3	28.6%	42.9%	14.3%	0.0%	14.3%	0.0%	0.0%
Hispanic female (N=3)	2.3	33.3%	33.3%	0.0%	33.3%	0.0%	0.0%	0.0%

SOURCE: Attorney Survey, Question 34.

More than a dozen attorneys volunteered comments relating to the racial and ethnic composition of the jury pool and juries. The general view was that there was a lack of minority representation and that minority litigants were very concerned about the issue. Attorneys also commented on whether the composition of juries affected the outcome of cases. One attorney wrote: "There are so few people of color selected through the present jury system that most attorneys who themselves are minority or who represent minorities are deeply concerned about fairness in decision making in the federal court and often (if possible) seek to use the local state courts."

Several attorneys noted that the racial and ethnic composition of juries affected the way they valued cases for settlement purposes and that judges encouraging settlement had expressly commented

on the racial and ethnic composition of the jury as affecting the value of a case. Other comments indicated that jurors may be inclined to disbelieve witnesses if they could not understand their accents or manner of speaking. One attorney noted that when he or she had served as a juror, other jurors made "racial remarks/gender remarks" during deliberations. In contrast, another attorney commented: "Juries and even jury panels are not representative of ethnic or gender mixes in the district, nor need they be. The survey . . . incorrectly assumes that the only significant [source] of ethnic unfairness is race. . . . [E]conomic status and even ethnic divisions among Caucasians are all sources of [unfairness] . . ."

Three attorneys commented that males were under-represented on juries, and one indicated that men were more likely than women to be excused upon their request. One attorney wrote: "Employed males tend to avoid being called for jury service."

b. The Process by Which the Jury Pool Is Selected in Each District

The Jury Committee reviewed the process by which the jury pool is selected in each of the districts in the Third Circuit. The selection of jury pools is governed by the 1968 Jury Selection and Service Act ("JSS Act").⁴¹⁰ The JSS Act requires each district to devise and implement a plan following the provisions of the statute and designed to meet its express policies: "that all litigants in Federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community in the district or division wherein the court convenes"; that all citizens have the opportunity and obligation to serve as jurors; and that no citizens be excluded from jury service on the basis of "race, color, religion, sex, national origin or economic status."⁴¹¹ Districts submit reports on the jury selection process within their jurisdiction to the AO of the Courts as directed. The statute provides that names of prospective voters are to be taken from either voter registration lists or lists of actual voters and that a district's "plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title."⁴¹²

410. 28 U.S.C. §§ 1861-1869 (1994).

411. *Id.* §§ 1861, 1862.

412. The Jury Committee has described the 1968 Jury Selection and Service Act only to explain the process by which jury pools are selected. We do not intend to comment in any way on whether any particular jury plan comports with the law.

Each of the districts in the Third Circuit has developed a plan pursuant to the statute. As the statute instructs, each plan uses voter registration lists as a source of names of prospective jurors. The Virgin Islands, Delaware, Middle District of Pennsylvania and Western District of Pennsylvania do not supplement the pool with any other lists. Prior to October 1996, the District of New Jersey selected jurors from a combined list of registered voters and licensed drivers. In October 1996, the District of New Jersey amended its jury plan to select jurors from a combined list of registered voters, licensed motor vehicle operators, filers of state gross income tax returns and filers of Homestead Rebate application forms. As information reflecting the racial and ethnic composition of this new merged list is not yet available, the statistics reported herein for New Jersey are based on the jury pool compiled from the combined list of registered voters and licensed drivers.

Prior to June 19, 1995, the Eastern District of Pennsylvania drew names of prospective jurors solely from the list of registered voters. On June 19, 1995, the Eastern District of Pennsylvania commenced a two-year pilot program in which names of prospective jurors were drawn from a combined list of registered voters and licensed motor vehicle operators. As of July 1997, the Eastern District of Pennsylvania has returned to the system of using the list of registered voters exclusively.

In each district in the circuit, names are randomly selected from the lists (or the "master wheel") at times designated by the court. After a person's name is drawn, the court sends the person a juror qualification form. The court uses the qualification forms to create qualified juror wheels from which people are called for jury service.

c. Statistical Comparison of the Racial and Ethnic Composition of the Jury Pool with the Population

The Jury Committee asked each District Court Clerk's Office to provide information showing the racial and ethnic composition of their respective jury pools. The Clerk's Offices for the Districts of Delaware, New Jersey and the Eastern, Middle and Western Districts of Pennsylvania provided such information. The District of the Virgin Islands reported that they did not begin to keep such data until 1997 and, therefore, did not have sufficient data available for analysis.⁴¹³

⁴¹³ The "jury pool" in each district reflects the information each district provided. The Districts of Delaware and New Jersey provided statistics for all jurors

The Jury Committee compared the information it received from the Clerk's Offices to the most pertinent and recent available census data.⁴¹⁴ Because only people over 18 years of age are eligible for jury service, the Jury Committee only considered the population of people over 18 years of age. For the District of Delaware, the 1994 population estimates, derived from the 1990 census, were available and were utilized by the Jury Committee. Because the 1994 data was available only by state, and because Pennsylvania is divided into three districts, and the District of New Jersey selects juries in three jury vicinages, it was necessary to have census data divided by county for the analysis of the District of New Jersey and the districts in Pennsylvania. Therefore, the Jury Committee was required to use 1990 census population data for those districts.⁴¹⁵

The results of the Jury Committee's comparison of the racial and ethnic composition of the jury pools with the population are presented in the figures and text below.⁴¹⁶ The results of this comparison are also represented in Table 145.

i. District of Delaware

The District of Delaware provided statistics showing the racial and ethnic composition of all 7053 persons who completed juror qualification forms for the 1992-1994 jury pool. As Figure 12 shows, the percentage of African-Americans and Hispanics in the jury pool

who filled out qualification forms. The Eastern, Middle and Western Districts of Pennsylvania provided statistical information on qualified jurors rather than all prospective jurors who returned qualification forms. Prospective jurors are disqualified by any one of several criteria set forth in a district's jury plan. Disqualifying criteria include illiteracy, mental or physical infirmity certified by a physician as rendering the person incapable of serving as a juror and a pending felony charge or sentence.

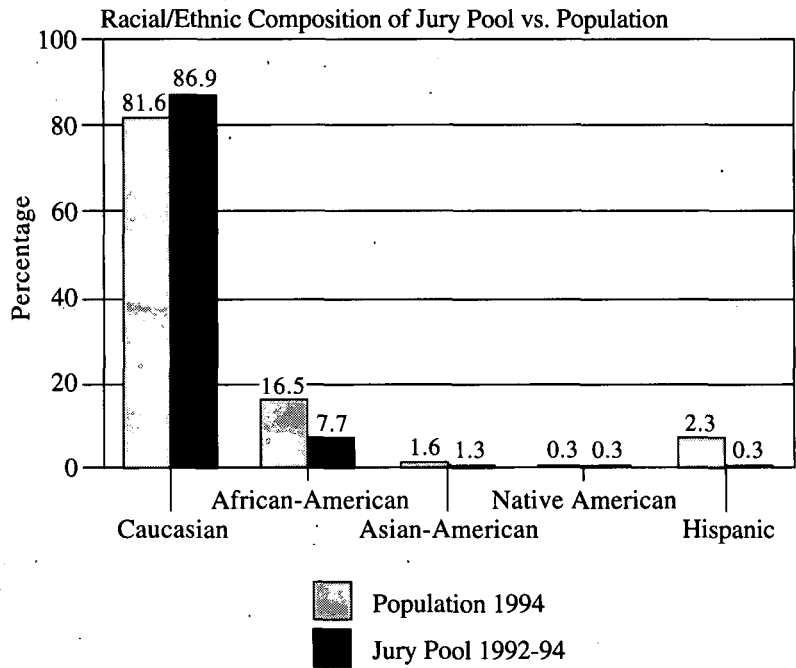
414. Several limitations in the available data may affect the Jury Committee's comparison of the composition of the jury pool with the relevant population as of the date of this Report. One limitation is that the census data included persons not legally eligible for jury service, such as noncitizens and convicted felons. Another limitation is the age of the available census data. In general, the minority population in the Third Circuit has grown since 1990. For example, in 1990 the population in the District of New Jersey for all persons was 75.0% Caucasian, 12.7% African-American, 3.3% Asian-American, 0.2% Native American and 8.8% Hispanic. In 1994, the population was 71.5% Caucasian, 14.3% African-American, 4.5% Asian-American, 0.2% Native American and 9.4% Hispanic. Similarly, in 1990, the population in the Middle District of Pennsylvania was 95.2% Caucasian, 2.6% African-American, 0.7% Asian-American, 0.1% Native American and 1.0% Hispanic. In 1994 the population was 95.0% Caucasian, 2.9% African-American, 0.9% Asian-American, 0.1% Native American and 1.1% Hispanic.

415. The census data is from the U.S. Census Bureau, STF 1 tables.

416. Due to rounding and the exclusion of the small "other" or "unknown" categories that occur in some of the source data, the sum of the percentages presented will not always equal 100%.

in the District of Delaware is significantly less than the percentage of African-Americans and Hispanics in the population.⁴¹⁷ In addition, Asian-Americans are slightly under-represented in the jury pool.

FIGURE 12: DISTRICT OF DELAWARE (PERCENTAGES)



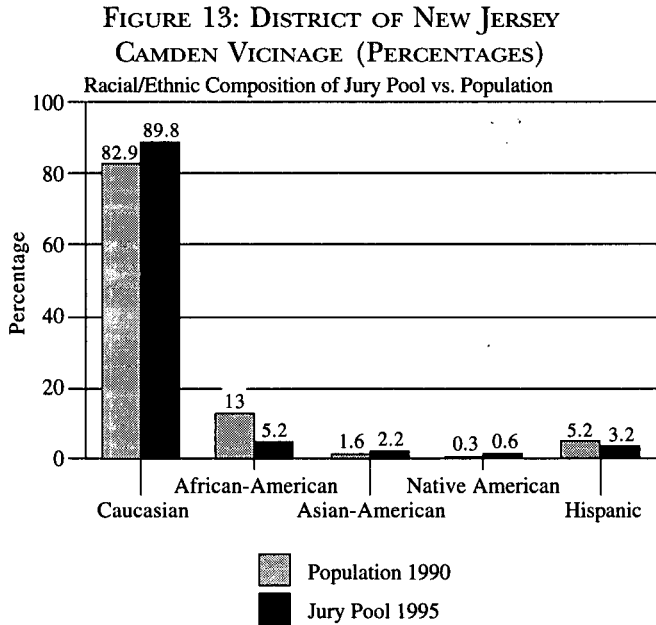
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

ii. District of New Jersey

The District of New Jersey is divided into 3 separate vicinages for purposes of selecting juries: Camden, Newark and Trenton. The Clerk's Office provided data regarding the racial and ethnic composition of these vicinages based on random samples of the completed juror qualification forms. In the Camden jury division, the sample was 500 of 16,619 completed forms; in Newark, 500 of 36,853 completed forms; and in Trenton, 500 of 18,614 completed

417. As the category Hispanic is an ethnicity rather than a race, the calculation of Hispanic was made separately from the calculation of racial categories. For example, the same person may be counted both as African-American and Hispanic. This distinction was made both by the census data and the statistics provided by the Clerk's Offices, except where otherwise indicated.

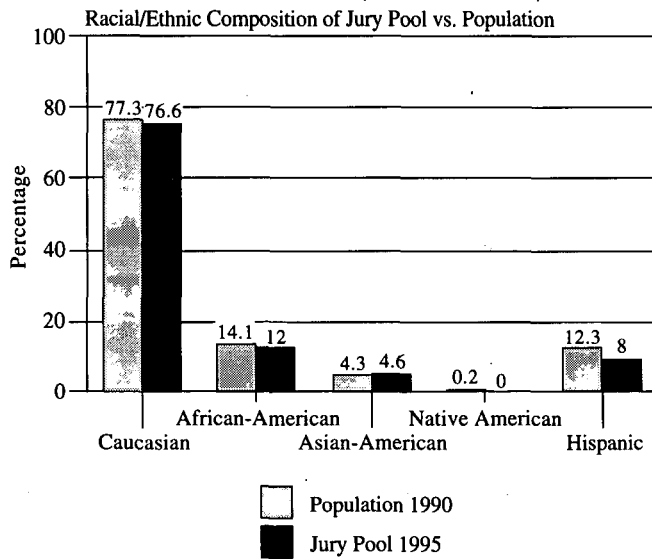
forms. As Figure 13 shows, in each jury division, African-Americans are under-represented in the jury pool.⁴¹⁸



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

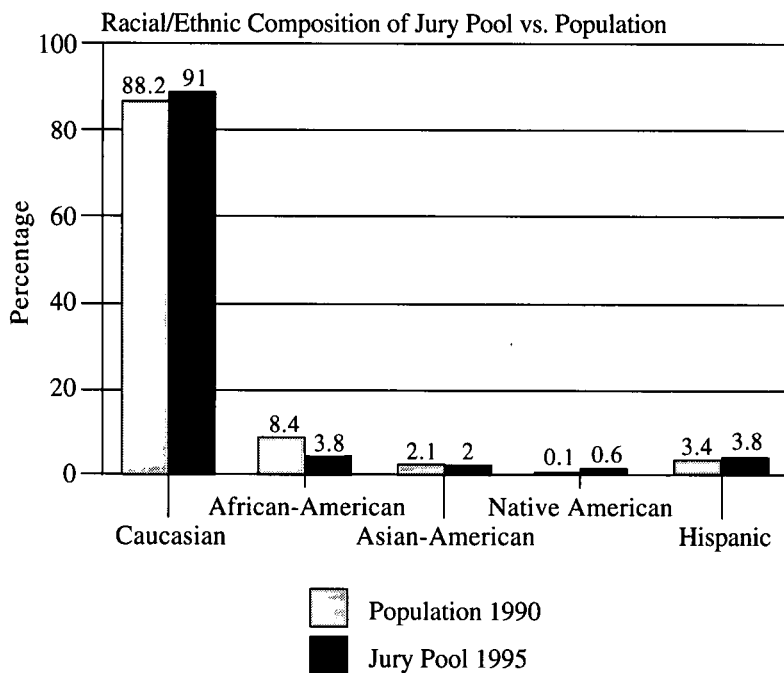
418. The figure for Newark shows that the percentages of all categories in the jury pool are less than the percentages in the population. This results from the differing methods in which the District Court Clerk's Office and the Census Bureau gathered data. The Clerk's Office had a larger "Other" category than the Census Bureau. In addition, a few respondents in the jury pool identified themselves as multiracial, a category not recognized by the Census Bureau.

FIGURE 13 (CON.): DISTRICT OF NEW JERSEY
NEWARK VICINAGE (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 13 (CON.): DISTRICT OF NEW JERSEY
TRENTON VICINAGE (PERCENTAGES)



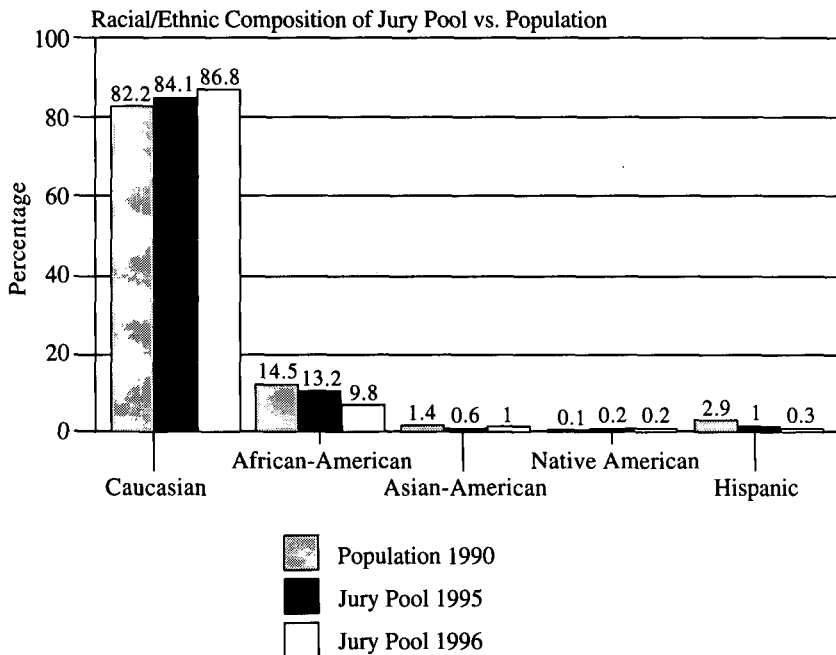
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

iii. Eastern District of Pennsylvania

The Eastern District of Pennsylvania provided statistical data based on the 37,159 qualified jurors in the pool as of June 1995, when it was based on the list of registered voters.⁴¹⁹ The Eastern District of Pennsylvania also provided statistical data for the 25,740 qualified jurors in the pool as of December 1996, based on both the list of registered voters and the list of licensed drivers. Both of these jury pools are represented in Figure 14, which shows that African-Americans, Asian-Americans and Hispanics are under-represented in the jury pool. Interestingly, the percentage of African-Americans and Hispanics in the jury pool decreased when the list of voters was supplemented with the list of licensed drivers.

419. The Clerk's Office in the Eastern District of Pennsylvania provided data listing as separate categories Black Hispanic, White Hispanic, American Indian Hispanic, Asian Hispanic and Other Hispanic. For purposes of statistical comparison on the basis of race and ethnicity, the Jury Committee counted these groups with the identified race, then made a separate calculation for Hispanics by combining the individual Hispanic groups. For example, Black Hispanics were counted as African-Americans, then separately as Hispanics.

FIGURE 14: EASTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

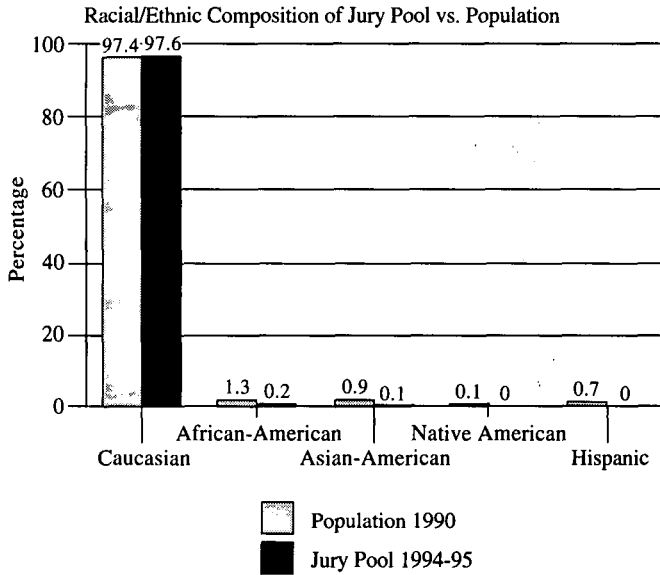
iv. Middle District of Pennsylvania

The Middle District of Pennsylvania is divided into 3 divisions for the purpose of jury selection: Williamsport, Harrisburg and Scranton. The Middle District provided statistics showing the racial and ethnic composition of the entire pool of qualified prospective jurors for each division as of 1994-1995. In the Williamsport division, the pool consists of 2525 people; in the Harrisburg division, 3084 qualified prospective jurors; and in the Scranton division, 3152 qualified prospective jurors.⁴²⁰ Figure 15 shows that while the minority population is rather small in each jury division, the percentage of African-Americans, Asian-Americans and Hispanics in the jury pool in each jury division is even smaller.⁴²¹

420. Because the Middle District of Pennsylvania provided statistics based on all qualified prospective jurors rather than random samples, the Jury Committee was able to analyze the composition of prospective jurors within the district as a whole, as well as within each jury division.

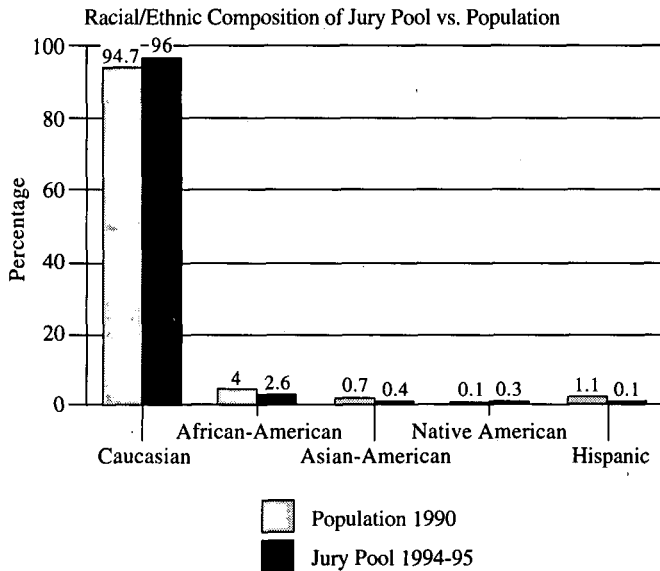
421. The figure for Scranton shows that the percentages of all categories in the jury pool are less than the percentages in the population. This results from the differing methods in which the District Court Clerk's Office and the Census Bureau gathered data. The Clerk's Office had a larger "Other" category than the Census Bureau. In addition, a few respondents in the jury pool identified themselves as multiracial, a category not recognized by the U.S. Census Bureau.

FIGURE 15: MIDDLE DISTRICT OF PENNSYLVANIA
WILLIAMSPORT DIVISION (PERCENTAGES)



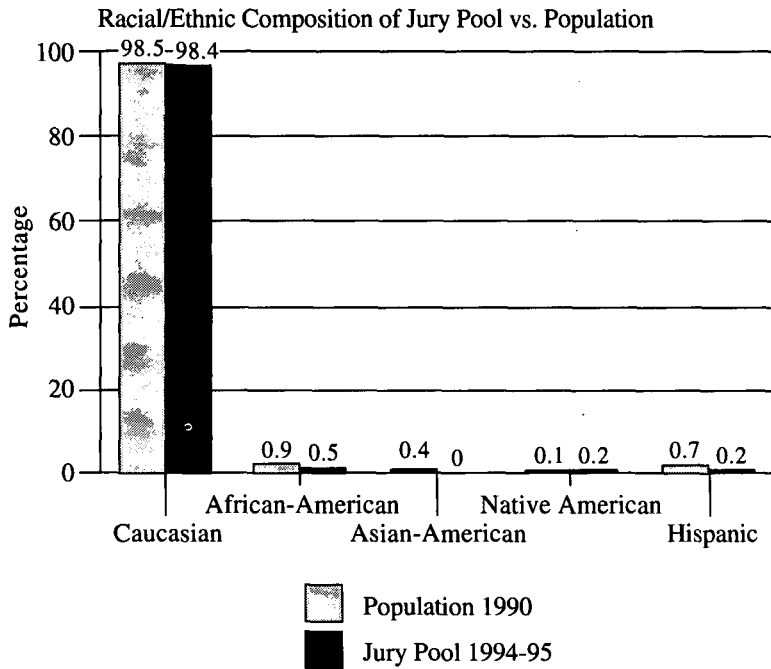
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 15 (CON.): MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 15 (CON.): MIDDLE DISTRICT OF PENNSYLVANIA
SCRANTON DIVISION (PERCENTAGES)



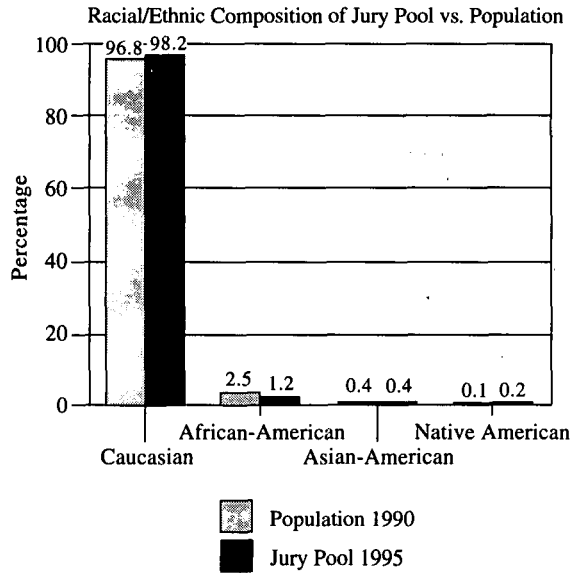
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

v. Western District of Pennsylvania

The Western District of Pennsylvania is also comprised of 3 divisions for the purpose of selecting jurors: Erie, Johnstown and Pittsburgh. The Western District provided statistics showing the racial and ethnic composition of its 1995 pools of qualified prospective jurors based on random samples. In the Erie division, the sample consisted of 500 of 2560 people in the pool. In the Johnstown division, the sample consisted of 130 of 1600 qualified prospective jurors in the pool. In the Pittsburgh division, the sample was of 500 of 17,180 qualified prospective jurors in the jury pool. The information provided did not include statistics showing the percentage of Hispanics in the Erie division or the percentage of Native Americans in the Johnstown and Pittsburgh divisions.

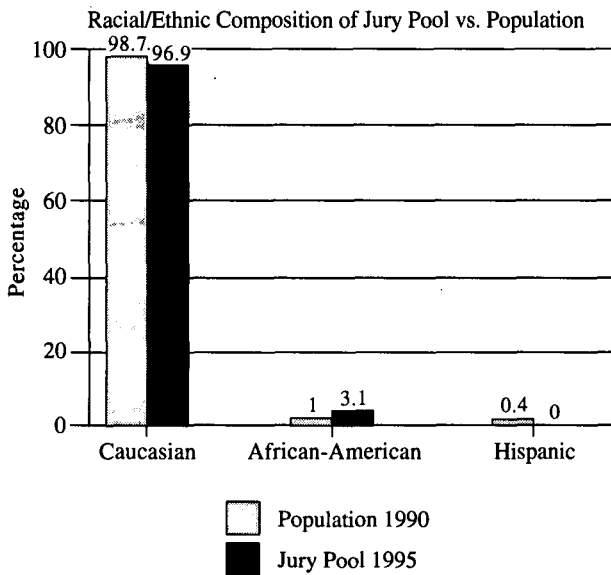
As Figure 16 shows, African-Americans are under-represented in the jury pools in the Erie and Pittsburgh divisions. Otherwise, minorities are not significantly under-represented in these jury pools.

FIGURE 16: WESTERN DISTRICT OF PENNSYLVANIA
ERIE DIVISION (PERCENTAGES)



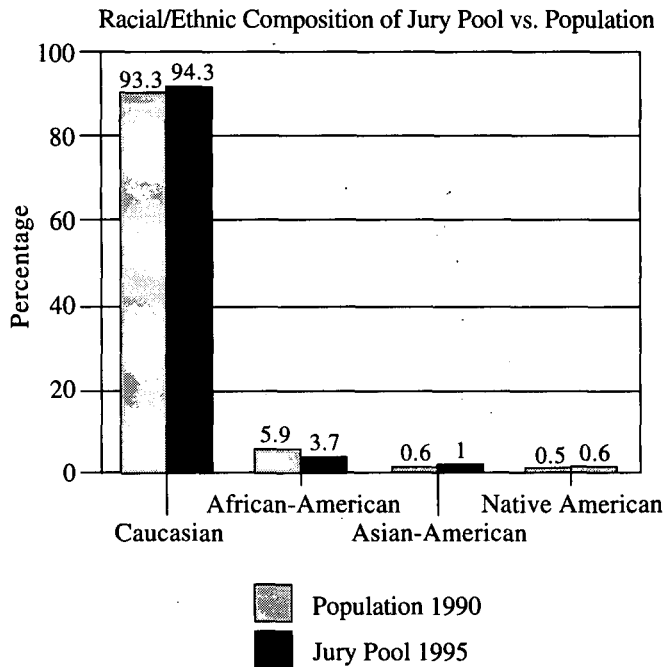
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 16 (CON.): WESTERN DISTRICT OF PENNSYLVANIA
JOHNSTOWN DIVISION (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 16 (CON.): WESTERN DISTRICT OF PENNSYLVANIA
PITTSBURGH DIVISION (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

vi. District of the Virgin Islands

The District of the Virgin Islands reported that until 1997 they kept no statistics on the racial and ethnic composition of their jury pools, and that adequate data for study of its jury pools has not yet been compiled.⁴²²

d. Statistical Comparison of the Gender Composition of Jury Pool with the Population and Within Racial and Ethnic Groups in the Population

The Jury Committee also asked each District Court Clerk's Office to provide information on the gender composition of their jury pools. The results of this comparison are represented in terms of percentage of females in the text and figures below and in Table

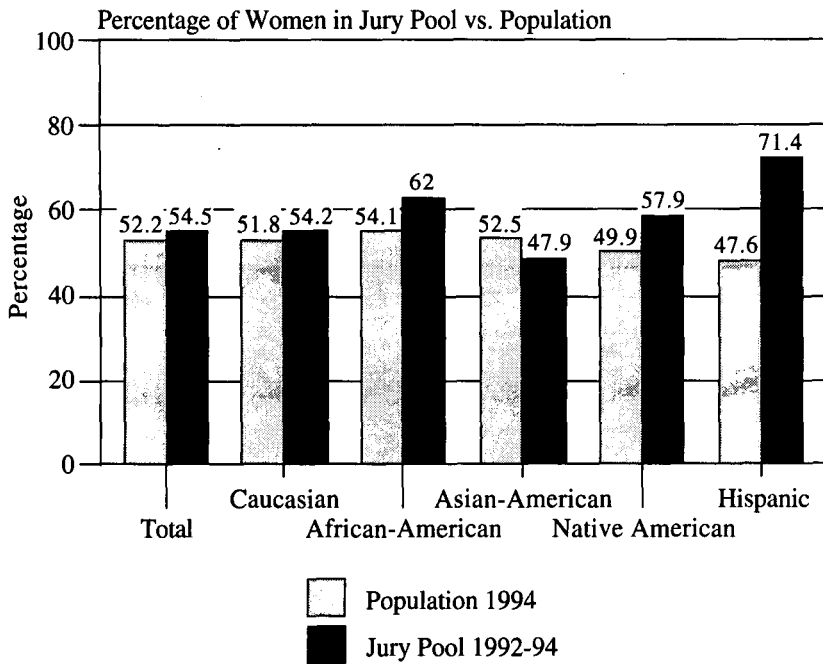
422. The Jury Committee is aware that there is a large transient population in the Virgin Islands. This population may affect the extent to which the racial, ethnic and gender composition of the jury pools in the Virgin Islands comports with the racial, ethnic and gender composition of the general population in the district.

146. Table 147 represents the results of the comparison in terms of percentage of males.

i. District of Delaware

As Figure 17 illustrates, in the District of Delaware, the percentage of females in the jury pool slightly exceeds the percentage of females in the population (2.3%). Among African-Americans, Native Americans and Hispanics, however, the percentage of females in each of these groups in the jury pool exceeds the percentage of females in these groups in the population by a more significant amount: 7.9% for African-Americans, 8% for Native Americans and 23.8% for Hispanics.

FIGURE 17: DISTRICT OF DELAWARE (PERCENTAGES)



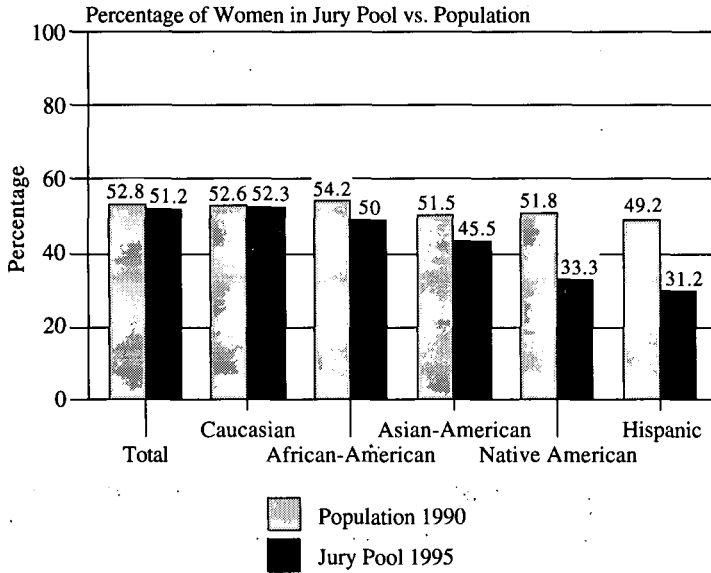
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

ii. District of New Jersey

Figure 18 demonstrates that the percentage of females in the jury pool exceeds the percentage of females in the population in the Newark and Trenton jury vicinages. In Camden, however, the percentage of females in the jury pool (1.6%) is slightly less than in

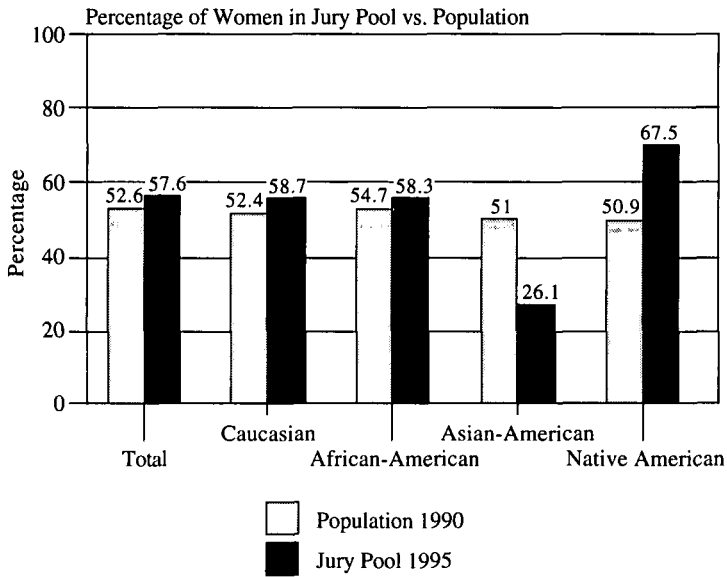
the population. The patterns in each of these jury vicinages remain constant, for the most part, among all racial and ethnic groups of jurors in each jury division. Note that in all 3 jury vicinages, the percentage of females among Asian-Americans in the jury pool is substantially less than the percentage of females among Asian-Americans in the population.

FIGURE 18: DISTRICT OF NEW JERSEY
CAMDEN VICINAGE (PERCENTAGES)



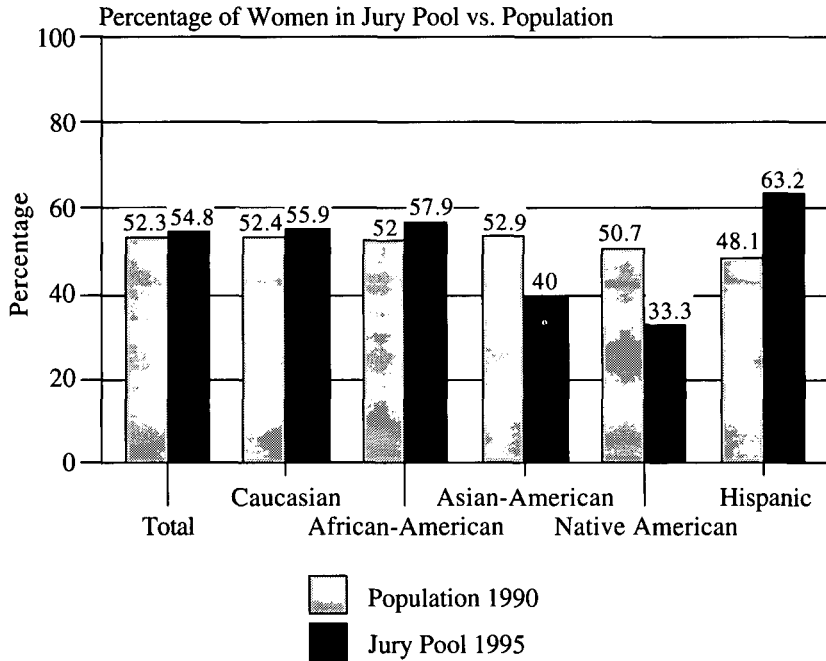
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 18 (CON.): DISTRICT OF NEW JERSEY
NEWARK VICINAGE (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

FIGURE 18 (CON.): DISTRICT OF NEW JERSEY
TRENTON VICINAGE (PERCENTAGES)

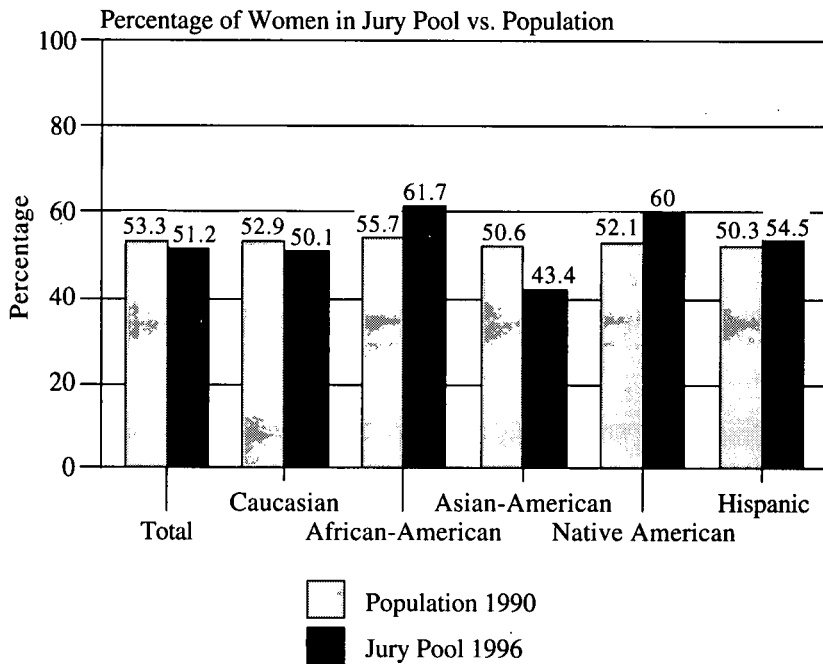


SOURCE: U.S. Census Bureau and District Court Clerk's Office.

iii. Eastern District of Pennsylvania of Pennsylvania

As Figure 19 shows, the percentage of females in the jury pool in the Eastern District of Pennsylvania is slightly less than in the general population. Among African-Americans and Hispanics, however, the opposite is true: the percentage of females in the jury pool exceeds the percentage of females in these groups in the population.

FIGURE 19: EASTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)



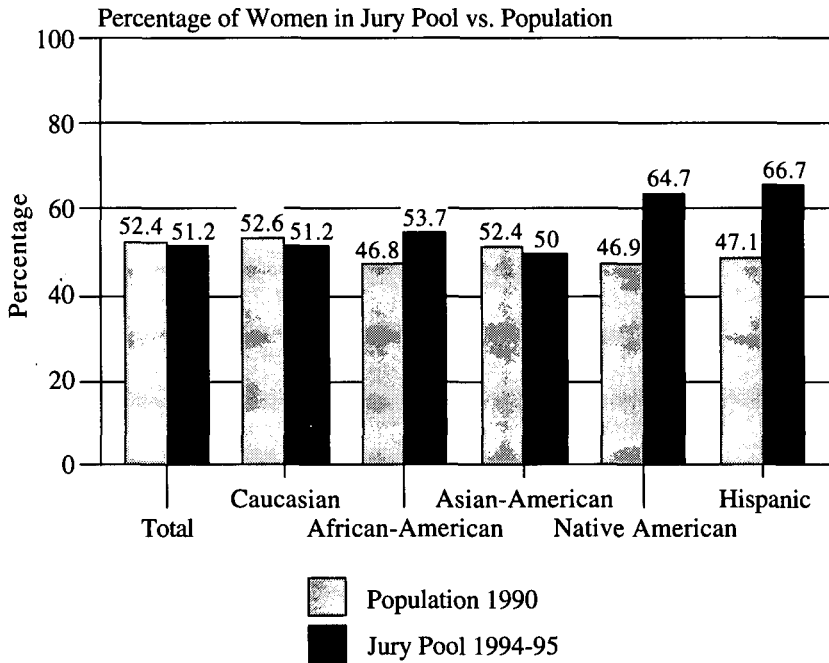
SOURCE: U.S. Census Bureau and District Court Clerk's Office.

iv. Middle District of Pennsylvania

Figure 20 sets forth the gender composition of the jury pools in the Middle District of Pennsylvania.⁴²³ In the jury pool as a whole, and among Caucasians and Asian-Americans, the percentage of females is slightly smaller than that of the general population. Among African-Americans, Native Americans and Hispanics, the percentage of females in the jury pool exceeds the percentage of females in the population.

423. Because the number of minorities is very small in the jury pools in each jury division in the Middle District, the Jury Committee did not graph the gender composition within each jury division. That information, however, is included in Table 146 and Table 147.

FIGURE 20: MIDDLE DISTRICT OF PENNSYLVANIA (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

v. Western District of Pennsylvania

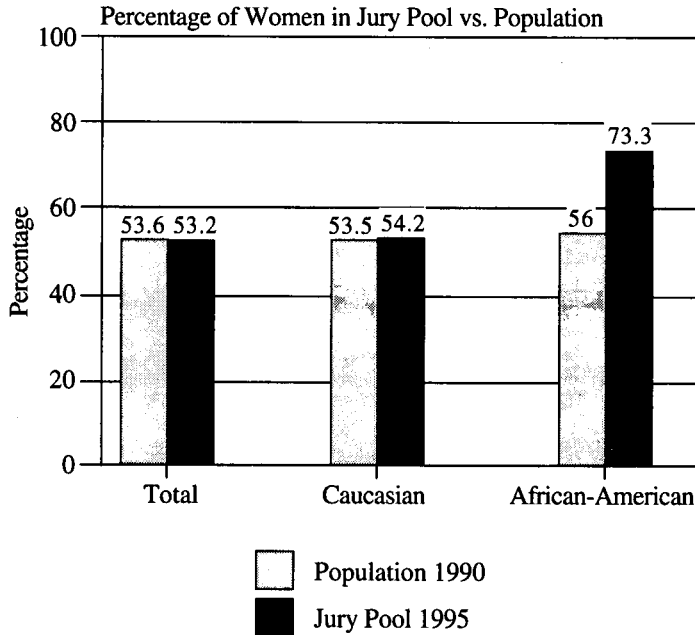
In the Erie division of the Western District of Pennsylvania, the gender composition of the jury pool as a whole essentially equals the gender composition of the population. In the Johnstown division, the percentage of all females in the jury pool (3%) slightly exceeds the percentage in the population. In each of these divisions, the number of minority jurors in the samples provided by the Clerk's Office were too small to yield meaningful information on the gender composition within racial and ethnic groups in the jury pools.⁴²⁴

Figure 21 shows the gender composition of the jury pool in the Pittsburgh division of the Western District of Pennsylvania. The percentage of all females in the jury pool and of Caucasian females essentially equals that in the general population. The percentage of females among African-Americans in the jury pool (17.3%), how-

424. Because the statistics for the jury pools in the jury divisions in the Western District of Pennsylvania are based on samples, the Jury Committee did not analyze the gender composition of the jury pool for the district as a whole.

ever, greatly exceeds the percentage of females in the African-American population in the Pittsburgh division.

FIGURE 21: WESTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)



SOURCE: U.S. Census Bureau and District Court Clerk's Office.

vi. District of the Virgin Islands

The District of the Virgin Islands reported that they had no available statistics on the gender composition of their jury pools.

e. Perceptions as to the Selection of Jurors from a Jury Panel

The judges' questionnaire gathered information on the selection of jurors from a panel of prospective jurors based on race and ethnicity. Judges were asked whether racial and ethnic minorities on a jury panel were more or less likely to be excused peremptorily than nonminority members of the panel. Table 142 shows their responses. It suggests that minority judges believed that racial and ethnic minorities are more likely to be challenged peremptorily than nonminorities.

TABLE 142: JUDGES' RESPONSES TO QUESTION: "ARE RACIAL AND ETHNIC MINORITIES ON THE JURY PANEL MORE OR LESS LIKELY TO BE EXCUSED PEREMPTORILY THAN NON-MINORITY MEMBERS, OR IS THERE NO DIFFERENCE?"

Race/Ethnicity of Judges Responding	More Likely	Less Likely	No Difference	Don't Know
Nonminority judges (N=95)	13.7%	7.4%	38.9%	40.0%
Minority judges (N=7)	57.1%	0.0%	14.3%	28.6%
All judges (N=102)	17.0%	7.0%	37.0%	39.0%

Note: N = total number within each category.

SOURCE: Judges Survey, Question 36.

Judges were also asked if female jurors or minority female jurors were more or less likely to be excused peremptorily than other jurors. Judges overwhelmingly answered that they observed no difference or that they did not know. There were no significant differences in the answers based on the demographics of the judges. The only comment provided by a judge based on these questions indicated that generalities on the exercise of peremptory challenges were difficult and that tendencies regarding the exercise of such challenges varied depending on the facts of any particular case.

While the attorneys' questionnaire did not ask specifically about the effect of race, ethnicity or gender on jury selection, several respondents provided comments on the subject. Some argued that voir dire was not sufficiently extensive to allow potential racial and ethnic biases of prospective jurors to be adequately explored. Others noted that attorneys placed considerable weight on the racial, ethnic and gender composition of the jury, and that the matter is frequently discussed among counsel during and after jury selection.

Several speakers at public hearings throughout the Third Circuit addressed issues involving jury selection. In the Eastern District of Pennsylvania, one speaker expressed concern that the prohibition on race-based peremptory challenges is very difficult to enforce because it is extremely difficult to assess an attorney's reasons for challenging a prospective juror.⁴²⁵ Two speakers in the Middle District of Pennsylvania shared this concern, and one noted that the difficulty is multiplied when there are few minorities on the panel because no pattern of race-based challenges is discernible.⁴²⁶

425. See *Public Hearings: Philadelphia, Pennsylvania*, *supra* note 32, at 10.

426. See *Public Hearings: Harrisburg, Pennsylvania*, *supra* note 27, at 10.

The only other comments regarding the treatment of jurors on the basis of race or ethnicity related to voir dire. In the Eastern District of Pennsylvania, an attorney said that no judge had ever refused his request to inquire whether prospective jurors would be prejudiced against the attorney's minority clients on the basis of race. The attorney added, however, that in his experience of participating in "jury trials for 20 years in the District Court here . . . only one person stood up and honestly said, 'I cannot be fair to a black litigant.'"⁴²⁷ The attorney said that he continues to request that the court ask about racial or ethnic bias "to raise the consciousness of the jury panel to let them know that any prejudices that they have or preconceived ideas about minorities have no place in the courtroom."⁴²⁸ Another attorney, however, who has practiced in the circuit for about five years said: "I was shocked recently at the number of members of the jury panel who during jury selection actually stood up and said, 'I don't think I can render a fair verdict because I don't like black people.'"⁴²⁹ Another attorney commented that during the recent MOVE trial in Philadelphia, "[a] few prospective jurors admitted they could not be fair sitting in judgment of an African-American plaintiff because of bias."⁴³⁰

Other speakers emphasized that possible racial or ethnic bias among jurors should be thoroughly explored during voir dire. A speaker in the Eastern District proposed the use of a standard set of voir dire questions in appropriate cases "to save time, [and] to assure [that] fundamental questions are asked [that are] calculated to probe the prospective juror's racial attitudes and/or possible bias."⁴³¹ A speaker in the Middle District of Pennsylvania proposed more liberal allowance of voir dire of individual jurors and also emphasized that when race or ethnicity issues arise during voir dire, judges should strive to conduct any potentially embarrassing questioning of attorneys or prospective jurors at side-bar.⁴³²

In the Middle District of Pennsylvania, an attorney recalled an incident where the attorney asked the judge to inquire on voir dire how prospective jurors would feel if their son or daughter dated a black person. The attorney said that the judge would not allow the

427. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 21.

428. *Id.*

429. *Id.* at 48.

430. *Id.* at 97.

431. *Id.* at 98.

432. *See Public Hearings: Harrisburg, Pennsylvania, supra* note 27, at 7.

question and stated: "Wouldn't anybody object if their son or daughter dated a black person, wouldn't you?"⁴³³

A speaker in the Eastern District of Pennsylvania observed that judges and other nonminority court employees should strive to be sensitive to the perceptions of minorities and minority attorneys. He noted:

When you are a minority attorney and [have] grown up in this country as [a] minority and experienced certain attitudes towards you because of your race, when someone speaks negatively towards you and you believe it is unfairly, when someone treats you negatively and you believe it is unfairly, it is reasonable . . . that you will think that [it] may be due to the fact that [you are] a minority⁴³⁴

f. Statistical Comparison of the Race and Ethnicity of Jurors Surveyed with the Population

While the Jury Committee did not obtain a statistical count of the number of jurors of different race and ethnicity excused during voir dire, the juror survey provides some indication of the racial, ethnic and gender composition of juries upon deliberation. The juror questionnaire was distributed to the 1021 jurors who sat in the Third Circuit between September 3, 1996 and October 15, 1996. Seven hundred and sixty-one of these jurors responded, yielding a total return rate of 74.53%. The return rates by district are set forth in Table 143.

TABLE 143: RETURN RATES FOR JUROR QUESTIONNAIRE BY DISTRICT

District	Questionnaires Distributed	Questionnaires Returned	Return Rate
D. Del.	37	32	86.5%
D.N.J.	223	150	67.3%
E.D. Pa.	486	342	70.3%
M.D. Pa.	86	84	97.7%
W.D. Pa.	108	108	100.0%
D.V.I.	45	45	100.0%

SOURCE: Jury Administrators, District Court Clerks' Offices.

The Jury Committee compared the information on the racial and ethnic composition of jurors who responded to the questionnaire with the population data utilized in the analysis of jury

433. *Id.* at 15.

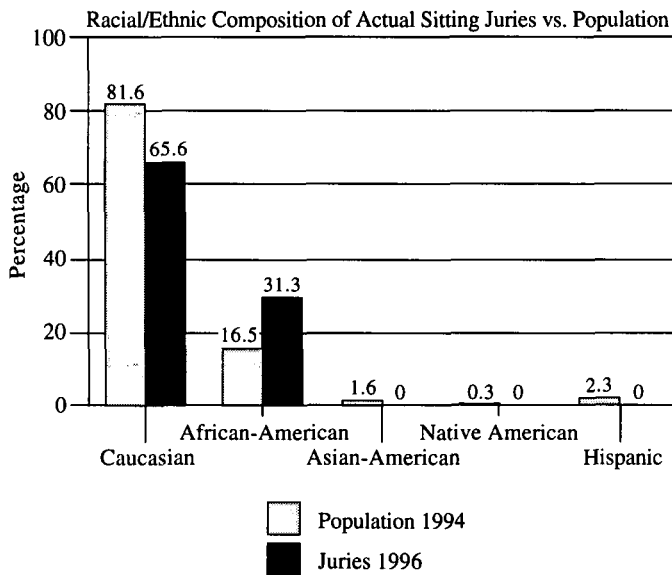
434. *Public Hearings: Philadelphia, Pennsylvania, supra* note 32, at 101.

pools.⁴³⁵ In addition, the Jury Committee compared the data from juror questionnaires with 1990 population statistics for the District of the Virgin Islands. The results of these comparisons are represented in the figures and text below and also in Table 148. The Jury Committee notes that the small number of jurors sampled in most districts may provide a basis upon which to question the significance of the results of the comparison. The Jury Committee also notes that, to its knowledge, this is the first self-reported study of the racial, ethnic and gender profile of sitting jurors compiled in the Third Circuit.

i. District of Delaware

Figure 22 shows the racial and ethnic composition of the 32 jurors surveyed in Delaware. It shows that the percentage of African-American jurors greatly exceeded the percentage of African-Americans in the population. There were, however, no jurors from any other minority groups.

FIGURE 22: DISTRICT OF DELAWARE (PERCENTAGES)



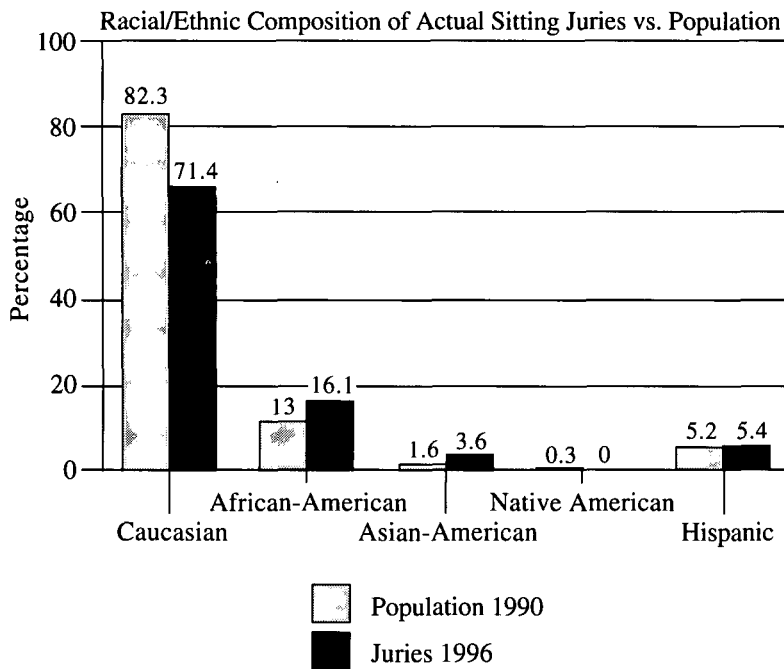
SOURCE: U.S. Census Bureau and Juror Survey.

435. The jurors questionnaire treated Hispanic as a racial group, not an ethnicity to be calculated separately.

ii. District of New Jersey

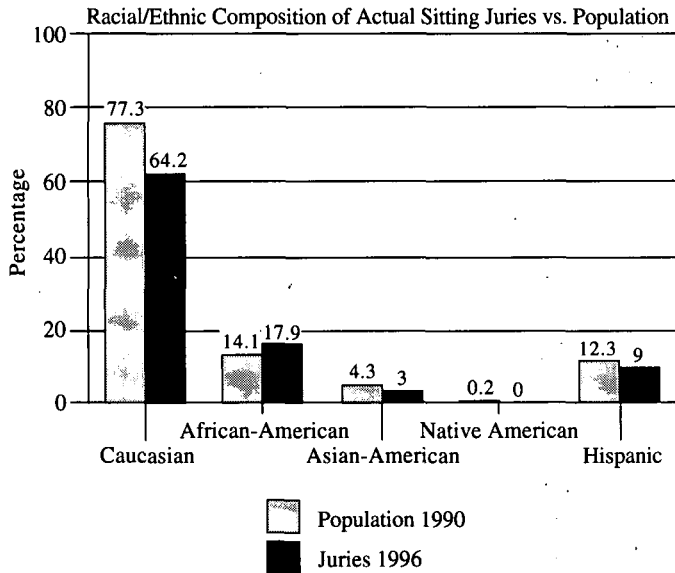
Figure 23 shows the racial and ethnic composition of jurors surveyed in the 3 jury vicinages in the District of New Jersey. In each division, the percentage of African-American jurors exceeded the percentage of African-Americans in the population. For the most part, other minority groups were represented in numbers essentially equal to their percentage in the general population.

FIGURE 23: DISTRICT OF NEW JERSEY
CAMDEN VICINAGE (PERCENTAGES)



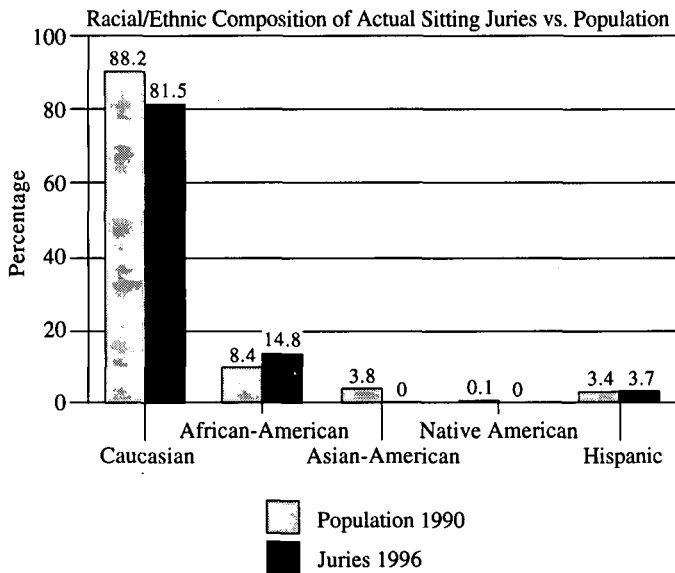
SOURCE: U.S. Census Bureau and Juror Survey.

FIGURE 23 (CON.): DISTRICT OF NEW JERSEY
NEWARK VICINAGE (PERCENTAGES)



SOURCE: U.S. Census Bureau and Juror Survey.

FIGURE 23 (CON.) DISTRICT OF NEW JERSEY,
TRENTON VICINAGE (PERCENTAGES)

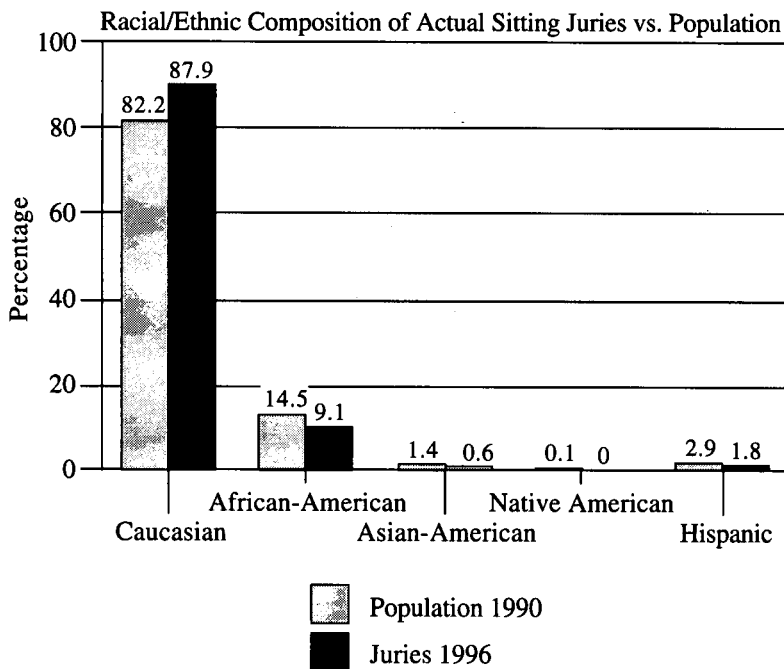


SOURCE: U.S. Census Bureau and Juror Survey.

iii. Eastern District of Pennsylvania

As Figure 24 shows, the percentage of minorities among the 330 jurors surveyed was smaller for each racial and ethnic minority group than their percentage in the general population. In fact, the percentages are very similar to the percentages of each minority group in the jury pool in effect in 1996, as represented above in Figure 14.

FIGURE 24: EASTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)



SOURCE: U.S. Census Bureau and Juror Survey.

iv. Middle District of Pennsylvania

In the Middle District of Pennsylvania, all 84 jurors who responded to the questionnaire identified themselves as Caucasian.⁴³⁶

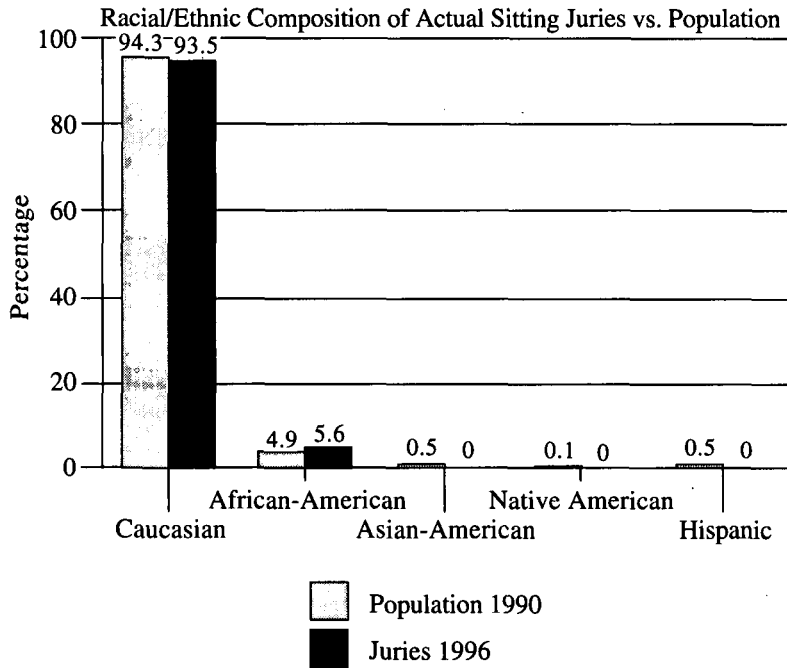
v. Western District of Pennsylvania

Figure 25 demonstrates that the percentage of Caucasians among the 108 jurors responding to the questionnaire was slightly smaller than the percentage of Caucasians in the population, while

⁴³⁶ The juror questionnaires did not identify whether the respondent served in the Middle or Western Districts of Pennsylvania.

the percentage of African-Americans responding was slightly greater than the percentage of African-Americans in the population. There were no persons from other racial or ethnic groups who served as jurors in the Western District during the survey period.

FIGURE 25: WESTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)

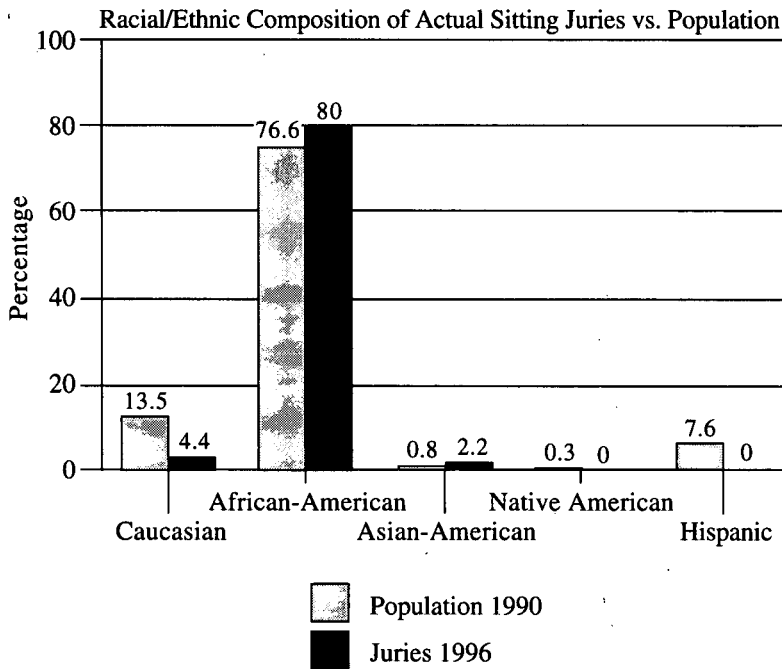


SOURCE: U.S. Census Bureau and Juror Survey.

vi. District of the Virgin Islands

In the Virgin Islands, where the majority of the population is African-American, African-Americans appeared on juries during the survey period in greater percentages than they appear in the population. Caucasians were under-represented by 9.1%. Asian-Americans appeared in slightly greater numbers than in the general population. No Native Americans or Hispanics, however, appeared on juries during the survey period.

FIGURE 26: DISTRICT OF THE VIRGIN ISLANDS (PERCENTAGES)



SOURCE: U.S. Census Bureau and Juror Survey.

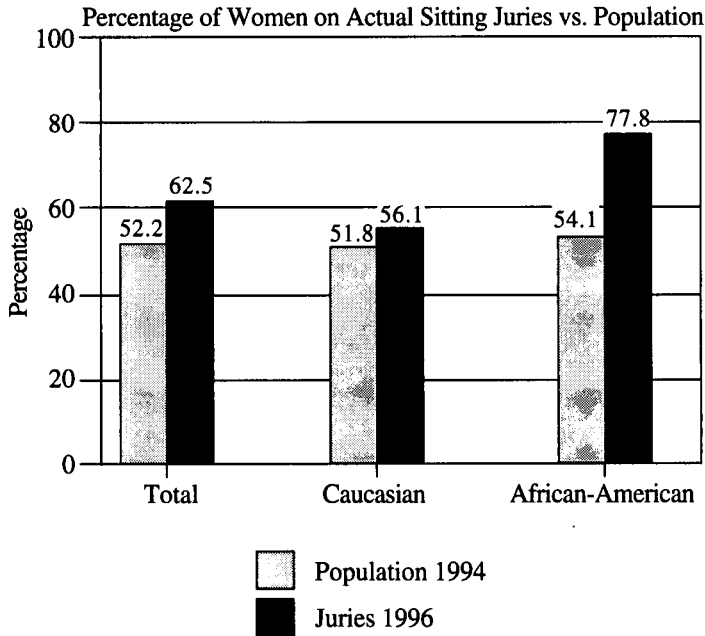
g. Statistical Comparison of the Gender of Jurors Surveyed with the Population

The Jury Committee also analyzed the gender composition of the group of jurors who responded to questionnaires and compared the percentages to the general population. The Jury Committee notes, however, that the percentages of jurors may be statistically unreliable as the total numbers of respondents to the juror survey were, in most districts, small. Where racial and ethnic groups are not included in the analysis, too few members of those groups filled out questionnaires to yield even arguably meaningful results. The results of the Jury Committee's comparison are presented in the text and figures below, and in Tables 148 and 149.

i. District of Delaware

Figure 27 demonstrates that in the District of Delaware, the percentage of female jurors responding to the questionnaire exceeded the percentage of females in the population. Among African-American jurors, this difference was more pronounced.

FIGURE 27: DISTRICT OF DELAWARE (PERCENTAGES)

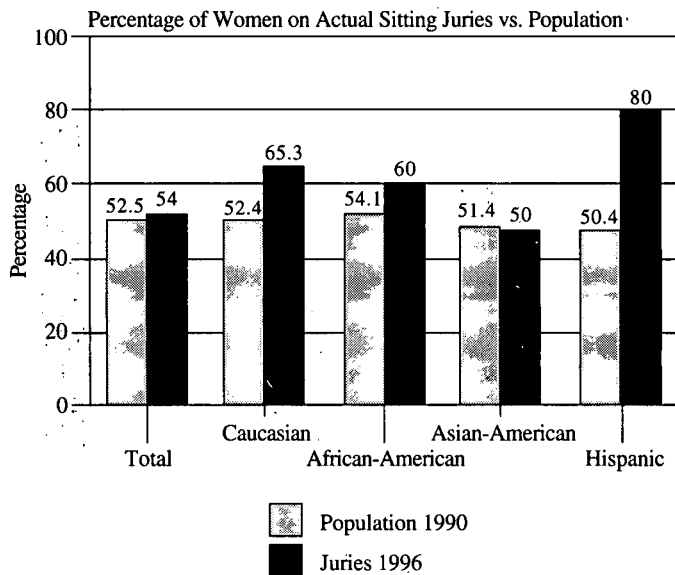


SOURCE: U.S. Census Bureau and Juror Survey.

ii. District of New Jersey

Figure 28 compares the percentage of females among jurors surveyed in the District of New Jersey with the percentage of females in the population of New Jersey. Tables 148 and 149 show the results of the comparison within each jury division. As the Tables show, the percentage of females among jurors surveyed exceeds the percentage of females in the population. The difference is essentially constant among racial and ethnic groups, except that among Asian-Americans the percentage of female jurors is slightly smaller than the percentage of females among Asian-Americans in the general population.

**FIGURE 28: DISTRICT OF NEW JERSEY IN ALL VICINAGES
(PERCENTAGES)**

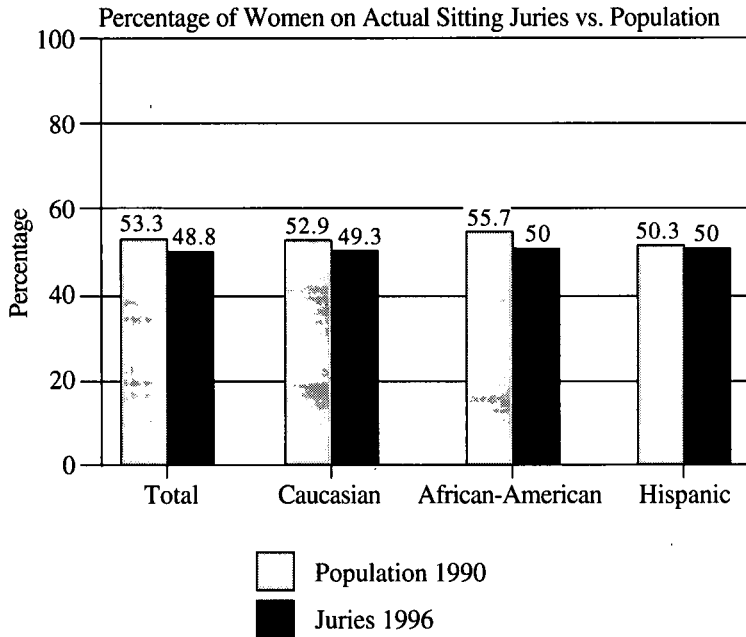


SOURCE: U.S. Census Bureau and Juror Survey.

iii. Eastern District of Pennsylvania

As Figure 29 shows, in the Eastern District of Pennsylvania, there were slightly fewer females among jurors surveyed than in the general population. This pattern was true in each racial and ethnic group represented among jurors surveyed.

FIGURE 29: EASTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)



SOURCE: U.S. Census Bureau and Juror Survey.

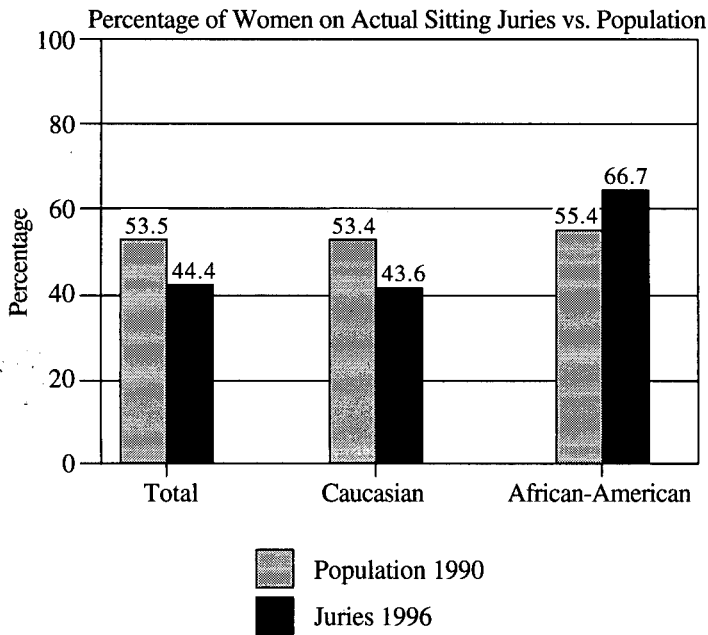
iv. Middle District of Pennsylvania

In the Middle District of Pennsylvania as a whole, there were slightly more females (3.5%) who served on juries during the survey period than in the population in the district.

v. Western District of Pennsylvania

As Figure 30 shows, in the Western District of Pennsylvania as a whole the percentage of females who served on juries during the survey period (9.1%) was smaller than the percentage of females in the population. Among African-Americans, however, the percentage of females who served on juries (11.3%) was greater than the percentage of females in the African-American population in the district.

FIGURE 30: WESTERN DISTRICT OF PENNSYLVANIA (PERCENTAGES)

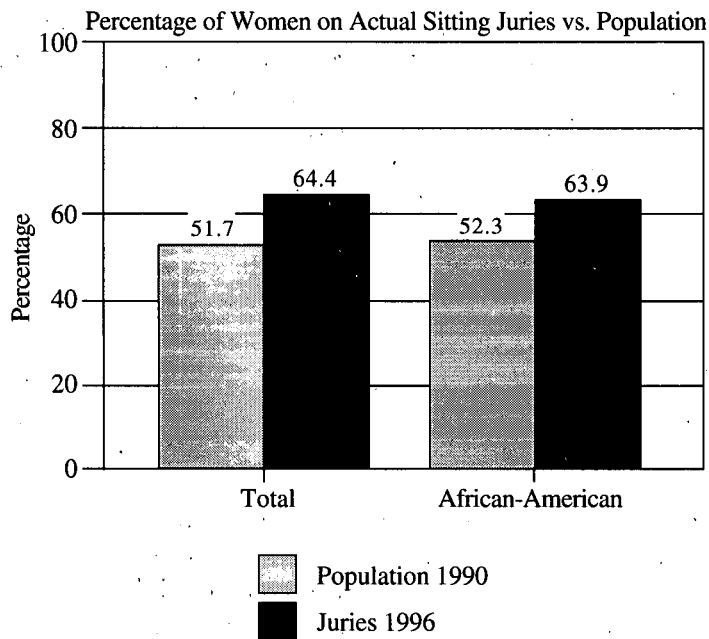


SOURCE: U.S. Census Bureau and Juror Survey.

vi. District of the Virgin Islands

Figure 31 shows that the percentage of females who served on juries during the survey period was substantially greater (12.7%) than the percentage of females in the population. The number of non-African-American jurors who served on juries was too small to yield meaningful results with regard to these groups.

FIGURE 31: DISTRICT OF THE VIRGIN ISLANDS (PERCENTAGES)



SOURCE: U.S. Census Bureau and Juror Survey.

C. Literature Review

The Jury Committee surveyed scholarly literature about the representation of racial and ethnic minorities and of women on juries in state and federal courts. Many commentators have stressed that racially and ethnically representative juries are critical to racial and ethnic minorities' perception of the fairness of the judicial system. For example, in *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, Judge Stephanie Domitrovich notes that voter registration lists under-represent racial and ethnic minorities and emphasizes that such under-representation undermines public confidence in the court system.⁴³⁷ Judge Domitrovich examines several proposed means of increasing minority representation. In particular, she argues that courts should strive to make the jury pool representative by using multiple source lists and reasonably limiting juror excuses.

Other commentators have argued that racial and ethnic representativeness on juries fosters important societal values and en-

437. See Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 88 (1994).

hances the truth-seeking ability of juries, and that representativeness should therefore be ensured by the government. For example, in *Rethinking the Jury*, Professor Phoebe Haddon explores the impact of race, ethnicity and gender on jury deliberations and proposes a representative jury model in which representation of different social groups is fostered at various stages of the jury selection process, including the development of source lists and voir dire.⁴³⁸ In a similar vein, Professor Nancy King, in *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, has discussed the actual impact of the racial composition of juries on jury deliberations and the potential for courts to measure any such impact.⁴³⁹

The impact of gender on jury deliberations and verdicts has been examined by a number of authors. For example, Professor Deborah L. Forman has discussed the effect of gender on the jury system and advocates a system of proportional representation in which an equal number of men and women must be selected for a jury.⁴⁴⁰ In a student-written piece, Nancy S. Marder examined empirical studies of mock juries that have concluded that female jurors generally do not voice their opinions as strongly and as often as male jurors do.⁴⁴¹ She discusses the potential for courts to instruct juries to strive to allow equal participation of all jurors.

In contrast, some commentators have rejected the principle that juries should reflect the racial, ethnic and gender composition of the population. In *We the Jury*, Jeffrey Abramson argues that the jury should be conceived of as a "deliberative" panel rather than a representative one, although he admits that representativeness may be important to deliver the appearance of justice.⁴⁴² Abramson focuses his arguments on the concern that jurors will view themselves as serving as representatives of particular groups instead of striving to put aside biases to search for objective truth.

Other commentators have focused on whether juries are in fact representative of the population in the jurisdiction in which they serve. Among the pertinent articles is Professor David Kairys'

438. See Phoebe Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 99-106 (1994). Professor Haddon was a member of the Commission on Gender.

439. See Nancy King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63 (1993).

440. See Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN'S L.J. 35, 75-82 (1992).

441. See Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 593 (1987).

442. See generally JEFFREY ABRAMSON, *WE THE JURY* (1994).

1977 analysis of the composition of jury pools.⁴⁴³ Kairys argued that racial and ethnic minorities and poor people were under-represented on juries because they were under-represented on the source lists, which at that time were almost exclusively based on voter registration lists. He recommended the use of multiple source lists to compensate for under-representation and emphasized that the additional lists must be selected to supplement the primary list. He argued that telephone and utility customer lists, city directories and actual voter lists generally under-represented the same groups as are under-represented on voter registration lists, including racial minorities. He recommended supplementing such lists with public assistance and unemployment lists, which generally give strong representation to people excluded from voter registration lists, including racial minorities.

More recently, Hiroshi Fukurai, Edgar W. Butler and Richard Krooth have examined various factors that affect the percentage of people from different racial, ethnic, gender and other groups who serve on juries. In *Race and the Jury: Racial Disenfranchisement and the Search for Social Justice*, they analyze empirical data and identify numerous practical obstacles to impaneling juries that accurately reflect the population.⁴⁴⁴ In particular, they note that the under-representation of African-Americans on voter registration and motor vehicle lists leads to their exclusion from the jury pool. They also observe that the failure to return jury qualification questionnaires may add to the exclusion of minorities from the juries because follow-up procedures are often neglected. They conclude that there are three important determinants of racially disproportionate juries: discrimination in the selection procedures, socioeconomic factors that limit community participation and discrimination in the judicial process that may allow racially-demarked jury representation.

Other recent studies have concluded that multiple source lists should be used to develop jury pools.⁴⁴⁵ In *Reformers Target Jury Lists*, Jeff Barge describes major jury reform proposals in New York State, Arizona and Los Angeles County.⁴⁴⁶ Each proposal points to juror source lists as the cause of under-representation of minorities

443. See David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776 (1977).

444. See generally HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR SOCIAL JUSTICE* (1993).

445. See, e.g., Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. BALT. L. REV. 127, 160-61 (1996).

446. See Jeff Barge, *Reformers Target Jury Lists*, A.B.A. J., Jan. 1995, at 26.

on juries and recommends supplementation with lists including lists of people receiving welfare and unemployment benefits, names from phone books, lists of city water hook-ups and names from the tax and Social Security rolls.

D. *Findings*

- The vast majority of judges, employees and participants in the federal courts in the Third Circuit have observed no incidents in which they believe that jurors were mistreated on the basis of race, ethnicity or gender.
- In general, attorneys believe that jurors are treated fairly by judges and court employees.
- In general, attorneys believe that jurors are treated fairly by attorneys. This perception, however, was not as strong as the perception that jurors are treated fairly by judges and court employees.
- There is no statistical association between an attorney's gender and the likelihood that the attorney believes that he or she has observed incidents of racial or ethnic bias involving jurors.
- Jurors also generally perceive that they are treated fairly with regard to race and ethnicity. When jurors do perceive incidents which they believe reflect racial or ethnic bias, the person acting offensively most often is another juror. The responses to the juror questionnaire show that only 16 of the 761 jurors surveyed indicated that during their service they had observed any conduct which may have insulted someone on the basis of race or ethnicity, excluding testimony or argument presented at trial. Of these 16, 13 indicated that a juror committed the potentially offensive act, and 10 of these responses appear to be based on the conduct of a single juror who was excused by the court prior to deliberations. Of the 3 acts by someone other than another juror, the responding jurors did not describe the conduct upon which their answers were based.
- In general, observations of mistreatment of jurors on the basis of gender is even more rare than mistreatment on the basis of race or ethnicity.
- Females are no more likely to indicate that they have observed mistreatment of jurors on the basis of gender than are males.
- In general, there is no statistical association between an attorney's race or ethnicity and the likelihood that the attorney believes that he or she has observed incidents of gender bias involving jurors.

- Jurors generally perceive that they are treated fairly with regard to gender. As with race and ethnicity, when jurors do observe incidents which they believe reflect gender bias, the person acting offensively is most often another juror. Only 15 of 761 jurors responding to the juror questionnaire indicated that they observed any conduct, other than testimony elicited at trial, which may have insulted a juror on the basis of gender. Of these 15 observations, 12 were based on the conduct of other jurors, and 11 of these answers appear to be based on a single incident.
- Statements in Task Force Public Hearings also indicate that jurors are treated fairly on the basis of race, ethnicity and gender. Two people commented that they had observed prospective jurors state during voir dire that they could not fairly serve as jurors because of their racial or ethnic bias. Others stated that such admissions by jurors are rare. Several attorneys who spoke, however, were concerned that some judges did not allow sufficient voir dire to examine potential racial or ethnic bias among jurors.
- There is widespread perception and concern among attorneys and minority litigants in each district in the Third Circuit that racial and ethnic minorities are under-represented in the jury pools and on actual juries in federal court in Delaware, New Jersey and Pennsylvania.
- Minority attorneys are more likely than nonminority attorneys to perceive that racial and ethnic minorities are under-represented in the jury pool and on actual juries.
- An attorney's gender does not statistically affect the likelihood that the attorney perceives that racial and ethnic minorities are under-represented in the jury pool and on actual juries.
- Statements by attorneys in Task Force Public Hearings suggest that minority clients believe that they may not receive a fair trial in federal court when minorities are under-represented on the jury.
- There is no comparable perception or concern regarding the gender composition of jury pools and actual juries.
- Neither the race, ethnicity nor gender of attorneys significantly affects their perceptions of the representativeness of the gender composition of jury pools and actual juries.
- In the District of Delaware, the Middle District of Pennsylvania and the Western District of Pennsylvania the jury pool is drawn from lists of registered voters. In these districts and generally in

the jury divisions within the districts, racial and ethnic minorities, particularly African-Americans and Hispanics, are not represented in numbers as great as their percentage of the general population.

- In the District of New Jersey, prior to October of 1996, the jury pool was drawn from a combined list of registered voters and licensed motor vehicle operators. In the jury vicinages within this district, racial and ethnic minorities, particularly African-Americans and Hispanics, were generally not represented in numbers as great as their percentage in the population. Because information is not yet available on the racial and ethnic composition of the jury pool in the District of New Jersey as drawn from the combined lists of registered voters, licensed motor vehicle operators, filers of state gross income tax returns and filers of Homestead Rebate application forms, the Jury Committee makes no finding as to the present composition of jury pools in New Jersey.⁴⁴⁷
- In the Eastern District of Pennsylvania prior to June of 1995 the jury pool was drawn from lists of registered voters. From June 1995 until July 1997, the jury pool in the Eastern District of Pennsylvania was drawn from a combined list of registered voters and licensed motor vehicle operators. Under both systems, racial and ethnic minorities, particularly Hispanics, were not represented in the jury pool in numbers as great as their percentage of the general population. In fact, the disparity for African-Americans increased while the combined source list was in use. The Eastern District has since returned to drawing the jury pool exclusively from the list of registered voters.
- Neither gender is consistently under-represented in jury pools throughout the Third Circuit. Among African-Americans in every district, however, the percentage of females in the jury pool generally exceeds the percentage of females in the African-American population. Among Asian-Americans in every district

447. While the Jury Committee did not attempt to analyze the percentage of cases in which a minority litigant appears before a jury that under-represents the percentage of minorities in the population, we note that in New Jersey criminal cases are distributed on a district-wide, rather than jury division-wide basis. As the percentage of minorities varies among the vicinages, the district-wide distribution of criminal cases may increase the likelihood that a criminal defendant will be tried in a division in which the racial and ethnic composition of the jury pool does not comport with the racial and ethnic composition of the jury division in which the alleged offense took place. The Middle District and Western District of Pennsylvania report that those districts do not distribute criminal cases on a district-wide basis.

- in which Asian-Americans were represented in the jury pool, the percentage of females in the jury pool was less than the percentage of females in the population.
- In the District of Delaware and the District of New Jersey, females are somewhat over-represented in the jury pool. The over-representation of females, however, increases substantially among African-Americans and Hispanics in the jury pool.
 - In the Eastern District of Pennsylvania males are slightly over-represented in the jury pool. Among African-American and Hispanic jurors, however, females appear in the jury pool in greater percentages than they appear in the general population of these groups.
 - In the Middle District of Pennsylvania males are over-represented in the jury pool by a very small percentage (1.0%). Females, however, are substantially over-represented among African-American and Hispanic jurors.
 - In the Western District of Pennsylvania females are slightly over-represented in the jury pool. Among African-American jurors, however, females appear in the jury pool in greater percentages than they appear in the general population.
 - Only a small percentage of judges in the Third Circuit believe that racial and ethnic minorities on the jury panel are more likely to be excused peremptorily than nonminorities. Minority judges, however, are more likely than nonminority judges to believe that minority jurors are more likely to be excused peremptorily than nonminority jurors.
 - The racial and ethnic composition of juries in the Third Circuit from September 3, 1996 to October 15, 1996 does not support any clear finding as to whether racial and ethnic minorities are under-represented on juries deliberating throughout the circuit. Among jurors surveyed, the percentage of African-American jurors in Delaware exceeded the percentage of minorities in the population of the district. In New Jersey and the Western District of Pennsylvania, the percentage of minority jurors was essentially the same as the percentage of minorities in the population of the district, jury division or vicinage. In the Eastern and Middle Districts of Pennsylvania, the percentage of minority jurors was less than the percentage of minorities in the district or jury division. In the Virgin Islands, the percentage of Caucasians on juries was less than one-third the percentage of Caucasians in the population, while African-Americans were slightly over-represented and the percentage of Asian-American

jurors was approximately three times the percentage of Asian-Americans in the general population. The small number of jurors sampled in the Juror Questionnaire in each district may make these percentages statistically unreliable as indicia of the representation of racial, ethnic and gender groups. We note, however, in the district with the largest sample of jurors surveyed, the Eastern District of Pennsylvania, the racial and ethnic composition of actual juries is roughly the same as the composition of the jury pool.

- The gender composition of juries in the Third Circuit from September 3, 1996 to October 15, 1996 does not support any clear finding as to whether either gender is generally under-represented on juries deliberating throughout the circuit, or whether either gender within any particular racial or ethnic group is consistently under-represented on actual juries in the circuit.

E. *Recommendations*

- Although incidents of racial, ethnic or gender bias involving jurors are rare in the federal courts in the Third Circuit, the courts should continue to strive to prevent such incidents in the future.
- Judges, employees and participants in the federal court system in the Third Circuit should be aware that minorities are generally more likely than nonminorities to perceive conduct as insulting or offensive on racial and/or ethnic grounds. The courts should consider holding on a regular basis discussion groups or other forums in which these differences in perception can be addressed. While jurors most likely would not be able to participate in such groups, increased consciousness among others in the court system may affect the treatment and behavior of jurors.
- The composition of the pool of prospective jurors in criminal and civil cases within the Third Circuit should reflect the racial, ethnic and gender composition of the district or jury division from which the jury pool is drawn.
- The district courts within the Third Circuit should make efforts to supplement the lists from which the jury pool is selected so that the racial, ethnic and gender composition of the jury pool more closely comports with the racial, ethnic and gender composition of the district or jury division from which the jury pool is drawn.

- Each district should identify potential source lists that would increase representativeness in the jury pool. These lists may differ from district to district. Consideration should be given to those sources which the experience of other districts, jurisdictions and the scholarly literature suggest increase minority representation, including state gross income tax returns, telephone directories and lists of licensed motor vehicle drivers, filers of homestead rebate application forms or similar filings, welfare recipients, unemployment compensation recipients, Social Security benefits recipients and utility customers.
- Each district should ask representatives from under-represented minority groups to help identify means of increasing the representation of those groups in the jury pool and on actual juries in federal court.
- Minority participation should be closely monitored under a multiple source list system to determine whether the system produces representative jury panels and to identify other changes which may be calculated to produce representative panels.
- The District of the Virgin Islands should continue to collect data showing the racial, ethnic and gender composition of its jury pools. The District should compile and maintain statistics based on this information. The District of the Virgin Islands should also attempt to analyze whether the racial, ethnic and gender composition of its jury pools comports with the racial, ethnic and gender composition of the general population in the district.
- The District of New Jersey should make available as soon as is reasonably possible, and the other districts in the Third Circuit should obtain, statistics showing the racial, ethnic and gender composition of the jury pools in New Jersey as compiled from combined lists of registered voters, licensed motor vehicle operators, filers of state gross income tax returns and filers of Homestead Rebate application forms.
- Each district should monitor and review the procedures by which prospective jurors are disqualified, exempted and excused to determine if any of these procedures inappropriately affect the composition of the jury pool.
- The courts of the circuit should publicize their efforts to ensure that the racial, ethnic and gender composition of juries comports with the racial, ethnic and gender composition of the population. Such publicity should help counter the perception

among some citizens that minority litigants are not treated fairly in jury trials in federal court.

TABLE 144: STATISTICAL COMPARISON OF THE RACIAL AND ETHNIC COMPOSITION OF THE JURY POOL WITH THE POPULATION

	Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del.	81.6%	86.9%	16.5%	7.7%	1.6%	1.3%	0.3%	0.3%	2.3%*	0.3%
D.N.J.	81.1%		12.4%		3.2%		0.2%		8.7%*	
• Camden	82.3%	89.8%	13.0%	5.2%	1.6%	2.2%	0.3%	0.6%	5.2%*	3.2%*
• Newark	77.3%	76.6%	14.1%	12.0%	4.3%	4.6%	0.2%	0.0%	12.3%*	8.0%*
• Trenton	88.2%	91.0%	8.4%	3.8%	2.1%	2.0%	0.1%	0.6%	3.4%*	3.8%*
E.D. Pa. 1995	82.2%	84.1%	14.5%	13.2%	1.44%	0.6%	0.1%	0.2%	2.9%*	1.0%*
E.D. Pa. 1996	82.2%	86.8%	14.5%	9.8%	1.44%	1.0%	0.1%	0.2%	2.9%*	0.3%*
M.D. Pa. total	96.6%	97.3%	2.4%	1.2%	0.6%	0.1%	0.1%	0.2%	0.9%*	0.1%*
• Williamsport	97.4%	97.6%	1.3%	0.2%	0.9%	0.1%	0.1%	0.0%	0.7%*	0.0%*
• Harrisburg	94.7%	96.0%	4.0%	2.6%	0.7%	0.2%	0.1%	0.3%	1.1%*	0.1%*
• Scranton	98.5%	98.4%	0.9%	0.5%	0.4%	0.0%	0.1%	0.2%	0.7%*	0.2%*
W.D. Pa.	94.3%		4.9%		0.5%		0.1%		0.5%*	
• Erie	96.8%	98.2%	2.5%	1.2%	0.4%	0.4%	0.1%	0.2%	0.7%*	X
• Johnstown	98.7%	96.9%	1.0%	3.1%	0.2%	X	0.1%	X	0.4%*	0.0%*
• Pittsburgh	93.3%	94.3%	5.9%	3.7%	0.6%	1.0%	0.1%	X	0.5%*	0.6%*

Note: Pop. = population. X = insufficient data. An asterisk (*) means these percentages reflect ethnicity considered separately from race. The Eastern District Pennsylvania jury pool for 1995 was based solely on the list of registered voters. The pool for 1996 was based on a combined source list of registered voters and licensed drivers.

SOURCE: U.S. Census Bureau and District Clerk's Offices.

TABLE 145: STATISTICAL COMPARISON OF THE GENDER COMPOSITION OF THE JURY POOL WITH THE POPULATION, BASED ON PERCENTAGES OF MALES

	Total		Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del. 1994	47.8%	45.5%	48.2%	45.8%	45.9%	38.0%	47.5%	52.1%	50.1%	42.1%	52.4%	28.6%
D.N.J.	47.5%		47.6%		45.9%		48.6%		48.5%		47.4%	
• Camden	47.2%	48.8%	47.4%	47.7%	45.8%	50.0%	48.5%	54.5%	48.2%	66.7%	50.8%	68.8%
• Newark	47.4%	42.4%	47.6%	41.3%	45.3%	41.7%	49.0%	73.9%	48.4%	X	49.2%	32.5%
• Trenton	47.7%	45.2%	47.6%	44.1%	48.0%	42.1%	47.1%	60.0%	49.3%	66.7%	51.9%	36.8%
E.D. Pa. 1996	46.8%	48.8%	47.1%	49.9%	44.3%	38.3%	49.4%	56.6%	47.9%	40.0%	49.7%	45.5%
M.D. Pa.	47.8%	48.8%	47.4%	48.8%	53.2%	46.3%	47.6%	50.0%	53.1%	35.3%	52.9%	33.3%
• Williamsport	48.3%	48.9%	48.0%	48.8%	62.2%	40.0%	53.5%	33.3%	53.5%	X	58.0%	X
• Harrisburg	47.8%	48.0%	47.7%	48.4%	49.5%	43.0%	44.3%	33.3%	53.0%	27.3%	51.7%	X
• Scranton	46.8%	49.4%	46.6%	49.2%	68.1%	64.7%	46.1%	X	53.0%	40.0%	52.3%	60.0%
W.D. Pa.	46.5%		46.6%		44.6%		49.4%		49.4%		49.3%	
• Erie	47.5%	47.6%	47.4%	47.4%	48.3%	X	48.0%	X	51.8%	X	57.8%	X
• Johnstown	46.8%	43.8%	46.7%	42.9%	54.5%	X	42.8%	X	50.7%	X	50.4%	X
• Pitsburgh	46.4%	46.8%	46.5%	45.8%	44.0%	26.7%	50.1%	X	48.6%	X	47.1%	X

Note: Pop. = population. X = insufficient data.

SOURCE: U.S. Census Bureau and District Clerk's Offices.

TABLE 146: STATISTICAL COMPARISON OF THE GENDER COMPOSITION OF THE JURY POOL WITH THE POPULATION, BASED ON PERCENTAGES OF FEMALES

	Total		Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del.	52.2%	54.5%	51.8%	54.2%	54.1%	62.0%	52.5%	47.9%	49.9%	57.9%	47.6%	71.4%*
D.N.J.	52.5%		52.4%		54.1%		51.4%		51.5%		50.4%	
• Camden	52.8%	51.2%	52.6%	52.3%	54.2%	50.0%	51.5%	45.5%	51.8%	33.3%	49.2%	31.2%*
• Newark	52.6%	57.6%	52.4%	58.7%	54.7%	58.3%	51.0%	26.1%	51.6%	X	50.9%	67.5%*
• Trenton	52.3%	54.8%	52.4%	55.9%	52.0%	57.9%	52.9%	40.0%	50.7%	33.3%	48.1%	63.2%*
E.D. Pa. 1996	53.3%	51.2%	52.9%	50.1%	55.7%	61.7%	50.6%	43.4%	52.1%	60.0%	50.3%	54.5%*
M.D. Pa.	52.4%	51.2%	52.6%	51.2%	46.8%	53.7%	52.4%	50.0%	46.9%	64.7%	47.1%	66.7%*
• Williamsport	51.7%	51.1%	52.0%	51.2%	37.8%	60.0%	46.5%	66.7%	46.5%	X	42.0%	X
• Harrisburg	52.2%	52.0%	52.3%	51.6%	50.5%	57.0%	55.7%	66.7%	47.0%	72.7%	48.3%	X
• Scranton	53.2%	50.6%	53.4%	50.8%	31.9%	35.3%	53.9%	X	47.0%	60.0%	47.7%	40.0%*
W.D. Pa.	53.5%		53.4%		55.4%		50.4%		50.6%		50.7%	
• Erie	52.5%	52.4%	52.6%	52.6%	51.7%	X	52.0%	X	48.2%	X	42.2%	X
• Johnstown	53.2%	56.2%	53.3%	57.1%	45.5%	X	57.2%	X	49.3%	X	49.6%	X
• Pittsburgh	53.6%	53.2%	53.5%	54.2%	56.0%	73.3%	49.9%	X	51.4%	X	52.9%	X

Note: Pop. = population. X = insufficient data. An asterisk (*) means these percentages reflect ethnicity calculated separately from race. SOURCE: U.S. Census Bureau and District Clerk's Offices.

TABLE 147: STATISTICAL COMPARISON OF THE RACIAL AND ETHNIC COMPOSITION OF JURORS SURVEYED WITH THE POPULATION

	Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del.	81.6%	65.6%	16.5%	31.3%	1.6%	0.0%	0.3%	0.0%	2.3%*	0.0%*
D.N.J.	81.1%		12.4%		3.2%		0.2%		8.7%*	
• Camden	82.3%	71.4%	13.0%	16.1%	1.6%	3.6%	0.3%	0.0%	5.2%*	5.4%*
• Newark	77.3%	64.2%	14.1%	17.9%	4.3%	3.0%	0.2%	0.0%	12.3%*	9.0%*
• Trenton	88.2%	81.5%	8.4%	14.8%	3.8%	0.0%	0.1%	0.0%	3.4%*	3.7%*
E.D. Pa.	82.2%	87.9%	14.5%	9.1%	1.4%	0.6%	0.1%	0.0%	2.9%*	1.8%*
M.D. Pa. Total	96.6%	100%	2.4%	0.0%	0.6%	0.0%	0.1%	0.0%	0.9%*	0.0%*
• Williamsport	97.4%	100%	1.3%	0.0%	0.9%	0.0%	0.1%	0.0%	0.7%*	0.0%*
• Harrisburg	94.7%	100%	4.0%	0.0%	0.7%	0.0%	0.1%	0.0%	1.1%*	0.0%*
• Scranton	98.5%	100%	0.9%	0.0%	0.4%	0.0%	0.1%	0.0%	0.7%*	0.0%*
W.D. Pa.	94.3%	93.5%	4.9%	5.6%	0.5%	0.0%	0.1%	0.0%	0.5%*	0.0%*
• Erie	96.8%	X	2.5%	X	0.4%	X	0.1%	X	0.7%*	X
• Johnstown	98.7%	X	1.0%	X	0.2%	X	0.1%	X	0.4%*	X
• Pittsburgh	93.3%	X	5.9%	X	0.6%	X	0.1%	X	0.5%*	X
D.V.I.	13.5%	4.4%	76.6%	80.0%	0.8%	2.2%	0.3%	0.0%	7.6%*	0.0%*

Note: Pop. = population. X = insufficient data. An asterisk (*) means these percentages reflect ethnicity calculated separately from race.

SOURCE: U.S. Census Bureau and District Clerk's Offices.

TABLE 148: STATISTICAL COMPARISON OF THE GENDER COMPOSITION OF JURORS SURVEYED WITH THE POPULATION, BASED ON PERCENTAGES OF MALES

	Total		Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del.	47.8%	34.4%	48.2%	43.9%	45.9%	22.2%	47.5%	X	50.1%	X	52.4%	X
D.N.J.	47.5%	46.0%	47.6%	34.7%	45.9%	40.0%	48.6%	50.0%	48.5%	X	47.4%	20.0%
• Camden	47.2%	45.5%	47.4%	50.0%	45.8%	55.5%	48.5%	X	48.2%	X	50.8%	X
• Newark	47.4%	40.3%	47.6%	46.5%	45.3%	16.7%	49.0%	X	48.4%	X	49.2%	16.7%
• Trenton	47.7%	59.3%	47.6%	54.5%	48.0%	75.0%	47.1%	X	49.3%	X	51.9%	X
E.D. Pa.	46.8%	51.2%	47.1%	50.7%	44.3%	50.0%	49.4%	X	47.9%	X	49.7%	50.0%
M.D. Pa. Total	47.8%	44.1%	47.4%	44.1%	53.2%	X	47.6%	X	53.1%	X	52.9%	X
• Williamsport	48.3%	X	48.0%	X	62.2%	X	53.5%	X	53.5%	X	58.0%	X
• Harrisburg	47.8%	X	47.7%	X	49.5%	X	44.3%	X	53.0%	X	51.7%	X
• Scranton	46.8%	X	46.6%	X	68.1%	X	46.1%	X	53.0%	X	52.3%	X
W.D. Pa.	46.5%	55.6%	46.6%	56.4%	44.6%	33.3%	49.4%	X	49.4%	X	49.3%	X
• Erie	47.5%	X	47.4%	X	48.3%	X	48.0%	X	51.8%	X	57.8%	X
• Johnstown	46.8%	X	46.7%	X	54.5%	X	42.8%	X	50.7%	X	50.4%	X
• Pittsburgh	46.4%	X	46.5%	X	44.0%	X	50.1%	X	48.6%	X	47.1%	X
D.V.I.	48.3%	35.6%	51.7%	X	47.7%	36.1%	X	X	X	X	X	X

Note: Pop. = population. X = insufficient data.
 SOURCE: U.S. Census Bureau and District Clerk's Offices.

TABLE 149: STATISTICAL COMPARISON OF THE GENDER COMPOSITION OF JURORS SURVEYED WITH THE POPULATION, BASED ON PERCENTAGES OF FEMALES

	Total		Caucasian		African-American		Asian-American		Native American		Hispanic	
	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool	Pop.	Jury Pool
D. Del.	52.2%	62.5%	51.8%	56.1%	54.1%	77.8%	52.5%	X	49.9%	X	47.6%	X
D.N.J.	52.5%	54.0%	52.4%	65.3%	54.1%	60.0%	51.4%	50.0%	51.5%	X	50.4%	80.0%
• Camden	52.8%	54.5%	52.6%	50.0%	54.2%	44.5%	51.5%	X	51.8%	X	49.2%	X
• Newark	52.6%	59.7%	52.4%	53.5%	54.7%	83.3%	51.0%	X	51.6%	X	50.9%	83.3%
• Trenton	52.3%	40.7%	52.4%	45.5%	52.0%	25.0%	52.9%	X	50.7%	X	48.1%	X
E.D. Pa.	53.3%	48.8%	52.9%	49.3%	55.7%	50.0%	50.6%	X	52.1%	X	50.3%	50.0%
M.D. Pa.	52.4%	55.9%	52.6%	55.9%	46.8%	X	52.4%	X	46.9%	X	47.1%	X
• Williamsport	51.7%	X	52.0%	X	37.8%	X	46.5%	X	46.5%	X	42.0%	X
• Harrisburg	52.2%	X	52.3%	X	50.5%	X	55.7%	X	47.0%	X	48.3%	X
• Scranton	53.2%	X	53.4%	X	31.9%	X	53.9%	X	47.0%	X	47.7%	X
W.D. Pa.	53.5%	44.4%	53.4%	43.6%	55.4%	66.7%	50.4%	X	50.6%	X	50.7%	X
• Erie	52.5%	X	52.6%	X	51.7%	X	52.0%	X	48.2%	X	42.2%	X
• Johnstown	53.2%	X	53.3%	X	45.5%	X	57.2%	X	49.3%	X	49.6%	X
• Pittsburgh	53.6%	X	53.5%	X	56.0%	X	49.9%	X	51.4%	X	52.9%	X
D.V.I.	51.7%	64.4%	48.3%	X	52.3%	63.9%	X	X	X	X	X	X

Note: Pop. = population. X = insufficient data.
SOURCE: U.S. Census Bureau and District Clerk's Offices.

APPENDIX A

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APPENDIX E

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