Minority Trial Lawyer

Surviving in a Law Firm in Good or Bad Economic Times
Strategies for Success for Minority Attorneys

PETER J. KALIS AND EDWARD W. DIGGS

Surviving in a law firm, whether in good or bad economic times, is no easy feat. It requires hard work and uncompromising dedication in a market driven by uncontrollable forces. Indeed, client demands, changing laws, increasing competition and swinging economies punctuate the market forces that drive law firms’ decisions as they struggle to survive in the marketplace.

Like law firms, attorneys must recognize and appreciate those market realities and exercise astute management over their professional careers. No longer can a lawyer rely solely on meeting a law firm’s billable hour requirements to succeed. Instead, the lawyer must become one of the many threads that bind the institutional fabric of the law firm. This requires contributing value to the various aspects of the firm’s operations, both administratively and professionally—the kind of contribution that allows the attorney to not only survive but also to become part of that which defines the very character of the law firm.

Career strategies for success will, no doubt, vary from firm to firm; there are no generic guidelines to follow that will ensure success. There are, however, three basic strategies that attorneys should employ in any law firm if they hope to succeed:

1. develop and cultivate relationships with firm colleagues,
2. perform immaculate work, and
3. adapt to the firm's culture.

Although these three basic strategies may not alone guarantee success, any strategy that does not include them is a formula for failure.

Never Underestimate the Power of Relationships
The relationships attorneys forge with colleagues in their law firms today become the blueprints for tomorrow’s success. For it is oftentimes through the conduit of these very relationships that an attorney’s career path is paved. Minority attorneys, in particular, should always appreciate the power of cultivating relationships. Forming the right alliances within

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Section of Litigation’s Commitment to Diversity
Walking the Walk

Early in 2002, ABA’s three-year-old Minority Judicial Externship Program was in search of a new Section home. Section of Litigation leadership responded by giving it a home in the Section and investing significant financial and human resources into this practical program—that promotes diversity among judicial clerks (see MJIP article on page 4).

This is only one example of how the Section of Litigation’s commitment to diversity goes far beyond rhetoric or paper pretense. Since adopting its formal Diversity Plan on May 9, 2001, the Section has taken tangible steps and implemented viable projects to enhance diversity in the Section, the ABA, and the legal profession.

The Section’s Diversity Plan identifies specific tasks to accomplish its objectives, and gives Section leadership the mandate to “Assign every task in this Diversity Plan.” To ensure follow through and accountability, the eleven-member Diversity Plan Implementation Working Group was established in 2002-03 as an active part of Section leadership.

The following objectives and tasks—as stated in the Diversity Plan—and corresponding actions already underway exemplify the Section’s commitment to “walk the walk” on diversity in the profession:

OBJECTIVE: The Section will designate staff and leadership to support and oversee the Section’s Diversity Plan.

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CHAIR’S COLUMN

Strengthening the Voice of Diversity In the Section and In the Profession

BRETT J. HART AND BURNADETTE NORRIS-WEEKS
CO-CHAIRS OF THE MINORITY TRIAL LAWYER COMMITTEE

Welcome to the debut issue of the Minority Trial Lawyer, THE publication for minority litigators and others who have an interest in diversity in the legal profession.

We are pleased to serve as Co-Chairs of the Minority Trial Lawyer Committee of the ABA Section of Litigation. We believe that strengthening a diverse voice within the Section of Litigation will benefit the legal profession as a whole. The Section of Litigation is committed to addressing the needs of minority attorneys by ensuring that lawyers of color have a strong voice within the Section. To that end, it is our goal to bring to the members of the Committee a publication that is both timely and relevant to minority litigators.

During the 2002-03 bar year, we have made a concerted effort to focus on our communication initiatives. We believe that the primary way to enhance our committee structure is to disseminate useful information to the members of the Committee on an ongoing basis. For example, we launched our Committee listserve that now reaches more than 500 members. And, this newsletter represents another cornerstone of our communication initiatives.

In order for this publication to be highly successful, we solicit your thoughts on issues most critical to the minority litigator. While lawyers of color share many issues with the general population of lawyers, given their specific areas of practice, there is much room for a publication that addresses our unique placement as minorities within the legal profession.

The ABA has shown that it is committed to promoting the inclusion and advancement of minorities in the highest ranks of its organizational structure. Minority lawyers are well positioned to leverage our gains and standings in our firms, the public sector, and corporations by sharing information that will mentor others similarly situated. As Committee Co-Chairs—through the newsletter and other communications—we hope to provide leadership that exemplifies the power of passing on valuable information that strengthens minority litigators.

We appreciate the hard work of Section of Litigation tireless staff, contributing writers and the editorial board for their participation with this publication. We invite you to take a few minutes and read through this issue—then, give us a call or e-mail to share your thoughts and vision for the Minority Trial Lawyer Committee and its quarterly newsletter. On page 17, the Committee's plans for this year summarize our objectives and planned actions. See the article on page 18, for specific ways to get involved in the Committee, and visit the Committee online (www.abanet.org/litigation/committee/minority/home.html) for updates on activities and events. If you’re not a Committee member yet, join now (complete form on inside back cover).

The Committee can be only as strong as its members. Together we can make a difference!

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Tips From the Bench

MONIQUE M. BRANSCOMB

To be a lawyer is to be an artist. A good lawyer should create an atmosphere that will inspire, intrigue, and persuade a judge or a jury to make a decision that will benefit the client. It is not necessary to possess supernatural legal ability. Most of the time, a “good lawyer” is one who masters and practices the basics.

Consider and put into practice these tips from two venerated judges on how to consistently give a winning performance.

The Honorable Solomon Oliver, Jr., of the U.S. District Court, for the Northern District of Ohio, Cleveland, Ohio, offers the following tips for success in any courtroom.

Be Prepared. Judge Oliver believes that a good lawyer should be prepared at every stage of the case, including the initial case management conference. “Prepared means to be totally knowledgeable about the case…to the extent possible, the lawyer should be able to tell the court who his witnesses will be, how long discovery will take, how long the trial will be, and if there is a possibility for settlement.”

In the case of a second- or third-chair associate who is sent to court for a pretrial conference, Judge Oliver expects that whoever appears should know as much about the case as the lead counsel.

Make Effective Use of Legal Tools. Judge Oliver is not pleased with lawyers who do not deal appropriately with difficult issues or who fail to make appropriate use of motions in limine. “The effective use of motions in limine alerts the court to issues that may come up at trial and reduces the element of surprise…Anything less tends to slow the process.”

“The effective use of motions in limine alerts the court to issues that may come up at trial and reduces the element of surprise.”

When interacting with witnesses, counsel should be respectful and courteous at all times, Judge Oliver suggests. And, counsel should make use of the court when a witness is being difficult. For example, ask the court to direct the witness to answer the question. It is best to avoid arguing with a witness, Judge Oliver warns.

Be Organized. A good lawyer should be prepared for each witness. Ideally, the attorney should prepare a detailed outline that designates the exhibits that will be introduced through a particular witness and identifies the foundational requirements for each exhibit. Move for the admission of evidence immediately after the foundation is laid. Do not wait until the end of the case. If the foundation has not been properly laid, the proponent of the evidence can require opposing counsel to explain what foundation is missing, and the witness is still available to provide the needed foundation. Additionally, it avoids confusion. It is difficult and time consuming to go through the proper analysis for each exhibit at the close of the evidence.

Expect to be Treated Fairly. Minority lawyers should behave no differently from any other lawyer. There is, however, the difficult situation when a judge may treat a minority lawyer unfairly. Judge Oliver believes the best way to handle such a situation is to learn as much about the judge as possible, seek counsel from another minority lawyer who has appeared before that particular judge, and act as if you expect the judge to be fair. “Create an expectation of being treated fairly,” Judge Oliver further suggests that “It would also be prudent to ask another, experienced attorney, to appear in court with you as a witness. He or she can act as an objective observer to confirm whether the judge has any bias.”

The Honorable Cecil Patterson, who sits on the Arizona Court of Appeals, Division One, Phoenix, Arizona, believes a good lawyer can “maximize the opportunity for success” if he is mindful of the following:

Be Prepared. Preparation is the key. Preparation means that the lawyer has researched the law regarding her case, has full command of the facts, and has anticipated the issues her case may raise. . . . “It is also important to think about what the other side is going to emphasize at oral argument so that you can be prepared to respond.”

Know Your Audience. “Be familiar with the protocol and custom of a particular court, and be sensitive to how the judges respond in oral argument.” A good
In 1995, Arizona Governor Symington appointed Judge Cecil Patterson to Division One of the Arizona Court of Appeals, making him the first African-American judge on the Arizona Court of Appeals. Judge Patterson had previously served on the bench in Maricopa County Superior Court from 1980 to 1991. He then took a position as Chief Counsel of the Human Service Division of the Office of the Attorney General.

Judge Patterson has been active in numerous legal and community organizations. He has served on the City of Phoenix Ad Hoc Use of Force/Cultural Awareness Task Force, the Minority Advisory Committee at Arizona State University, and the Board of Directors at the Maricopa County Branch of the NAACP.

Judge Patterson graduated from Hampton University in 1963, and served five years as an officer in the U.S. Air Force. He then earned his law degree from Arizona State University in 1971. From 1971 to 1975, Judge Patterson practiced with the Legal Aid Society, the Phoenix Urban League and as a partner with the firm of Bursch and Patterson. From 1975 to 1980, he was a trial attorney with the Maricopa County Public Defender’s Office.

In September of 2002, the Section of Litigation, in partnership with the Council on Legal Education Opportunity (CLEO), assumed the administration of what was then known as the Minority Judicial Externship Program. The ABA Section of Antitrust Law created the original program in 1999.

After much success with the program, the Antitrust Section was looking to place the program in a new home. The Section of Litigation gladly accepted and now administers the Minority Judicial Internship Program (MJIP). The program provides judicial clerk internship opportunities for minority law students—those who are members of traditionally under-represented groups in the legal profession. In 2003, the Section plans to place 55 students in internship positions.

The Minority Judicial Internship program is a full-time, eight-week minimum, summer internship program open to all first- or second-year minority law students who want to do legal research and writing for state or federal judges in participating cities. Judges from the United States District Court for the Northern District of Illinois, the Southern District of Texas, and state courts in Illinois participate in MJIP. Interns receive a stipend of $1,500 for the entire summer. Students also have the option of obtaining law school credit for MJIP participation, contingent on their school’s approval.

The Section of Antitrust Law and CLEO continue to serve as major MJIP sponsors. CLEO is a non-profit project of the American Bar Association Fund for Justice and Education, dedicated to diversifying the legal profession by expanding legal education opportunities for members of under-represented groups. Many other ABA entities also help to sponsor MJIP, including the Section of Administrative Law, the General Practice, Solo and Small Firm Section, the Government and Public Sector Lawyers Division, the Judicial Division, the Judicial Division National Conference of Federal Trial Judges, and the Law Student Division.

The time commitment for each internship can vary by student, subject to an eight-week minimum. Students are expected to coordinate their schedules with their individual judges and to work the hours required by each judge. Students are also expected to attend an orientation program.

Many Section members volunteered to assist with interviewing the more than 190 students who submitted applications for the 2003 MJIP. After completion of the initial interview process, the students will interview with judges in Illinois or Texas.

For more information on the program, contact the MJIP Program Director, Gail Howard at howardg@staff.abanet.org or 312-988-6348.

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Diversity Development Database

Burt Blanchard

With the membership of the Minority Trial Lawyer Committee growing steadily, the Section realizes that it has a virtually untapped pool of talent to participate in various Section and ABA projects. If you are looking for ways to become more involved—not only with the Minority Trial Lawyer Committee, but also the Section of Litigation as a whole—then you are in the right place.

The Section has launched a Diversity Development Database that will serve as a resource for identifying members to work on a variety of substantive projects. If you are interested in writing for a publication (e.g., committee newsletters or book projects, such as model jury instructions series), or speaking on a CLE panel, or perhaps co-chairing a subcommittee for one of the many substantive committees within the Section, then you’ll want to become part of the Diversity Development Database.

To become part of this exciting initiative, go to the Minority Trial Lawyer Committee’s home page at www.abanet.org/litigation/committee/minority/, and complete the short profile listed under “Section Database.” There, you will tell us a little about yourself, your areas of practice expertise, and what you may be interested in. Once you have entered your information in the database, get ready because you’re likely to receive a call or e-mail asking for your input on a project!

This is a great way to further your involvement in the Section. The Section is excited about this endeavor and looks forward to your active participation. Remember, go to the Committee’s home page at www.abanet.org/litigation/committee/minority/ to include your information in the Section’s Diversity Development Database today!

Commitment to Diversity

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**Action:** For 2002-03, five of the twelve participants (41%) in the Section’s Young Lawyer Leadership Program are ethnic/racial minorities. This program provides mentors and financial reimbursement to ensure young lawyers active involvement in Section leadership. The Section of Litigation has also worked directly with the ABA Young Lawyers Division’s Minorities in the Profession Committee (MIPC) on joint programming. For example, at the 2003 ABA Midyear Meeting, the Section sponsored a program and provided financial support for the MIPC reception.

**Objective:** The Section will promote diversity in the profession.

**Task:** Continue to support law school scholarships for persons of color and support ongoing ABA or other initiatives that provide funding to assist persons of color to attend law school.

**Action:** Since the 1999-2000 bar year, the Section has contributed $250,000 to the ABA Legal Opportunity Scholarship Fund.
Strategies for Success

Continued from page 1

A firm will often develop an incalculable resource for meaningful assignments that lead to professional growth and partnership.

The early legal career of Kenneth C. Frazier, Senior Vice President and General Counsel of Merck & Co., Inc., serves as a perfect illustration of the significance of developing relationships in a law firm. In an interview conducted by the Minority Law Journal, Frazier—one of only 14 African-American general counsel in a Fortune 500® company—reflects upon his first job as an associate in a large law firm.

Early in his career, Frazier’s strategy was simple: Keep to himself, focus on his work, and he could be successful by his skills alone. To his surprise, however, Frazier received average performance reviews that he felt were inaccurate reflections of his work-product. Suspecting that race may have been a factor, he decided to leave the firm and take a position in the public sector.

Before leaving though, Frazier stopped by the office of Melvin Breaux—the firm’s first African-American attorney, and then partner. Breaux’s advice profoundly impacted Frazier’s career path: “Play the game,” Breaux insisted. “The legal game,” as Breaux defined it, “is one based on relationships. Nurturing those relationships and making people feel vested in your future are the keys to success.”

Taking Breaux’s advice to heart, Frazier decided to stay at the firm. At once, he assertively incorporated himself into the social structure and culture of the firm. He cultivated alliances. And because of his willingness to create relationships with attorneys at the firm, partners began to reach out to him. Frazier, as a result, saw his career filled with despair and dissatisfaction. As one African-American attorney recently stated: “It’s not a job. If you see it as your life’s work, then you have a chance to become a contender.”

Surviving in a law firm is about developing a legal practice that supports or expands the law firm’s services. This requires purpose-driven initiatives and strategic planning on the attorney’s part. He must continuously evaluate his practice, keep abreast of new developments and trends in the law, and seek out new ways to improve his services. He must, in essence, become the owner of his career. And “ownership” entails taking full responsibility for and control of his practice.

The attorney should have but one goal in mind: to be recognized in the profession as one of the leading practitioners in her field. This, of course, is no easy task for any attorney, and it is particularly difficult for minority attorneys who find themselves practicing in a profession that has been a closed society for decades. Nevertheless, the minority attorney must persevere through the host of challenges she will, no doubt, encounter throughout her career both culturally and professionally. She must simply resolve to take on those challenges and find ways to overcome them.

Striving for perfection is no sprinting affair; it is a marathon event that requires years of hard work and unfettered dedication. And although minority attorneys can be assured that they will confront a number of obstacles in this profession on account of their ethnicity (a sad but true commentary to say the least), they cannot allow this to defeat their purpose. They must seek perfection despite such obstacles.

One of the surest ways to overcome many of the obstacles you encounter is to be very good at what you do. Consider, for example, the accomplishments of one of the best legal scholars ever—Thurgood Marshall. Justice Marshall rose to prominence in the wake of some of the most extreme adversities. Yet, he discovered a way to prevail—he became the best at what he did. That same formula holds true today, as manifested by the increased number of minority attorneys that direct legal departments in law firms and Fortune 500® companies today, such as Du Pont, PPG Industries, McDonald’s Corporation and others.

A common denominator among these accomplished lawyers is that they all sought to be their best. Being the best will not only allow minority attorneys to survive in a law firm through good and bad economic times, but it will also enable them to become intricately entwined in the very fabric of the institution.

Adapt to Firm Culture

Another key ingredient to the recipe for success is adapting to the firm’s culture. Having the ability to adapt to your surroundings is an invaluable skill in life; it is indispensable in the law firm environment. An attorney must not only know and understand the culture of her law firm but also must learn to adapt accordingly. Minority attorneys may find this a particularly challenging task because they often discover themselves immersed in a cultural environment that bears no real resemblance to their own inherent culture. Thus, minority attorneys face the additional challenge of balancing their own cultural values and customs with the law firm’s, which may be starkly diverse. Finding that balance, nevertheless, is imperative to succeeding at the law firm.

But what exactly makes up a law firm’s
“culture”? Does its infrastructure, its size, or practice areas determine the firm’s culture? Is it determined by management and policy decisions, billable hour requirements, partnership track requirements, or work distribution? Or is it those subtle contours of firm life—such as hallway atmospheres, social and political philosophies, or unspoken rules of engagement? Well, a firm’s “culture” entails all of the above. Indeed, it encompasses all the intangibles that define and distinguish a firm. Though “culture” is not readily discernable—to paraphrase one commentator—you’ll know it when you “feel” it.7

The firm’s managing partners largely define its culture. For the management and policy decisions made by this select group will dictate in great measure the behavioral patterns of the firm’s attorneys. For example, if the law firm’s management is one that embraces an institutional philosophy in the management of its affairs, it is less likely that the firm’s attorneys will work solely for their own self-fulfillment. Instead, the attorneys will view the law firm as a higher order and will be more willing to make concessions and sacrifices (both personal and financial) necessary for the betterment of the institution itself. Law firms of this type tend to be more receptive of their attorneys’ ideas to improve the working relationships within the firm and raise the firm’s profile in the legal community.

In contrast, if the “billable hour” drives the firm’s management, the attorneys will more likely adopt a more self-centered attitude when conducting the firm’s affairs. These law firms tend to pay less attention to their attorneys’ needs, creating a diminished collegial environment and a breeding ground for ill competition among its lawyers.

Of course, the examples above merely represent two opposite extremes of the spectrum of law firm cultures. There are a host of others that fall between the two extremes. Nonetheless, whatever the firm’s culture may be, an attorney must adapt to it in order to survive.

Now, some may ask, “Why adapt? Why not push to change the firm’s culture instead?” Answering that question, however, raises topics outside the scope of this discussion, which is strategies for “surviving” in a law firm. Changing a law firm’s culture is an entirely different matter and requires an exhaustive analysis of its own, which is wholly unrelated to the employment of survival techniques. Thus, for purposes of this article, we will assume that the attorney is looking for ways to navigate his career through the philosophical and political corridors of the firm—as it exists.

Adapting to a law firm’s culture begins with the lawyer’s initial decision to join the firm. This is extremely important for minority attorneys because the cultural gap between the minority attorney and the law firm can be insurmountable. Hence, choosing which firm to join plays an important part in an attorney’s ability to embrace and adapt to the firm’s culture.

In making that initial employment decision, an attorney should thoroughly research the law firm to gauge its culture. Without first-hand experience, characterizing culture will not be an easy endeavor. Nonetheless, there are various information sources that can provide some insight into the law firm’s cultural environment. For instance, almost every law firm maintains a Website that provides various indicators of the firm’s culture. The structure of the firm, the lawyers that make up the firm, the extent that the firm is involved in community affairs, and the firm’s clients—all speak volumes about the firm’s culture.

Other sources, such as national, local, and specialty bar associations, can provide information on the firm’s demographics, its hiring practices, its attrition rates, and other valuable information for assessing a firm’s culture.

Upon entering the law firm, the minority attorney will be tasked to adapting to the firm’s culture. This may pose unique challenges for the minority attorney because in many instances he will journey down this road alone, with virtually no mentoring support to help ease the burden of his travels.8 Although some firms have attempted to establish support mechanisms for their minority attorneys through the creation of diversity committees and various networks (many of which have not been in place long enough to gauge their effectiveness), the majority of firms have simply not yet arrived at this point.

Ultimately, the burden falls upon the minority attorney to seek out and develop relationships with firm colleagues who will enable her to infuse herself into the firm’s culture. And, for all practical matters, the minority attorney will have to initiate and foster these relationships because too often her colleagues will hesitate to do so—which often times is due to their limited exposure to minority attorneys.

Nevertheless, the relationship-building initiatives the minority attorney takes early in her career at the firm will go a long way to bridge any cultural divide with her firm colleagues. This, of course, will be no easy stroll in the park for the minority attorney. She may have to forge these relationships in the wake of racial biases and stereotypical views—attitudes law firms must make every effort to eradicate if they are to provide a nurturing environment in which their minority attorneys not only survive, but thrive.

—Peter J. Kalis and Edward W. Diggs are partners at Kirkpatrick & Lockhart PLLC. Mr. Kalis also serves as Chair of the Firm’s Management Committee. The authors gratefully acknowledge the contributions of associates Clarence E. Dozier, Jr. and Debra Y. Hughes.

Endnotes
1. See Vivia Chen, Master of the Game, MINORITY LAW JOURNAL, Summer 2001,

2. Id. at 2.

3. Id.

4. Id.


8. See, e.g., Elizabeth Chambliss, Miles to Go 2000: Progress of Minorities in the Legal Profession, A.B.A. COMM’N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION (2000) (discussing how a lack of access to mentors and informal internal networks create obstacles to minority attorneys’ advancement in law firms).

Online Extra
Visit the Minority Trial Lawyer Committee Website www.abanet.org/litigation/committee/minority/home.html for a more extensive version of this article, which was excerpted from program materials from the 2002 National Conference for the Minority Lawyer, cosponsored by the ABA Section of Litigation.
The Winning Argument: Make It Goal-Directed

RONALD WAICUKAUSKI, PAUL MARK SANDLER, AND JOANNE EPPS

Argument is the fundamental tool of a lawyer's craft. As lawyers, we argue to persuade juries to render favorable verdicts, to convince judges to grant motions, and to induce appellate courts to correct errors. In less formal settings, we argue to persuade witnesses to cooperate, to convince opposing parties to settle, and to achieve myriad other objectives, large and small.

In learning to think like a lawyer during law school, most of us developed a sense for recognizing a strong legal argument, the kind a judge is likely to find compelling. There is, however, much more to the process of crafting a winning argument than possession of the analytical tools learned in law school. Many factors contribute to the success or failure of an argument. Because these factors are critical to our work as lawyers, they need to be recognized and understood. We need to be able to employ them quickly and effectively whenever we argue. One of the foundational factors is making arguments goal-directed.

Understand the Purpose of Argument

Use argument as a call to action. As a professional arguer, you are retained not merely to influence beliefs but to induce the action of a favorable decision by a judge or jury. This desired action is the goal that should guide the preparation and presentation of your argument. A possibly apocryphal story is that when people heard the Greek orator Demosthenes, they often remarked, “My, what a pretty speech; after hearing Cicero, they shouted, “Let us march!” Your goal, then, is to make the argument that not merely impresses but, like Cicero’s, induces the desired action.

Identify Your Primary Goal

Clarify your goal. Before preparing an argument, whatever the context, you should first determine precisely what it is you hope to achieve. As Casey Stengel warned, “If you don’t know where you’re going, you might end up someplace else.” Sometimes your goal will be obvious—e.g., to win a defense verdict for your client. Often, it may not be this clear. Think about your goal carefully. Then, describe it in one crystal-clear sentence so you know exactly where you are heading.

Choose a realistic goal. As James Russell Lowell explained, “There is no good arguing with the inevitable. The only argument available with an east wind is to put on your overcoat.”

Identify Secondary Goals

In some cases, you may identify multiple goals. In a summary judgment argument, you may seek to win the motion but, if that fails, to persuade the judge and opposing counsel that the case has less settlement value than they think. Winning the motion may be the primary goal and the secondary goal to posture the case for a favorable settlement.

Identify Intermediate Goals

Determine the underlying claims. There may be intermediate goals that, if achieved, will facilitate realization of the ultimate goal. To understand the intermediate goals of an argument, consider the concept of “claim.” In this context, “claim” refers to a proposition that you, as an advocate, seek to have accepted by your listener. In a routine personal injury case, much of your argument for the plaintiff would be concerned with the reasons, supported by the law and evidence, that the plaintiff’s claim of negligence should be accepted. The jury’s acceptance of this claim is an intermediate goal of your argument.

The ultimate goal of your argument, of course, is the award of a substantial plaintiff’s verdict. In your typical argument, there may be several claims that provide the logical building blocks that lead your listener to the desired outcome. In the example of the personal injury case, these claims might be that the defendant was negligent by driving drunk; the defendant’s negligence caused the plaintiff’s back injury; and the back injury prevented the plaintiff from returning to work for two years. The jury’s acceptance of each of these claims is the intermediate goal of your argument.

Identify other supporting objectives. Other goals include Clarence Darrow’s belief that “the main work of a trial attor-
ney is make a jury like his client,” or inducing the jurors to identify with you—
to believe you are similar to them and, therefore, a person whom they can trust. If
the jury identifies with you and likes your client, the probability of a favorable verdict is
materially enhanced.4

Use Your Goals to Direct Preparation
of Your Argument

When preparing an argument, keep your ultimate goal clearly in mind. As you think through your case, continually test any point you might make by asking,
“How will this help to achieve my goal?!”
In golf, every stroke you take should advance your ball toward the hole. In argument, every point you make also should advance your goal.

For example, if you represent a plaintiff opposing a summary judgment motion, your ultimate goal is the court’s denial of the defendant’s motion. An intermediate
goal might be acceptance of your claim that there are genuine issues of material fact. While preparing your argument, you consider arguing that the evidence in favor of the plaintiff is so strong that a plaintiff’s verdict at trial is overwhelmingly likely. Does the point help you achieve your goal? For purposes of the motion, you want the
court to focus on the narrow question of whether there is a genuine issue of material fact. Making the point about the strength of the evidence raises the bar you must jump to survive the motion. The task at this stage is not to evaluate the overall merits of the case, so it does not help you to suggest that it is. Stay focused on your goal and reject the idea of making that particular point.

Follow a Brief Outline to Stay on Course

Stay focused. During an argument, temptations may arise that can distract you from your goal. Opposing counsel may make irrelevant points that you want to decimate. Clever comments may come to mind. Beware of such temptations. Use a short outline of your main points to help you stay on course. Think of your outline as a map to guide you to your desired destination. There may be appropriate times for a detour, but be cautious, lest you lose your way.

Allow for spontaneity. Do not become so wedded to the outline that you forsake all spontaneity. Avoid reading your argument, because you will lose eye contact with your audience and limit your ability to observe and respond to your listener’s reactions. Instead, follow the example of Archibald Cox, one of the greatest advocates of all time. Even in argument before the U.S. Supreme Court, he reduced his argument to notes on a single sheet of paper.

Establish an effective framework. As you prepare your brief outline, consider this classic scheme for presenting your argument: Begin with what you are going to tell the jurors; tell them; and conclude by telling them what you told them. This framework will help you maintain your focus on the precise points that, after careful reflection, you selected as the most useful in achieving your goal.5

Use Moot Court Sessions to Prepare

Practice responding to questions. When arguing before judges, you will often be required to answer questions. Such questions should be welcomed because they can provide important information about what a judge is thinking and give you an opportunity to respond directly.

Nevertheless, questions can also make it more difficult to stay focused on your goal. Rehearsing your argument in a moot court format can help. Practice with an audience that interrupts you with questions—these could very well reflect the types of questions that will be in the minds of your listeners when you actually present the case.

Thurgood Marshall reportedly moot courted his famous Brown v. Board of Education argument at Howard University Law School the day before he was scheduled to appear in the Supreme Court. During the practice session, a student serving as a moot court justice asked a question that stumped Marshall. Marshall spent the evening thinking about the question and developing a strong response. As it happened, the same question was posed by one of the Supreme Court justices the next day. Marshall’s preparation contributed significantly to the achievement of his goal of obtaining a landmark decision in favor of desegregation.

Develop transitions to your main points. As you work on developing good answers to questions, consider how you might transition from those answers to the main points you want to emphasize. In using a moot court session, practice weaving the points you wish to convey into your answers. Suppose, for example, you want to argue that the plaintiff lacked standing but, before you reach the point, the court asks, “Counsel, did the trial court have jurisdiction to hear the case?” You answer, “Yes, Your Honor, the Court did have jurisdiction to hear the case, but we contend that the plaintiff lacked standing to bring the case.” If you are arguing before a court that asks frequent questions, you will soon realize that you may not have enough time to present all of your argument unless you have developed the skill of transitioning from your answers to your main points.

Concede weak points that could cloud strong points. One example of an appropriate concession occurred during a claim against a bank for wrongfully invading a customer’s account to pay the negative balance on the account of a related business. The bank’s defense was that the owner of the related business account had authorized the transfer of funds. Plaintiff’s counsel conceded that the owner had authority to instruct the bank to transfer funds but argued that the owner had not exercised the authority. That the owner had authority was a good point to concede, because the bank could have produced written documents proving such authority, and a battle over interpretation of the documents would have clouded the issue whether authority actually had been exercised. By avoiding a battle over a weak point, plaintiff’s counsel focused the jury’s attention on an issue that was much stronger for his client.

Resist the Temptation to Play

to the Gallery

Remember that the decision-maker is your key audience. When you are engaged in argument, it is alarmingly easy to lose sight of your goal. One reason for this is that in addition to being an opportunity to persuade a judge or jury, an argument is also an opportunity to impress the gallery. In televised trials, there is even the temptation to play to the television audience. Resist such temptations because they divert you from your real mission—persuading the decision-maker.

Avoid negative effects on the decision-maker. Not long ago in a court trial in Nottingham, England, counsel succumbed to the temptation to play to the gallery during his final argument. Earlier in the trial, a tape recording had been introduced into evidence and, rather than consume court time, the judge, at counsel’s suggestion, decided to listen to the tape on his own time. Later, counsel inquired whether the judge had listened to the tape. The judge replied, “I did but dozed off. Then I replayed the tape and listened to it all.” During closing argument, counsel argued that since the judge had fallen asleep, he had not listened carefully to the tape. The judge interrupted, reminding counsel that, after “drifting off,” he had rewound the tape and listened to it all. The judge then
Abruptly terminated counsel’s argument, saying he had heard enough, and ruled for the other side. Counsel’s point about the judge’s sleeping may have played well in the gallery. The judge, on the other hand, was not amused. If counsel had stayed focused on his goal of persuading the judge, the case might have had a different outcome.

When Your Point Is Made, Stop Talking

Know when you have made your point. While some lawyers play to the gallery, others enjoy hearing themselves talk. Sometimes they continue to talk, to make yet another supposedly telling point even after the judge has acknowledged agreement with their position. By doing so, they can jeopardize their cases. These advocates would do well to remember the old adage “When you strike oil, stop boring.” Many an advocate, lulled by the sound of his own voice, has snatched defeat from the jaws of victory.

Avoid weakening your strong point by making a weak point. This can happen even when you make a relatively minor point. If your listener disagrees with you, you may begin to doubt everything you say, including what she was previously inclined to accept. Professional negotiators use a technique in which, after opponents have made a strong point, they simply ask if that is the opponent’s only point. If the opponent responds by making a second weaker point, the negotiator aggressively attacks the weaker point, putting the opponent on the defensive. Experienced negotiators block this technique by suggesting that there is no need to consider additional points because the first point is compelling. If your first point has found the jugular and your adversary’s case is critically wounded, do not revive it by giving your opponent another opportunity to attack your case.

Avoid Quarreling

Staying focused on your goal will help you avoid the kind of arguments that become emotionally charged battles. Some lawyers resemble George and Martha in Who’s Afraid of Virginia Woolf, carping at one another. These verbal jousts are intended less to persuade than to wound the adversary. Usually, a self-inflicted wound results. In the early 1980s, an Indiana defense lawyer used his final argument to vent weeks of pent-up frustration in a hotly contested product liability trial. He ripped opposing counsel up one side and down the other for a series of perceived abuses and transgressions. In the process, he did little to advance his client’s cause on the merits and much to alienate the jurors. They vented in return by delivering a verdict of $6 million against him. When your argument starts to sound like a quarrel, you have lost your focus on the goal and are likely to lose your argument.

Keep Your Eye on the Goal

Whatever goal you identify, never lose sight of it during your argument, regardless of temptations or distractions that may come your way. To execute tennis strokes effectively, you must always keep your eye on the ball. To make a successful argument, you must keep your eye on the goal of your argument. In a hard-fought trial, this is not always easy. To help, you might want to take a tip from a prominent Irish barrister named Daniel O’Connell. At trial, he kept a piece of paper in view at counsel’s table on which he had written these words: “A good speech is a good thing, but never forget that the verdict is the thing.”

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Endnotes

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4. See Waicukauski et al., supra note 1, at ch. 3 “Winning Arguments Are Strengthened by the Speaker’s Ethos.”
5. For guidance on organizing your argument, see Waicukauski et al., supra note 1, at ch.8 “Winning Arguments Are Strategically Arranged.”

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ABA 2003 Annual Meeting

Section of Litigation will present a variety of practical, informative programs at the ABA Annual Meeting in San Francisco, August 7-12. The following programs may be of particular interest to Minority Trial Lawyer readers:

Thursday, August 7
- 3:15-5:00pm ~ The Aftermath: Affirmative Action and the U.S. Supreme Court
- 2:00-3:45pm ~ Fixing History
  In the Courtroom:
  How the Legal System Responses to Reparations Claims
  Diversity in the Courtroom: Perspectives from the Jury

Friday, August 8
- 8:45-11:45am ~ Eleventh Annual Bench Bar Conference:
  Marbury v. Madison Bicentennial
- 2:00-3:45pm ~ Women’s Summit II:
  Practical Steps for Keeping Women on the Success Track
- 4:00-5:30pm ~ Diversity in the Courtroom:
  Perspectives from the Jury

Saturday, August 9
- 8:45-11:45am ~ Women’s Summit II:
  Practical Steps for Keeping Women on the Success Track
- 2:00-3:45pm ~ Fixing History
  In the Courtroom:
  How the Legal System Responses to Reparations Claims
- 4:00-5:30pm ~ Diversity in the Courtroom:
  Perspectives from the Jury

Sunday, August 10
- 9-11:00am ~ Women’s Summit II:
  Practical Steps for Keeping Women on the Success Track

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Defining Racial Profiling

Racial profiling occurs when law enforcement officers use race as an element of a pre-existing “profile” in deciding whom to detain, search, or otherwise subject to criminal suspicion.3 The debate over racial profiling should not address those situations where race is an element of the description of a specific perpetrator; the use of race in such a situation is not objectionable, because it is used in a non-subordinating, non-dehumanizing manner.4 As Professor Randall Kennedy has noted:

“If a young white man with blue hair robs me, the police should certainly be able to use the description of the perpetrator’s race in efforts to apprehend the felon. In this situation, though, whiteness is a trait linked to a particular person with respect to a particular incident. It is not a free-floating proxy for risk that hovers over young white men practically all the time—which is the predicament in which young black men currently find themselves.

Racial profiling, therefore, occurs when officers lack grounds for individualized suspicion, but nonetheless investigate, stop, or detain a person based on a profile that includes race or ethnic background. The much-publicized “driving while black” phenomenon is only one manifestation (although an important one) of racial profiling.5 Race enters the investigatory process in a variety of ways, from the police officer who decides to predominate ly subject black men to Terry stops on the streets; to federal officials’ decision to single out students of Middle Eastern background for reporting requirements after September 11; to immigration officials using the pretext of possible immigration violations to detain and search Latinos for possible narcotics offenses. The common thread in all these situations is that law enforcement officers, often at the express or implied direction of their superiors, decide that race (perhaps along with other factors, perhaps by itself) can substitute for individual indicia of criminality.

The Damage Caused by Racial Profiling

Racial profiling is damaging not only to minorities, but also to effective law enforcement, for several reasons. Psychologists have begun to examine the damaging effects on minorities of criminal suspicion based on race.8 A psychological understanding of the impact of a race-based stop or investigation confirms what minorities have often informally stated: “When it [racial profiling] does happen, you feel powerless. You don’t want to have a confrontation that could escalate it, but at the same time there is a high level of frustration, guilt and resentment.”9

As the proposed Federal End Racial Profiling Act of 2001 recognizes, “racial profiling harms individuals subjected to it because they experience fear, anxiety, humiliation, anger, resentment, and cynicism when they are unjustifiably treated as criminal suspects.”10 Given the long history of the intersection of race and criminal justice in the United States, racial profiling is rightly seen by many racial and ethnic minorities, particularly African-Americans, as merely old wine in a new bottle; as simply another indication that they continue to be perpetually suspected of criminal misconduct because of their skin color or accent.11

The impact of racial profiling on the administration of criminal justice should not be underestimated. Singling out members of racial minorities for criminal suspicion erodes confidence and trust in those communities in the police, the courts, and the criminal law. Indeed, racial profiling not only leads to increased disdain for legal norms among minorities but can also lead to increasingly dangerous interactions between the police and members of racial minorities. “If someone is stopped for a minor reason they attribute to their race, they may become defiant, hostility escalates and the police could even end up killing someone.” Subsequently, the swelling tide of mutual suspicion makes crime prevention more difficult for police.12 Law enforcement groups and individual officers who condone racial profiling would do well to remember that the reality and perception of racial unfairness in the administration of criminal justice only undermines their honorable goal of protecting all of our communities from crime.13

There is yet another problem with racial profiling: It is almost always ineffective and therefore raises the costs of law enforcement by diverting time and resources from other, more effective, forms of investigation. The defense of racial pro-
filing generally proceeds from the argument that if African-Americans, for example, commit more of a certain type of crime, it is simply good policing to focus suspicion on blacks.14 Yet this argument contains a rather simple logical fallacy: Even assuming that “most drug dealers are X, [that] does not mean that most X are drug dealers.”15 The danger of this erroneous reasoning is apparent:

When officers stop disproportionately numbers of African-Americans because this is “just good police work,” they are using race as a proxy for the criminality or “general criminal propensity” of an entire racial group. Simply put, police are targeting all African-Americans because some are criminals . . . . Therefore, having black skin becomes enough—perhaps along with a minimal number of other factors, perhaps alone—for law enforcement to stop and detain someone.16

This “statistical” defense of racial profiling has largely been demolished. For example, in the well-publicized case of Maryland’s police using racial profiling in deciding which motorists to stop and search for drugs, studies revealed that the “hit rate” (the percentage of vehicles searched in which drugs were actually found) were statistically indistinguishable for blacks and whites.17 Yet massively more black drivers were stopped in Maryland during the period studied.18 Data from Terry stops in New York City show that the hit rates for recovery of narcotics and weapons were actually higher for whites than for African-Americans and Latinos.19 The same holds true for drug interdiction efforts at airports.20 There is a wealth of similar evidence, which need not be repeated here in detail, showing that racial profiling exists, is widespread, and is not justified by actual statistics on crime.21

Suffice it to say that every minute the police spend investigating minorities because of a flawed assumption that race is an accurate proxy for criminality is one less minute they can spend investigating persons on a race-neutral basis who share characteristics that are accurate predictors of criminal behavior.

Even assuming, arguendo, that racial profiling may generate some modest efficiency benefits, defenders of racial profiling generally ignore the costs of the practice. If racial profiling benefits society as a whole (an assumption rebutted above), then the costs of the practice should also be spread generally. The costs of racial profiling are currently not spread on a non-racial basis—even assuming that one believes racial profiling is more efficient, the costs of this extra efficiency are almost exclusively and unfairly imposed on young minority males.

Not surprisingly, most reported cases involving racial profiling have arisen in the criminal context.22 Also unsurprising is the courts’ almost uniform rejection of claims of racial profiling, given the generally unfriendly current state of the law toward claims of racial discrimination, further amplified by courts’ reluctance to give credence to even well-founded claims by criminal defendants. What should be more surprising to anyone with a working knowledge of constitutional law are the reasons courts have given for rejecting claims of racial profiling.

Fourth Amendment Remedies

It would be logical to think that when the police detain or search a person based on that person’s race, the Fourth Amendment would offer protection from such an unreasonable search or seizure. In Whren v. United States,23 however, the Supreme Court held that subjective evidence of an officer’s intent, e.g., to target racial minorities, is not relevant in assessing Fourth Amendment violations. Although the stated motivation for a stop (in Whren, a traffic violation) may be purest pretext, the Court firmly closed the door to a Fourth Amendment inquiry into the officer’s true motivation for the encounter.

Whren by itself is a highly troubling decision because the Supreme Court essentially held that racially discriminatory policing per se is reasonable under the Fourth Amendment. When taken in combination with other Supreme Court cases on the Fourth Amendment, Whren becomes even more disturbing. Under the “automobile exception” to the Fourth Amendment, police have substantial leeway in conducting warrantless searches and seizures of drivers.24 Pursuant to the “search incident to arrest” doctrine, the police may conduct a full search of someone they have arrested.25 Further, the Court has recently held that the police may make a full custodial arrest of a driver for even a minor traffic violation.26 The potential for abuse sanctioned by the Court’s Fourth Amendment jurisprudence is apparent. Assume that the police believe that most drug dealers are black. Accordingly, they stake out a partially hidden stop sign in order to, by their own admission, stop only black drivers who cross the white line in front of the stop sign before coming to a complete stop. The police routinely stop such drivers and subject them to a full custodial arrest. Thereafter, they conduct a search incident to arrest and recover drugs from, say, one of a hundred black drivers stopped. This practice, the Court has told minorities, is wholly reasonable under the Fourth Amendment.27

Whren is also in significant tension with the Court’s other precedents on the relevance of motive in assessing constitutional violations. The Court’s Equal Protection jurisprudence requires a litigant to show that the challenged governmental action arose from purposeful racial discrimination.28 Thus, in the Fourteenth Amendment context, the Court has held that the only thing that matters is subjective intent. In the Fourth Amendment area, Whren teaches that subjective intent is wholly irrelevant. It is difficult to discern a consistent theoretical basis for the Court’s schizophrenic view of the relevance of motive to constitutional violations.29

Fourth Amendment Remedies

The Fourth Amendment, under Whren, is clearly no bar to even explicit racial pro-
filing, and consequently, criminal defendants and civil claimants have turned their attention to the Fourteenth Amendment. The starting point, whether racial profiling is raised as a defense in a criminal prosecution or as a basis for a civil suit under section 1983, is establishing the constitutionally suspect use of race, thereby triggering strict scrutiny under the Equal Protection Clause. Contrary to the Supreme Court’s decisions in other areas, lower courts have generally held that strict scrutiny is not triggered in racial profiling cases unless race was the sole motive for the officer’s action. Thus, the courts have generally stopped litigants alleging racial profiling at the threshold, without ever reaching the question of whether the use of a racial profile in a particular case satisfies the demands of strict scrutiny.

United States v. Avery is a good example of how courts have addressed claims of racial profiling. The defendant in Avery moved to suppress evidence of cocaine found in his carry-on luggage on the grounds that (1) he was targeted and detained solely due to his race, in violation of the Equal Protection Clause of the Fourteenth Amendment and (2) the officers seized his bag without reasonable suspicion, as required under the Fourth Amendment. The Sixth Circuit rejected both challenges. According to the officers’ testimony, Avery drew their attention for racial profiling.

What should be surprising to anyone with a working knowledge of constitutional law are the reasons courts have given for rejecting claims of racial profiling.

The Sixth Circuit rejected the Fourth Amendment claim, holding that Avery’s fit with the “formal” profile elements, combined with his later inconsistent statements to the officers, made the seizure of the bag reasonable in the totality of the circumstances. The court also rejected Avery’s Equal Protection claim. Because Avery did not raise a Fourth Amendment challenge to the legality of the officer’s initial questioning (because it was essentially a consensual encounter), the court had to confront whether the Fourteenth Amendment offered additional protection. The court’s holding on this question is instructive in analyzing future allegations of racial profiling:

Although Fourth Amendment principles regarding unreasonable seizure do not apply to consensual encounters, an officer does not have unfettered discretion to conduct an investigatory interview with a citizen. The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourteenth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.

Thus, the Sixth Circuit has squarely held that when individuals are singled out by law enforcement because of their race, those persons can bring a Fourteenth Amendment challenge to the government’s action, even where a Fourth Amendment challenge would not succeed.

Despite concluding that the Fourteenth Amendment applied with independent force, the court rejected Avery’s Equal Protection challenge. Relying on its earlier decisions, the court reasoned as follows:

(1) the Fourteenth Amendment prohibits an officer from targeting an individual because of his race, even in consensual encounters;
(2) that limitation only applies, however, where the decision was based solely on racial considerations; therefore,
(3) Avery’s Equal Protection challenge failed, because he could not prove that his race was the only reason he was singled out for suspicion.

Thus, Avery’s promise of independent Fourteenth Amendment protection against racial profiling is almost wholly illusory. Seldom, if ever, could one prove that law enforcement officials acted solely on the basis of race, because the official will always claim that he acted based on race plus “X” (he was black, plus in the wrong neighborhood; black, plus the way he was dressed; black, plus he was young; black, plus . . . ). Human beings almost always act with a variety of motives; it is for that very reason that courts and Congress (most notably in “mixed-motive” Title VII cases) have developed doctrines that take this basic fact of human nature into account.

Being stopped because you are African-American (or Latino, Arab, or any other racial/ethnic group) “plus” you are wearing sweatpants instead of a suit doesn’t make the stop any less dehumanizing or counter-productive.

The solely-because-of-race standard, aside from being unsound as a matter of policy, is inconsistent with the Supreme Court’s Equal Protection precedent. The Court, in a variety of circumstances, has held that the government’s use of race will be subject to strict scrutiny where race was the “predominate” or “primary” motivation for the government’s action.

There is some support in Supreme
Most courts have adopted a narrow view of when racial profiling violates the Fourteenth Amendment.

more deterrent effect than in the Fourth Amendment context because deterrence theory assumes “that potential offenders exercise rational judgment in deciding to offend . . . .”56 In other words, because the predicate constitutional violation is willful, deterrence theory makes more sense in the Equal Protection context. Moreover, the “judicial integrity” rationale carries greater weight in the Equal Protection context. The Supreme Court’s precedents make clear that it is repugnant for courts to sanction or participate in public or private racial discrimination.57 By permitting admission of evidence obtained as a result of racial profiling, courts have given judicial legitimacy to racial discrimination.58

New Jersey courts, forced to confront one of the nation’s most blatant patterns of racial profiling, have been in the forefront in finding that racial profiling violates the Equal Protection Clause and authorizing exclusion of evidence as a remedy. In State v. Soto,59 plaintiffs presented overwhelming statistical evidence60 demonstrating that the New Jersey State Police engaged in racial profiling. The Soto court found that this practice violated the Equal Protection and Due Process Clauses. The court also applied the exclusionary rule as a remedy for the violation:

[W]here objective evidence establishes that a police agency has embarked upon an officially sanctioned or de facto policy of targeting minorities for investigation and arrest, any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity.61

Conclusion

Criminal defendants who are the victims of racial profiling face an uphill battle. The Supreme Court has explicitly foreclosed the Fourth Amendment as an avenue for relief. Further, most courts have adopted a narrow view of when racial profiling violates the Fourteenth Amendment. Aside from the rare case where it can be proven that race was the sole subjective motivation for the encounter, the best hope lies in statistical proof of a pattern or practice of racially selective law enforcement.

Once an Equal protection violation has been established—either through direct proof of discriminatory intent or statistical evidence raising an inference of discriminatory intent—the purposes of the exclusionary rule justify suppressing evidence obtained as a result of racial profiling. The best remedy for racial profiling would be legislation outlawing the practice, such as the proposed Federal End Racial Profiling Act of 2001. In the absence of such legislation, however, litigants must continue to vindicate the principal of race-neutral law enforcement in the courts.

Endnotes

1. A December 1999 Gallup poll revealed that more than 80% of both blacks and whites disapproved of racial profiling, where it was defined as “police officers stop[ping] motorists of certain racial or ethnic groups because the officers believe these groups are more likely than others to commit certain types of crimes.” Gallup Poll Analysis, December 9, 1999 (available online at www.gallup.com/poll/releases/pr991209.asp). Perhaps understandably, there was a sharp shift in opinion immediately after the terrorist attacks. An ABC News/Washington Post poll on September 13, 2001, found that 58% of respondents of all races favored more intensive security checks for persons of Arab background and 49% favored special identification cards. See Nicole Davis, “The Slippery Slope of Racial Profiling,” available at www.alternet.org/story.html?StoryID=12079 at 1. However, subsequent surveys reveal that the pendulum, particularly with regard to singling out Muslims and persons of Arab descent, has largely swung back to its pre-September 11 position. See “U.S. Attitudes Altered Little by Sept. 11, Pollsters Say,” The New York Times, May 20, 2002 p. A12.

2. Perhaps counter-intuitively, the conduct of the subsequent investigation into the September 11, 2001, terrorist attacks may provide an impetus for legislative efforts (at least at the state level) to outlaw racial profiling. See, e.g., “Sept. 11 May Aid Race Profile Bill,” Atlanta Journal-Constitution, January 31, 2002, p. B4 (available online at www.stacks.ajc.com).

3. The proposed Federal End Racial Profiling Act (ERPA) of 2001, U.S. Senate Bill 989, defines prohibi-
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12. O’Connor, supra n.8 at 2 (emphasis added and internal citation omitted).

13. Cf. David A. Harris, Driving While Black: Racial Profiling On Our Nation’s Highways, An American Civil Liberties Union Special Report at 25 (June 1999) (available online at www.aclu.org/profil-


17. For a good discussion of the issues raised by the post-September 11 investigation, see Liam Braber, Korenmut’s Ghost: A Post-September 11th Analysis of Race and National Security, 47 VILL. L. REV. 451 (2002).


20. For example, U.S. Customs Service nation-


22. ERPA, supra n.3, Sections 2(a)(8) and (9).


27. The scenario need not be so underhanded to take these cases to their full reach. As any driver knows, it is almost impossible to drive for even a short distance without committing some technical traffic violation. See PROFILES IN INJUSTICE at 30-33 (dis-


29. For the seminal criticism of the Court’s undue fixation on “purposeful” racial discrimination, see Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 59 STAN. L. REV. 317, 339 (1987).

30. Indeed, the Whren majority stated that the Fourteenth Amendment is the appropriate vehicle for claims of racially selective law enforcement. Whren, 517 U.S. at 813 (“We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to the intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment.”).

31. 42 U.S.C. § 1983 provides a civil remedy for vio-

32. This cramped analytical framework places civil litigants alleging racial profiling at a tremendous disadvantage, since defendants can predicate a motion to dismiss for failure to state a claim on the plaintiff’s inability to allege that race was the only motive for the encounter. Applying the standard Equal Protection analysis to claims of racial profiling would
at least permit litigants to get past the motion to dismiss stage and gather the necessarily fact-specific evidence of motive and intent through discovery.

33. 137 F.3d 433 (6th Cir. 1997).
34. Id. at 346.
35. Avery was a young African-American male, wearing sweatpants and a short-sleeved sweatshirt.
36. Id. at 346.
37. Id. at 346-47.
38. The prime “formal” elements of the profile were “(1) one-way cash tickets purchased shortly before flight time; (2) persons leaving the airplane who do not ask for directions; (3) certain modes of dress [the opinion does not specify what those “modes” are]; and (4) people who are walking hurriedly through the airport.” Id. at 347.
39. Id.
40. One response to this statistical evidence may be that blacks were the most stopped group because they smuggle more drugs than any other group. This may or may not be persuasive, depending on the actual rates of drug transport among ethnic groups (data not includ-
ed in the opinion). It is interesting to note, however, that if the officers were actually following the “inform-
al profile” factor, they would have disproportionately stopped young white women (the mostly likely couriers, according to the officer’s testimony), not blacks.
41. Avery, 137 F.3d at 350.
42. Id. at 352 (emphasis added). This is not dicta: the court’s statement here was clearly necessary to the decision. Because the defendant challenged the initial decision to single him out for suspicion, not the consensual questioning, the court needed to resolve whether the 14th Amendment provided additional protection, since the Fourth Amendment does not apply to purely consensual encounters where the citizen is free to leave. Even the concurring judge in Avery, who believed much of the majority’s decision was dicta, stated that “I fully agree that . . . the initiation of consensual contacts based solely on race can violate the Equal Protection Clause.”

Racial Profiling: It’s Now a Crime in New Jersey

A new law in New Jersey makes racial profiling by public officials a criminal offense. It took more than three years of legislative wrangling, but on March 14, 2003, New Jersey Gov. James McGreevey’s signature enacting the new law closed another chapter in the state’s long-standing racial profiling problems. Under this new legislation, public officials may face criminal prosecution if they knowingly commit an act that violates another person’s personal or property rights to intimidate or discriminate against that person due to race, color, gender, ethnicity, handicap, reli-
gion, or sexual orientation. If convicted, a public official could receive a 5- to 20-year prison term.

Id. at 358 (Boggs, concurring).
44. Avery, 137 F.3d at 352-358. The court also rejected defendant’s statistical arguments, seeking to show a pattern of singling out black air travelers.
45. See Kennedy, supra n.4 at 5: For example, an employer who prefers white candidates to black candidates — except black candidates with clearly superior experience and test scores — may be engaging in racial discrimina-
tion, even though race is not the only factor he considers (since he is willing to select black superstars). There are, of course, different degrees of discrimination. In some cases, race is a marginal factor; in others it is the only fac-
tor. The distinction may have a bearing on the moral or legal justification for the discrimina-
tion. But it cannot negate the existence of racial discrimination. Taking race into account at all means engaging in racial discrimination.

(emphasis in original). The Supreme Court has followed similar reasoning in mixed-motive employment discrimination cases. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); but see Ford v. Wilson, 35 F.3d 924, 929 (7th Cir. 1994) (refusing to apply the mixed-motive analysis to a racial profiling/Equal Protection claim).
46. Other cases have generally followed Avery’s reasoning. An individual is prosecuted based on evi-
dence arising from alleged racial profiling; the defen-
dant seeks to suppress the evidence; and the court finds that even accepting the defendant’s arguments as true, the Fourteenth Amendment was not violated because the defendant cannot show that his race was the only reason for the officer’s suspicion. In addition to the Sixth Circuit’s Avery line of cases, see, e.g., United States v. Weaver, 966 F.2d 391 (8th Cir. 1992).
47. See, e.g., Miller v. Johnson, 515 U.S. 900, 916 (1995) (“The plaintiff’s burden is to show . . . that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977) (in housing discrimination case, holding that the Equal Protection Clause “does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes”).
48. United States v. Brigmen-Ponce, 422 U.S. 873, 886-87 (1975) (emphasis added). But see United States v. Montero-Camargo, 208 F.3d 1122, 1131-36 (9th Cir. 2000) (characterizing this statement from Brigmen-Ponce as dictum abrogated by subsequent Supreme Court decisions), cert. denied, 531 U.S. 889 (2000). Moreover, this dicta is not directly relevant to assessing the “solely because of race” standard under the Fourteenth Amendment, because Brigmen-Ponce was a Fourth Amendment case.
49. At least one court has hinted, however, that sufficiently persuasive statistical evidence “may also create a strong inference that officers chose to engage in a particular consensual interview solely because of the interviewee’s race.” Travis, 62 F.3d at 174.
50. The reference, of course, is to the haunting Billy Holiday song about lynching and the Supreme Court’s decision in Wong Sun v. United States, 371 U.S. 471 (1963), holding that not only direct, but also derivative, evidence gained as a result of unconstitutional practices is subject to exclusion.
51. The unnecessarily stringent “sole motive” standard applied by most courts in determining whether racial profiling violates the Fourteenth Amendment means that most courts need not reach the question of whether the evidence should be excluded. See, e.g., Travis, 62 F.3d at 174 (“We have no need to reach [the question of whether the exclusionary rule applies to Fourteenth Amendment violations] because the detectives in this case did not choose to interview the defendant solely because of her race. Therefore, they did not violate her rights under the Equal Protection Clause.”).
54. See Mapp v. Ohio, 367 U.S. 643, 660 (1961) (stating that the exclusionary rule is an “essential part of both the Fourth and Fourteenth Amendments.”); United States v. Laymon, 730 F. Supp. 332, 339-40 (D. Colo. 1990) (finding that racial profiling violated both the Fourth and Fourteenth Amendments and granting motion to suppress); United States v. Velasquez, 2001 WL 629655 (D. Colo. June 1, 2001) (unpublished) (citing Mapp, Elkins and Avery for the proposition that courts should apply the exclusionary rule to Fourteenth Amendment violations (but finding that the Fourth Amendment was not implicated in that case because race was not the sole reason for the deten-
tion).
55. At least one court has hinted, however, that sufficiently persuasive statistical evidence “may also create a strong inference that officers chose to engage in a particular consensual interview solely because of the interviewee’s race.” Travis, 62 F.3d at 174.
56. See, e.g., United States v. Jennings, 1993 WL 5927 at *4 (stating that the exclusionary rule’s actual deterrent effect is beyond the scope of this article. But see Holland, supra n.59 at 1211-1213 (citing arguments that the exclusionary rule has little actual deterrent effect, primarily because it is not limited to “intentional constitutional violations”).
57. Id. at 1211 (citation omitted).
58. There may be an alternative to arguing that the exclusionary rule should be applied to Fourteenth Amendment violations: namely, a motion to dismiss the indictment altogether. See, e.g., United States v. Cuevas-Ceja, 58 F. Supp.2d 1175, 1183 (D. Or. 1999) (construing the motion to suppress as a motion to dismiss the indictment because “[p]resumably, if the bus passengers were targeted for investigation based sole-
lly on their race or ethnicity, the indictment returned against [defendant] is constitutionally flawed and must be dismissed.”).
60. It is important to note that the Soto court did not follow the “solely because of race” standard articulated in Avery. Rather, the Soto court held that pur-
poseful racial discrimination in violation of the Equal Protection Clause may be inferred from statistical proof and that the burden of rebut-
ning this prima facie case. Soto, 734 A.2d at 360.
61. Id.
## Minority Trial Lawyer Committee
### 2002-03 Annual Plan (Selected Highlights)

<table>
<thead>
<tr>
<th>Goal: Professional Development</th>
<th>Goal: Justice System</th>
<th>Goal: Ethics</th>
<th>Goal: Diversity</th>
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<tbody>
<tr>
<td><strong>Objective:</strong> Meet member’s needs through programs, publications and services.</td>
<td><strong>Objective:</strong> Promote improvements in the system of justice</td>
<td><strong>Objective:</strong> Promote high ethical standards and professionalism.</td>
<td><strong>Objective:</strong> Diversify Section membership and leadership.</td>
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<tr>
<td>● Coordinate minority programming with San Francisco Program Chairs for the ABA Annual Meeting in San Francisco (Minority General Counsel Roundtable/Minority judges roundtable/Diversity reception).</td>
<td></td>
<td>● Evaluate and review rules governing professional conduct and discipline and suggest improvements to them.</td>
<td>● Contribute to efforts to increase minority membership in Litigation Section by incorporating local minority bar associations into programming for the Section Annual Meeting in Houston.</td>
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<td>● Develop and publish quarterly electronic newsletter to committee members.</td>
<td></td>
<td>● Promote the effective distribution of information on ethics, professionalism, and lawyer discipline to the public.</td>
<td>● Assist other Section committees with outreach to local minority bar associations and identify potential minority members for leadership positions.</td>
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<tr>
<td><strong>Objective:</strong> Utilize technology to educate and reach out to committee members.</td>
<td><strong>Objective:</strong> Focus the attention of lawyers and the public on barriers to access to the justice system, work to dismantle those barriers, and support shifts in procedure that encourage open access.</td>
<td></td>
<td>● Contribute to efforts to increase minority membership in general ABA and Litigation Section by incorporating local minority bar associations into programming for the ABA Annual Meeting in San Francisco.</td>
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<td>● Develop committee website.</td>
<td>● Propose program for ABA Annual Meeting in San Francisco (Judges Roundtable) focusing on recent changes in the justice system that may disproportionately impact minorities.</td>
<td></td>
<td>● Increase membership of Minority Trial Lawyer Committee through Website, quarterly newsletter, and initiatives developed by ABA staff.</td>
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<td>● Identify and utilize currently available listservs to communicate with committee and subcommittee members.</td>
<td>● Utilize the committee Website and quarterly newsletter to encourage dialogue on issues related to access to the justice system between committee and subcommittee members.</td>
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<td>● Assist other committees on increasing minority participation.</td>
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<td>● Send communication to committee members soliciting articles for newsletter and speakers for future conferences.</td>
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<td>● Monitor and encourage other committees to utilize speakers of color for all programs.</td>
</tr>
<tr>
<td><strong>Objective:</strong> Enhance structure, leadership, membership and resources of the Section.</td>
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<td></td>
<td>● Identify interested speakers of color and compile list.</td>
</tr>
<tr>
<td>● Strengthen subcommittee structures by: (1) identifying co-chairs for program subcommittees; and (2) formally evaluate current subcommittee chairs and make necessary organizational changes.</td>
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How To Get Involved In The Minority Trial Lawyer Committee

BRETT J. HART AND BURNADETTE NORRIS-WEEKS

Looking for ways to get involved? As the Co-Chairs of the Minority Trial Lawyer Committee of the ABA Section of Litigation, one of our primary objectives is to present committee members with opportunities to get to know and make themselves known to attorneys across the United States.

Write An Article
The committee is looking for attorneys and law students who want to get hands-on experience in working with one or more of our subcommittees — including Communications (newsletter and Website), Membership, and Programs. We are particularly interested in identifying committee members who would like to contribute articles to the newsletter and serve as speakers at various ABA meeting sponsored programs around the country.

Chair A Subcommittee
The committee is also one of the newest committees within the Section of Litigation. Establishing a sound subcommittee structure is critical to our continued effectiveness. Much has been accomplished since the inception of the committee. In 1999, the Section of Litigation started the National Conference for the Minority Lawyer. The conference has grown and has now been turned over to the ABA Commission on Racial and Ethnic Diversity in the Profession. The Minority Trial Lawyer Committee desires to start another conference in 2003-04, with more of an emphasis on the minority trial lawyer. There are exciting opportunities to participate at the ground level in organizing a litigation-based conference for the minority lawyer.

Speak On a Panel
We often receive requests from other committees within the Section of Litigation to assist with identifying lawyers of color to speak on panels regarding various substantive legal issues. If you feel that you have developed expertise in a particular area of the law and wish to be considered, please contact one of us and share your background and area(s) of expertise (see Diversity Development Database article on page 5).

We are looking for articles, articles, articles. Have you written on an interesting development in the law? Do you have an interesting idea to share? Please contact one of us or the newsletter co-editors (see page 2).

We have several exciting diversity initiatives that we are undertaking this year. One is the Minority Judicial Internship Program (see MJIP article on page 4). There is a considerable amount of work involved in running that program, and we want your ideas and assistance.

As you can see, we have an ambitious agenda set for the upcoming months. There is a place for everyone in the Minority Trial Lawyer Committee.

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☐ I am not a member of the American Bar Association. Please send me information on joining.

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☐ Antitrust Litigation  ☐ Criminal Litigation  ☐ Minority Trial Lawyer
☐ Appellate Practice  ☐ Employment and Labor Relations Law  ☐ Pretrial Practice and Discovery
☐ Aviation Litigation  ☐ Energy Litigation  ☐ Pro Bono and Public Interest
☐ Bankruptcy and Insolvency Litigation  ☐ Environmental Litigation  ☐ Products Liability
☐ Business Torts Litigation  ☐ Ethics and Professionalism  ☐ Professional Liability Litigation
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☐ Class Actions and Derivative Suits  ☐ First Amendment and Media Litigation  ☐ Securities Litigation
☐ Commercial and Business Litigation  ☐ Government Litigation  ☐ Solo and Small Firms
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