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An Inclusive Judiciary Is a Work in Progress



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As former Chief Judge Judith Kaye eloquently observed:

Diversity is important, not because people's brains are microscopically different but because it is essential that we have the perspective of different life experiences in the vital role of adjudicating our fellow citizens' disputes. A diverse bench gives the public a belief that they are included in the justice system.¹

Likewise, Chief Judge Jonathan Lippman has stated that "the value of a diverse workforce needs no argument—inclusiveness promotes public trust in justice."² I strongly agree with both, and while we are making progress towards a diverse judiciary in the Third Department, we have a long path to travel before we achieve equal representation. Simply put, as a legal profession, we must remain vigilant in promoting diversity because the lack of it is perceived as unfair. For example, in 1990, when I sat as a Family Court judge in Ulster County along with another woman, Judge Mary Work, I experienced the satisfaction of seeing my son, Avanti, grow up in a community where having women judges and women lawyers was perfectly normal. Thus, from my perspective, he was being exposed to a diverse judiciary. Yet, one morning when Avanti was three years old, he asked me a startling question as we drove past the Family Court on our way to daycare. He said, "Mommy, how come only girls can be judges, why can't boys be judges?" Of course I explained that not all judges are girls, but his concern, albeit born of limited experience, was

valid. Unfortunately, my son's perception about the courts being unfairly composed of a single type of person is shared by many people today.

As both the first woman to be elected to the Supreme Court in the Third Department and the first to be appointed Presiding Justice of the Appellate Division Third Department, I am proud to be part of the shift towards greater diversity in New York's courts. Still, we have a long way to go before the judiciary reflects the population it serves. To my knowledge, every individual who has ever been elected to the Supreme Court in the entire Third Department has been Caucasian.

While the concept of diversity is a popular topic, its prominence has not yet translated to the judiciary in the Third Department. At its base, diversity is defined as "the inclusion of different types of people in a group or organization."³ Thus, a diverse judiciary would consider nationality, ethnicity, race, gender and identities, including age, religion, geography, family status, sexual orientation, and other differences. Yet, the national data reflects a severe disparity. In 2009, white males were approximately 37.5 percent of the general population of the United States, but accounted for approximately 66 percent of judges on state appellate benches.⁴ To chart a path from disparity to a more diverse judiciary, we must identify the barriers that exist and overcome them.

Barriers to a Diverse Judiciary

Method of selection. There are several methods through which judi-

cial vacancies are filled, including merit selection, gubernatorial appointment (with or without legislative confirmation), and partisan election. Some studies have found that appointive systems advance judicial diversity,⁵ while others have found no link between the selection system and diversity.⁶

Studies show that the political environment is also a large factor in minority and women representation on the bench. One study concluded that "minority judges were more likely to attain seats on intermediate appellate courts under Democratic governors than Republican governors."⁷ Yet, there was no increased likelihood for advancement of minorities selected for state trial courts under Democratic governors.⁸ Additionally, studies show that minorities may be less likely to run for Supreme Court due to the cost of running a campaign.⁹ The obstacles facing minorities differ from those that women face. Indeed, "the results for women judges are markedly different, suggesting that there are different underlying factors promoting gender diversity than racial and ethnic diversity."¹⁰

Gender diversity. In a 2012 report on women in federal and state judgeships, women represented 27.1 percent of the nation's state and federal benches, just 0.5 percent up from 2011.¹¹ In a similar 2011 report, New York State was highlighted and, among other things, a comparison between the different judicial departments was made.¹² Of the four judicial departments, the Third Department lagged far behind the other three, with no women sitting on the Supreme Court trial bench in the Third or Fourth Judicial Districts. Since the 2011 report was issued, strides towards diversity have been made in the Fourth Judicial District with the election of Justice Ann Crowell and Justice Christine Clark to the Supreme Court. Yet, the Third Judicial District remains homogenous, with no women Supreme Court Justices at the trial level. And, while I applaud the fact that the Court of Appeals is approaching parity at 43 percent, notably the Court of Claims trails behind at 23 percent.¹³

Ethnic diversity. The lack of diversity in the judiciary stems, in part, from the lack of minorities in our legal profession.¹⁴ Surprisingly, although the country's population is becoming increasingly diverse, the legal profession remains "overwhelmingly white" and is failing to keep pace with "the browning of the general population of the United States."¹⁵ Thus, it is imperative that the

processes used for screening judicial candidates remain unbiased. Undoubtedly, if a candidate's evaluation is negatively impacted by race, less diversity may result.¹⁶ And, "the lack of diversity among [our] judges and lawyers [] fuels distrust of the legal system in many minority communities."¹⁷

Conclusion

The strength of diversity is realized by valuing differences. The resolution of disputes through the rule of law only succeeds when the public believes that its voice has been heard and that it has been treated fairly. While progress has been made in the Third Department, diversity is a dynamic goal. There is much more work to be done. I am committed to making a difference for justice, and hope that you will join me in striving to bring about real change and improve public confidence in our justice system.



1. 57 Alb. L. Rev 973, 974 (Fall 1994).

2. See <http://www.nycourts.gov/careers/diversity>.

3. See <http://www.merriam-webster.com/dictionary/diversity>.

4. See Torres-Spelliscy, Clara, "A Bench That Looks Like America," *Judges' Journal*, 00472972, Summer 2009, Vol. 48, Issue 3, p. 4.

5. See "Examining diversity on state courts: How does the judicial selection environment advance—and inhibit—judicial diversity?" *The Judges' Journal*, Vol. 48, No. 3, Summer 2009, p. 1 ("Examining diversity"); see also "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts," *State Politics and Policy Quarterly*, Vol. 3, No. 4 (Winter 2003), pp. 329-52.

6. See "Examining diversity," supra note 5 at pp. 1-2.

7. *Id.* at 6.

8. *Id.*

9. See "Improving Diversity on the State Courts: A Report from the Bench," Research Conducted for the Lawyers' Committee for Civil Rights Under Law and the Justice at Stake Campaign by the Center for Justice, Law and Society at George Mason University, 2009, pp. 14-15.

10. See Examining diversity on state courts: How does the judicial selection environment advance—and inhibit—judicial diversity, *The Judges' Journal*, Vol. 48, No. 3, Summer 2009, p. 6.

11. See "Women in Federal and State-level Judgeships," A Report by the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York, 2012, p. 1.

12. See "Women in Federal and State-level Judgeships," A Report by the Center for Women in Government & Civil Society, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York, 2011, pp. 14-16.

13. See *id.* at 16.

14. See Brief for the New York State Bar Association as Amicus Curiae in support of Respondents, *Fisher v. University of Texas at Austin*, pp. 4-5.

15. *Id.*

16. "Are Judicial Performance Evaluations Fair to Women and Minorities? A Cautionary Tale from Clark County, Nevada," *Law & Society Review*, Vol. 45, No. 3 (2011), pp. 731, 750-51.

17. See Brief for the New York State Bar Association as Amicus Curiae in support of Respondents in *Fisher v. University of Texas at Austin*, p. 2.