GOAL IX

TO PROMOTE FULL AND EQUAL PARTICIPATION IN THE LEGAL PROFESSION BY MINORITIES Volume 5, Number 4, Spring 1999

Diversity and Justice at the Supreme Court

Frank H. Wu

Last October in Washington, D.C., one thousand people gathered on the marble steps of the United States Supreme Court to protest the continuing absence of African Americans and Hispanics among the law clerks who work with the Justices to give meaning to the Constitution. Although the Court prefers to view itself as above partisan politics, it should see the important principles at stake.

The issue is who belongs at the center of our most significant public institutions. That symbolizes to whom the civic culture belongs in turn. The controversy over clerkships reflects our struggle to create a better sense of community—one that embraces our racial diversity.

Despite the title of "clerk," everyone within the legal profession knows that the position is coveted. For the three dozen recent graduates working in the chambers of the nine Justices, the proverbial doors of opportunity are opened. The prestigious post not only is itself a wonderful job, but also starts off careers marked for success. After a year at the high court as combination ghostwriters–gofers, clerks write their own tickets as the saying goes.

In Edward Lazarus's recent non-fiction account, *Closed Chambers*, the clerk corps emerges as ideological advocates who determine more than which cases the Court will review, greatly influencing how the Justices will vote on the merits. Lazarus was attacked for revealing secrets about the high court and he confirmed what observers have always suspected about the role of clerks.

However powerful the clerks are at the time, that potential is in their future. All judicial clerkships with the federal bench are worthwhile (and, incidentally, lower courts have become intensely competitive in recruiting students, apparently without increasing representation of people of color who might then pursue a Supreme Court clerkship). But because Justices are at the top of the hierarchy, so too are their clerks in an especially elite group.

Many federal judges were formerly clerks. For example, Chief Justice William Rehnquist himself served Justice Robert Jackson in 1952–53. Law firms regularly pay $50,000 signing bonuses to recruit clerks fresh from their unique apprenticeship. Law schools hire new professors who, though they have never practiced a day in their lives, possess that all-important qualification.

In choosing clerks, the Justices ought not set themselves above the law and beyond public criticism.

Chief Justice Rehnquist's response to requests for a meeting from the National Bar Association was disappointing. He said he believed there would be no "useful purpose" for such a discussion.

Justice Antonin Scalia, responding to a reporter who was admittedly aggressive, replied to the question why he had never had a black clerk with an ambiguous "Why do you think?"

Neither Rehnquist nor Scalia has ever had an African American law clerk.

Justices can choose clerks based on their interest in a decent tennis partner or any other criteria because there has been until recently no scrutiny of their selections. While they must have the independence, which is crucial for executing their responsibilities in representative democracy, and they can be expected to prefer staffs who will share their opinions, they would do well to consider reform.

The current system is difficult to defend. It is nothing more than the Old Boy network. A handful of law professors who themselves belong to a network of ex-clerks, and "feeder" judges with political connections to the Justices,

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> "The Justices are proving they can be the last progressive branch of the federal government."

Letter from the Chair

José Gaitán

As we prepare to enter the new millennium and embark on the twenty-first century, there are several issues that confront us as a nation. Perhaps the most vexing of these is the issue of race in America. Most recently, a black man was brutally tortured and murdered outside a small rural town in south Texas. The man was chained and dragged behind a pickup truck until he was dismembered. One person charged with the commission of this horrific crime reportedly has a tattoo on his arm of a black man being lynched.

In New York City, demonstrators have protested recent incidents of police brutality directed at young African American males. These demonstrations were triggered when a black man was killed after being shot nineteen times by police officers as he sat behind the wheel of a parked vehicle. Reported incidents of police brutality against persons of color have become commonplace in other large metropolitan cities, as well.

At the same time of rising racial tensions in America, the opponents of affirmative action seek to undo the little progress achieved in education. Under the guise of "equal protection," critics of affirmative action have mobilized to enact such legislative initiatives as California's Proposition 209, and Washington Initiative 200. They now have their sights set on revamping the university admissions rules in the State of Michigan. As a result, minority enrollment in prestigious California universities has plummeted. The University of California at Berkley, Boalt Hall Law School, recently admitted only one African American to its entering first-year class. In some respects, it appears as if the civil rights movement has come full circle. Once again, ethnic minorities are being denied a first-class public education.

Unfortunately, the legal profession has been slow and timid in responding to the issues of injustice. While the percentage of persons of color continues to rise (more than 25 percent of Americans are ethnic minorities), the ABA Commission on Opportunities for Minorities in the Profession in the *Miles to Go* report confirmed that the legal profession remains a predominantly white profession. Approximately 92.5 percent of our nation's lawyers are white.

Black defendants continue to be tried in courts where they are the only person of color in the courtroom. The same remains true of Hispanics, Native Americans, and Asians. This dichotomy creates an appearance of injustice and unfairness. This point is illustrated by a story that Judge Bernice Donald, former chair of the Commission on Minorities, is fond of telling. Judge Donald relates the case of a white criminal defendant who entered a United States district courtroom in Tennessee where she presided. She described the concern etched on the defendant's face as he looked around the courtroom to find that he was the only European American in the courtroom.

Lawyers of color continue to be grossly underrepresented in all segments of our profession. Moreover, the recent anti-affirmative action initiatives are exacerbating the problem. With a decline in minority enrollment in law schools such as Boalt Hall, the pipeline is getting smaller and smaller. As a result, the number of minority law school graduates is expected to decrease for the foreseeable future.

This year, ABA President Philip S. Anderson has made the delivery of color-blind justice a priority for his tenure in office. ABA President-Elect William G. Paul has declared that during his administration, he will focus on the issue of minority underrepresentation within the legal profession. These two leaders should be applauded for their efforts and leadership.

With continued strong leadership from the ABA, the confidence of ethnic minorities in the criminal justice system can be restored and enhanced. This will require in the short term that affirmative steps be taken to ensure the inclusiveness of American colleges and law schools. At the same time, the minority community cannot continue to look to others to make justice a reality for them. Minority lawyers must rise to the challenge. It is ultimately our responsibility to make the legal profession more inclusive and responsive to our needs. I look forward to working with you to that end.

"It is ultimately our responsibility to make the legal profession more inclusive and responsive to our needs."

Hopwood v. State of Texas:
Retreat from the Supreme Court Ruling in *Bakke*

Leo J. Jordan

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers applied for admission to the 1992 entering class at the University of Texas School of Law. All four were white residents of Texas and were rejected. They brought suit against the law school and other university officials claiming violations of the Fourteenth Amendment, as well as other statutes all prohibiting discrimination based on race. Hopwood and others maintained that the law school discriminated against them by favoring less qualified black and Hispanic applicants through the use of a quota system. Their contention was that any preferential treatment of a group based on race violated the Fourteenth Amendment.

In August 1994, the federal district court ruled that the law school's use of racial preferences was not unconstitutional per se. Instead the court examined the affirmative action plan used by the law school in its admissions procedures. The court applying the strict scrutiny standard required by the Supreme Court in *Regents of the University of California v. Bakke* held it did not pass constitutional muster. While recognizing that "the remedial nature of the admission process, in which racial classifications were used as a means of overcoming the present effects of past discrimination served a compelling state interest," the district court ultimately found that the law school's use of separate admissions procedures for minorities and nonminorities was not narrowly tailored to achieve those compelling state interests "because the process prevented any meaningful comparative evaluation among applicants of different races." Thus, the court entered a declaratory judgement that the law school's 1992 admission procedures violated the Equal Protection Clause of the Fourteenth Amendment. The court also permitted plaintiffs to reapply for admission to the 1995 entering class. Nominal damages of $1 were awarded to each plaintiff.

Despite its constitutional holding, the court nonetheless found the law school had legitimate, nondiscriminatory grounds for denying admission to the four plaintiffs. The court added that, in all likelihood, the plaintiffs would not have been offered admission even under an admission practice that was constitutionally permissible.

The rejected applicants appealed the district court's decision to the Federal Circuit Court of Appeals for the Fifth Circuit. A divided opinion by a three-judge panel of the court reversed the lower court's decision. The Fifth Circuit held:

1. The law school's use of racial preferences served no compelling state interest under the Fourteenth Amendment.
2. The law school may not use race as a factor in admission.

The Fifth Circuit remanded the case back to the district court directing reconsideration of two issues. First, the district court was required to reevaluate whether any of the plaintiffs would have been admitted to the law school without admission procedures that take into account the applicant's race. Second, the court was directed to "revisit" the issue of damages.

Upon petition for rehearing before the court of appeals, requesting en banc consideration by the entire court, the petition was denied without further comment. A strong dissent from the denial of rehearing en banc by the chief judge and six circuit judges was pub-

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Contributions are welcome.
Please submit articles and editorials to the address above.

Jimmy Gurulé, Editor
Notre Dame Law School
Notre Dame, IN 46556
219/631-5917
FAX: 219/631-6371
E-mail: gurule.1@nd.edu

Staff
Commission on Opportunities for
Minorities in the Profession
Director
Sandra S. Yamate
312.988.5638
yamates@staff.abanet.org

Project Manager
Terryl Mannings
312.988.5667
tmannings@staff.abanet.org

Program Administrator
Sharon Tindall
312.988.5642
tindalls@staff.abanet.org

Meetings Coordinator
Adriana Garcia
312.988.5508
garciaa@staff.abanet.org

Administrative Assistant
Candace Smith
312.988.5643
smithc@staff.abanet.org

Technology Assistant
Douglas Knapp
312.988.5679
knappd@staff.abanet.org

ABA Publishing
Lori T. King, Editor
Andrew Alcala, Designer

Defending Liberty
Pursuing Justice

Valuing Diversity—A Given?

Keith Earley

My position as a corporate lawyer supporting my company's human resources (HR) function affords me many opportunities to address a full range of employment matters, including those relating to EEO compliance, affirmative action and diversity. I have attended diversity training and have had numerous discussions with HR professionals regarding the topic. I also have been involved in coordinating diversity presentations with the American Bar Association's Commission on Opportunities for Minorities in the Profession. Thus, like many employment lawyers, I believe I have developed a context from which I gain better perspective regarding diversity issues. Perhaps as important, I have assumed that as an African American, I have a natural resonance with diversity issues because of the history of oppression and exclusion of African Americans in this country.

But how much do I really understand about diversity? I have not devoted meaningful time to studying the technical underpinnings of diversity. I have some, but not an extensive level of, knowledge regarding the evolution of diversity theory, its impact on organizational dynamics, diversity models or the psychodynamic issues impacting diversity. Moreover, any meaningful discussion of diversity requires each of us to "work the issues" and probably experience some degree of discomfort. While this is true for those who have engaged in oppressive behavior, it is also true for those who have been historically excluded.

As minorities, how many of us continue to hold on to feelings of distrust and have difficulty forgiving those who have engaged in oppressive behavior? How many of us have created a "hierarchy of isms" to evaluate and understand the dimensions of diversity? This construct allows us to place our defining qualities at the forefront of any discussions regarding the importance of diversity. If you are an African American, for example, do you have a sense of moral superiority over members of the groups that have oppressed African Americans?

While you may understand and be sympathetic to concerns regarding exclusion of others based on gender, age, physical ability, sexual orientation and other dimensions of diversity, are you inclined to view issues involving racial exclusion as more insidious than any other type of exclusion? If so, you may exhibit a constricted view of the importance of diversity and its implications.

The juxtaposition of our presumed enlightenment around diversity issues with the reality of our own lack of understanding and indifference brings us face to face with the difficulties we confront when we seek to promote and model desired behavior. The baggage we bring is our emotional, psychological and even spiritual frame of reference. That frame of reference is the basis for evaluating and judging the attitudes and behavior of others who are different.

The failure to be wedded fully to openness and acceptance is problematic because it can cause diversity initiatives to take on a "flavor of the month" character from which individuals, groups and organizations can retreat when it is expedient to do so. Exclusion and denial of opportunity can be based on any one (or more) of the differences that define us. That is why it is important to view diversity from as broad a perspective as possible. By understanding that as human beings we are more alike than we sometimes think, we can look beyond our differences.

This does not eliminate the need to continue to focus on remedying the effects of past discrimination and oppression against racial and ethnic minorities in this country. It is clear that the impact of exclusion has had the most profound effect on race relations. Moreover, it is myopic and dangerous to assume that racial issues are not among the most significant issues that we must confront as individuals, in organizations and as a country. The stark reality is that organizations do not exist in a vacuum. People are affected by the problems that exist outside of our companies. For this reason, we must continue to struggle against the historical oppression of racial and ethnic minorities and its present-day manifestations.

There is a significant difference between groups that have been systematically excluded and denied and those that have not. While individuals in either group can champion inclusion, those in "one-up" groups must come to grips with the reality that the cost of promoting inclusion may be the loss of privilege, prestige, and comfort. Individualism and competition characterize the attitudes of many white males—the ones who typically dominate organizations—and it is a phenomenon that militates strongly against the loss of privilege. This translates into blind belief in meritocracy, a lack of comfort with minority cohesiveness and it explains the active and passive resistance to initiatives that are perceived as threatening to the status quo.

We must dedicate ourselves to the goal of diversity and inclusion for persons of color. To that end, our challenge is to act with courage and integrity. We must persevere over the forces of racial intolerance, indifference, and the defenders of the racial status quo.

Mr. Earley is chair of the Minority In-House Counsel Group.

"By understanding that we are more alike than we sometimes think, we can look beyond our differences."

Affirmative Action:
Define "Qualifications" from Diverse Viewpoints

D a l e F. R u b i n

I speak to you today about a subject that has been extremely controversial and has caused emotional upset to those of us who have considered the issue. It is the subject of affirmative action. On this day when we are celebrating the affirmative actions of Dr. Martin Luther King to eliminate racial discrimination in both public and private institutions, I think it appropriate that we also celebrate the concept of and legislation designed to ensure that the powerful and deeply entrenched forces of racism be required to relent and allow qualified persons of color equal access to economic opportunity. Make no mistake about it, affirmative action is about the allocation of economic resources.

I have come to understand the true meaning of affirmative action as a result of my experiences as a beneficiary of the concept. At least three such instances have made a difference in my life.

The first occurred in 1963 when, as a young man seeking admission to Stanford University, I found myself in the office of its president. If admitted I would be only the tenth black person to do so in the university's sixty-five years. I was a graduate of an all-black public high school in Oakland, California, with a C+ average and was required to attend one year of junior college to bring up my grades. The president looked at my junior college transcript, talked to me for about 15 minutes and decided that I was qualified for admission. He chose to ignore my SAT scores, which were far below the scores of the average Stanford student.

Oh yes, I forgot to mention one thing: I played football very well. Thus, in determining whether I was qualified to attend Stanford University, the president chose to consider and emphasize attributes other than simply grade point average and SAT scores. No voices in opposition to *this* kind of affirmative action were raised then, nor are they raised today. No white student has ever filed suit alleging that a black university athlete was admitted with "qualifications" less than his. This is because superior athletic achievement has always been considered an important factor in the admissions process for both black and white students. You somehow become "qualified" if you can play basketball. And obviously, in spite of my low SAT scores, I was qualified to be a Stanford student. After all, I graduated.

This example indicates that we must refocus the discussion of affirmative action to the meaning of "qualified." SAT scores and grade point average are not the only determinants of ability to succeed in college.

My second affirmative action experience occurred in 1970 when I graduated from law school. I was successful in law

school, scoring first in my class in corporation law, and was chosen to take a business law seminar that only twenty students could take. I was selected by a prestigious San Francisco law firm to be its first black associate in seventy-five years. At this point there was no question about my qualifications.

Also there were more and more blacks graduating from law school who were seeking lucrative law firm jobs. The firm that hired me made a commitment to devote some of its resources to recruit and hire black lawyers. Toward this end, the firm interviewed black lawyers nationwide and although I was the only one hired that year, two more were hired the following year. Over the next fifteen years many qualified blacks were hired in business firms across the country.

Did this spasm of hiring eliminate the problem of discrimination in law firms? Unfortunately no, because the number of black associates making partner and thus obtaining a permanent economic stakehold in the firm and the ability to take part in the decision making process was miniscule. For example, when I was hired in 1970, the number of black partners in San Francisco law firms totaled one-half of 1 percent. In 1996, this figure nationwide was 1.2 percent. How is it that the number of qualified black associates hired is 10 percent nationally but the number of black partners is only 1 percent? Does this suggest the continuing need for affirmative action?

Finally, the third affirmative act was committed by an institution that is nearby: The Appalachian School of Law, where I am presently employed. The board of trustees of the institution, along with the president and the dean determined that this new law school would have a faculty with diverse viewpoints. And it should be no secret to any of us that people of color have viewpoints in many areas that are significantly different from those of white people. It is vitally important that students hear all such viewpoints. Thus the administration at the law school committed resources to recruiting people of color to serve on its faculty and to comprise a part of its student body. In addition, successful efforts were made to prepare the Grundy community for its only black family. And I can confidently state that the reception my kids and I have received has been wonderful.

The point I want to make is that had the law school not acted affirmatively in seeking out qualified persons of color, I certainly would not have heard of Grundy, Virginia, nor would I have had the pleasure of addressing you today.

I would like to pose a hypothetical which illustrates both the inadequacy of standard notions of the meaning of "qualified" and the need to broaden our perspectives when evaluating whether a person of color is qualified to do the job. Let us suppose that the Southwest Virginia Community College was just getting started and wanted to hire ten new faculty members. And let us further suppose that the standards for hire depended upon traditional requirements, such as teaching experience and scholarship. And let us further suppose that after a review of all the resumes submitted, the top ten candidates were black. Do you think that all of these candidates would

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1999 Spirit of Excellence Awards

Charisse R. Lillie

The 1999 Spirit of Excellence Awards Luncheon provided a dramatic window into the legal history of the diverse peoples of America. The outstanding lawyers honored this year were Gilbert F. Casellas, president and chief operating officer of The Swarthmore Group, an investment and financial advisory firm; the late Honorable A. Leon Higginbotham, Jr., public service professor of jurisprudence at Harvard University and counsel to Paul, Weiss, Rifkind, Wharton & Garrison; the Honorable Gary Locke, governor of Washington State; and F. Browning Pipestem, senior attorney, F. Browning Pipestem & Associates. Judge Higginbotham, who was honored posthumously, was represented by his son, Kenneth Higginbotham, and his cousin, Michael Higginbotham, who gave moving tributes in his memory. The remaining Spirit of Excellence Award winners told stories of triumph over segregation, prejudice, institutional racism, and other pressures. These personal testimonials were compelling, encouraging, and educational for all attendees.

The Spirit of Excellence Corporate Award was presented to Guy Rounsaville, Jr., former general counsel and corporate secretary of Wells Fargo & Company and Wells Fargo Bank, N.A. Mr. Rounsaville was one of the founders of the California Minority Counsel Program, which was established to provide greater access to opportunities for minorities in the legal profession. The Spirit of Excellence Inspiration Award was presented to Elaine R. Jones, president and director-counsel of the NAACP Legal Defense and Education Fund, the nation's oldest organization fighting for equal rights under the law.

The ABA Commission on Opportunities for Minorities in the Profession established the Spirit of Excellence Award to celebrate the achievements of minority lawyers. The award recognizes their contributions to the legal profession and society. Each of the recipients personify excellence in the profession and has made significant contributions to the advancement of racial and ethnic diversity in the profession. The Award's motto is, "Ad Astra Per Aspera—To the Stars through Difficulty."

Nominations are now open for the Year 2000 Spirit of Excellence Awards. Nomination forms are available from the Commission on Minorities staff in Chicago. Nomination forms must be received on or before August 15, 1999. Award recipients will be selected September 1, 1999.

Ms. Lillie is vice-chair of the ABA Commission on Opportunities for Minorities in the Profession.

1999 Spirit of Excellence Award Winners: Gov. Gary Locke, Elaine Jones, Gilbert Casellas, Guy Rounsaville, Jr., F. Browning Pipestem, and Kenneth Higginbotham and Michael Higginbotham accepting for the late Honorable A. Leon Higginbotham

Elaine Jones and Commissioner Richard Mulroy

Commission Vice Chair Charisse Lillie, Kenneth Higginbotham and Michael Higginbotham

Commission Liaisor
Jackson Vaughn an

F. Browning Pipestem

ns Patrick Thompson, Connye Y. Harper, Karen
d Larry Smith

Commissioner Teresa Lai, Gilbert Casellas,
and Commissioner Alison Nelson

Diversity and Justice

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recommend a handful of candidates.

Of course, this approach has not produced results that are inclusive, unless taking a risk on an alumnus of New York University or Berkeley can be regarded as outreach. In particular, 20 percent of law school graduates are now persons of color and many attend schools ranked within the top ten schools. Yet less than 2 percent of the clerks ever employed by the sitting Justices were African American (7 out of 428), and only 1 percent Hispanic (5 out of 428). This term, the Justices have no African Americans and only one Hispanic. Furthermore, only one quarter of the clerks have been women.

Worse still, the approach does not reflect open competition. All of the law clerks have amazing resumes. Many more who could not even be considered—whose own law schools would politely advise them that they didn't stand a chance—are comparable in actual performance.

The mistake is the belief that merit and credentials are the same. It scarcely benefits society to measure the former by a limited range of the latter. The belief that the best and the brightest or the cream of the crop can be identified simply and exactly harms all but a few of us who can and should contribute to the country. About half the hires by the current Justices have been from Harvard or Yale; virtually all of the remaining clerks are graduates of the other top ten schools.

Modest affirmative action, such as recruiting and reviewing a range of applicants, would likely help everyone. If the Justices would interview some possibilities from, say, University of Washington at Seattle or University of Minnesota, or Fordham or Emory—all schools whose finest could match those from Michigan or Stanford—they would increase the number of African American hopefuls as well as talented individuals from other backgrounds. It is disingenuous to suggest that such efforts amount to racial quotas.

The Justices who have insisted that they do not consciously discriminate on the basis of race or gender undoubtedly are right about their individual preferences. Nonetheless, they are government officials whose cumulative actions form a pattern that may have the unfortunate consequence of excluding people.

It is important to emphasize that there isn't a basis for accusing specific Justices of bigotry, as some have implied for rhetorical effect. It would be needlessly inflammatory to do so, because their good faith doesn't resolve "the American dilemma." Achieving racial diversity requires leadership and action. It isn't likely to happen either naturally or accidentally.

Indeed, public comments from the Justices support the notion that it isn't merely a matter of preventing explicit prejudice which properly concerns the Court. Justice Clarence Thomas, testifying before Congress in March, stated of the relatively low numbers of African Americans and Hispanics as clerks, "There is not a person at the Court who would not want to change this."

The unusual appearance by Justice Thomas, along with Justice David Souter, during hearings on the budget of the judiciary this spring, highlights another aspect of the controversy. As in other contexts where choices are made among people, decision-makers should be prepared to explain the process in public.

The Supreme Court's failure is ironic. It was once regarded as a leader on civil rights, changing the nation with its unanimous desegregation cases. In another era, the Justices are proving they can be the least progressive branch of the federal government.

Mr. Wu, an associate professor at Howard University, served as a law clerk to the late United States District Judge Frank J. Battisti in Cleveland.

The Commission on Opportunities for Minorities in the Profession and Minority Counsel Program would like to acknowledge:

Mesch Clark & Rothschild Tucson, Arizona

Streich Lang, Tucson, Arizona

Cohen Kennedy Dowd & Quigley, P.C., Phoenix, Arizona

for providing funding for the CLE program *"How Outside Counsel Can Get Their Groove Back: Corporate Counsel Share Their Predictions About the Cutting Edge Legal Topics Every Prospective Outside Counsel Should Know to Develop (and Keep) Business in the New Millennium,"* Saturday, May 15, 1999 during the Joint Spring Meeting with the ABA Tort and Insurance Practice Section, Phoenix, Arizona.

ATLANTA ABA

1999 Annual Meeting August 5 – August 11

Commission on Opportunities for Minorities in the Profession

1999 Annual Meeting Schedule
August 5–8, 1999
Westin Peachtree Plaza, Atlanta, Georgia

Think sweet, succulent, sun-ripened peaches washed down with a swig of Coca-Cola while shopping Underground and you're obviously getting into the mood for glorious Atlanta, site of the 1999 ABA Annual meeting, August 5-11. The Commission on Opportunities for Minorities in the Profession will be there in full force and hopes that you will be, too.

This year, the Commission will be offering three programs; *two* that have been designated as Presidential Showcases. On Friday afternoon, August 6, join us for "Miles to Go: The Next Step" where a panel of distinguished lawyers will discuss the current status of minorities in the profession and strategies to advance lawyers of color.

On Sunday, August 8, "Do You See What I See? Cultural Differences in the Courtroom" will feature Johnnie Cochran, Michael F. Yamamoto and others in a discussion about the legal implications for differences in cultural values ranging from corporal punishment, expressions of affection, and intergenerational taboos, to male circumcision and female genital mutilation. In addition, the Commission has secured as speakers Angela Oh and Kirkland and Ellis Professor of Law David B. Wilkins.

Later that same day, "Building Your Practice By Serving Communities of Color" will address the ways sole practitioners, small firms, and others with a general practice can build their practices and client bases by reaching out to traditionally underserved communities of color. Even if you are not bilingual or belong to a different racial or ethnic group, are you overlooking a potentially lucrative but underserved client base?

The Commission's business meetings and the Information Center will be at the Westin Peachtree Plaza. There you will be able to find out more about these and other programs that will be offered, as well as any last minute changes. The CLE programs will be held at the Georgia World Congress Center, which will be the Presidential CLE Center during the meeting. The Commission will be sharing the Westin with the Litigation Section and the Real Property, Probate and Trust Law Section, so it is imperative that you make your reservations early!

Some of the Commission's cosponsored CLE and social events are:

- "Hate Crimes in America: Legislating Tolerance or Criminalizing Intolerance," Friday, August 6 (2:00 p.m.–5:00 p.m.), Georgia World Congress Center
- Reception/Dinner at the Carter Center, on Friday, August 6. The primary sponsor is the Section of State and Local Government Law. Buses will depart from the Westin at 6:00 p.m. This is a ticketed event ($85.00).

Other Annual Meeting highlights to plan for:

- A reception for all lawyers of color attending the Annual Meeting and Atlanta's minority legal community on Friday, August 6;
- A meeting for the Commission, its liaisons, and local minority bar leaders on Saturday, August 7; and,
- The latest update on restructuring of the Minority Counsel Program on Saturday, August 7.

So consider joining us in Atlanta for an exciting and jampacked Annual Meeting 1999! For more information, call Adriana Garcia at (312) 988-5508 or visit our website at www.abanet.org/minorities or e-mail us at abaminority@abanet.org

SCHEDULE

All CLE meetings will be held at the Georgia World Congress Center.

Thursday, August 5	
5:00 p.m.–7:30 p.m.	Reception (location to be announced)
Friday, August 6	
8:00 a.m.–5:00 p.m.	Commission Information Center
8:00 a.m.–1:00 p.m.	Commission Business Meeting (closed meeting)
2:00 p.m.–4:00 p.m.	*Miles to Go: The Next Step*
4:00 p.m.–6:00 p.m.	Reception (location to be announced)
Saturday, August 7	
8:00 a.m.–5:00 p.m.	Commission Information Center
9:00 a.m.–12:00 p.m.	Commissioners and Liaisons Business Meeting
1:00 p.m.–3:00 p.m.	Policy and Programming
3:00 p.m.–5:00 p.m.	Constituent Groups—Roundtable Breakouts • Minority Counsel Program • Minority In-House Counsel Group • Conference of Minority Partners • Multicultural Women's Attorney Network (MWAN) • *Goal IX* Newsletter
Sunday, August 8	
9:30 a.m.–11:30 a.m.	*Do You See What I See? Cultural Differences in the Courtroom* (Presidential Showcase Status/CLE)
11:30 a.m.–2:00 p.m.	Margaret Brent Luncheon–Commission on Women (Georgia World Congress Center, Ballroom)
2:00 p.m.–4:00 p.m.	*Building Your Practice By Serving Communities of Color* (CLE)
3:00 p.m.–5:00 p.m.	ABA House of Delegates Minority Caucus

Retreat from *Bakke*

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lished. Because the three-judge panel directed the law school not to use race as a factor in the law school's admissions process, the dissent criticized the panel as purporting to overrule the Supreme Court's decision in *Regents of the University of California v. Bakke.* The dissenting judges forcefully argued that the implications of the panel decision were so racial as to "change the face of public educational institutions throughout Texas." The dissent added, "A case of such monumental impact demands the attention of more than a divided panel."

The case was tried again in late March and early April 1997 and the district court found:

1. The law school proved none of the plaintiffs would have been admitted to the law school under a constitutional admission system.

2. But in the event any of the plaintiffs successfully appealed this finding, the court made several alternative factual findings regarding the issue of damages.

The federal district court entered the following judgment:

1. The plaintiffs have judgments against the University of Texas in the amount of $1 each; and

2. The University of Texas law school was permanently enjoined from taking into consideration racial preferences in the admission process.

The ABA Commission on Minorities, as well as the Commission on Women, the Section of Individual Rights and Responsibilities, the Section on Legal Education and Admissions to the Bar, and the Council on Racial and Ethnic Justice, have joined forces in a working group to have the ABA's voice heard as the case moves forward. The working group anticipates filing an amicus curiae brief in support of the University of Texas law school.

From the viewpoint of the ABA working group, the important issue presented for appeal arises from the final judgment of the federal district court. Federal Judge Sam Sparks of the Western District of Texas set the stage for this appeal—and ABA involvement—by enjoining the University of Texas School of Law from taking into consideration racial preferences in the selection of those individuals to be admitted to law school.

The Fifth Circuit's decision in *Hopwood* departed with Supreme Court precedent by holding that the goal of achieving a diverse student body could not be a compelling government interest under the Fourteenth Amendment. Moreover, issuing an injunction proscribing consideration of race in the admissions process appears to be a direct challenge to the Supreme Court's decision in *Regents of the University of California v. Bakke.*

The United States Supreme Court in *Bakke* reversed the decision of the lower courts enjoining the University of California at Davis from ever considering the race of any applicant. Justice Powell, joined by Justices Brennan, White, Marshall and Blackmun, said the lower courts failed to recognize that the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. *Bakke,* 438 U.S. at 320. The use of race by the trial court in *Hopwood* is inconsistent with *Bakke.*

Surely, it is the position of the ABA working group that the *Hopwood* ruling prohibiting the use of race constitutes a radical departure from the Supreme Court ruling in *Bakke* and cannot be permitted to stand.

Mr. Jordan is a member of the ABA Commission on Opportunities for Minorities in the Profession.

Affirmative Action

continued from page 5

be hired? Of course not. Should they be hired? Of course not. This is because a community college faculty should represent at least some of the viewpoints of the community it serves. Thus the administration should at least hire some white faculty members even though they do not meet the traditional standards for hire. It is recognition that such traditional standards are deficient in that they do not enable this hypothetical educational institution to achieve the important goal of exposing its students to different points of view.

Finally, it is too bad that Dr. Martin Luther King is not around today to diminish the two main arguments of the opponents of affirmative action. To the first assertion that blacks are adequately represented in all areas of the national employment arena, Dr. King would have labeled that assertion as an appeal to tokenism:

> With tokenism, the solution was simple. If all twenty million Negroes would keep looking at Ralph Bunche, the one man in so exalted a post would generate such a volume of pride that it could be cut into portions and served to everyone. A judge here and a judge there; an executive behind a polished desk in a carpeted office; a high government administrator with a toehold on a cabinet post; one student in a Mississippi university lofted there by an army; three Negro children admitted to the whole high-school system of a major city—all these were tokens used to obscure the persisting reality of segregation and discrimination.

And to the implication that simply because of the passage of time, and that affirmative action laws have been on the books for over twenty-five years, the problem of discrimination has been eliminated, I will conclude with the following words written by Dr. King in his letter from a Birmingham jail:

> I had also hoped that the white moderate would reject the myth concerning time in relation to the struggle for freedom. I have just received a letter from a white brother in Texas. He writes: All Christians know that the colored people will receive equal rights eventually, but it is possible that you are in too great a religious hurry. It has taken Christianity almost two thousand years to accomplish what it has. The teachings of Christ take time to come to earth. Such an attitude stems from a tragic misconception of time, from the strangely irrational notion that there is something in the very flow of time that will inevitably cure all ills. Actually, time itself is neutral; it can be used either destructively or constructively. More and more I feel that the people of ill will have used time much more effectively than have the people of good will. We will have to repent in this generation not merely for the hateful words and actions of bad but for the appalling silence of the good people. Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God, stagnation. We must use time creatively, in the knowledge that the time is always ripe to do right. Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.

Mr. Rubin is a law professor at Appalachian School of Law in Grundy, Virginia. These comments are adapted from a speech to Southwest Virginia Community College on January 19, 1998.

An open letter to Minority Counsel Program supporters:

On the eve of the third millennium, lawyers of color have yet to achieve level ground on the playing field of corporate America. Consequently, lawyers of color continue to be disproportionately underrepresented in partnerships of the nation's large law firms, in upper management of Fortune 500 law departments, and in almost every area of the legal profession except government. At a time when surveys of public perceptions about our legal system reveal a lack of confidence by minorities, demographics suggest that the face of America is changing with the potential for profound ramifications. Despite these changes, our present reality suggests that we are no closer today to the American Bar Association's Goal IX objective—"to achieve the full and equal participation of minorities within the profession"—than we were a decade ago.

In 1988, the ABA's Commission on Opportunities for Minorities in the Profession created the Minority Counsel Demonstration Program. The program's purpose was to demonstrate to corporate America and others in the legal profession that lawyers of color could successfully manage the legal work and representation of corporate clients. Additionally, it sought to establish a benchmark of talent, ability and work product for lawyers of color evidencing the high levels of confidence currently enjoyed by corporate America. The program's initial success prompted the Commission to drop the word "demonstration" from its title in the belief that corporate America would continue to retain minority lawyers for outside legal services.

The Minority Counsel Program's (MCP) early success may have set the tone for its decline, however. The growing perception of limitless opportunity combined with misconceptions and unrealistic expectations of MCP members, contributed significantly to the program's explosive growth and its ultimate decline. For its constituents, the program had lost its focus.

In October 1998, MCP leadership held a summit to redefine the program's course and renew its objectives. MCP2000 was conceived with its revised goal of assisting lawyers of color in their efforts to develop mutually rewarding business relationships with America's largest corporations. The program will showcase lawyer's skills through such events as mock trials, panel discussions, legal workshops, and forums on issue/case trends, and activities which provide networking opportunities for lawyers and prospective clients.

Please join us in October 1999 as we unveil MCP2000 and raise the stakes for competitive legal services in the new millennium.

Sincerely,
Minority Counsel Program Strategic Committee

MCP: Old vs. New

Old MCP:

- Focus upon immediate assignment of outside legal work;
- Interviews conducted by corporate representatives who lacked authority to assign work;
- Unpredictable schedule for interviews;
- "Entitlement" attitude by many prospective outside counsel;
- "Feeding frenzy" atmosphere a deterrent to corporate attendance;
- Little or no statistical information to evaluate the success or ineffectiveness of the program; and,
- Dissatisfaction with the amount, type, or quality of legal assignments generated by the program.

MCP2000:

- Focus upon building strong, long-term business relationships;
- Opportunities for prospective outside counsel to demonstrate their legal abilities and showcase their talents;
- Emphasis upon small group and one-on-one programming;
- Prospective outside counsel who expect to benefit from the program will, in turn, be expected to help those less privileged than themselves through a pro bono requirement;
- Attendance caps for prospective outside counsel based upon the number of corporate counsel registered for each meeting;
- Skill-building workshops where prospective outside counsel and corporate counsel can learn together;
- Policy programs to educate corporate counsel about the politics associated with the use of lawyers of color as outside counsel in areas such as recruitment, hiring, promotion to partnership, and retention;
- Policy programs to educate prospective outside counsel about the politics associated with the selection and use of outside counsel, both within and outside the law department;
- A reporting requirement to track the amount, type, and outcome of work assigned through the program; and,
- Honoring corporations, law firms and bar associations that demonstrate a special commitment to or success in promoting the full and equal participation of minorities and women in the legal profession.

Upcoming Programs

Brown v. Board of Education
45th Anniversary Program
Joint Program with ABA Museum
tentatively scheduled for July 21, 1999
Thorne Auditorium, Northwestern University
Chicago, Illinois

Minority Counsel Program 2000
"Back and Better Than Ever!"
October 21-24, 1999
Chicago, Illinois

For more information contact Adriana Garcia 312/988-5508.

ABA Commission on Opportunities for Minorities in the Profession

Master Calendar of Meetings

June 1999	NBA/International Affiliate Meeting	Israel
June 4–5, 1999	NAPABA/Midyear Meeting	Phoenix, AZ
June 10–11, 1999	Minority Trial Advocacy Program	Chicago, IL
June 17–19, 1999	ABA Board of Governors Meeting	Boston, MA Ritz Carlton Boston
June 23–24, 1999	Minority Trial Advocacy Program	New York, NY
July 24–31, 1999	NBA/74th Annual Convention	Philadelphia, PA Philadelphia Marriott Hotel
July 29–August 1, 1999	Organization of Chinese Americans National Convention	Dallas, TX Adams Mark Hotel
August 4–6, 1999	ABA Board of Governors Meeting	Atlanta, GA Hyatt Regency Atlanta
August 5–7, 1999	HNBA Board Meeting	Chicago, IL
August 5–11, 1999	ABA Annual Meeting	Atlanta, GA Hyatt Regency Atlanta
August 6–7, 1999	NAPABA/Board Meeting	Seattle, WA
August 15, 1999	Spirit of Excellence Awards Nomination Deadline	
September 1, 1999	Selection of Award Recipients	
September 15–18, 1999	Congressional Black Caucus 29th Annual Legislative Convention	Washington, DC Convention Center
October 8–10, 1999	National Coalition of 100 Black Women Biennial Conference	Los Angeles, CA
October 13–16, 1999	HNBA/Annual Convention	Dallas, TX Westin Galleria
October 21–24, 1999	Commission Business Meeting Minority Council Program (MCP2000)	Chicago, IL
November 3–5, 1999	ACCA/Annual Meeting	San Francisco, CA The Fairmont Hotel
November 10–14, 1999	NAPABA Board Meeting	Los Angeles, CA
November 12–14, 1999	NAPABA Convention 1999	Los Angeles, CA Westin Bonaventure
March 22–26, 2000	MCP's Joint Meeting with Real Property, Probate, & Trust Law	Miami, FL Loews Hotel
March 29–April 1, 2000	ABA Board of Governors Meeting	New Orleans, LA
May 24–27, 2000	ABA Board of Governors Meeting	Chicago, IL

*Abbreviations

ABA	American Bar Association
ACCA	American Corporate Counsel Association
HNBA	Hispanic National Bar Association
NABA	Native American Bar Association
NBA	National Bar Association
NAPABA	National Asian Pacific Bar Association
MCP	Minority Counsel Program
MWAN	Multicultural Women Attorneys Network

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The ABA Section of Litigation invites you to the

National Conference for the Minority Lawyer

Cosponsored by:
Glasser LegalWorks Seminars

June 10-11, 1999
The Fairmont Hotel
Chicago, IL

June 23-24, 1999
New York Hilton and Towers
New York, New York

Presented in cooperation with:

- ABA Commission on Opportunities for Minorities in the Profession
- ABA Section of Labor and Employment Law
- ABA Corporate Counsel Committee, Section of Litigation
- National Bar Association
- Asian American Bar Association of Greater Chicago Area
- Conference of Minority Law Partners of Majority Law Firms
- The Latino Lawyers Association of Queens County
- The Black Women Lawyers Association of Chicago
- The Chicago Committee on Minorities in Large Law Firms
- The Boston Law Firm Group
- Hispanic National Bar Association

Registration fee: $360. Fee for ABA Litigation Section Members and Nonprofit organizations $325.
To register for this program, call 800/308-1700.

On Sale Now

1999 Minority In-House Counsel Directory

To order the ***1999 Minority In-House Counsel Directory*** call the ABA Service Center **1-800-285-2221** directly. Refer to product code number: **4520005**, and secure your copy for **$25 plus $5.95 shipping and handling**.

GOAL IX

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