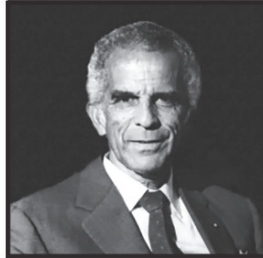


# Report from the **Special Adviser on Equal Justice** in the New York State Courts



October 1, 2020

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>I. OUR WORK .....</b>	<b>10</b>
A. The Mandate .....	10
B. Engagement with Stakeholders .....	10
C. Materials Received from Interviewees.....	13
D. Public Contacts.....	13
E. Research .....	13
F. Court Visits.....	14
<b>II. THE NEW YORK STATE COURT SYSTEM .....</b>	<b>15</b>
A. History of the New York State Courts .....	15
B. Today's New York State Court System .....	17
C. Lower Courts Within New York City .....	22
D. Lower Courts Outside New York City.....	23
E. The Proposed Merger Plan .....	25
F. Case Volume .....	25
<b>III. ADDRESSING RACE IN THE COURT SYSTEM .....</b>	<b>27</b>
A. The Minorities Commission.....	27
B. The Franklin H. Williams Commission .....	29
C. Race in the Town and Village Courts .....	31
<b>IV. DEMOGRAPHICS OF THE JUDICIARY .....</b>	<b>32</b>
A. Diversity of the Judiciary Over Time.....	32
B. Diversity of the 2020 Judiciary Compared to the Populations Served .....	35
<b>V. POLICIES, PRACTICES, PROGRAMS AND ORGANIZATIONS DESIGNED     TO ADDRESS BIAS IN THE NEW YORK STATE COURT SYSTEM .....</b>	<b>42</b>
A. The Franklin H. Williams Commission .....	42
B. Managing IG for Bias Matters.....	43
C. OCA's Office of Diversity and Inclusion .....	45
D. Anti-Discrimination Panels .....	46
E. Disproportionate Minority Representation Committee.....	47
F. Bias Training for Judges.....	47
G. Training for Non-Judicial Personnel .....	50

## TABLE OF CONTENTS CONT'D

H. Training for Personnel in Town and Village Courts .....	51
I. Training Efforts of Judicial Districts .....	52
<b>VI. WHAT WE HEARD.....</b>	<b>54</b>
A. An Under-Resourced, Over-Burdened Court System .....	54
B. Existing Institutions Addressing Racial Bias are Inadequate, Opaque or Unknown .....	59
C. Court Officers .....	61
D. Issues Facing Attorneys of Color .....	66
E. Judicial Diversity .....	67
F. Diversity Within the UCS Bureaucracy .....	70
G. Bias Training .....	72
H. Juries .....	74
I. Assigned Counsel .....	75
J. Translation and Interpretation Services .....	76
K. Town and Village Courts .....	77
<b>VII. RECOMMENDATIONS.....</b>	<b>79</b>
A. A Commitment From the Top .....	79
B. Promote Existing Institutions .....	80
C. Expand Bias Training .....	81
D. Address Juror Bias .....	83
E. Adopt a Social Media Policy .....	84
F. Strengthen the IG Process for Bias Complaints .....	87
G. Review of Rules Changes for Bias .....	90
H. Continue Progress on Translation and Interpretation Services .....	91
I. Improve Data Collection and Stewardship Practices .....	91
J. Improve Diversity and Inclusion within HR Practices .....	95
K. Enhance Trust between Court Officers and the Community .....	98
L. Facilitate Navigation of Courthouses .....	99
M. Ensure Implementation of Change .....	100

## EXECUTIVE SUMMARY

October 1, 2020

Dear Chief Judge DiFiore:

On June 9, 2020, Your Honor appointed me to conduct a review of racial bias in the New York State court system. I salute your willingness to call for this review on this topic, at this time. You asked that I deliver this report and recommendations by today, October 1, 2020.

To conduct this review, I was ably assisted by a number of my colleagues at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP.<sup>1</sup> We also enlisted the advice and input of Professor Harold Goldstein, an industrial psychologist at Baruch College, The City University of New York, and his team at Siena Consulting. Professor Goldstein and I, and our respective firms, undertook this assignment pro bono. We received no compensation or reimbursement from the court system for our work on this matter. Finally, throughout this review, I was advised and supported by Justices Troy Webber and Shirley Troutman, co-chairs of the Franklin H. Williams Judicial Commission, and a number of your other colleagues in the New York State judiciary.

Since my appointment four months ago, my team and I conducted 96 interviews involving 289 individuals. We interviewed current or former judges from almost every type of court upstate and downstate. Our team interviewed court clerks, court watchers, court officers, court attorneys and administrative personnel, private civil and criminal practitioners, institutional and public defenders and prosecutors. We engaged numerous bar associations, judicial associations, court employee unions, court reform organizations and affinity groups. Along with the recommendations set forth below, we believe it important to convey to you what we heard from these interviews, and we do so in Section VI of this report (pp. 54–78).

In general, people we spoke with welcomed this review and were anxious to talk with us. Some organizations canvassed their respective memberships and came forward with their own thoughtful written observations and recommendations. To promote candor from interviewees, we promised that their statements would not be attributed to them by name unless we received explicit permission to do so. At my request, OCA created a public

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<sup>1</sup> This Paul, Weiss team included counsel Maria H. Keane, associates Amitav Chakraborty, Lissette Duran, Anna Gonzalez, Kimberly Grambo, Danielle Hayes, Vincent Honrubia, Madison Lupino, Agbeko Petty and Jonathan Wall, summer Associates Claire Abbadi (Columbia Law '21), Sheridan Cunningham (Harvard Law '21) and Tobias Kuehne (Yale Law '21) and paralegals Zachary Hoffman and Erin Mah.

email address to enable individuals to submit anonymously to my team and me information about their experiences with racial bias in the court system. In the course of this review, I received numerous unsolicited letters, phone calls, emails and voicemails from individual members of the public and various organizations concerning racial bias in the courts. Our team studied past reports that examined racial bias in the New York State court system. We also received and reviewed OCA's policies and practices on hiring, promotion, workplace conduct and bias training.

Given COVID-19, my opportunity to visit courts and observe in-person proceedings around the state was limited, though I did have the opportunity to personally visit several courts toward the end of this review.

As written, your assignment to me was a nuanced one. In sum, you asked me to review existing policies, practices and organizations within the New York State court system that are intended to address racial bias and recommend any changes or expansion of those policies, practices and organizations. You did not ask me to undertake a comprehensive review of criminal and civil justice throughout the system – encompassing, for example, jury selection, detention, police, bail or sentencing practices, or the substance of judicial decision-making – for evidence of racial bias. In fact, you have asked the Justice Task Force to study the issue of racial disparity in stops, arrests, charging decisions and jury selection. Thus, I have avoided the temptation (and the invitation of some) to wander into that vast forest.

That said, I have three big-picture observations to share:

*First*, though it has been 16 years since I chaired the Judiciary Committee of the New York City Bar Association, I was reminded over the last four months of the intense pride and dedication that many in and around the New York State court system – from the upstate Village justice to the Kings County Family Court judge – feel for their work. Particularly given the challenges over the last seven months associated with COVID-19, you should take great comfort that many in the court system you lead work hard to get it right and make it better.

*Second*, there is the bad news. This review would lack credibility if I omitted it. Through Your Honor's Excellence Initiative considerable progress has been made since 2016 to improve promptness, productivity, disposition rates, reduce case backlogs and modernize courtrooms. But, in one form or another, multiple interviewees from all perspectives still complain about an under-resourced, over-burdened New York State court system, the dehumanizing effect it has on litigants, and the disparate impact of all this on people of color. Housing, Family, Civil and Criminal courts of New York City, in

particular, continue to be faced with extremely high volumes of cases, fewer resources to hear those cases and aging facilities. Over and over, we heard about the “dehumanizing” and “demeaning cattle-call culture” in these high-volume courts. At the same time, the overwhelming majority of the civil or criminal litigants in the Housing, Family, Civil and Criminal courts in New York City are people of color. The sad picture that emerges is, in effect, a second-class system of justice for people of color in New York State. This is not new. In 1991, a Minorities Commission appointed by then-Chief Judge Wachtler declared “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.”<sup>2</sup>

As intended, the proposed merger plan will also achieve efficiencies and improve things. But, problems so extensive and systemic in nature can only be addressed by a new, wholesale investment in resources, technology, people and infrastructure. Obviously, you do not have the power to make these changes alone. The judiciary cannot print money or tax the people. This is a matter for all three branches of New York State government, as well as the local governments that own and maintain the courthouses. Should this report become public, my hope is that it aids you in obtaining greater legislative and executive support for the judicial branch, at both the state and local level.

*Third*, I must report that the news in June of the vile, racist Facebook posting by the Brooklyn-based court officer appears to have peeled the lid off long-simmering racial tensions and intolerance within the court officer community, particularly in Kings County. This, too, is not new. In 1991, the Minorities Commission noted racial tensions that existed then within the court officer community. In 2020, a number of court officers of color were outspoken to us in expressing similar grievances, and told us the Facebook post was not an isolated incident. According to court officers of color, the use of racial slurs by white court officers is common and often goes unpunished. These court officers also told us they felt they could not report incidents of bias for fear of being ostracized by their fellow officers and facing adverse career consequences from powerful and entrenched union leaders. We note that at least one union leader has himself posted offensive messages on social media, leading several court officers to brand union leadership as a “safe haven for racist speech and actions.”

For this review, I took very seriously (and, from my own experience in public office, agree with) your direction to only recommend changes to the system that “center on operational issues that lie within the power of the court system to implement

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<sup>2</sup> REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, Vol. 1, at 1 (1991) [hereinafter MINORITIES COMMISSION REPORT].

administratively and unilaterally.” To that end, my team and I worked hard to put forth the following recommendations that are specific, practical and workable:

**A Commitment From the Top.** Just as the legislature has mandated for all state personnel on matters of sexual harassment, we recommend that the court system’s leadership embrace a “zero tolerance” policy for racial bias, and explain that the duty to uphold this policy extends to all those working within the New York State court system – from judges, to interpreters, to court officers. While we note that OCA’s current discrimination policies state that “the Unified Court System prohibits and will not tolerate . . . discrimination or harassment” on the basis of race, we suggest a more robust, publicized policy specifically addressing racial bias is warranted.

**Promote Existing Institutions.** From our interviews it is apparent that there is a considerable lack of transparency within the court system on matters of race and racial bias. Interviewees across the board were unfamiliar with many of the existing institutions dedicated to addressing issues of racial bias, as well as the nature of their missions. Others suggested such organizations were “running out of steam.” We endorse the continued missions of the Williams Commission and OCA’s Office of Diversity and Inclusion, for example, but we recommend a reemphasis on promoting, clarifying and strengthening the mandate of these existing organizations.

**Expand Bias Training.** The Williams Commission recently recommended regular, mandatory training on bias for all judicial and non-judicial personnel across the court system. We agree. Countless interviewees told us that mandatory implicit bias and cultural sensitivity training is long overdue for judicial and non-judicial personnel in the New York State court system. At present, it appears that such training is both inconsistent and insufficient.

Judges are human, too. They are not above the reach of the implicit racial biases that pervade our society, yet equality before the law requires them to be. Multiple judges we spoke with were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. As we understand it, new judges receive bias training at a plenary session during summer sessions at the Judicial Institute in White Plains. Beyond that, the Judicial Institute provides a yearly session on implicit bias that may be accessed remotely as a video, but it is not mandatory.

We perceive an equal if not greater need for more robust bias training for non-judicial personnel, particularly the court officer community. Interviewees have relayed innumerable stories of dehumanizing language by court officers towards litigants of color, as well as instances where tensions were directly escalated by courts officers’ actions. But,

it appears that the only “mandatory” training that OCA’s Human Resources department uniformly provides to non-judicial personnel is delivered as part of the orientation for new employees and covers “discrimination and harassment,” but not implicit bias, specifically. As for court officers, we understand there is a form of implicit bias training at the Court Officer Academy, but we are told that the training provided was lacking, and that it did not actually prioritize understanding racial bias.

In all, it appears there is no centralized body charged with developing, administering, tracking and updating training on racial bias and cultural sensitivity for judicial and non-judicial personnel. We recommend that OCA develop and require comprehensive racial bias and cultural sensitivity training for both judicial and non-judicial personnel, informed by experts in these fields. This training must be multidimensional and address the overlap between issues of race, class, gender, sexual orientation, immigration status, trauma and beyond, in order to ensure more relevant and nuanced discussions.

**Address Juror Bias.** Interviewees expressed to us a number of concerns about juror bias. Jurors are human, too, and bring to the courtroom all the biases and prejudices they are exposed to in our society. To address this:

*First*, we recommend that OCA create and display a video educating jurors about implicit bias before *voir dire*. We understand that in many, if not all, state courthouses where jurors are summoned and selected for trials, prospective jurors are already shown a general orientation video. We recommend that OCA work with court personnel, outside experts and members of the bar to include within that video orientation a carefully balanced message on implicit bias that can be shown to venire panels of jurors.

*Second*, we recommend that Your Honor appoint a new or standing committee to investigate and formulate a proposal to create uniform rules to explicitly permit and endorse *voir dire* of jurors on racial bias. Trial attorneys have told us that the practice of permitting *voir dire* on the subject of implicit bias is inconsistent, and that certain judges allow *voir dire* on such questions while others do not.

*Third*, we recommend that a model jury instruction on implicit bias be developed for both criminal and civil trials. A number of courts around the country have adopted jury charges that explain the concept of implicit bias and remind jurors to be aware of their implicit biases. As we understand it, OCA can utilize standing committees for criminal and civil pattern jury instructions to develop standard language on implicit bias.

**Adopt a Social Media Policy.** We recommend that OCA develop a policy for judicial and non-judicial personnel that provides clear restrictions on the use of social media – whether in an official or personal capacity – for racially or culturally offensive remarks

that reflect poorly on the court system. Our reading of the law is that such a policy is legally permissible. *See, e.g., Festa v. Westchester Medical Ctr. Health Network*, 380 F. Supp. 3d 308, 319–321 (S.D.N.Y. 2019) (finding that public hospital may discipline an employee for an off-hours anti-Semitic Facebook post if it would disrupt the hospital’s ability to serve the local community and “cause harm within the ranks”). We note that other court systems around the country have implemented social media policies to ensure that employees’ online activity does not undermine public confidence in the operation of the courts and the application of justice. A social media policy may prohibit communications that constitute harassment or racially offensive remarks, but should be drafted in a way that will not prohibit protected activities under the National Labor Relations Act.

**Strengthen the Inspector General Process for Bias Complaints.** After consulting a retired Inspector General with extensive experience in the U.S. government and other sources, we recommend that OCA adopt the following best practices to improve its complaints and investigations processes:

*First*, given the number of interviewees – judicial and non-judicial – who were unaware that mechanisms for making bias complaints even existed, we recommend that OCA engage in a robust campaign to educate court system participants about the existence and purpose of these offices and the procedures to lodge a bias complaint.

*Second*, we recommend that OCA clarify its retaliation policy to better assuage concerns that interviewees across the spectrum cited about filing complaints. While the current policy states that retaliation is prohibited, the definition of retaliation provided in OCA’s discrimination booklet is narrow, difficult to understand and only provides a few examples of very formal, narrow work-related actions of retaliation, such as termination or a demotion with a decrease in wage or salary.

*Third*, we recommend that OCA update its policies and publicly available resources to more clearly explain that complaints may be made anonymously.

*Fourth*, we recommend that OCA update and clarify its current public guidance about informal complaint mechanisms.

*Fifth*, we recommend that, following a complaint, OCA routinely follow up with the complainant to apprise him or her of the status of the investigation initiated by the complaint, and, to the extent permitted by law and privacy concerns, apprise the complainant of the outcome of the investigation. We are advised by an experienced retired IG that this simple act goes a long way to promote credibility and confidence in the process.

*Sixth*, we recommend that OCA designate an ombudsperson within the IG office to advise potential complainants of their options for registering their concerns. We note that several state court systems and federal agencies maintain similar offices to help individuals navigate complaint systems.

*Seventh*, we recommend that OCA track and annually report the number of racial bias or race discrimination complaints received, investigated and where possible, substantiated.

**Review of Rules Changes for Bias.** Next, we recommend that one of the existing institutions for addressing bias – the Williams Commission, the IG for Bias Matters or the Office of Diversity and Inclusion – be tasked with the standing responsibility to review legislation, proposed constitutional amendments, regulations and rules changes pertaining to the state judiciary for any potential bias or disparate impact on people of color, and convey any such concerns to the Chief Administrative Judge. This was suggested to us by the National Center for State Courts and there is precedent for it among government agencies.

**Continue Progress on Translation and Interpretation Services.** We note that in 2017, the New York State Advisory Committee on Language Access issued a “Strategic Plan” for implementing a number of good recommendations to improve translation and implementation services throughout the state, and we are told implementation of these recommendations is underway. We have heard positive feedback about implementation of the Strategic Plan, and we endorse the Plan’s recommendations.

**Improve Data Collection.** We regret to report that the New York State court system’s data collection and publication practices have fallen behind those of other states. We therefore recommend that OCA both expand on categories of data already collected and collect additional, more robust and rigorously audited information that will help create a baseline to measure progress on fighting disparate case outcomes, beyond that which is required by the recently enacted Police Statistics and Transparency Act and the recent amendments to the bail reform law.

**Improve Diversity and Inclusion within HR Practices.** Throughout the course of our investigation, interviewees frequently raised the lack of diversity within the court system’s workforce, and their perception that diversity is not a serious consideration for leadership. Specifically, several interviewees asserted that diverse employees are underrepresented in senior leadership positions, particularly within the OCA bureaucracy. To cure this, we recommend a number of HR reforms developed with assistance from an expert in the field, Professor Harold Goldstein. While they are most aptly suited for the

non-judicial workforce, some may also be applicable to the judiciary, to the extent that they are within OCA's power to implement.

**Enhance Trust between Court Officers and the Community.** According to judges, public defender organizations, bar associations and numerous others, court officer mistreatment of litigants of color, their families, and attorneys of color is a significant barrier to achieving equality in the court system. In addition to the recommendations above that would impact the court officer community, we recommend these changes for court officers specifically: court officers should be required to wear name tags, and, similar to the NYPD Patrol Guide, OCA should publicly post the rules that court officers must follow in carrying out their official duties, including use-of-force guidelines.

**Facilitate Navigation of Courthouses.** Interviewees recommended a "greeter" in courthouses on a more widespread basis. We agree, and recommend that there be a designated individual within each courthouse whose role is to welcome litigants and answer basic questions about how to navigate the building and adhere to general procedures and practices. Likewise, helpful, clear, signage and written guidance within courthouses is essential to ensuring that litigants are able to navigate the courthouse and understand the proceedings before them.

**Ensure Implementation of Change.** Finally, experience shows that recommendations matter little if there is no follow-through on the implementation of them; far too often, reports and recommendations such as these are placed on a shelf and gather dust unless there is a commitment to put words into action. We recommend that Your Honor appoint an entity or group to, on an ongoing basis, monitor and report on implementation of the recommendations here that are adopted.

\* \* \* \* \*

One final thought: This review comes at a particularly tense moment for race relations in America. Black Americans watch an unrelenting parade of video images of their people's lives snuffed out like animals at the hunt, at the hands of law enforcement in this jurisdiction and beyond. They conclude, with considerable evidence to support it, that in the eyes of law enforcement their lives do not matter as much as those of whites. The very notion of equality under law is today cast in serious doubt.

You are obviously committed to change and the assessment of hard questions, which is why you asked for this review. In my assessment as a lawyer, a student of history, a former public official, and as an African American, this is a moment that demands a strong and

pronounced rededication to equal justice under law by the New York State court system. It is also my experience that credibility will only be earned if the public sees both strong commitments to reform at the front end and a sustained effort to follow through on those commitments, during your tenure as Chief Judge and beyond.

Respectfully submitted,

A handwritten signature in black ink, featuring a stylized, cursive script with a long horizontal flourish extending to the right.

Jeh Charles Johnson

## **I. OUR WORK**

### **A. The Mandate**

On June 9, 2020, Chief Judge DiFiore appointed Secretary Johnson to conduct “an independent review of the New York State court system’s response to issues of institutional racism,” and to make “[r]ecommendations [that] center on operational issues that lie within the power of the court system to implement administratively and unilaterally.”<sup>3</sup> Chief Judge DiFiore directed that Secretary Johnson deliver this report and recommendations by October 1, 2020.

In specific terms, the Chief Judge’s assignment was to:

- Review the policies and statewide practices of the court system that explicitly address issues of racial bias, with recommendations as to the revision and expansion of such practices.
- Review the structure, operations and effectiveness of organizations and programs within the court system designed to address issues of systemic and implicit bias, and to make recommendations for necessary changes to such structure and operations.
- Review bias education and training practices of judges and non-judicial personnel to ensure that such training maximizes the understanding of all court personnel on the challenging issues of racial justice, with recommendations for necessary changes in such practices.
- Review the practices of selection and appointment of judicial and non-judicial officers and employees within the court system, with recommendations to ensure that those practices are consistent with the highest standards of fairness, equity and inclusiveness.
- Review court policies and programs to ensure they are free of racism and other bias, with recommendations for the amendment of such policies and programs.

### **B. Engagement with Stakeholders**

To conduct our work, our team solicited the views of various stakeholders in the New York State court system to gain a comprehensive understanding of the issues concerning racial bias. These stakeholders included current and former judges, non-judicial personnel

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<sup>3</sup> Press Release, Hon. Lawrence K. Marks, *Aiming to Advance Equal Justice in the Courts, Chief Judge DiFiore Announces Independent Review of Court System Policies, Practices and Initiatives* (June 9, 2020), [https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20\\_24.pdf](https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_24.pdf).

with the Office of Court Administration (“OCA”), district attorneys, prosecutors, public defenders, private attorneys, bar associations, judges’ associations and representatives from court employee unions.

More specifically, we engaged a broad range of people in and around the New York State court system, including individuals from the following:

- Administration for Children’s Services
- Asian American Bar Association of New York
- Asian American Judges Association
- Association of Latino Judges
- Brooklyn Defender Services
- Bronx Defenders
- Caribbean American Lawyers Association
- Center for Court Innovation
- Commission on Judicial Conduct
- District Attorneys of Albany, Bronx, Dutchess, Erie, Kings, Monroe, New York, Suffolk, Queens and Westchester Counties
- Dominican Bar Association
- Dutchess County Public Defender
- Franklin H. Williams Judicial Commission on Minorities
- Fund for Modern Courts
- Guardians Association of the New York State Courts
- Judicial Friends Association, Inc.
- Latino Court Officers Society
- Latino Judges Association
- Legal Aid Bureau of Buffalo
- Legal Aid Society of New York City
- Legal Aid Society of Northeastern New York
- Legal Services Of the Hudson Valley
- Manhattan Legal Services
- Mayor’s Office of Criminal Justice
- Measures for Justice
- Metropolitan Black Bar Association
- Mobilization for Justice, Inc.
- Monroe County Public Defender
- National Center for State Courts

- New York City Association of Criminal Court Judges
- New York City Association of Housing Judges
- New York City Bar Association
- New York City Criminal Court Judges Association
- New York City Family Court Judges Association
- New York City Housing Court Judges Association
- New York City Law Department
- New York City Mayor's Office of Criminal Justice
- New York County Clerk
- New York Courts Shomrim Society
- New York State Association of Criminal Defense Attorneys
- New York State Court Clerks Association
- New York State Court Officers Association
- New York State Family Court Judges Association
- New York State Judicial Institute
- Northern Manhattan Improvement Corporation
- OCA Office of Diversity and Inclusion
- OCA Counsel's Office
- OCA Human Resources
- Office of the Appellate Defender
- Office of the Inspector General
- Puerto Rican Bar Association
- South Asian Bar Association
- Tribune Society
- Westchester Magistrates Association

In all, we conducted 96 interviews involving 289 individuals. We interviewed current or former judges from the Court of Appeals, the Appellate Divisions, the trial-level Supreme Courts, County Courts, City Courts and Town and Village Courts. Our team interviewed court clerks, court officers, court attorneys and administrative personnel of OCA. We interviewed prosecutors, private civil and criminal practitioners, public defenders and attorneys acting as assigned counsel.

To promote candor from all interviewees, in this report we do not by name attribute (unless authorized) narratives or quotations to specific individuals interviewed.

### **C. Materials Received from Interviewees**

In addition to our interviews, we received and reviewed over 200 documents, including memoranda and emails supplementing answers given during interviews, pictures and emails documenting instances of discrimination or bias and memoranda and emails referring us to prior studies or models for innovative practices.

### **D. Public Contacts**

At our request, OCA created a public email address to enable individuals to anonymously submit messages and concerns about their experiences with racial bias in the New York State court system. The email inbox was activated on July 8, 2020, and was advertised on OCA's internal listserv the same day. We received 59 emails, 24 of which reported incidents of experienced racial bias and 15 recounted incidents of observed racial bias. Only our team had access to this emails; they are not accessible to OCA. In the course of this review, Secretary Johnson also received a number of unsolicited letters, phone calls, emails and voicemails on the subject of racial bias in the courts.

### **E. Research**

Our team studied past reports on the New York State court system that examined issues of racial bias. These included reports of past and ongoing commissions, as well as external studies and news reports. Most notably, the team reviewed 27 reports from the Williams Commission,<sup>4</sup> and analyzed recommendations the Williams Commission made from 1991 to 2019 to alleviate racial bias and increase diversity in the court system. Beyond the Williams Commission reports, we studied reports by the Vera Institute of Justice,<sup>5</sup> the Court Statistics Project,<sup>6</sup> the Center for Court Innovation<sup>7</sup> and various additional reports that examined issues relevant to the mandate.

Our team received and reviewed OCA's policies and practices on hiring, promotion, workplace conduct and bias training. We engaged and consulted with Professor Harold Goldstein, an industrial psychologist at Baruch College, The City University of New York, and his team at Siena Consulting, in the review of these policies and practices. Professor

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<sup>4</sup> Our team did not review the Williams Commission's reports in 1999 and 2000 as they were not provided to us and do not exist on the Williams Commission website.

<sup>5</sup> Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County – Technical Report*, VERA INST. OF JUST. (Jan. 31, 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>.

<sup>6</sup> *Collecting Race and Ethnicity Data*, CT. STATISTICS PROJECT (June 24, 2020), [http://www.courtstatistics.org/data/assets/pdf\\_file/0018/42255/Race\\_special\\_topic\\_final.pdf](http://www.courtstatistics.org/data/assets/pdf_file/0018/42255/Race_special_topic_final.pdf).

<sup>7</sup> Rachel Swaner et al., *Procedural Justice at the Manhattan Criminal Court: Impact, Limitations, Implications*, CTR. CT. INNOV. (Aug. 2019), [https://www.courtinnovation.org/sites/default/files/media/documents/2019-08/pj\\_manhattan\\_report.pdf](https://www.courtinnovation.org/sites/default/files/media/documents/2019-08/pj_manhattan_report.pdf).

Goldstein made a series of recommendations for OCA’s recruitment, hiring, training, evaluation and promotion practices, as well as suggestions for accountability measures to assess progress toward fairness and diversity-related goals and objectives. Many of his recommendations have been incorporated into this report.

Using 2020 employment statistics provided by OCA, we also analyzed the diversity of employees of the New York State court system.

Finally, we researched several legal matters, as well as the text and legislative history of New York State Senate bill 7703, which, once signed into law, will require OCA to compile and publicize demographic data in the judiciary. We also studied the recently-passed STAT Act, which requires OCA to compile and publicize demographic data for individuals charged with misdemeanors.

#### **F. Court Visits**

Given COVID-19, our opportunity to visit courts and observe in-person proceedings around the state was limited. This would have been of great benefit to this review. However, toward the end of the review, as the courts began to reopen, Secretary Johnson had the opportunity to personally visit several courts, observe proceedings, and meet with judges, attorneys, court clerks and court officers there.

## II. THE NEW YORK STATE COURT SYSTEM

The New York State court system is the largest and most complex in the Nation, serving one of the most populated, complex, diverse and dynamic states in the Nation. Adding to the complexity, the court system is structured one way inside New York City and another way outside the City. Few practitioners and observers understand the full complexity of the state's court system and how it got that way.

### A. History of the New York State Courts

In 1777, New York adopted the state's first constitution, which marked the beginning of a long history of organizing and re-organizing its judiciary.<sup>8</sup> The courts operating in New York prior to 1777 reflected the model of judicial organization introduced during British colonial rule: the Supreme Court held jurisdiction over disputes under law – akin to jurisdiction of the English King's Bench – while the Court of Chancery enjoyed jurisdiction over equitable disputes.<sup>9</sup> The courts of law and chancery were supplemented by specialized courts, such as those responsible for hearing non-capital felony cases or disputes arising in New York City.<sup>10</sup>

The 1777 Constitution largely continued this system; in 1786 Circuit Courts were introduced.<sup>11</sup> Justices were assigned to particular counties, and traveled within them holding court sessions for civil cases.<sup>12</sup> These courts were supplemented in the decades that followed by a number of additional courts responsible for specialized disputes, such as the Surrogate's Court established in 1787 to handle the administration of estates.<sup>13</sup>

By the time of the Constitutional Convention of 1846, the Circuit Courts had proved ineffective at responding to the needs of the growing and increasingly-centralized population of the state. As a result, New York adopted a consolidated court structure which prevails, in many respects, to this day.<sup>14</sup> The Supreme Court absorbed jurisdiction over the equitable disputes once heard by the abolished Court of Chancery, becoming a court of

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<sup>8</sup> N. Y. State Bar Ass'n Committee, THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION 1, 9 (2017) [hereinafter THE JUDICIARY ARTICLE].

<sup>9</sup> *Id.*; see also COURTS OF NEW YORK STATE, <https://history.nycourts.gov/new-york-legal-history/history-new-york-courts/> (last visited July 30, 2020).

<sup>10</sup> THE COURT OF GENERAL SESSIONS 1683–1847, <https://history.nycourts.gov/court/court-general-sessions/> (last visited July 30, 2020); COURT OF COMMON PLEAS 1686–1895, <https://history.nycourts.gov/court/court-common-pleas/> (last visited July 30, 2020).

<sup>11</sup> CIRCUIT COURTS 1786–1895, <https://history.nycourts.gov/court/circuit-courts-1786-1895/> (last visited July 30, 2020); Marc Bloustein, A SHORT HISTORY OF THE NEW YORK STATE COURT SYSTEM (1987).

<sup>12</sup> *Id.*

<sup>13</sup> SURROGATE'S COURT, <https://history.nycourts.gov/court/surrogates-court/> (last visited July 30, 2020).

<sup>14</sup> See generally Bloustein, *supra* note 11; see SPECIAL COMMISSION ON THE FUTURE OF THE N. Y. STATE COURTS, A COURT SYSTEM FOR THE FUTURE 16 (2007) [hereinafter SPECIAL COMMISSION REPORT 1].

general original jurisdiction.<sup>15</sup> The newly-expanded Supreme Court was divided into eight Judicial Districts, each made up of four justices elected by residents of the district.<sup>16</sup> The Convention also introduced the Court of Appeals: the highest court of the state responsible for hearing appeals from the state’s various trial courts.<sup>17</sup> Judges of the Court of Appeals would be elected by a state-wide vote, subject to certain eligibility criteria.<sup>18</sup> The 1894 Constitutional Convention built upon these changes and established an intermediate level of appellate review by creating four Appellate Divisions throughout the state consisting of elected Supreme Court Justices appointed by the Governor to hear appeals.<sup>19</sup>

The current New York State court system is the product of the 1962 Constitutional Convention, which instituted a “unified court system” under Article VI of the New York State Constitution.<sup>20</sup> This unification consisted primarily of consolidating administrative bodies and funding arrangements.<sup>21</sup> The post-1962 court system also constitutionally enshrined the structure of the eleven lower courts of original jurisdiction that still exist today.<sup>22</sup> These courts are: the Supreme Court, the Court of Claims, District Courts, County Courts, Family Courts, Surrogate’s Courts, City Courts, a New York City Criminal Court, a New York City Civil Court, and the Town and Village Courts.<sup>23</sup>

In addition, the unification instituted a cap of one Supreme Court justice to fifty thousand residents, but created provisions for the appointment of “acting” Supreme Court justices appointed by the Chief Administrative Judge.<sup>24</sup> This has led to a large number of lower court judges serving as “acting” Supreme Court justices over the second half of the twentieth century and continuing to the present day.<sup>25</sup>

In 1977, the New York electorate, by constitutional amendment, authorized the creation of a unified state court system and the Office of Court Administration, or OCA, to oversee it. With the exception of Town and Village Courts, the budget and financing for the state judiciary was placed under unified state control, though state courthouses themselves remain the property and responsibility of local governments.<sup>26</sup> At the same time, the

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<sup>15</sup> THE JUDICIARY ARTICLE, *supra* note 8, at 13.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 16.

<sup>20</sup> N.Y. CONST. art. VI, § 1(a).

<sup>21</sup> Bloustein, *supra* note 11; SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17.

<sup>22</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 16–17.

<sup>23</sup> *Id.*; N.Y. CONST. art. VI, § 1.

<sup>24</sup> *Id.* at 23–24.

<sup>25</sup> *Id.* at 24.

<sup>26</sup> N.Y. CONST. art. VI, § 29; art. VII § 1.

electorate approved creation of a Commission on Judicial Conduct, and the gubernatorial appointment of judges to the Court of Appeals.<sup>27</sup>

## **B. Today's New York State Court System**

Today's New York court system is made up of eleven lower courts and four appellate divisions.<sup>28</sup> The highest court is the New York Court of Appeals.<sup>29</sup> While some of New York's trial courts – such as the Family Court – are distinguished by their subject matter jurisdiction, others have jurisdiction over the same legal issues in different areas within the state.<sup>30</sup> Most notably, the court structure within New York City differs from the rest of the state, as it includes Civil and Criminal courts to resolve legal disputes.<sup>31</sup> By comparison, the judicial system outside New York City employs a combination of City Courts, District Courts and Town and Village Courts that hear cases involving civil claims for \$15,000 or less, as well as non-felony criminal prosecutions.<sup>32</sup> The County Courts in the counties outside New York City are responsible for all felony criminal prosecutions.<sup>33</sup>

Present day, New York's courts are divided geographically into 13 Judicial Districts.<sup>34</sup> The First, Second, Tenth, Eleventh, Twelfth, and Thirteenth Judicial Districts encompass New York City and Long Island.<sup>35</sup> The Third and Ninth Districts cover a number of counties directly north of New York City, such as Westchester, Rockland, Ulster and Albany counties.<sup>36</sup> The Fourth District covers the northernmost part of the state, while the Fifth and Sixth Districts encompass the middle of the state.<sup>37</sup> Finally, the Seventh and Eighth Districts cover the western part of the state.<sup>38</sup>

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<sup>27</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 53–54.

<sup>28</sup> Jay C. Carlisle and Matthew J. Shock, *The Constitutional Convention and Court Merger in New York State*, 38 PACE L. REV. 69, 74 (2017).

<sup>29</sup> N.Y. CONST. art. VI, § 3.

<sup>30</sup> Carlisle and Shock, *supra* note 28, at 75; *see also* Quintin Johnstone, *New York State Courts: Their Structure, Administration, and Reform Possibilities*, 43 N.Y.L. SCH. L. REV. 915, 916 (1999).

<sup>31</sup> NEW YORK CITY COURTS, <https://www.nycourts.gov/courts/cts-NYC.shtml> (last visited Aug. 18, 2020).

<sup>32</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17–22; THE COURTS OUTSIDE NEW YORK CITY, <https://www.nycourts.gov/courts/cts-outside-nyc.shtml> (last visited Aug. 18, 2020).

<sup>33</sup> *Id.*

<sup>34</sup> NEW YORK STATE JUDICIAL DEPARTMENTS AND DISTRICTS, <https://www.nycourts.gov/courts/ad4/Court/Dept-Districts.html> (last visited Aug. 18, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



Figure 1<sup>39</sup>

**The Court of Appeals.** The Court of Appeals is the highest court in the state. As the single ultimate arbiter of New York law, the court can review decisions from the state’s appellate courts, rulings by the Commission on Judicial Conduct<sup>40</sup> and direct appeals from the trial courts in certain instances.<sup>41</sup> The court consists of seven judges who serve fourteen-year terms.<sup>42</sup> Court of Appeals judges are appointed by the Governor, and are chosen from a slate of candidates recommended by the Commission on Judicial Nomination.<sup>43</sup>

**The Supreme Court.** Consistent throughout the state is the Supreme Court and its Appellate Divisions. The Supreme Court is a statewide court of “general original jurisdiction in law and equity,” which automatically has jurisdiction over all “classes of actions and proceedings” created by the state legislature.<sup>44</sup> In practice, however, the Supreme Court only hears those cases which do not fall under the jurisdiction of one of the

<sup>39</sup> *Id.*

<sup>40</sup> See *Procedures in the New York State Court of Appeals*, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/Procedures.html> (last visited Aug. 18, 2020).

<sup>41</sup> N.Y. CONST. art. VI, § 3. For example, direct appeals can be taken from the trial courts where the constitutional validity of a state or federal statute is at issue. *Id.*

<sup>42</sup> *Id.* at § 2.

<sup>43</sup> *Id.*; see also NEW YORK STATE COMMISSION ON JUDICIAL NOMINATION, <http://nysegov.com/cjn/overview.htm> (last visited September 5, 2020).

<sup>44</sup> N.Y. CONST. art. VI, § 7(a)–(b).

other ten smaller or more specialized trial courts operating within the state.<sup>45</sup> The Supreme Court may also refer disputes to another trial court – except the Court of Claims – when doing so would “promote the administration of justice.”<sup>46</sup> As a result, the Supreme Court primarily hears major civil litigation, such as commercial or matrimonial disputes.<sup>47</sup>

The Supreme Court also contains a specialized Commercial Division, in which judges resolve commercial disputes with potential damages of over \$500,000.<sup>48</sup> There are four Commercial Divisions in New York City located in the Supreme Court in the Bronx, Manhattan, Brooklyn and Queens. There is also a Commercial Division in Albany, Nassau, Suffolk, Onondaga and Westchester Counties and in the 7th and 8th Judicial Districts.<sup>49</sup>

Supreme Court justices are elected to each of the Judicial Districts by the electorate of that district.<sup>50</sup> There is a maximum of one Supreme Court justice to every fifty thousand residents, and each justice serves a maximum term of fourteen years.<sup>51</sup> These restrictions are not imposed on acting Supreme Court justices, who are appointed by the Chief Administrative Judge.<sup>52</sup> Acting justices have the same powers as elected Supreme Court justices.<sup>53</sup>

**Supreme Court, Appellate Division.** The Supreme Court also includes an appellate function. There are four appellate Judicial Departments of the Supreme Court across the state, which are served by four corresponding Appellate Divisions. The Appellate Divisions hear criminal and civil appeals from the courts of original jurisdiction within their geographical Department, as well as appeals from the Court of Claims, Surrogate’s Court, Family Court and County Courts.<sup>54</sup> The Constitution places a cap of seven justices on the first and second Appellate Divisions, and five justices in the third and fourth Appellate Divisions.<sup>55</sup> Additional judges can be added on a temporary basis for as long as they are necessary for the speedy disposition of the Appellate Division’s docket.<sup>56</sup>

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<sup>45</sup> See THE JUDICIAL SYSTEM, [https://www.dos.ny.gov/lg/handbook/html/the\\_judicial\\_system.html](https://www.dos.ny.gov/lg/handbook/html/the_judicial_system.html) (last visited July 30, 2020).

<sup>46</sup> N.Y. Const. art. VI, § 19(a).

<sup>47</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 17.

<sup>48</sup> COMMERCIAL DIVISION – N. Y. SUPREME COURT, <http://ww2.nycourts.gov/courts/comdiv/history.shtml> (last visited July 30, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> N.Y. CONST. art. VI, § 6(b).

<sup>51</sup> *Id.* at §§ 6(c)–(d).

<sup>52</sup> *Id.* at § 26.

<sup>53</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23–24.

<sup>54</sup> N.Y. CONST. art. VI, § 7(a); SPECIAL COMMISSION REPORT 1, *supra* note 14, at 27.

<sup>55</sup> N.Y. CONST. art. VI, § 4(b).

<sup>56</sup> *Id.* at § 4(e).

**Supreme Court, Appellate Term.** Appellate Terms of the Supreme Court are additional courts created at the discretion of each Judicial Department, consisting of between three and five justices.<sup>57</sup> Currently, only the First and Second Departments have Appellate Terms.<sup>58</sup> These Terms hear appeals from the New York City Civil Court, New York City Criminal Court, the City Courts and the District Courts within each Department and appeals from non-felony criminal convictions within the Department.<sup>59</sup> Appeals from civil judgments made by the Appellate Terms are heard by the Appellate Division, and then by the Court of Appeals if the Appellate Division’s holding is appealed. The Appellate Terms’ criminal decisions are appealable only to the Court of Appeals directly.<sup>60</sup>

**The Family Court.** There is a Family Court in each county across the state.<sup>61</sup> Family Court judges in counties outside New York City are elected to their positions, while judges in New York City are appointed by the mayor.<sup>62</sup> Judges of the Family Court serve ten-year terms.<sup>63</sup> The Family Court possesses original jurisdiction primarily over disputes involving minors.<sup>64</sup> The Family Court is also empowered to hear certain related disputes referred to it by the Supreme Court, and in such cases is authorized to exercise all the authority normally allocated to the Supreme Court.<sup>65</sup> Appeals from Family Court judgments are heard by the Appellate Division of the Supreme Court, and a litigant may appeal an Appellate Division decision to the Court of Appeals.<sup>66</sup>

**The Surrogate’s Court.** Like the Family Court, the Surrogate’s Court is a specialized body with one court in each county. The court has original jurisdiction over wills, trusts and estates and all actions and proceedings related to these areas that are not already within the exclusive jurisdiction of the Supreme Court.<sup>67</sup> In addition, the court can exercise “equity jurisdiction” to hear other cases, unless such an exercise would conflict with the law.<sup>68</sup> Surrogate’s Court judges are elected by each county, and serve ten-year terms outside of New York City or fourteen-year terms within New York City.<sup>69</sup>

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<sup>57</sup> *Id.* at § 8(a).

<sup>58</sup> THE JUDICIARY ARTICLE, *supra* note 8, at 27.

<sup>59</sup> N.Y. CONST. art. VI, § 8(d)–(e); SPECIAL COMMISSION REPORT 1, *supra* note 14, at 27.

<sup>60</sup> N.Y. C.P.L. § 460.20(2)(b).

<sup>61</sup> N.Y. CONST. art. VI, § 13(a).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at § 13(b).

<sup>65</sup> *Id.* at § 13(c).

<sup>66</sup> Carlisle and Shock, *supra* note 28, at 76, 80.

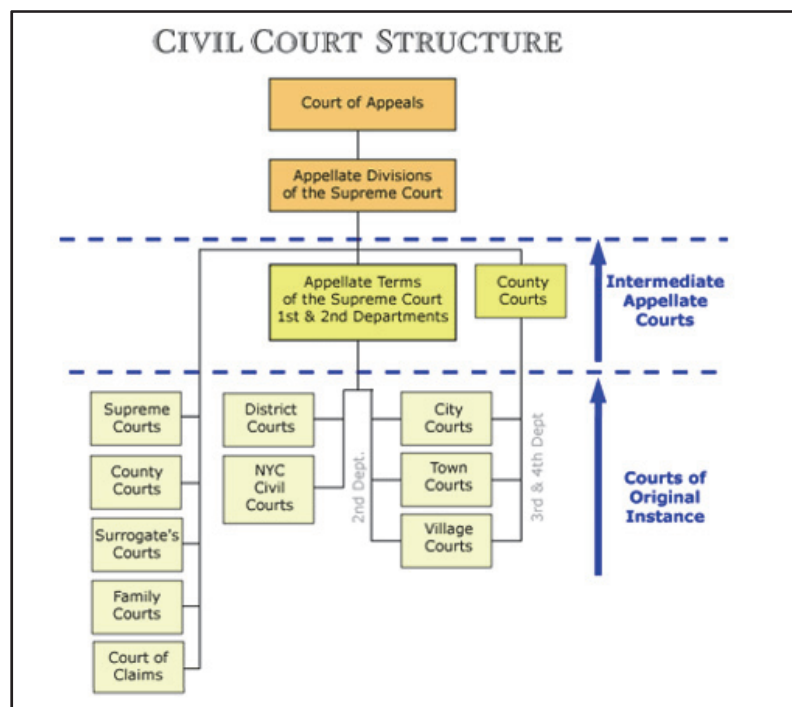
<sup>67</sup> N.Y. CONST. art. VI, § 12(d).

<sup>68</sup> *Id.* at § 12(e).

<sup>69</sup> *Id.* at §§ 12(b)–(c).

**The Court of Claims.** The Court of Claims handles litigation in which the state of New York is a party.<sup>70</sup> The Constitution authorizes between six and eight judges to sit on the court for terms of nine years.<sup>71</sup> Judges can only be appointed to the court by the Governor with the advice and consent of the State Senate.<sup>72</sup> Appeals from judgments by the Court of Claims proceed to the Appellate Division, then to the Court of Appeals.<sup>73</sup> A number of Court of Claims judges also serve as acting Supreme Court justices.<sup>74</sup>

In addition to these statewide courts, the court system also contains a number of specialized courts across the state. These include the Integrated Domestic Violence courts and the Problem Solving Courts.<sup>75</sup> Specialized courts exist across the state, but not consistently. For instance, there is a Human Trafficking Intervention Court in Suffolk County, but not in Albany County.<sup>76</sup> Litigants are referred to these courts, if they are available, by the court of original jurisdiction over the case.



<sup>70</sup> *Id.* at § 9.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Carlisle and Shock, *supra* note 28, at 80.

<sup>74</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23–24.

<sup>75</sup> These Problem Solving Courts identify underlying issues bringing people into court and employ innovative approaches to address those issues, including drug treatment, human trafficking intervention, mental health services, as well as adolescent diversion programs. See Office of Policy & Planning, N.Y. UNIFIED CT. SYS., <https://ww2.nycourts.gov/admin/opp/index.shtml> (last visited July 30, 2020).

<sup>76</sup> Human Trafficking Intervention Courts: Court Locations, N.Y. UNIFIED CT. SYS., [http://ww2.nycourts.gov/courts/problem\\_solving/htc/courts.shtml](http://ww2.nycourts.gov/courts/problem_solving/htc/courts.shtml) (last visited July 30, 2020).

Figure 2<sup>77</sup>

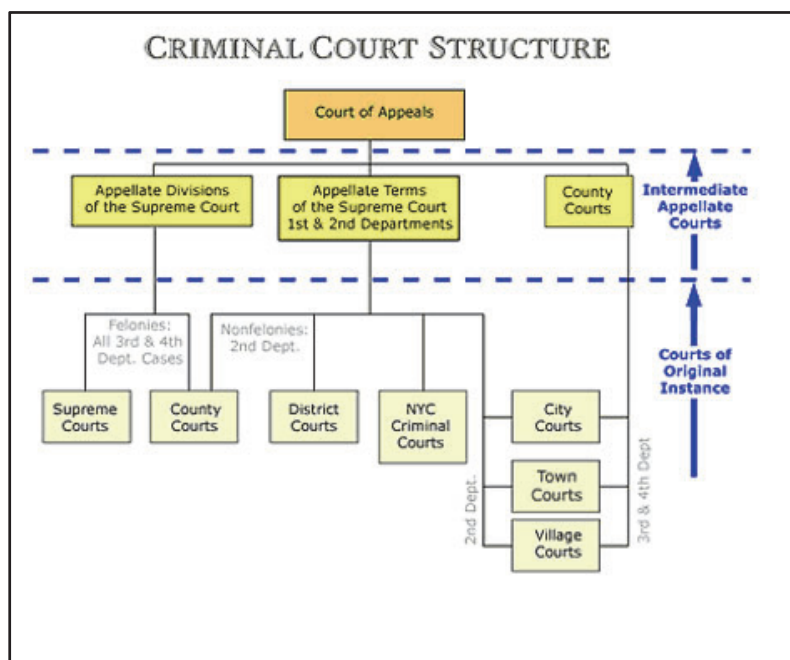


Figure 3<sup>78</sup>

### C. Lower Courts Within New York City

**Civil Court.** The Civil Court of the City of New York has original jurisdiction over civil suits involving damages up to \$25,000.<sup>79</sup> The Small Claims Courts and the Housing Courts are part of the Civil Court system, although they are often referred to as separate courts. The Small Claims Court adjudicates claims valued up to \$10,000<sup>80</sup> and the Housing Court handles housing or landlord-tenant matters of any value.<sup>81</sup> There is a Housing Court and Smalls Claims Court in each of the city's five boroughs, as well as two additional locations in Harlem and Red Hook.<sup>82</sup> Appeals from Civil Court proceed to the First and Second Appellate Term, then to the Appellate Division, then to the Court of Appeals. All

<sup>77</sup> *Structure of the Courts*, N.Y. UNIFIED CT. SYS., <https://www.nycourts.gov/courts/structure.shtml> (last visited Sept. 5, 2020).

<sup>78</sup> *Id.*

<sup>79</sup> *New York City Civil Court: In General*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/smallclaims/general.shtml> (last visited July 30, 2020).

<sup>80</sup> *New York City Small Claims Court: In General*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/smallclaims/general.shtml> (last visited July 30, 2020).

<sup>81</sup> *New York City Housing Court: In General*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/housing/general.shtml> (last visited July 30, 2020).

<sup>82</sup> *New York City Housing Court: Phone Listings & Addresses*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/housing/addresses.shtml> (last visited July 30, 2020); *New York City Small Claims Court: Phone Listings & Addresses*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/smallclaims/addresses.shtml> (last visited July 30, 2020).

Civil Court Judges are elected to office for ten-year terms, with the exception of the judges serving in the Housing Courts.<sup>83</sup> These Housing Court judges are instead appointed by the Chief Administrative Judge from a list compiled by an Advisory Council.<sup>84</sup> Civil Court Judges are eligible to be appointed acting Supreme Court justices.<sup>85</sup>

**Criminal Court.** The Criminal Court handles misdemeanors and lesser offenses.<sup>86</sup> The Criminal Court is also responsible for arraigning defendants charged with indictable felony offenses.<sup>87</sup> After arraignment, the prosecution of felonies proceeds in the Supreme Court. Appeals from Criminal Court proceed to the First and Second Appellate Term, then directly to the Court of Appeals. Criminal Court judges are appointed to office for ten-year terms by the mayor.<sup>88</sup> As with the Civil Court judges, Criminal Court judges are also eligible to be appointed acting Supreme Court justices.<sup>89</sup>

#### **D. Lower Courts Outside New York City**

Outside of New York City, legal disputes akin to those handled by the Civil and Criminal courts are handled by five different trial courts. Jurisdiction over a specific issue largely depends on the county, and differs across the state. There are 57 counties outside of New York City.

In each of these counties, a County Court presides over felony criminal cases.<sup>90</sup> Judges serving on these courts are elected by the county for ten-year terms.<sup>91</sup> The Constitution also authorizes these courts to hear civil suits involving damages of less than \$25,000, as well as housing or landlord-tenant disputes.<sup>92</sup> The latter power is rarely exercised, since the legislature typically creates Town, City or Village courts with original jurisdiction over these disputes.<sup>93</sup>

In Nassau County and the western part of Suffolk County, civil suits for monetary damages up to \$15,000 and misdemeanor offences are handled by a District Court.<sup>94</sup> These

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<sup>83</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 20; N.Y. CONST. art. VI, § 15(a).

<sup>84</sup> *Id.*; *New York City Housing Court: Advisory Council*, N.Y. UNIFIED CT. SYS., <http://www.courts.state.ny.us/COURTS/nyc/housing/advisory.shtml> (last visited Sept. 5, 2020).

<sup>85</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23, 78.

<sup>86</sup> Janet DiFiore and Lawrence K. Marks, *THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE 1* (2016).

<sup>87</sup> *Id.*

<sup>88</sup> N.Y. CONST. art. VI, § 15(a).

<sup>89</sup> SPECIAL COMMISSION REPORT 1, *supra* note 14, at 23, 78.

<sup>90</sup> DiFiore and Marks, *supra* note 86, at 2.

<sup>91</sup> N.Y. CONST. art. VI, § 10(b).

<sup>92</sup> *Id.* at § 11(a).

<sup>93</sup> SPEC. COMM’N ON THE FUTURE OF THE N.Y. ST. CTS., *JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE 7* (2008) [hereinafter SPECIAL COMMISSION REPORT 2].

<sup>94</sup> DiFiore and Marks, *supra* note 86, at 1.

courts also hear arraignments for felony offenses.<sup>95</sup> The actual limitations imposed on a District Court within their jurisdictional bounds is determined by law.<sup>96</sup> A locality outside of New York City can petition to create a District Court by legislative action, but the state legislature can “regulate and discontinue” these courts.<sup>97</sup> At least one judge must serve on each District Court, and these judges are elected by the District’s constituents for a term of six years.<sup>98</sup> Nassau and Suffolk Counties are currently the only counties that employ District Courts.<sup>99</sup>

The Constitution also permits the creation of Town, Village and City Courts in all counties outside of New York City.<sup>100</sup> Town, Village and City Courts are often referred to as “Justice Courts.”<sup>101</sup> These courts have original jurisdiction up to, but not greater than, the jurisdiction of the District Courts.<sup>102</sup> These courts may be regulated or dissolved by the legislature.<sup>103</sup> Town and Village Courts typically arraign defendants for felonies, and issue judgments on misdemeanor or minor offences, housing or landlord-tenant disputes, and civil suits involving damages up to \$3,000.<sup>104</sup> In the Second Department, which has an Appellate Term, judgments by Town, Village and City courts may be appealed to the Appellate Term.<sup>105</sup> In the Third and Fourth Departments, judgments from Town, Village and City courts are appealed to the County Court.<sup>106</sup>

City Courts generally handle civil suits up to \$15,000, misdemeanor offenses, and occasionally small claims.

The selection process and terms of the judges overseeing the Town, Village and City courts is determined by the legislature, with the exception that Town judges must be elected for four year terms.<sup>107</sup> In 2008, The Special Commission on the Future of New York State Courts found that a majority of the judges in these courts did not have a law school education.<sup>108</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> N.Y. CONST. art. VI, § 16(d).

<sup>97</sup> *Id.* at §§ 16(a), (i).

<sup>98</sup> *Id.* at § 16(h).

<sup>99</sup> *District Court: Introduction*, N.Y. UNIFIED CT. SYS., <https://www.nycourts.gov/courts/cts-outside-nyc-DISTRICT.shtml> (last visited Aug. 18, 2020).

<sup>100</sup> N.Y. CONST. art. VI, § 17.

<sup>101</sup> SPECIAL COMMISSION REPORT 2, *supra* note 93, at 7.

<sup>102</sup> N.Y. CONST. art. VI, § 17(a).

<sup>103</sup> *Id.* at § 17(b).

<sup>104</sup> SPECIAL COMMISSION REPORT 2, *supra* note 93, at 29.

<sup>105</sup> Carlisle and Shock, *supra* note 28, at 83; DiFiore and Marks, *supra* note 86, at 3.

<sup>106</sup> DiFiore and Marks, *supra* note 86, at 3.

<sup>107</sup> N.Y. CONST. art. VI, § 17(d).

<sup>108</sup> SPECIAL COMMISSION REPORT 2, *supra* note 93, at 13.

## **E. The Proposed Merger Plan**

In recent years there have been calls for extensive change to the court system, such as the consolidation of the eleven trial courts into a two- or three-tiered trial court system. In 2019, Chief Judge DiFiore unveiled a court merger proposal that would replace the current structure with a three-tiered trial court system.<sup>109</sup> The merger plan would require an amendment to the state Constitution.<sup>110</sup>

Pursuant to the plan, County Court, Family Court, Surrogate's Court and the Court of Claims would be abolished and incorporated into the Supreme Court system.<sup>111</sup> Former judges on these courts would transition to become Supreme Court Justices.<sup>112</sup> In addition, City Courts, District Courts and New York City's Civil and Criminal Courts would be abolished and incorporated into a new statewide Municipal Court system.<sup>113</sup> Former judges from each of these courts would become judges of newly created Municipal Courts.<sup>114</sup> Town and Village Courts would remain unchanged.<sup>115</sup>

## **F. Case Volume**

The New York State court system is one of the busiest in the Nation, with the state's trial courts handling over 3 million cases each year.<sup>116</sup> There has been a steady decrease in filings in recent years, from 3,510,348 filings in 2015 to 3,009,470 in 2019.<sup>117</sup> In 2019, the Court of Appeals decided 116 cases from a pool of 19,094 dispositions from the Appellate Divisions.<sup>118</sup> At the Supreme Court level, there were 450,409 civil filings and 38,966 criminal filings, which represent a steady decline of filings in recent years.<sup>119</sup> Across the state, the City and District Courts outside of New York City processed 854,056 filings in total. The Surrogate's Court processed 141,237 filings, and the Court of Claims

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<sup>109</sup> See Press Release, Hon. Lawrence K. Marks, *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources* (Sept. 25, 2019), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19\\_22.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf).

<sup>110</sup> *Id.*

<sup>111</sup> See *Key Provisions of the Chief Judge's Court Consolidation Proposal*, N.Y. UNIFIED CT. SYS., <https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/CourtMergerSummaryandProposal.pdf> (last visited Aug. 18, 2020).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> N.Y. ST. UNIFIED CT. SYS., 2019 ANNUAL REPORT 35 (2020).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 33–34. There were also 2, 807 dispositions in the Appellate Terms. *Id.*

<sup>119</sup> *Id.* at 35, 42.

handled 1,801 claims.<sup>120</sup> The Family Court received 578,346 filings in 2019, with 192,799 filings in New York City alone.<sup>121</sup>

New York City handled 278,928 filings in its Criminal Court and 540,583 filings in its Civil Court in 2019.<sup>122</sup> Criminal Court filings in New York have declined in recent years, but Civil Court filings have increased from 528,059 filings in 2015 to 540,583 in 2019.<sup>123</sup> Of the cases filed in the city's Civil Court, 323,971 were civil actions, 193,970 were housing claims, 17,587 filings were small claims, and 5,055 were commercial claims.<sup>124</sup> In addition, the 1,277 Town and Village Courts also process almost 2 million cases each year.<sup>125</sup>

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<sup>120</sup> *Id.* at 39–40.

<sup>121</sup> *Id.* at 40.

<sup>122</sup> *Id.* at 35.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 41.

<sup>125</sup> *Id.* at 43; N.Y. UNIFIED CT. SYS., JUSTICE COURT MANUAL 7 (2015)  
<http://www.nycourts.gov/courts/townandvillage/FinalJusticeCourtManualforUSCsite.pdf>.

### III. ADDRESSING RACE IN THE COURT SYSTEM

In 1983, a Supreme Court justice in Queens looked out at his courtroom and reportedly said “there’s another nigger in the woodpile.”<sup>126</sup> In 1994, a Finger Lakes judge was reported to have remarked in open court, “[o]h, it’s been a rough day – all those [B]lacks in here,” after arraigning three Black defendants arrested in a college disturbance.<sup>127</sup> It would be naïve to think that in such a large court system serving such a large, diverse and dynamic state, these expressions of overt racism are isolated. As documented by two judicial commissions over the last 30 years, explicit and implicit racial bias has existed throughout the New York State court system. The good news is that today’s New York State judiciary is more diverse than it was 30 years ago (*see* Section IV, pp. 32–41). The bad news is that the accounts of explicit and implicit racial bias we heard as part of this review were strikingly similar to the testimony from decades ago.

#### A. The Minorities Commission

In 1988, then-Chief Judge Sol Wachtler announced the formation of the New York State Judicial Commission on Minorities. The Minorities Commission’s mandate was, in summary, to ascertain how the public and court participants perceive the treatment of minorities in the courts, to review the diversity of court personnel in non-judicial positions and recommend ways to increase that diversity and to determine whether the elected or appointed process for selecting judges results in greater diversity.<sup>128</sup>

The Minorities Commission’s report, released in 1991, was blunt in its findings. The report concluded that “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor.”<sup>129</sup> The Minorities Commission also concluded that the public perceived the court system to be racially biased,<sup>130</sup> and that courts used primarily by minorities – *i.e.* the Family, Criminal, Civil and Housing courts within New York City – were “grossly deteriorated and inadequate” and referred to as “ghetto courts.”<sup>131</sup>

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<sup>126</sup> MINORITIES COMMISSION REPORT, *supra* note 2, at 21.

<sup>127</sup> William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006.

<sup>128</sup> FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, EQUAL JUSTICE: A WORK IN PROGRESS, FIVE YEAR REPORT 1991–1996 7 (1997).

<sup>129</sup> MINORITIES COMMISSION REPORT, *supra* note 2, at 1.

<sup>130</sup> *Id.* at 27.

<sup>131</sup> *Id.*

The report also recounted a number of overtly racist comments from judges in open court across the state.<sup>132</sup> Other findings of the Minorities Commission include that:

- nearly half of all attorneys surveyed witnessed discriminatory treatment of minority court users, that court personnel were frequently disrespectful and discourteous to minority court users;<sup>133</sup>
- the quick pace at which judges make weighty decisions in the cases of minority litigants undermines their confidence in the system;<sup>134</sup>
- many of the judges who made bail determinations lacked the cultural sensitivity to make fair determinations appropriate for the realities faced by minority court users;<sup>135</sup>
- for litigants for which English is not a primary language, full access to the court system was significantly impaired due to the insufficient amount of interpreters;<sup>136</sup>
- minority attorneys were treated with less professional respect and courtesy than their white counterparts;<sup>137</sup>
- minority judges were underrepresented in supervisory and administrative positions in the court system<sup>138</sup> and
- minorities were underrepresented within the non-judicial work force and that the EEO office within OCA had been “relegated to second class status.”<sup>139</sup>

The Minorities Commission also singled out the court officer community, which one attorney quoted in the report described as “an especially horrible problem,”<sup>140</sup> citing segregated locker rooms for court officers in the Bronx, and graffiti reflecting racial insults in hallways and locker rooms.<sup>141</sup> The Minorities Commission noted an incident where a court officer placed an attorney of color in a chokehold because the court officer assumed the attorney was a defendant who was approaching a judge too closely, though the judge had motioned for the attorney to approach the bench.<sup>142</sup> During public hearings conducted

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<sup>132</sup> *Id.* at 21–22 (Judges used phrases like “not having a Chinaman’s chance” when speaking to Asian court users. One Housing Court judge remarked to a white landlord that he was “stuck” with a “tarbaby,” referring to the Black tenant who was also in court.).

<sup>133</sup> *Id.* at 27.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 43.

<sup>136</sup> *Id.* at 52.

<sup>137</sup> *Id.* at 92.

<sup>138</sup> *Id.* at 100.

<sup>139</sup> *Id.* at 116.

<sup>140</sup> *Id.* at 111.

<sup>141</sup> *Id.* at 114.

<sup>142</sup> *Id.* at 88.

by the Minorities Commission, a Black court officer testified that her fellow court officers told her to refer to litigants as “slime,” to refer to their children as “baby slime,” and not to show litigants “any courtesy whatsoever.”<sup>143</sup>

## **B. The Franklin H. Williams Commission**

The Minorities Commission recommended that a further commission be formed to ensure the successful implementation of their recommendations. Therefore, in 1991, Chief Judge Wachtler re-established the Minorities Commission permanently and renamed it the Franklin H. Williams Judicial Commission, in honor of the former Chairman of the Minorities Commission.

In addition to implementing the Minorities Commission’s recommendations, the newly-named Williams Commission was tasked with the following mandate:<sup>144</sup>

- *Engagement with Court Leaders:* To attend annual meetings with the Chief Judge and court administrators to discuss issues of concern to the minority legal community.
- *Data Collection & Analysis:* To collect and analyze race data and analyze programs relating to the treatment of people of color in the court system and suggest methods for correcting identified issues. In appropriate instances, successful programs in certain counties could be standardized and/or centralized under the authority of the Commission.
- *Monitoring Racial Bias Complaints:* To collect and monitor complaints of racial bias within the judicial system and forward them to the commission or agency with jurisdiction to discipline, where appropriate. In addition, the Commission could propose remedies to prevent repeat offending.
- *Policy Review:* To review and comment on existing and pending legislation affecting people of color and the state court system and recommend new legislation where necessary.
- *Nationwide Coordination:* To participate in the National Consortium of Commissions and Task Forces on Racial/Ethnic Bias in the Courts, which was spearheaded by Ambassador Williams himself.
- *Programming & Community Engagement:* To interact with local bar associations, law schools and community groups in an effort to develop

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<sup>143</sup> *Id.* at 22.

<sup>144</sup> *See id.* at 8–9.

educational and other programs designed to address racial and ethnic bias in the legal profession.

The Williams Commission has been involved with the implementation of several recommendations aimed at furthering its mandate. One initiative generated by the original Minorities Commission's 1991 study included the "establishment of the position of Special Inspector General for Bias Matters (now Managing Inspector for Bias matters) to reinforce the UCS's commitment to a bias-free work environment."<sup>145</sup> The Commission's original 1991 recommendations also led to the creation of the UCS's Workforce Diversity Office, which strives to promote diversity throughout the court system, as well as the reconfiguration of judicial nominating and screening panels to include at least one individual-of-color and one female.<sup>146</sup> Similarly, the Commission's original recommendations led to the creation of a Minority Advisory Committee to the Chief Administrative Judge, which, among other measures, led to the establishment of more inclusive interview panels for non-judicial positions.<sup>147</sup>

Over the years, the Williams Commission has hosted various trainings and professional development programs for court employees and the broader legal community. For example, the Commission developed and annually presents a class for new judges on cultural awareness at the New York State Judicial Institute training session for new judges.<sup>148</sup> Similarly, the Commission has hosted seminars for judges exploring issues affecting minority litigants, defendants, juvenile offenders and minors in foster care.<sup>149</sup> On a handful of instances, and as recently as 2016, the Williams Commission also facilitated implicit bias training for court personnel, including human resource supervisors and managers.<sup>150</sup> In 2019, the Commission organized professional development workshops where employees of color were trained on public speaking and interview and writing skills so that these applicants have the requisite skillset when applying for upper-management roles.<sup>151</sup> Similarly, we understand one of the Commission's more popular programs is their annual seminar entitled "Everything You Need to Know About Becoming a Judge." This

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<sup>145</sup> See FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, ON THE PATH TO EQUAL JUSTICE 1998–2008: MAKING A DIFFERENCE 1, 3 (2008) [hereinafter ON THE PATH TO EQUAL JUSTICE].

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Franklin H. Williams Judicial Commission, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml> (last visited Sept. 23, 2020).

<sup>149</sup> ON THE PATH TO EQUAL JUSTICE, *supra* note 145, at 7.

<sup>150</sup> NEW YORK STATE UNIFIED COURT SYSTEM 2016 ANNUAL REPORT 1, 17 (2017) (noting that training was focused in Eighth Judicial District); *see also* NEW YORK STATE UNIFIED COURT SYSTEM 2013 ANNUAL REPORT 1,2 (2014).

<sup>151</sup> NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT 1, 21 (2020) (noting that training occurred in Third and Fourth Judicial District).

seminar – targeted toward attorneys-of-color and law students of color – has existed for 10 years, and purports to provide education, resources, mentorship and networking opportunities to these individuals to increase the pipeline of future judges of color.<sup>152</sup> The Williams Commission has also published informational brochures in Spanish and Chinese to help non-English speaking litigants navigate Small Claims Court.<sup>153</sup>

### **C. Race in the Town and Village Courts**

Finally, we believe it is worth noting a comprehensive 2006 *New York Times* report on the Town and Village court system in New York. The *Times* spent a year interviewing prosecutors, defendants, defense attorneys and plaintiffs, reviewing public documents and visiting courts across the state. The *Times* concluded that litigants in these courts “have been subjected to racial . . . bigotry so explicit it seems to come from some other place and time.”<sup>154</sup>

Focusing substantially on misconduct by judges, the *Times* noted that over three quarters of Town and Village justices were not attorneys, highlighting that New York requires “more schooling for licensed manicurists and hair stylists” than for Town and Village justices. Some examples of explicit racism located in the disciplinary files of Town and Village justices include a Catskills judge reminiscing in open court that it was once safe for young women to walk in his community “before the [B]lacks and Puerto Ricans moved here.” In 2003, when a white complainant referred to a Black defendant in a disorderly conduct case as “that colored man,” the Alexandria Bay judge told the defendant that the term was not offensive, explaining that while other words were racist, “colored” was not. The judge went on to say, “you know, I could understand if he would have called you a Negro, or he had called you a nigger. . . . For years we had no colored people here.” In 2003, a Westchester County judge asked a Lebanese-American woman with a parking ticket if she was a terrorist. In Le Roy, a town outside of Rochester, a judge “concocted false statements . . . to help immigration officials deport a Hispanic migrant worker in 2003.” In a Town and Village court in Malone, the judge told a Latinx defendant “you’re not from around here, and that’s not the way we do things around here,” when the man requested that the plaintiff suing him be forced to come to court and prove his case. The judge did not mention that the plaintiff was his dentist.<sup>155</sup>

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<sup>152</sup> See, e.g., NEW YORK STATE UNIFIED COURT SYSTEM 2016 ANNUAL REPORT at 17.

<sup>153</sup> ON THE PATH TO EQUAL JUSTICE, *supra* note 145, at 3.

<sup>154</sup> Glaberson, *supra* note 127.

<sup>155</sup> *Id.*

## IV. DEMOGRAPHICS OF THE JUDICIARY

Both the Minorities and Williams Commissions identified the lack of diversity among judges and non-judicial employees within the court system as a major issue affecting the administration of justice in the state. Many of those we spoke with in 2020 also expressed concerns about the lack of diversity in the court system, particularly among judges. We analyzed past and current demographic data provided by OCA to evaluate the progress that has been made to diversify the judiciary.

It is important to note that there are limitations to the data available. Most notably, the team did not have race data for Town and Village justices. This limitation is not without impact, as the vast majority of court users interacting with the court system outside of New York City do so with Town and Village justices. Anecdotally, several interviewees described the Town and Village justices and courts as overwhelmingly white.

### A. Diversity of the Judiciary Over Time

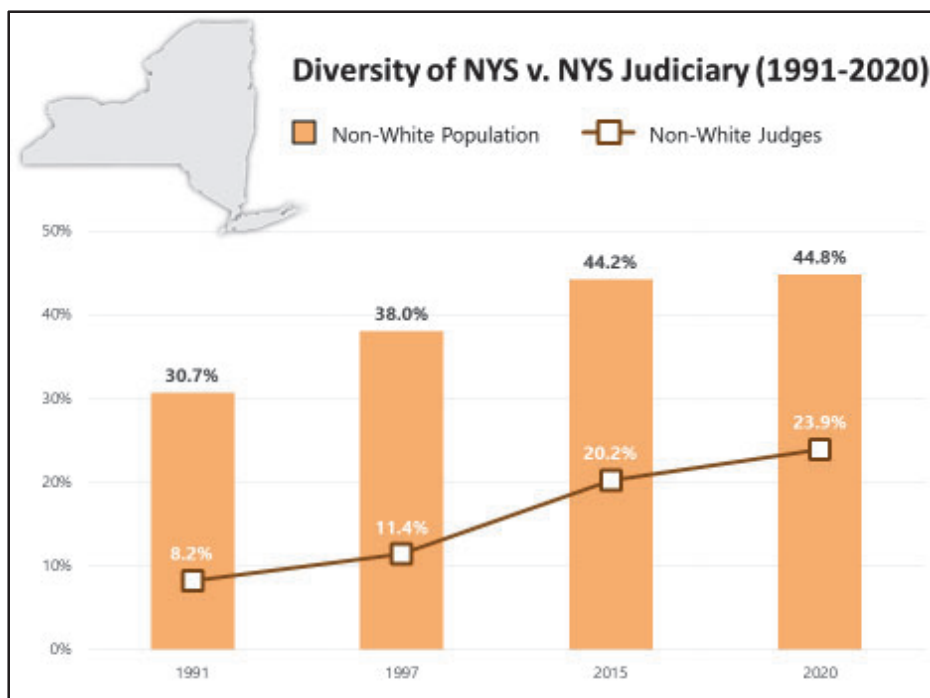
The judiciary in New York State has become more diverse over the past 30 years. However, when compared to the evolving demographics of the state, judges of color continue to be underrepresented on the bench, and the gap between the non-white share of the judiciary and non-white share of the population remains the same. In 1991, there was a 20.5 point gap between the share of the population that was non-white (30.7%)<sup>156</sup> and the percent of non-white judges on the bench (8.2%).<sup>157</sup> In 2020, the gap between the non-white population (44.8%) and judiciary (23.9%) is 20.9 points.<sup>158</sup>

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<sup>156</sup> Population statistics are based on 1990 and 2000 census data, and 2015 and 2018 census estimates of those selecting only one race. See U.S. Census Bureau, *Explore Census Data* (Sept. 22, 2020, 12:31 PM), <https://data.census.gov/>.

<sup>157</sup> FRANKLIN H. WILLIAMS JUDICIAL COMMISSION ON MINORITIES, *EQUAL JUSTICE: A WORK IN PROGRESS*, FIVE YEAR REPORT 1991–1996 1, 20 (1996).

<sup>158</sup> See New York State Unified Court System, *DIVERSITY ON THE BENCH BY JUDICIAL DISTRICT/COURT* (2020) (rec'd Aug. 28, 2020) (on file with N.Y. Office of Ct. Admin.) [hereinafter *DIVERSITY ON THE BENCH*]; see also New York State Unified Court System, *DIVERSITY ON THE BENCH STATEWIDE* (2020) (rec'd Aug. 28, 2020) (on file with N.Y. Office of Ct. Admin.).



**Figure 4**

Underrepresentation has persisted across all non-white groups, though the representation of Black judges has steadily improved over the past 30 years. For the Latinx and Asian communities, the gaps between population and judges widened in the late 1990s before more recently narrowing, but they remain larger for both communities than they were in 1991. In 1991, around 15.9% of the population identified as Black compared to 6.3% of judges (a 9.6 point difference); 10.5% of the population was Latinx compared to 1.7% of the judiciary (an 8.8 point gap);<sup>159</sup> and 3.9% of New Yorkers identified as Asian compared to 0.3% of the bench (3.6 points). In 2020, Black people account for 15.7% of the population and 14% of judges (a 1.7 point difference); Latinx people make up 17.7%

<sup>159</sup> Unlike the census, which treats Hispanic as an ethnicity, the data received from OCA treats Hispanic as a race, distinct from other races. When completing demographic forms, an employee indicating that they are both Hispanic and another race would be recorded in OCA data as “Two or More Ethnicities.” Since very few employees have selected “Two or More Ethnicities,” we assume that the vast majority of persons of Hispanic ethnicity choose either to identify as Hispanic or another race. In order to render population data that are comparable to the OCA data, we were obliged to treat the Hispanic ethnicity in the census data as a category exclusive of other minority races. To this end, we calculated the percent of Hispanics in the census data as all persons selecting “Hispanic or Latino” and subtracted persons also identifying their race in the census as Black or Asian. We acknowledge that this calculation is imperfect and excludes Afro-Latinx and Asian Latinx people from the “Hispanic” category in the OCA data. This decision was not taken lightly or with the intent to erase the existence of Afro-Latinx and Asian Latinx people.

of the population and 7.0% of the judiciary (a 10.7 point difference); and Asian people comprise 8.5% of New Yorkers and only 2.6% of the bench (5.9 points).

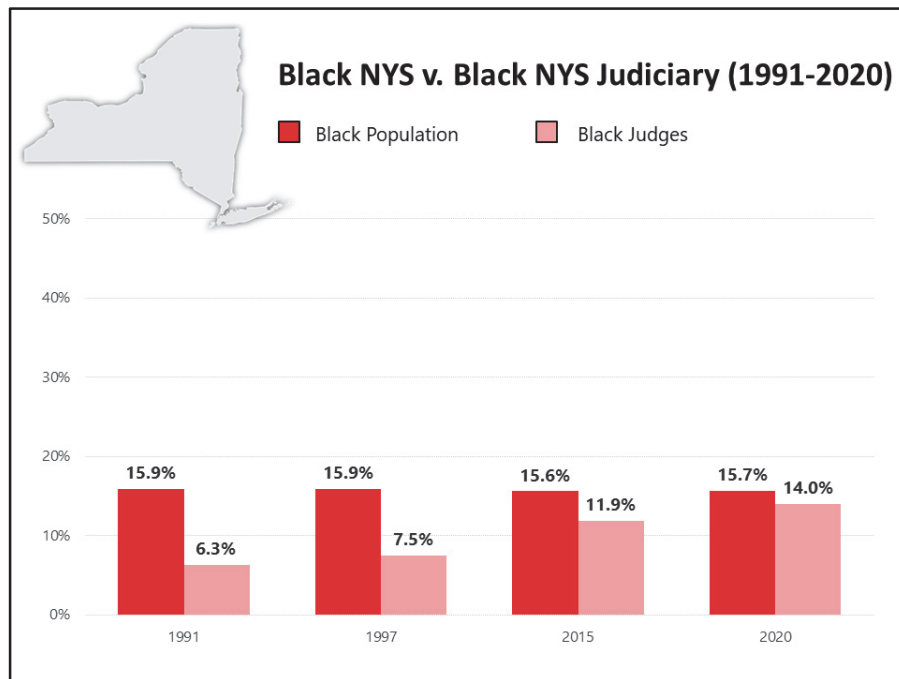


Figure 5

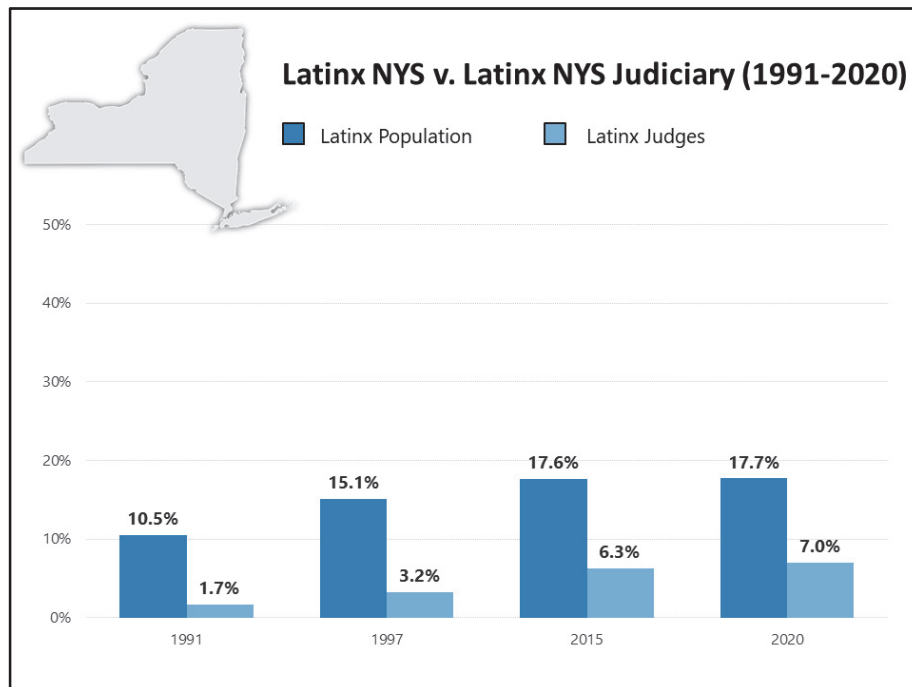
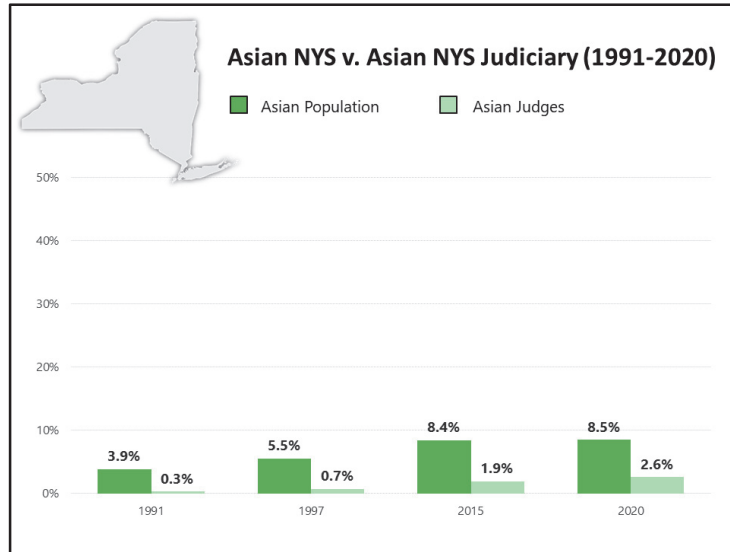


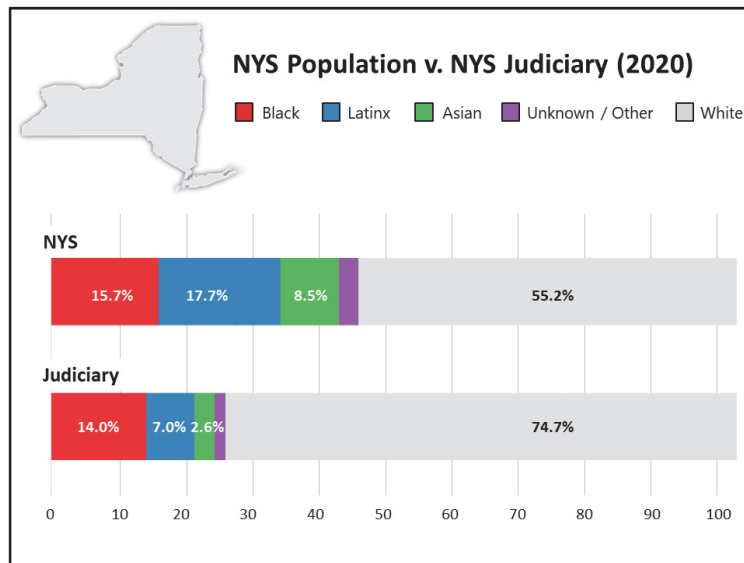
Figure 6



**Figure 7**

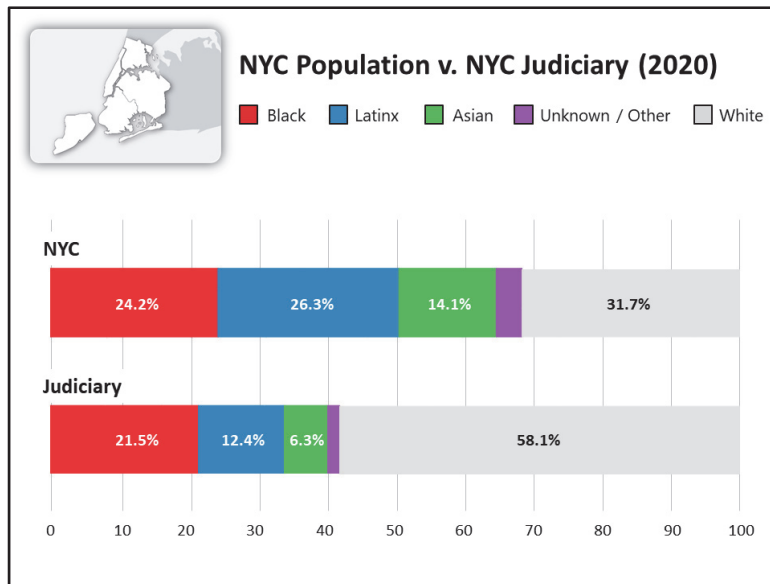
## **B. Diversity of the 2020 Judiciary Compared to the Populations Served**

Today, judges of color are still underrepresented compared to the populations the courts serve. This is true both statewide and in New York City. New York City has a population that is approximately 31.7% white, 24.2% Black, 26.3% Latinx, and 14.1% Asian. However, the judiciary in New York City courts is 58.1% white, 21.5% Black, 12.4% Latinx, and 6.3% Asian (see Figures 8 and 9 below).<sup>160</sup>



**Figure 8**

<sup>160</sup> This includes the City, Supreme and Surrogate's courts. See DIVERSITY ON THE BENCH, *supra* note 158.



**Figure 9**

## 1. New York City Courts

Defendants appearing in the New York City courts face a judiciary that is not representative of the city, let alone of the litigant population. Although we have no statistics from OCA that track the races of litigants in the city, all interviewees involved in the New York City courts, particularly in Criminal Court, Family Court and Housing court, noted that the vast majority of litigants appearing in those courts are Black and Latinx. In New York City Criminal Court, defendants face a judiciary that is 56% white, 13.1% Black, 11.9% Latinx, and 11.9% Asian (*see* Figure 10 below).<sup>161</sup> In other words, a criminal court judiciary that is one-fourth Black and Latinx serves a city that is more than half Black and Latinx, where the Black and Latinx communities are overrepresented among people arrested and appearing in criminal court.

According to interviewees with experience in the New York Family Court system, most litigants appearing in Family Court are parents and families of color. Here, again, all minority populations are underrepresented on the bench, with the Latinx and Asian community – two of the fastest-growing and youngest populations in New York City – the

<sup>161</sup> These figures include both New York City Criminal Court judges and judges temporarily assigned from Civil Court. *See* DIVERSITY ON THE BENCH, *supra* note 158. Note that percentages calculated in the chart differ from those calculated by UCS. These percentages were calculated by dividing the raw number of judges by the total number of judges.

most underrepresented, making up less than half the share of the Family Court bench as they do of the general population (*see* Figure 11 below).<sup>162</sup>

Non-white judges are likewise underrepresented on the Housing Court bench, comprising 44% of the judiciary serving a population that is over 64% people of color (*see* Figure 12 below).

Civil Court has the lowest percentage of white judges (40%) of all City Courts, and the highest percentage of Black judges (31.1%) and Latinx judges (24.4%) (*see* Figure 13 below). Asian judges remain underrepresented compared to the overall Asian population in the city. The slightly more diverse demographics of the Civil Court bench may be partly explained by the fact that Civil Court judges are elected rather than appointed. As discussed in the section below, elections of judges tend to benefit the Black and Latinx populations, whereas the Asian community remains underrepresented among judges chosen by election.

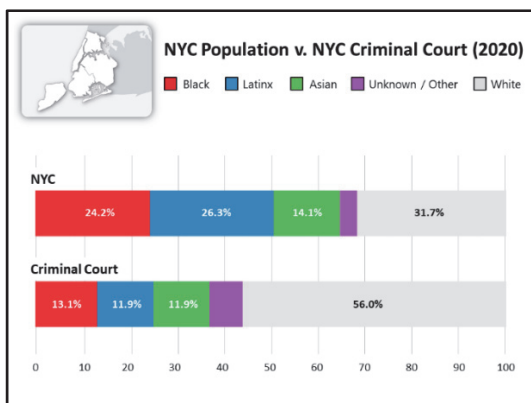


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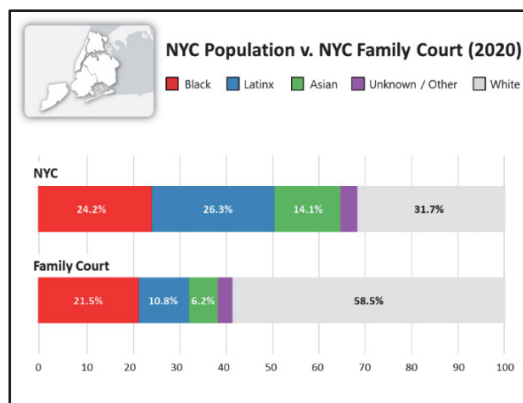


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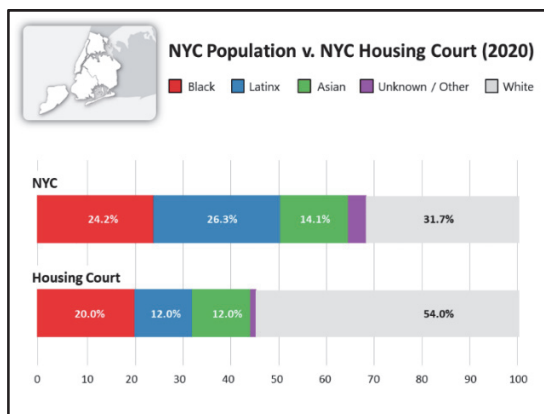


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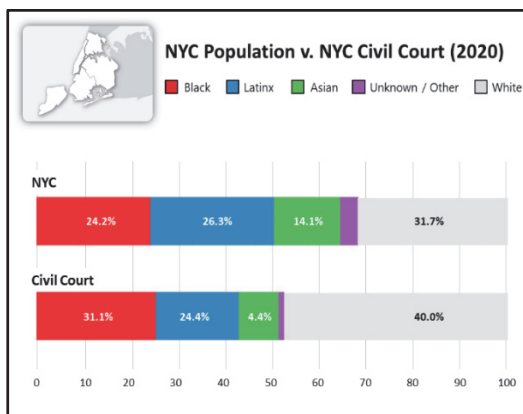


Figure 13

<sup>162</sup> These figures include both NYC Family Court judges and judges temporarily assigned from Civil Court. *See* DIVERSITY ON THE BENCH, *supra* note 158.

## 2. New York City Judiciary by Borough

People of color are underrepresented on the benches of all boroughs of New York City.<sup>163</sup> In the Bronx, where over 85% of the population is non-white, only 57% of the judiciary are people of color (*see* Figure 14 below).

In Queens, the borough with the next largest proportion of minorities, over 60% of the judiciary is white (*see* Figure 15 below). Latinx and Asian populations are the most underrepresented on the bench there.

Non-white judges are also underrepresented in Brooklyn, where white judges account for over half of the judiciary (56.5%), though white Brooklynites are just over one-third of the population (36.2%) (*see* Figure 16 below). Most striking, Brooklyn has fewer than 5% Asian judges (4.3%), though it is over 10% Asian (11.6%).

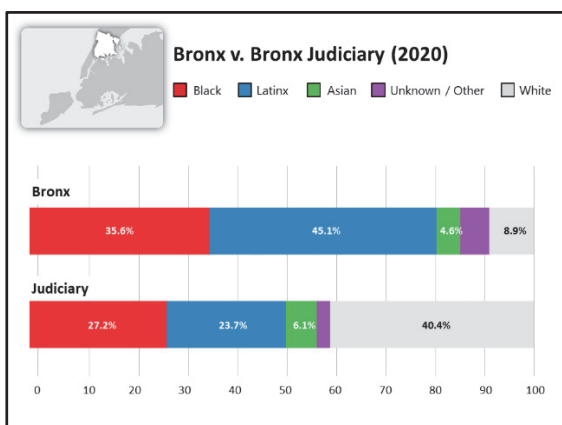


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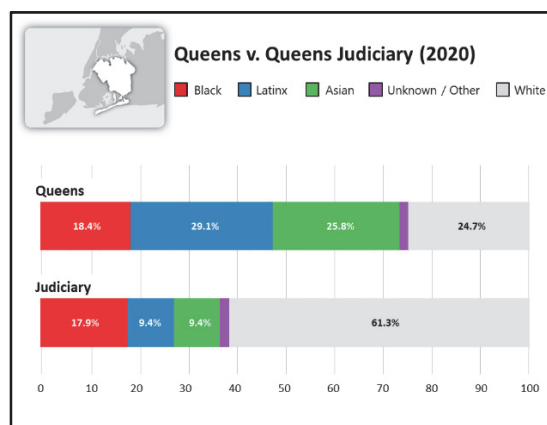


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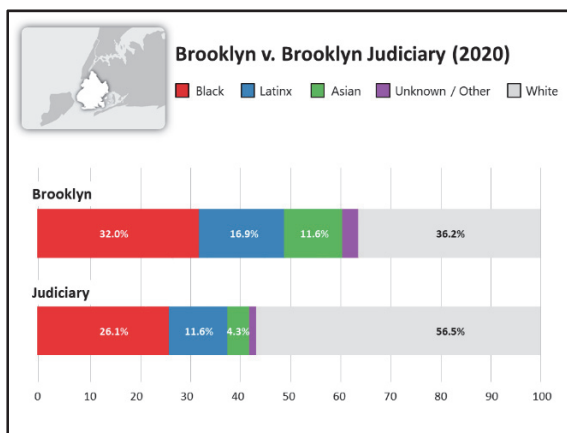


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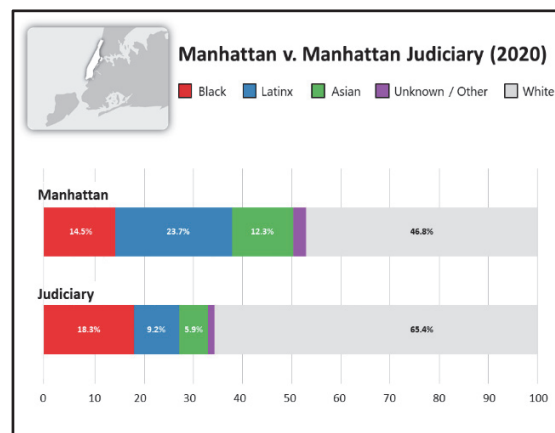
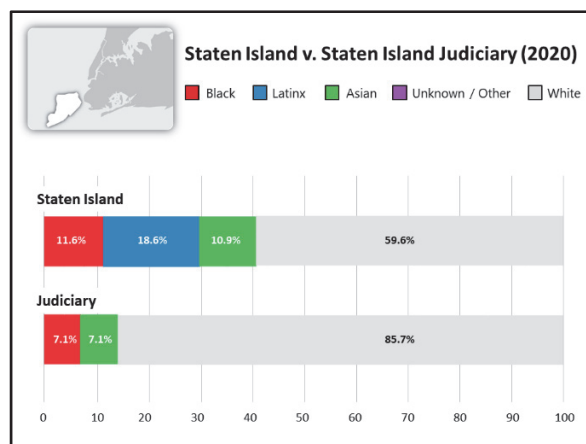


Figure 17

<sup>163</sup> Numbers presented in this section include all judges sitting on City Courts, the Supreme Court and Surrogate's Court in the borough. *See* DIVERSITY ON THE BENCH, *supra* note 158.



**Figure 18**

### **3. Judicial Districts Upstate**

It is well known that counties upstate are, on the whole, less diverse than New York City. However, across all Judicial Districts, the upstate judiciary is even less diverse than the population. In the Fourth,<sup>164</sup> Fifth,<sup>165</sup> and Sixth<sup>166</sup> Judicial Districts in the northernmost parts and center of the state, the population is over 80% white (*see* Figures 20–22 below). However, the judiciary is well over 90% white.

In the easternmost parts of the state, the Seventh<sup>167</sup> and Eighth<sup>168</sup> Judicial Districts are more diverse because they contain the cities of Rochester, Buffalo, and Syracuse (*see* Figures 23–24). These districts are around 80% white, but white judges are about 86% and 88%, respectively, of the judiciary.

Even in the Third,<sup>169</sup> Ninth,<sup>170</sup> and Tenth<sup>171</sup> Judicial Districts, the more diverse jurisdictions in the southern part of the state, non-white judges are underrepresented (*see* Figures 19, 25–26). The Third Judicial District is around 10% Black, but less than 5% of its judiciary is Black; the Latinx community accounts for 8.3% of the population, but only 1.6% of the judges, and there are no Asian judges in the Third District. The Ninth Judicial

<sup>164</sup> The Fourth District is comprised of Clinton, Essex, Franklin, Fulton, Hamilton, Montgomery, St. Lawrence, Saratoga, Schenectady, Warren and Washington counties.

<sup>165</sup> The Fifth District contains Herkimer, Jefferson, Lewis, Oneida, Onondaga and Oswego counties.

<sup>166</sup> The Sixth District includes Broome, Chemung, Chenango, Cortland, Delaware, Madison, Otsego, Schuyler, Tioga and Tompkins counties.

<sup>167</sup> The Seventh District includes Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates counties.

<sup>168</sup> The Eighth District contains Allegany, Cattaraugus, Erie, Genesee, Niagara, Orleans and Wyoming counties.

<sup>169</sup> The Third District includes Albany, Columbia, Greene, Rensselaer, Schoharie, Sullivan and Ulster counties.

<sup>170</sup> The Ninth District includes Dutchess, Orange, Putnam, Rockland and Westchester counties.

<sup>171</sup> The Tenth District includes Nassau and Suffolk counties.

District is over 40% non-white, but less than 20% of its judges are of color. The Ninth District is over 20% Latinx, but has less than 4% Latinx judges, and there are no Asian judges in this District. The Tenth Judicial District on Long Island is nearly 40% non-white, but over 85% of its judges are white. In the Tenth District, the Latinx and Asian communities are the most underrepresented on the bench.

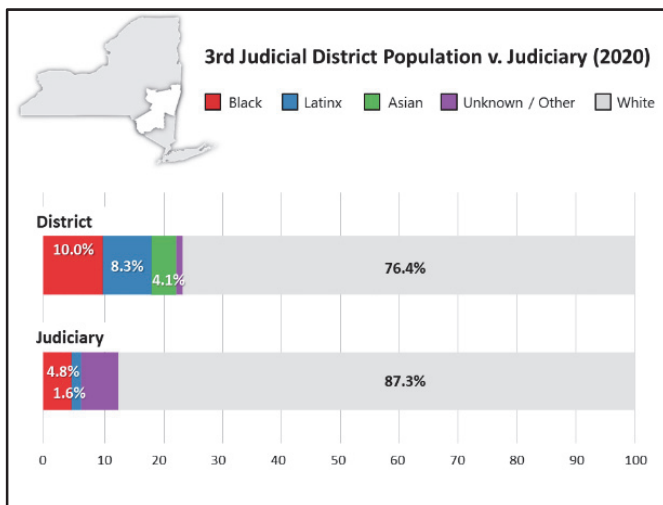


Figure 19

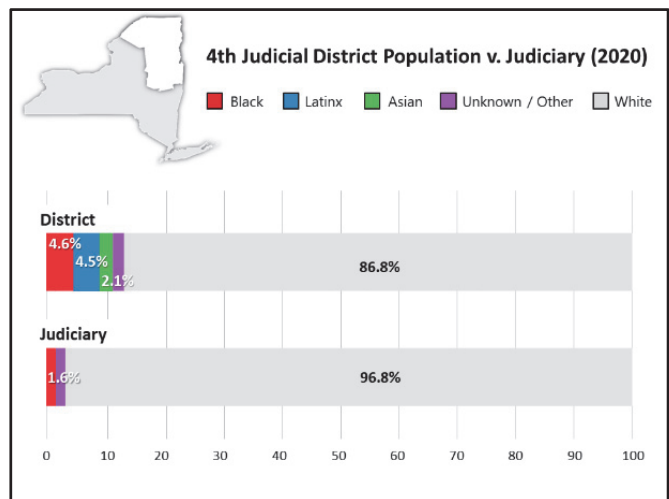


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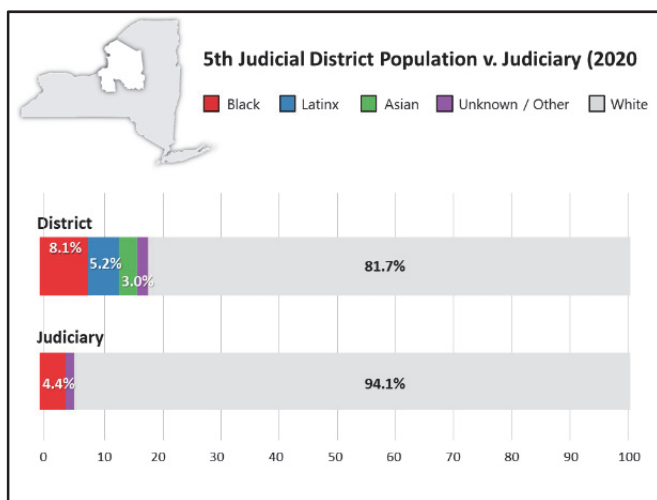


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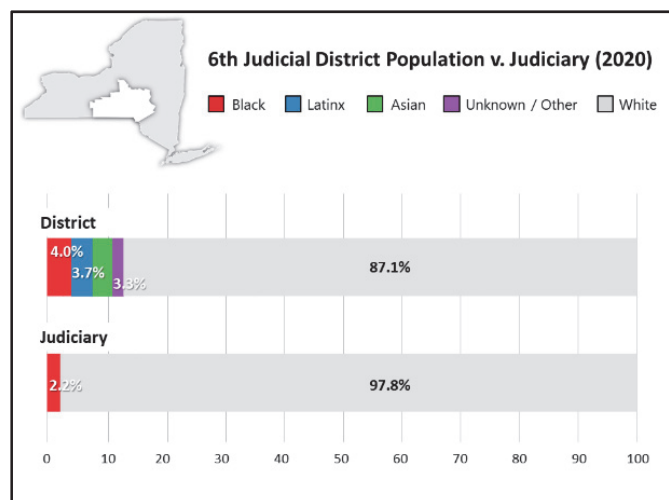


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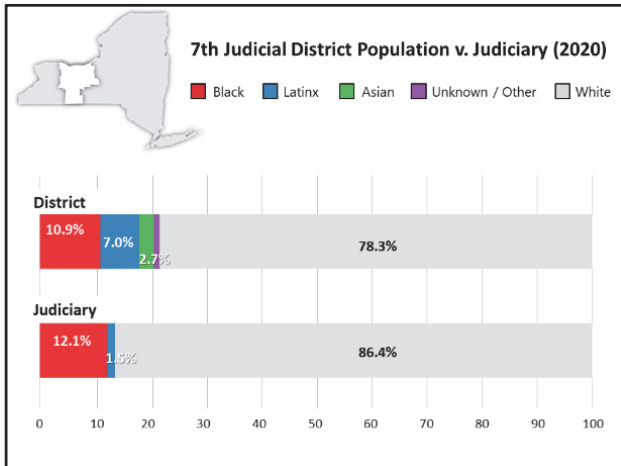


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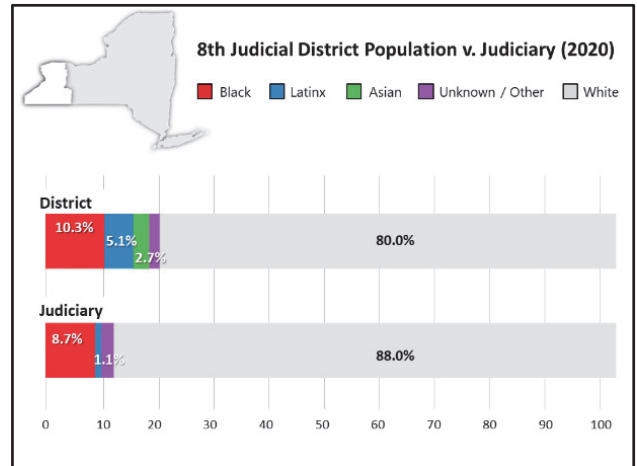


Figure 24

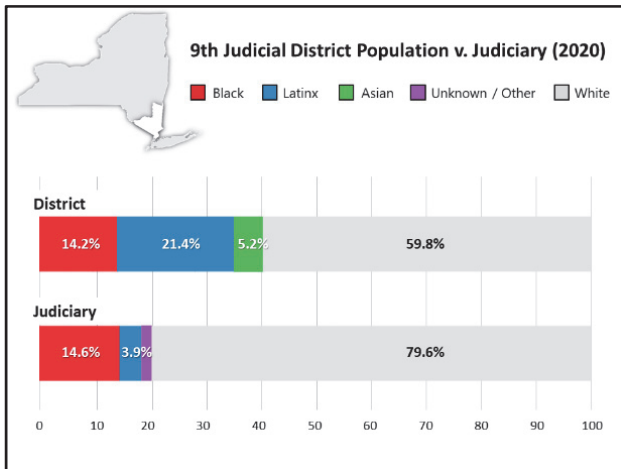


Figure 25

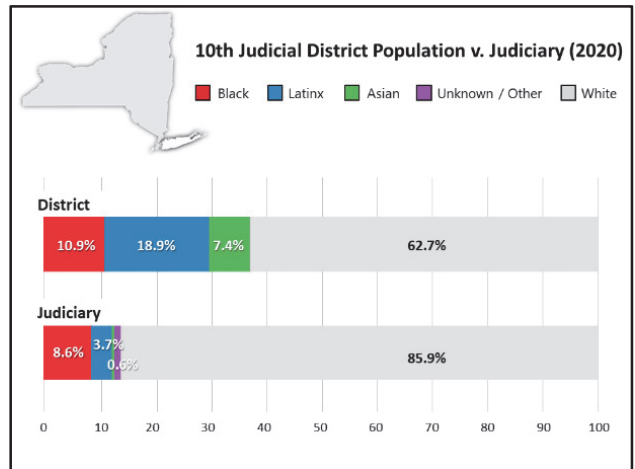


Figure 26

## **V. POLICIES, PRACTICES, PROGRAMS AND ORGANIZATIONS DESIGNED TO ADDRESS BIAS IN THE NEW YORK STATE COURT SYSTEM**

The Chief Judge's mandate called for us to identify and evaluate all existing policies, practices and organizations within the New York State court system that are intended to address racial bias.

We conducted an extensive search within and around the court system for policies and programs addressing racial bias. Notably, it was difficult to find a list or organizational chart explaining the various institutions and resources within the New York State court system intended to address racial bias, and what they do. Information in various booklets, brochures and webpages is confusing, inaccurate and often out of date. Further, a number of interviewees suggested that reality and practice fall short of the stated goals and intentions of these programs. In our interviews, even some of those working within these organizations were unaware of the activities or roles of other organizations, despite their shared mission. Additionally, some policies and programs are less formalized and were difficult to fully evaluate.

We found the following policies, practices, programs and organizations that exist in whole or in part to address issues of racial bias:

### **A. The Franklin H. Williams Commission**

As explained in Section II above, the Williams Commission was established in 1991. It is a standing Commission currently co-chaired by Justices Troy Webber and Shirley Troutman. From our review, it seems plain that the Williams Commission serves as the primary and most visible program throughout the court system for addressing issues of racial bias and the treatment of underrepresented communities.

The Williams Commission was originally charged with implementing the 1991 recommendations of the Minorities Commission. And from its founding in 1991 until 1996, the Williams Commission published detailed analysis, findings and updated recommendations as bolstered by their own studies and initiatives. These annual reports also measured progress on the implementation of the Minorities Commission's 1991 recommendations and highlighted specific areas of attention and needed focus for subsequent years.

Beginning in 1997, the Williams Commission transitioned away from those detailed reports and primarily focused on coordinating conferences, seminars and mentorship programs. The Williams Commission continued – and continues – to publish brief

summaries of their activities in a short section in the New York State Unified Court System’s Annual Reports. According to its own website,<sup>172</sup> the Williams Commission’s primary functions include:

- Serving as a conduit to people of color within the court system and meeting annually with the Chief Judge and court administrators to discuss issues of concern to court employees and matters pertaining to racial and ethnic fairness in the courts.
- Sponsoring seminars and conferences for judges and court personnel on issues of diversity and race within the courts.
- Holding professional development and leadership workshops for court personnel and providing judicial mentors for attorneys interested in judicial appointments.
- Acting as a liaison to community groups, fraternal organizations within the court, bar associations and judicial appointing authorities.
- Producing and distributing various publications, including a newsletter.
- Hosting a Diversity Awards Program, which honors individuals and organizations working to promote racial and ethnic fairness in the New York State Unified Court System and the broader legal community.
- Presenting a class for new judges on cultural awareness at the New York State Judicial Institute training session for new judges.

## **B. Managing IG for Bias Matters**

OCA’s Inspector General is responsible for investigating complaints of disciplinary violations, criminal activities, conflicts of interest and misconduct on the part of non-judicial employees, as well as persons or organizations, working within the court system.<sup>173</sup> There are two specialized units within the IG’s Office: the Office of the Managing Inspector General for Bias Matters (“IG for Bias Matters”) and the Office of the Managing Inspector General for Fiduciary Appointments.

Established in 1998, the IG for Bias Matters is responsible for investigating allegations of bias based upon race, as well as other protected classes, that affect the workplace of personnel within the court system, “including acts that relate to services provided by court personnel to the public.”<sup>174</sup> The IG for Bias Matters receives complaints from both the public and court system employees and investigates the behavior that precipitated the

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<sup>172</sup> *Franklin H. Williams Judicial Commission*, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml> (last visited Sept. 23, 2020).

<sup>173</sup> *Office of Inspector General*, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/admin/ig/index.shtml> (last visited Sept. 23, 2020).

<sup>174</sup> *Id.*

complaint, including studying systemic issues involving the functions of particular court units or systems. Notably, non-judicial employees of the Town and Village Courts are not under the authority of the IG for Bias Matters because they are hired by, and therefore disciplined by, local governance bodies. In addition to its internal-facing functions, the IG for Bias Matters also acts as a liaison with federal, state and local law enforcement and regulatory agencies, such as the Equal Employment and Opportunity Commission and the New York State Commission on Human Rights, on matters that fall within their jurisdiction.

Kay-Ann Porter Campbell currently serves as the IG for Bias Matters. She oversees the office and personally investigates serious allegations of bias, such as allegations against judges or allegations of criminal conduct. Other allegations are handled by designated investigators. Complaints of bias in upstate courts are handled by an investigator located in Albany.

Employees wishing to make a formal complaint may call the IG for Bias Matters or fill out the Claim of Discriminatory Treatment form.<sup>175</sup> The webpage for the Office of Diversity Inclusion (discussed below)<sup>176</sup> contains a link to a Discrimination Claim Policy and Procedure, and statement declaring that it is the court system's policy to ensure equal employment opportunity without regard to race as well as other protected classes.<sup>177</sup> Complainants may also contact the IG for Bias Matters indirectly via the court system's toll-free hotline or through referrals from other offices within the court system, such as the Division of Human Resources and the Chief Clerk's office. Although the Discrimination Claim Policy and Procedure does not state that an employee may file an anonymous complaint, we were told that anonymous claims are accepted and investigated. Litigants may also contact the IG for Bias Matters to file a formal complaint about discrimination or bias they experience from a court employee.

Complaints that are deemed to be serious receive a formal investigation.<sup>178</sup> The investigation involves an interview with the complainant, any witnesses and the individual against whom the claim was filed.<sup>179</sup> The IG for Bias Matters requests that anyone

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<sup>175</sup> Bias Complaint Form, Office of Inspector General, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/ClaimDiscrimTreatment.pdf> (last visited Sept. 23, 2020).

<sup>176</sup> See Office of Diversity and Inclusion, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/careers/diversity/index.shtml> (last visited Sept. 23, 2020).

<sup>177</sup> See Discrimination Claim Policy & Procedure, OFFICE OF CT. ADMIN. (2016), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/DiscClaimBklet.pdf> [hereinafter OCA Discrimination Claim Policy & Procedure].

<sup>178</sup> OCA Discrimination Claim Policy & Procedure, *supra* note 176, at 13.

<sup>179</sup> *Id.*

contacted during an investigation maintain confidentiality by not disclosing the existence or any details of the complaint. In most cases, however, a complainant's identity and at least some details of their complaint are made known to interviewees and the complainant's supervisor.

After the investigation is complete, the IG for Bias Matters will submit a confidential, final investigative report to the Administrative Judge of the District where the conduct occurred, including whether the complaint was substantiated and, if appropriate, recommended sanctions. Within thirty days of the issuance of the report, the Deputy Chief Administrative Judge will issue a final determination in consultation with the District's Administrative Judge.<sup>180</sup> If the Deputy Chief Administrative Judge agrees that the complaint is substantiated, the matter is supposed to proceed to a hearing, where the subject of the complaint faces disciplinary action. It is our understanding that, in most instances, the subject agrees to settle the matter without a hearing. If the matter is not settled, decisions can be appealed to the Chief Administrative Judge, who will issue a final determination within thirty days of the date of the appeal.<sup>181</sup>

### **C. OCA's Office of Diversity and Inclusion**

The Office of Diversity and Inclusion ("ODI") is responsible for implementing the court system's diversity policies and maintaining diversity within the workforce. ODI – which was called the "Office of Workforce Diversity" prior to this year – has performed various functions over the years, before assuming its current role. Prior to the creation of a separate diversity office around a decade ago, diversity issues were handled by the Office of Equal Employment Opportunity within OCA's Division of Human Resources. One of this office's roles was to investigate complaints of discrimination, a function now handled by OCA's Inspector General Office.

Currently, ODI focuses primarily on recruiting and maintaining diversity within the court system's non-judicial workforce. To this end, ODI is tasked with carrying out the court system's diversity policies, specifically as they relate to recruitment and hiring. Additionally, ODI strives to ensure that diversity and inclusion is a consideration in every decision made throughout the court system, specifically that minority employees feel that their opinions are welcomed and considered.

Although we have found no formal policies mandating ODI's participation, we are told that ODI is involved in the interview and hiring process. According to one OCA

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<sup>180</sup> *Id.* at 14.

<sup>181</sup> *Id.*

administrator, interview panels are constituted in each court across the state, consisting of five employees, three from the locale where the court sits and two from outside the locale. ODI's Director, Anthony Walters, sits on several of the interview panels, especially in courts upstate where there is a lack of minority court employees of sufficient seniority to sit on the panels. The panels' recommendations go to the Deputy Chief Administrative Judge and the Chief Administrative Judge for final approval.

We are told also that ODI is involved in outreach initiatives to ensure that OCA is recruiting diverse candidates. There are several fraternal organizations within the court system that provide resources for minority court employees, such as the Tribune Society and the Cervantes Society. We understand that ODI partners with these organizations to provide information about job opportunities to the public. We also understand that ODI sends job announcements to minority organizations, such as bar associations and HBCUs.

Although there is no mention of it on its website, according to ODI staff, the office also created a diversity task force that focuses on promoting minority court employees, especially in courts upstate. The task force consists of court employees at every level including judges. The goal of the task force is to develop trainings, programs and policies that promote diversity, which the employees on the task force can implement in their respective courthouses.

#### **D. Anti-Discrimination Panels**

Court employees can informally resolve issues of bias or discrimination by contacting a supervisor or, if the complaint involves a direct supervisor, a higher-level manager.<sup>182</sup> Employees are also able to direct their complaints to the Administrative Office or Administrative Judge of the Judicial District in which the incident or behavior of concern occurred. Upon receiving a complaint, the Administrative Judge can choose to either resolve the matter informally, or refer the matter to the IG for Bias Matters or a member of the District's Anti-Discrimination Panel,<sup>183</sup> though the latter option has been characterized as "largely defunct."

The Anti-Discrimination Panel program<sup>184</sup> was designed to be another informal procedure for employees to resolve complaints of bias and discrimination.<sup>185</sup> Coordinated by ODI, panels were established in each court, and consisted of judicial and non-judicial

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<sup>182</sup> *Id.* at 11.

<sup>183</sup> *Id.* at 12.

<sup>184</sup> See *Anti-Discrimination Panel Program*, OFFICE OF DIVERSITY AND INCLUSION, <http://ww2.nycourts.gov/CAREERS/diversity/bias-free-environ.shtml> (last visited Sept. 23, 2020).

<sup>185</sup> *Id.*

employees trained to receive complaints of discrimination.<sup>186</sup> The panels acted as an intermediary platform to help resolve issues without a formal investigation process.<sup>187</sup> Panel members would listen to employees and offer alternatives for resolutions to the complained-of behavior.<sup>188</sup> Panels would also inform employees of their options for advancing complaints of discrimination, including directing employees to the proper channels to file a formal complaint.<sup>189</sup> If a complaint described a serious issue of misconduct, the panels would report the complaint to the IG for Bias Matters.

#### **E. Disproportionate Minority Representation Committee**

In 2005, the New York State Family Court Judge’s Association (“NYSFCJA”) sponsored its first educational session to discuss what was then referred to as disproportionate minority contact with the child welfare and juvenile justice systems. Thereafter, the NYSFCJA partnered with the Williams Commission to sponsor a day-long program at the Judicial Institute. In 2009, Judge Gayle Roberts, who sits in the Bronx Family Court, requested a series of meetings with Family Court Judges in the other four boroughs with the goal of creating a Disproportionate Minority Representation (“DMR”) Committee in each borough focusing on these issues. DMR Committees were eventually formed throughout the state and have sponsored statewide and local conferences, trainings and working groups designed to address systemic issues and issues of bias affecting minority children and their families in the New York State court system. Although the committees are spearheaded by judges, they work in cooperation with outside stakeholders and are focused on bringing awareness to these issues to all court personnel. Interviewees described these trainings as “very high quality.”

#### **F. Bias Training for Judges**

In the course of our review, we identified a number of bias training programs for judicial personnel in and around the court system. Notably, there does not appear to be a consistent, state-wide approach to bias training. Most bias trainings offered by OCA do not appear to be mandatory. Some Judicial Districts and individual courts have taken the initiative to implement bias trainings, but these efforts appear to be ad hoc or diffuse.

**New Judges Seminar.** The Judicial Institute provides education and training for New York State judges and justices. Newly elected and appointed judges must attend the Judicial Institute’s New Judges Seminar offered in January of each year. The New Judges

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

Seminar is a weeklong program designed to assist new judges “transition to [their] new role.”<sup>190</sup> Subjects covered during this training include what Judicial Institute personnel termed “soft” subjects, such as bias training and introductions to OCA policies and procedures, and “hard” subjects, such as how to run a courtroom, arraignments and other judicial skills.

The 2020 New Judges Seminar provided two opportunities for implicit bias training: a one-hour session entitled “Implicit Bias in the Courtroom” and a two-hour panel session entitled “The Judge’s Role as Supervisor and Manager.” “Implicit Bias in the Courtroom” was held on the second day of the New Judges Seminar, just before lunch, and was led by Mirna Santiago, an attorney and member of the New York State Bar Association’s Committee on Diversity and Inclusion. The course “examine[d] how implicit bias affects the administration of justice.” “The Judge’s Role as Supervisor and Manager” was a panel session held during the morning of the third day of the New Judges Seminar. Kay-Ann Porter, the Managing Inspector General for Bias Matters, and Carolyn Grimaldi, OCA Director of HR, were among those on the panel.

Our team reviewed the PowerPoint presentation and reference list given to participants as part of the “Implicit Bias in the Courtroom” session. The session appears to have discussed the sources and manifestations of unintended and implicit bias, explained cultural competence, including why it is important and how it is achieved and reviewed and how bias and lack of cultural competence affect the legal profession and the administration of justice. At least one-third of the presentation was dedicated to helping participants develop strategies for interrupting their own implicit biases. The reference list provided sources for further reading on topics covered in the presentation, as well as other relevant topics, such as how implicit bias affects education and employment. Our team did not review any materials for the second session on “The Judge’s Role as Supervisor and Manager.”

**Judicial Summer Seminars.** The Judicial Institute also offers “Judicial Summer Seminars” every summer, when judges from across the state may “gather, face-to-face with their colleagues, to share their experiences and wisdom.”<sup>191</sup> The Judicial Summer Seminars are a three-day program which includes seminars on legal updates, judicial skills and “broader-based, thought-provoking courses particularly relevant to [judges’] work.”<sup>192</sup> Newly elected and appointed judges are required to attend because the second part of the

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<sup>190</sup> Letter from Juanita Bing Newton, Dean, N.Y. Judicial Inst., to judges attending the 2020 N.Y. New Judges Seminar (Jan. 6, 2020) (on file with N.Y. Office of Ct. Admin.).

<sup>191</sup> Letter from Lawrence K. Marks, Chief Administrative Judge, N.Y. Unified Court System, to judges attending the 2019 N.Y. Judicial Summer Seminars (Summer 2019) (on file with N.Y. Office of Ct. Admin.).

<sup>192</sup> *Id.*

New Judges Seminar is held on the afternoon before the start of the Judicial Summer Seminars and the morning of the first day.

In 2019, one of the plenary sessions intended for new judges was entitled “Implicit Bias in the Courtroom.” This session, led by David Horowitz, a lecturer at Columbia Law School, was characterized as “[a] description of the ways in which implicit bias affects the administration of justice.” Our team reviewed the PowerPoint presentation and session materials given to participants as part of this workshop, which appears to have focused on issues of bias in jury selection, as well as ideas for recognizing and remediating systemic biases affecting both judges and juries. The materials for this workshop seem to reflect a session geared toward court policies and practices, rather than solutions for curing personal biases.

In addition to these dedicated courses on bias, we are advised that Judicial Institute personnel are attempting to incorporate bias training into seminars on a broader range of issues. One recent class on new artificial intelligence technology discussed how such platforms exhibit design biases that disproportionately affect minorities. The seminars have also covered topics such as the social and legal history of the excessive use of force and the effects of trauma on litigants’ lives.

**The Office of Justice Court Support.** Town and Village justices attend twelve hours annually of mandatory training courses administered by the Office of Justice Court Support (“OJCS”). We are told these courses are practical and geared toward what Town and Village justices do on a daily basis. One of the yearly trainings focuses on issues of diversity and inclusion. In 2019, the diversity and inclusion training focused on recognizing implicit bias.

**Training in Judicial Districts.** In the course of our review, we learned that judges in the Third District have the option of attending a bias training given in their district. The training lasts between 1.5 and 2 hours, and takes place before dinner. Materials for this training are created by a panel of judges in the district, and the training itself is conducted by outside consultants.

**New York State CLE Requirements.** Both attorneys and judges admitted to the New York State bar are subject to New York State Continuing Legal Education requirements. Members of the bar are required to complete at least one credit hour in the area of diversity, inclusion and elimination of bias every biennial reporting cycle.<sup>193</sup> Diversity, inclusion and elimination of bias courses and programs may include, among other things, “implicit

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<sup>193</sup> N.Y. Ct. Rule § 1500.22.

and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with the public, judges, jurors, litigants, attorneys, and court personnel.”<sup>194</sup>

### **G. Training for Non-Judicial Personnel**

As with the bias training for judges, there does not appear to be a consistent or coordinated effort to provide bias training to all non-judicial personnel across the state. Some individual Judicial Districts have begun to develop training programs and policies, but these efforts are not centralized and the trainings not uniform.

**For Interviewers.** Materials received from OCA indicate that employees responsible for interviewing and hiring receive some training on racial bias. A 2017 PowerPoint entitled, “The Interview Process,” gives tips on how to conduct interviews and advises interviewers not to ask questions about race and national origin. Another PowerPoint from 2018 entitled, “The Hiring Process: Interview Best Practices: Using the New Structured Interview Forms and the Interview Resource Center” includes tips on how to mitigate various types of biases, including racial bias, when rating interviewees. It also discusses prohibited areas of inquiry, which includes race and color. A third PowerPoint from 2019, entitled “Recruiting a Diverse Workforce,” discusses how to reach a diverse applicant pool and also explains rating errors and implicit bias. According to officials from Office of Diversity and Inclusion, this was the training ODI gave on this topic for HR managers in each Judicial District. We also identified several one-page documents listing instructions for interviewers. One list sets out prohibited areas of inquiry during an interview, including “all questions regarding a person’s race/color.” Another list contains tips on avoiding bias in the interview process, but does not specifically mention racial bias.

**For Managers.** Materials we received from OCA indicate that bias is discussed in at least some management training. A PowerPoint dated May 16, 2019, entitled, “Ethics Training: Transition to Supervisor,” documents a training given by Rosemary Garland-Scott, the Statewide Special Counsel for Ethics. It sets out ethics rules that apply to court system employees. The presentation mentions that “no bias or prejudice” is allowed under the Rules Governing Judicial Conduct and the Conduct of Nonjudicial Court Employees. It also states that court employees “shall not discriminate . . . on the basis of race, color, [or] national origin” and lists “discourag[ing] racist . . . jokes or remarks” under “best

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<sup>194</sup> *Id.* at § 1500.2.

practices” for court employees. This presentation does not directly focus on racial discrimination.

We received two versions of a PowerPoint entitled, “Performance Management & Problematic Conduct for HR Professionals” which discusses best practices for performance management. The presenter’s notes on slides addressing performance evaluations contain a discussion of bias issues, including the “similarity bias.” Other notes reference “subconscious bias” and state that evaluations “should not contain . . . discriminatory language/code words.” This presentation does not explicitly discuss implicit bias or racial or ethnic bias. While the notes contain examples of bias, none of those examples are of racial, ethnic or cultural bias.

A third PowerPoint, dated June 11, 2020, entitled, “NYS Unified Court System: Discrimination and Harassment Awareness” contains an overview of the laws and policies prohibiting harassment and discrimination, and discusses racial discrimination and harassment. It also presents a series of scenarios involving different types of discrimination. Only one of the eight scenarios depicts ethnic discrimination (against an Irish employee); none involve racial discrimination. The presentation also includes training on how to report discrimination claims.

**General Training.** In addition to materials geared toward educating interviewers and managers on issues of bias, we received one PowerPoint entitled, “Implicit Bias” created by the OCA HR Training and Professional Development Office. The target audience for this presentation is unclear. The last slide of the PowerPoint refers trainees to Harvard’s Implicit Association Test, and the presenter’s notes suggest that the audience was invited to take the test and consider their own biases. No other materials received appear to be bias training given by OCA to a general audience.

Officials from ODI no longer administer anti-discrimination trainings; they believe they were removed because OCA prefers attorneys to conduct those trainings. ODI has recently conducted a training at the Court Officers Academy, and officials expressed that they were “moving in the direction of conducting ongoing trainings” on bias.

## **H. Training for Personnel in Town and Village Courts**

Clerks in Town and Village Courts are municipal employees and not generally subject to the authority of OCA. The Administrative Judge of each Judicial District develops the practices and policies of Town and Village Courts, but does not appear to be involved in training non-judicial employees of Town and Village Courts. We were not able to ascertain whether there are any training programs implemented by OCA, the Judicial Institute or

OJCS for Town and Village Court clerks or any other non-judicial employee. Justices interviewed were unsure what type of training their court clerks receive or who would be responsible for administering this training.

### **I. Training Efforts of Judicial Districts**

**Third Judicial District.** Officials from the Third District began mandating bias training two years ago.<sup>195</sup> The training was initially required only for judges and managers in the District, but more recently, the training requirement was extended to all courthouse employees in the District, including court officers. An implicit bias training panel, currently comprised of the Chief of the local Legal Aid branch, the Chief Clerk of Albany County, an LGBTQ advocacy group In Our Own Voices, Court Analyst Julio Rivera and the Hon. Richard Rivera, travels to various courthouses within the district to conduct the training. This training has not yet been universally administrated in the District due to interruptions caused by COVID-19. Interviewees shared the PowerPoint for this training, which begins with several interactive exercises, reviews the difference between explicit and implicit bias and discusses the Harvard Implicit Association Test. The training also discusses microaggressions, and provides strategies for “debiasing” and practicing greater cultural competence. The presentation seems to emphasize to trainees that having biases does not necessarily mean they are bad people.

**Eighth Judicial District.** Officials from the Eight Judicial District have developed and executed bias trainings largely on an ad hoc basis. All new employees, including law clerks and secretaries, are required to attend a one-day training, which includes a segment dedicated to racial and gender bias; the training is not required for judges. There is also a separate training for court officers that focuses on implicit bias training. Managers across the Eight Judicial District attend annual court meetings to discuss future trainings. However, different courts have different policies and practices. Family Court, for example, has its own training, which is offered in six counties, including Niagara County and Erie. The Erie Family DMR Committee provides a two-day training on implicit bias that specifically addresses cultural differences among families appearing in Family Court. The training uses a video entitled “Race the Power of Illusion” as a learning tool to engage a joint dialogue about race. The Erie Family DMR Committee has also hosted an education series on related topics like Racial Anxiety, Cultural Competency, Generational Trauma in Communities of Color and Working with Native American Families. Interviewees observed that counties with greater resources, like Erie County, are able to provide more trainings, but it is more difficult to do training programs in less populous areas with less

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<sup>195</sup> Officials interviewed from the Third District believe they were the first district to mandate bias training.

resources. There has been some effort to bring trainings to counties through electronic meetings on Skype.

## VI. WHAT WE HEARD

In the course of this review we connected with 289 people in 96 individual and group interviews. We spoke with sitting and retired judges representing almost every type of court in the system, prosecutors, criminal defense attorneys, institutional defenders, private practitioners, affinity groups, judicial associations, bar associations, court watchers, court officers and court clerks. Many interviewees followed with written sets of recommendations. We promised interviewees they would not be quoted by name, which we assess promoted candor. Accordingly, we do not attribute the quotes and assertions in this section by name, except where we were granted express permission to do so. Nor do we repeat every single thing we heard in our interviews. What appears below is representative of what we heard, reflecting a number of consistent observations and concerns. Some of what is recounted below is beyond the scope of this review to address. Nevertheless, we believe it important, as part of this assignment, to give voice to all the concerns expressed below.

### **A. An Under-Resourced, Over-Burdened Court System**

We are obliged to begin with this. We note the Excellence Initiative and the considerable progress that has been made since 2016 to improve productivity, eliminate backlogs and modernize courtrooms. However, in one form or another, the #1 complaint we heard from multiple interviewees from all perspectives was about an under-resourced, over-burdened court system, the dehumanizing effect it has on litigants and the disparate impact all this has on people of color.

The Housing, Family, Civil and Criminal courts of New York City in particular continue to be faced with high volumes of cases, fewer resources to hear those cases, subpar technology and in some instances, crumbling and outdated facilities. Addressing the backlog of cases due to court closures during COVID-19 will no doubt make matters worse. Over and over, we heard about the “dehumanizing” and “demeaning cattle-call culture” in New York City’s highest volume courts. At the same time, a disproportionately high percentage of the civil or criminal litigants in the Housing, Family, Civil and Criminal courts in New York City are people of color. The picture painted for us was that of a second-class system of justice for people of color in New York State.

One judge told us that the systemic reluctance to devote resources to these high-volume courts in New York City, which primarily serve indigent people of color, is “the very definition of institutional bias.” Some interviewees went so far as to allege that deliberate choices have been made over the years not to address the persistent problems that have an

undeniable racially disproportionate effect. A Family Court judge noted the overlap between the concerns expressed by the Williams Commission in the early 1990s and the complaints repeated today.

The widespread complaints about high-volume courts took several forms:

*First*, there were the complaints about the facilities themselves. We note that this was not universally a problem. Courthouse visits undertaken as a part of this review revealed renovated facilities that had been further retrofitted to accommodate COVID-19 concerns. However, interviewees stressed that new, well-kept and clean courthouses are not a privilege enjoyed by all litigants equally. For example, multiple, independent groups of interviewees cited the “atrocious” Housing Court facilities in Brooklyn and the Bronx – courts frequented disproportionately by litigants of color. As one lawyer explained, Brooklyn’s Housing Court is “the most inadequate facility for anything, let alone court proceedings.” Another interviewee said that the courthouse is hardly recognizable as such, given that it is not a courthouse at all – but rather, a repurposed office building.<sup>196</sup> A public defender informed us that while other courthouses are operated by OCA, the office building occupied by the Kings County Housing Court is rented by the city, and the landlord of this building has regularly appeared on the Public Advocate’s “Worst Landlords Watch-list.” Several interviewees also described long lines to enter the Brooklyn facility, which often wrap around the block. Litigants are forced to stand outside in inclement weather – without shelter – for hours, waiting to enter. Upon entry, litigants were reported being “herded into an over-crowded elevator, over-heated by the crush of human bodies and strollers.” A Housing Court judge told us the public bathrooms in Kings County Housing Court are among the worst she has ever seen, and another cited their resemblance to “a run-down public school bathroom, along with the public-school smells, stains and scratched up stalls.” Judges cited dark, poorly ventilated and overheated or overcooled hallways and courtrooms affect individuals with respiratory issues, while overcrowding, stress and tense interactions affect individuals with mental health problems.

In the Bronx, we are told some litigants must descend into a non-ADA-compliant basement to have their cases heard, with ceiling tiles hanging on by a thread above their heads. Meanwhile, air conditioning is problematic and unpredictable – with some judges citing that they once measured the temperature in a makeshift courtroom at 62 degrees Fahrenheit.

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<sup>196</sup> The Working Group understands that there are long-term plans to move and update these courthouses, according to a report of the Housing Court Commission. See *Reforming New York City Housing Courts, A One-Year Update*, OFFICE CT. ADMIN. 9-10 (Feb. 2019), [http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19\\_Housing\\_Court-Report\\_Update.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_Housing_Court-Report_Update.pdf).

Interviewees acknowledged the 2017 expansion of access to counsel for those in eviction proceedings has dramatically increased the numbers of individuals accessing the New York City's Housing Courts on a daily basis,<sup>197</sup> but noted that Housing Court facilities had previously been and are still insufficient to handle the volume of cases and individuals.

*Second*, judges acknowledged to us that the high volume of cases in these courts is their “enemy” in addressing bias, specifically. As a Supreme Court justice noted, Housing and Family Court judges have only have one clerk, while in the court's Commercial Division, most judges have three clerks. A group of Family Court judges surveyed cited research showing that implicit bias is more likely to be acted upon when a decision-maker is rushed.<sup>198</sup> They noted that if a judge has time to slow down, unpack the case before them, look at it from multiple angles and “surface their own biases and reactions” to the individuals involved, that judge is more likely to second-guess their own assumptions and biases. In a separate interview, another Family Court judge admitted that proceedings are often too rushed when judges are making decisions about removing a child from his or her family.

*Third*, interviewees noted that the atmosphere of Family Court is often dominated by concerns about security, with little to no consideration for its effects on litigants. We recognize that armed court officers are indispensable to court security. Nevertheless, interviewees told us that the presence of armed officers in Family Court contributes to the impression that it is yet another institution that “polices and controls” people of color.

*Fourth*, interviewees noted the length of time litigants must wait for their cases to be heard and adjudicated in high-volume courts. In Civil Courts hearing consumer debt cases, litigants are shuffled into “overstuffed” waiting rooms to wait for hours, only to have a few short minutes before the judge. As one organization noted, “wait times are a problem; the court system does not have what one would call a ‘customer service model,’ and it has a disproportionate impact on the non-white population in the courts.” Interviewees, particularly those who spend much of their time in court, cited the lack of a formalized procedure or set of guidelines for setting court calendars as particularly problematic for litigants of color. Interviewees statewide cited an established practice of scheduling

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<sup>197</sup> See *Implementing New York City's Universal Access to Counsel Program: Lessons from Other Jurisdictions*, NYU FURMAN CTR. 16 (Dec. 2018), [https://furmancenter.org/files/UAC\\_Policy\\_Brief\\_12\\_11-18.pdf](https://furmancenter.org/files/UAC_Policy_Brief_12_11-18.pdf).

<sup>198</sup> See Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 56 AM. CRIM. L. REV. 649, 652-55 (2017) (citing Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1555 (2004); Vanessa Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. AND HUM. BEHAV. 413, 415 (2011)).

litigants who have sufficient resources to retain paid counsel before clients represented by legal aid attorneys or public defenders.

Interviewees said this practice wastes precious time, especially for indigent litigants, who must miss work or spend much needed resources on childcare to wait all day in court for their case to be called. As a group of Housing Court judges explained, when the court cannot complete its calendar for the day, cases are often adjourned out of necessity, meaning that unrepresented litigants must take another day off from work or arrange for childcare. For some litigants in Housing Court, “missing even one day of work can mean that a month’s rent cannot get paid in full,” putting litigants facing eviction even further behind.

One defender organization reported that their internal data analysis has shown clear racial disparities in case processing time in felony cases in New York City. In the case of Family Court, delays in processing a case can mean potentially permanent damage to children, particularly when those delays impact reunification. As one Family Court Judge noted, in this context, “justice delayed is justice denied.”

One lawyer noted that the delays impart a sense of profound unfairness and have a demoralizing effect on clients. Ultimately, the message sent is that the loss of the litigants’ time – particularly those who are indigent or people of color – is a casualty within the system’s broader disorganization. One lawyer told us that occasionally, litigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all.

*Fifth*, interviewees also cited the lack of uniform access to childcare services, especially in New York’s high-volume courthouses. The difficulties that litigants, and particularly litigants of color, face in arranging for childcare in order to attend and fully participate in court proceedings, was a commonly raised theme throughout interviews. A group of Housing Court judges told us that previously, the Housing Court provided childcare services within the courthouse while parents or caretakers attended their cases, but that this practice has been discontinued due to budgetary limitations. Judges stressed that the need for childcare support continues to be an “overwhelming” issue faced by litigants, particularly women, who otherwise must bring their children into the courtroom with them, or miss proceedings altogether. Beyond this, the bare minimum of needs faced by working parents in court are not met – one legal aid attorney mentioned that there are not even changing tables in Family Court bathrooms throughout New York City. While a narrow issue, as she framed it, if litigants are going to be subject to delays and long wait times, they should at least be able to easily use the restroom with their small children while they wait.

*Sixth*, interviewees noted the importance of adequate signage in courthouses. Aside from practical concerns, they noted that signage is important for the message that it sends to litigants: that the court system is there to serve them, and that they are active participants in it. Yet, one prosecutor noted that the signage is so bad in some courts in his jurisdiction, “airports and local Department of Motor Vehicles offices are more navigable than the courthouse.” Interviewees often pointed to the importance of adequate signage for unrepresented litigants and those who are of limited English proficiency – noting that it is unacceptable that these individuals often only accidentally end up at their intended destination within the courthouse, and that once there, they sometimes do not have even a basic grasp of what is taking place. In essence, interviewees felt that other, larger issues aside – like the quality of interpretation services or access to counsel – useful, common-sense, accessible signage is the bare minimum of resources that the system can provide its most vulnerable litigants.

*Finally*, multiple interviewees noted that in this environment, court officers, attorneys and judges sometimes exhibit a lack of understanding, empathy and compassion towards litigants of color interacting with the court system. One judge mentioned that there is “a culture in the courts that discourages compassionate treatment.” One district attorney noted, “you don’t see, at all, any care or compassion for the family that is watching their son or daughter being sentenced to 20 years in prison. When there’s that emotional outburst, they are ushered out of the courts by security.” A number of interviewees mentioned a tendency of certain judges and court officers to “moralize” at litigants of color and disparage them because of their dress or how they speak in court. One defense attorney noted that certain judges yell at or punish clients for being late, without regard to litigants’ poverty, childcare needs or ability to take time off from work. A senior member of a leading bar association recalled an incident in which a Family Court judge in New York City yelled at a litigant for saying in court that she did not know who the father of her child was. The judge apparently then inquired, “How is it that you people never know?”

This insensitive behavior extends to attorneys in court as well. One Housing Court judge noted, during her time on the bench, she frequently overheard statements by attorneys that ran the gamut of overt racism, racial bias and racially tinged condescension. She mentioned that this dynamic was especially problematic in the Housing Courts, an environment where the litigants of color are often being evicted and the landlords and attorneys pursuing the evictions are overwhelmingly white. One public defender reported an instance in which he witnessed a court-appointed attorney buy boots on her iPad while her client lost custody of her child in Family Court.

Interviewees also pointed out that personnel across the system have virtually no idea how to interact with indigenous persons, despite that, as interviewees pointed out, “there are so many Native Americans that come into contact with the bar and the courts.” One interviewee noted that although “most discrimination exists closer to [Native American reserves],” the farther one moves from those areas, Native Americans are essentially considered “nonexistent.”

## **B. Existing Institutions Addressing**

### **Racial Bias are Inadequate, Opaque or Unknown**

Part of our assignment from the Chief Judge was to examine existing programs or policies geared towards reducing racial bias.

Significantly, many interviewees simply were not aware that many of these programs and policies existed, or if they did, they were unfamiliar with their scope and function.

The IG for Bias Matters is the prime example of this. This office is charged with investigating complaints of racial, sexual, sexual orientation and gender identity related-discrimination or bias. Many individuals in the system simply did not know that this office existed, or did not understand its role. One national-level state court observer noted that New York State was truly “ahead of its time” in creating such an office, and that few other states have a similar institutionalized role for investigating complaints of racial bias. As such, she was “surprised and disheartened” to learn that it was not widely understood. When prompted, another upper-level OCA employee admitted that she had only recently learned the office existed. One group of judges interviewed even recommended that OCA establish an “Inspector General for Diversity and Bias Related Conduct,” though this position already exists. Potentially a reflection of its relatively unknown status, we are told that the IG for Bias Matters typically receives ten or fewer complaints of racial bias meriting an investigation per year.

While one OCA staff member informed us that there are posters advertising complaint procedures for registering a complaint to the Offices of the IG or the IG for Bias Matters in some courthouses, few others acknowledged that they had seen such advertising. In general, interviewees pointed to the lack of well-publicized, anonymous and fair complaint procedures for reporting incidents of bias on the part of judicial and non-judicial personnel. Several judges and former judges noted that the current system does not address “festered” issues with court officer conduct, and another former judge cited “deep concerns” about complaint procedures as a whole.

Even when interviewees were able to name a few of the organizations tasked with addressing racial bias in the court system, many noted that these entities are ineffectual or exist in name only. The characterization “window dressing” was used more than once.

Interviewees noted that the Office of Diversity and Inclusion, or ODI, had recently experienced budget cuts, and its team of eight people involved in discussing diversity issues with courthouses across the state had recently been pared down to only two. One judge noted “if one is serious about interrupting bias, it cannot be done cheaply.”

Likewise, an interviewee questioned whether the newly-expanded Office for Justice Initiatives had any “real leverage” to combat racial bias in the courts. For example, we were told that this office’s budget request for programs specifically addressing racial bias was denied in 2018, and that subsequent funding received has been “far too little” to develop and administer such a program.

Interviewees were also generally confused about the “largely defunct” Anti-Discrimination Panels, which were originally created to serve as a more informal dispute resolution mechanism for incidents of bias and beyond. The panels were administered by trained judicial and non-judicial intermediaries, and are still advertised in OCA’s “Discrimination Claim Policy & Procedure” booklet as a confidential means for personnel to “resolve incidents of discrimination” outside of formal complaint procedures.<sup>199</sup> However, interviewees informed us that these panels are no longer in widespread operation. While one interviewee noted that reinvigorating the program would be beneficial for addressing incidents of bias in a less adversarial fashion than the formalized complaint process, other interviewees who were familiar with the program in practice noted that the panels were difficult to manage and resulted in inconsistent or unwieldy investigations. Ultimately, a member of OCA’s staff noted that the most problematic feature of the Anti-Discrimination Panels is that they are neither in use, nor have they been formally disbanded.

One interviewee noted that while the New York Federal-State-Tribal Courts and Indian Nations Justice Forum was once successful in achieving judicial recognition of Tribal Court Orders, and had been having discussions about incorporating Federal Native American Law into the New York bar exam,<sup>200</sup> these efforts have waned in recent years.

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<sup>199</sup> *OCA Discrimination Claim Policy & Procedure*, *supra* note 176, at 11.

<sup>200</sup> We understand that other states have done this, such as Washington State, which now includes Indian law on the state bar exam and stresses the importance of Indian law in Washington State law schools. *See State and Tribal Courts: Strategies for Bridging the Divide*, CTR. FOR CT. INNOV. 19 (2011), <https://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf>.

Next, a number of interviewees told us – in words or in substance – that the Williams Commission has “run out of steam.” This view is shared even by Commission members. One member expressed a hope the Commission will ultimately be empowered through independent initiatives like this one. We recognize the Commission’s efforts over decades to address diversity and equal justice in the court system. That said, interviewees told us their belief that the Commission is no longer “as critical of the system” as it once was. This may partially be attributed to the Commission’s apparent shift from an investigative and reporting mechanism to more of a community-building organization over the last few years. Many interviewees stressed the Commission’s potential to be an “asset” on matters of equal justice, and that the Commission could be more “proactive” and “forceful” in its approach to its original mandate.

Finally, many interviewees told us they do not feel comfortable lodging complaints of racial bias, largely for fear of retaliation from superiors or colleagues. As one judge of color noted, there is “a fear among Black leadership in the system,” and that these leaders of color try to “tread lightly” when dealing with claims of racial discrimination. The judge added that this is perhaps because they fear that they will not be supported, or will lose their positions of power if they speak out. Judges expressed fear of raising issues of racial bias, out of concern for blowback from fellow judges. Court attorneys, as at-will employees, fear reporting incidents of bias against the judges they work for.

Meanwhile, attorneys described feeling powerless to raise complaints against judges who engaged in biased behaviors or made racially-charged comments against them or their clients. As repeat players in the system, prosecutors and defense attorneys expressed that despite pervasive problems with problematic judges, their professional duties often require them to keep their feedback to themselves, at the risk of compromising their client’s case, their own reputation or that of their organization. One legal aid attorney interviewed noted that many pro bono attorneys of color tend to be young, which creates additional barriers to speaking up against inappropriate behavior.

### **C. Court Officers**

On June 7, 2020, it was reported publicly that a Brooklyn-based court officer had posted on Facebook an illustration of President Barack Obama with a noose around his neck, and Secretary Hillary Clinton being taken to a wooden apparatus to be hanged. The post prompted immediate outrage, and we are told that the officer has been suspended.

It is apparent from our interviews that this episode peeled the lid off raw emotions about and within the court officer community, particularly in Kings County. A number of interviewees were outspoken in expressing those grievances about the court officer

community. Several told us that the post described above is not an isolated incident. Interviewees reported that the court officer who posted the offensive message had been “protected for years,” and that her racist views and mistreatment of people of color as a court officer had long been tolerated without adverse consequences. Others alleged that problematic social media posts by court officers have been a widespread issue repeatedly ignored despite complaints long before this recent incident. Interviewees said the court officer’s post evidences a broader institutional acceptance of racist behavior.

Still worse, court officers of color told us they felt they could not report incidents of bias, for fear of being ostracized by their fellow officers and facing adverse career consequences from powerful union leaders. Even some judges told us they hesitate to report court officers, citing incidents where court officers have created a hostile environment for judges who they feel have criticized them. One very senior judge confided that she is aware that some judges are afraid of reprimanding or correcting the misbehavior of certain court officers in their courtrooms.

Although interviewees stressed that not all court officers behave in a hostile manner, almost every interview touched on what appears to be a culture of toxicity and unprofessionalism exhibited by court officers towards litigants, litigants’ relatives and attorneys of color.

Multiple interviewees told us that a number of court officers engage in disrespectful, condescending and unprofessional behavior directed disproportionately at individuals of color interacting with the judicial system. For example, a Family Court practitioner relayed experiences of court officers yelling at litigants of color, as well as at immigrants for whom English is not a first language. Her experience was echoed by other interviewees, who described court officers as “routinely bullying defendants, displaying short fuses” and perceiving courtroom users as potential threats. Other examples of unprofessional behavior included discussing litigants’ marital status and berating litigants about the clothes that they wear. Interviewees mentioned that such behavior is often unprompted, and frequently escalates an already-tense situation given the nature of certain judicial proceedings.

Interviewees also noted that court officers exhibit differential treatment towards certain individuals by applying facially neutral policies differently on the basis of race. For example, interviewees at a legal think tank noted that litigants and attorneys of color consistently receive additional scrutiny and are required to produce their identification when entering the courthouse, while white individuals are waived through. Another example is the prohibition against cell phone use in the courthouse; this rule is often

enforced aggressively against people of color, but not against white individuals. One former prosecutor noted that Black defendants are more often handcuffed when appearing for minor infractions, while their white counterparts are not.

Some interviewees reported instances of explicitly racist conduct or comments by court officers. According to court officers of color, the use of racial slurs by white court officers is common and often goes unpunished. One public defender relayed a story of being in an elevator with her clients, who happened to be Black teenagers, and multiple court officers. In response to comments made by the Black teenagers, one white sergeant replied, “Keep running your mouth. You’ll always be a nigger.” Multiple court officers of color mentioned white court officers using the n-word. One court officer of color recalled an incident where she overheard a white court officer telling another officer that he would have done better on the requalification exam if it had a “Sean Bell target” – referencing the unarmed Black man who was killed on his wedding day after police officers fired 50 bullets into his car. Another court officer of color recounted an incident in a locker room where a white court officer referred to a Black court officer as “one of the good monkeys.” According to interviewees, these incidents were reported, but the court officers involved were not disciplined. One court officer told us that his supervising officer ranted at a Christmas party about how Black people are lucky that they are allowed to be court officers in the first place.

Though court officers are employees of the Unified Court System, according to several interviewees, court officer discipline and promotion is heavily influenced by union leadership, specifically the leadership of the New York State Court Officers Association. Multiple interviewees occupying various positions within the court system also told us it is well-known that court officers cannot be promoted unless it is personally approved by the head of Court Officers Association, who has been president of that union for 46 years. Court officers of color describe the Court Officers Association as “insular,” and believe that union leadership has over time become entrenched and insulated itself from any real scrutiny or challenge.

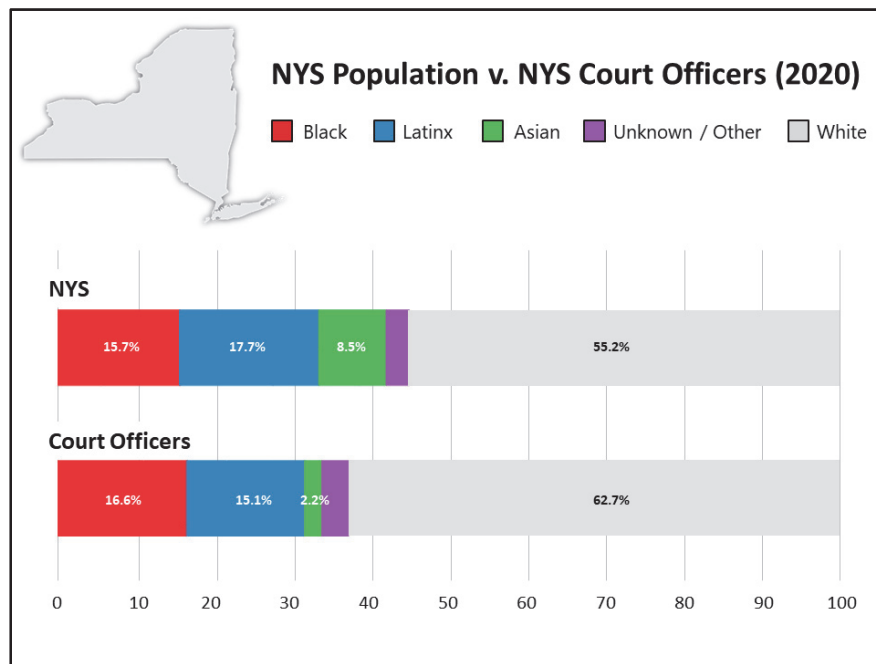
We also note that certain union leaders have themselves posted offensive messages on social media, leading several court officers to complain that union leadership is a “safe haven for racist speech and actions.”<sup>201</sup> In one Facebook post, a member of union leadership referred to protestors who sprayed graffiti on a New York State court van as “animals.” In that same Facebook post, the union leader’s profile picture was the Betsy

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<sup>201</sup> Rebecca Rosenberg & Bruce Golding, *Racial Inequality Probe Ordered Into Court Officers Union Leader*, N.Y. POST (June 12, 2020), <https://nypost.com/2020/06/12/racial-inequality-probe-ordered-into-court-officers-union-leader/>.

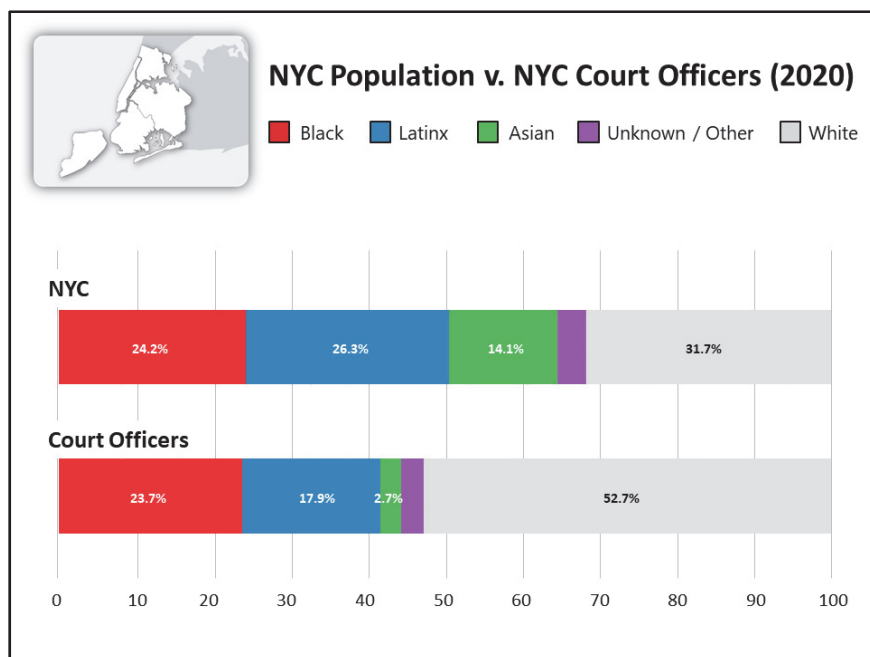
Ross flag, which has been widely adopted by white Supremacist groups, including the Ku Klux Klan.<sup>202</sup>

Notably, the overall diversity of the court officer community does not diverge significantly from the population statewide or in New York City (*see* Figures 25 and 26 below), though the statewide or citywide population does not necessarily reflect the demographics of the litigants in particular state courts.



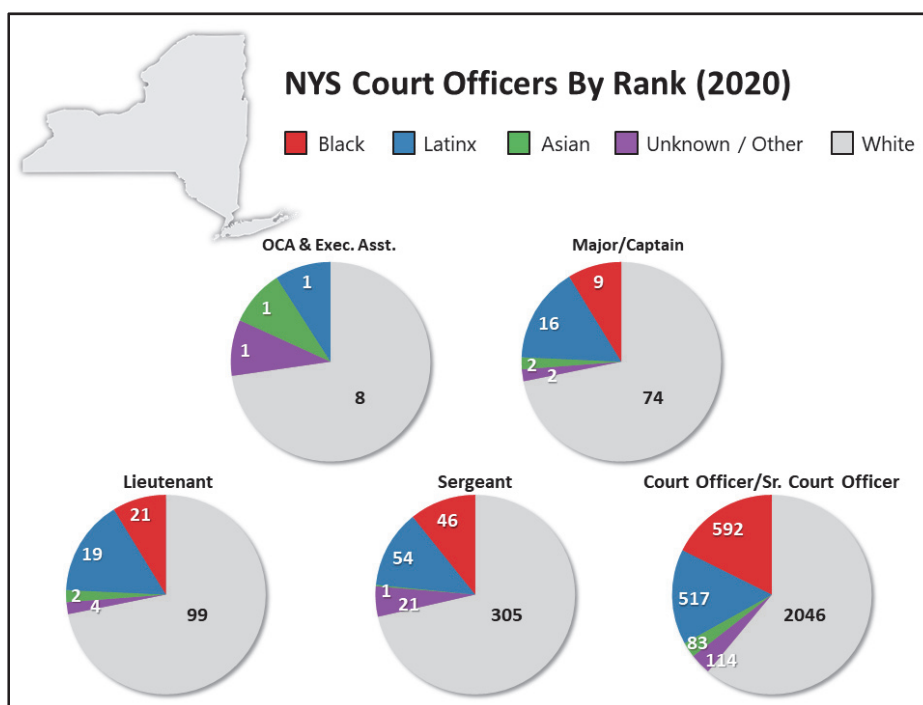
**Figure 25**

<sup>202</sup> In New York, a KKK group passed out mini Betsy Ross Flags, in addition to the Confederate Flag which they commonly use. In Georgia, some KKK groups required members to use the Betsy Ross Flag in ritualistic meetings. Janice Williams, *Is the Betsy Ross Flag Racist? Meaning, History and Symbolism Behind U.S.A.'s 13-Star Flag*, NEWSWEEK (July 2, 2019), <https://www.newsweek.com/betsy-ross-flag-meaning-history-racist-1447174>.



**Figure 26**

Critically, interviewees emphasized that the diversity of the court officer community is concentrated at the lower levels, and the data below supports this (see Figure 27 below).



**Figure 27**

#### **D. Issues Facing Attorneys of Color**

In the course of our interviews, we were struck that almost every attorney of color we spoke with – ranging from criminal defense attorneys to the Bronx District Attorney herself – reported incidents in which they were mistaken for someone other than an attorney or otherwise subjected to disparate treatment. A supervising attorney of color currently serving in a public defender’s office told us “every Black attorney working in the system has a story” of being treated differently, seemingly on the basis of race. These instances take several forms:

- being mistaken for a criminal defendant;
- being mistaken for an interpreter;
- being mistaken for another attorney of color;
- being asked to show identification to enter the courthouse while white attorneys are not;
- being questioned about sitting in the front row of the courtroom reserved for attorneys and
- comments from judges and court officers on how they carry themselves or are dressed.

Both upstate and downstate practitioners appearing in multiple types of courts have reported such treatment. One African American criminal defense attorney recounted for us the recent experience of appearing in state court upstate to represent a client. His description of the experience sounded as if he were appearing in a courtroom in the deep South in the early 1960s: the reaction from local officials was astonishment and questions such as “why are you here?”

Some attorneys of color also told us that they are “believed less often” when making statements to the judges before whom they appear. This problem is magnified when an attorney of color represents a litigant of color in court; in such an instance, according to the head of a public defender’s office, the bias manifests itself as disbelief of both attorney and client and the failure to take them seriously. Another frequent practitioner in Family Court noted that she has repeatedly been referred to as aggressive or overly assertive, while her white male counterparts making similar arguments to represent their clients are not.

So pervasive are such incidents that the head of a legal organization told us that attorneys of color practicing in one county keep a running Google document tracking the

inappropriate comments that they hear from judicial personnel. Two other legal organizations told us they keep running lists of such incidents.

Finally, we heard there is a palpable, cumulative effect such disparate treatment has on attorneys of color and the quality of representation that they can provide: if a client witnesses this treatment, it lessens the confidence the client has in his or her lawyer, and erodes the client's overall confidence in the ability of the judicial system to deliver fair outcomes.

### **E. Judicial Diversity**

Though the data (*see* Section IV above) demonstrates overall progress in this area, many judges we spoke with stated the view that the judiciary is not sufficiently diverse or representative of New York's population, particularly upstate. The data does in fact reflect an increasingly diverse judiciary statewide and New York City-wide (*see* pp. 32–41); we note, however, pockets and particular groups where representation in the judiciary lags behind the population. As one particularly notable example, one interviewee pointed out that there is currently only one Native American jurist on the entire New York State bench. According to the interviewees, the lack of diversity among the judiciary leads to perceptions that justice is not fairly administered.

The judges we spoke to also noted underrepresentation in certain positions of power (*e.g.*, the position of Presiding Justice) and much-sought-after assignments (*e.g.*, the Commercial Division of New York County). On the other hand, we are told by OCA that in fact nine of the fifteen Administrative Judges who sit in downstate New York (the City plus Long Island and Rockland, Orange, Putnam and Dutchess Counties) are people of color.

After surveying a group of Supervising and Administrative Judges on the topic, a summary of the responses sent to us by the Judicial Friends Association indicated that procedures for judicial part assignments often appear to be entirely discretionary and lack sufficient transparency to even critique them in an informed way.<sup>203</sup> Another group of judges interviewed complained of a seeming lack of transparency around the factors or qualifications that go into judicial promotions.

Finally, we heard mixed views from judges about whether the elected or appointed process better promotes diversity. Some interviewees expressed that people of color have

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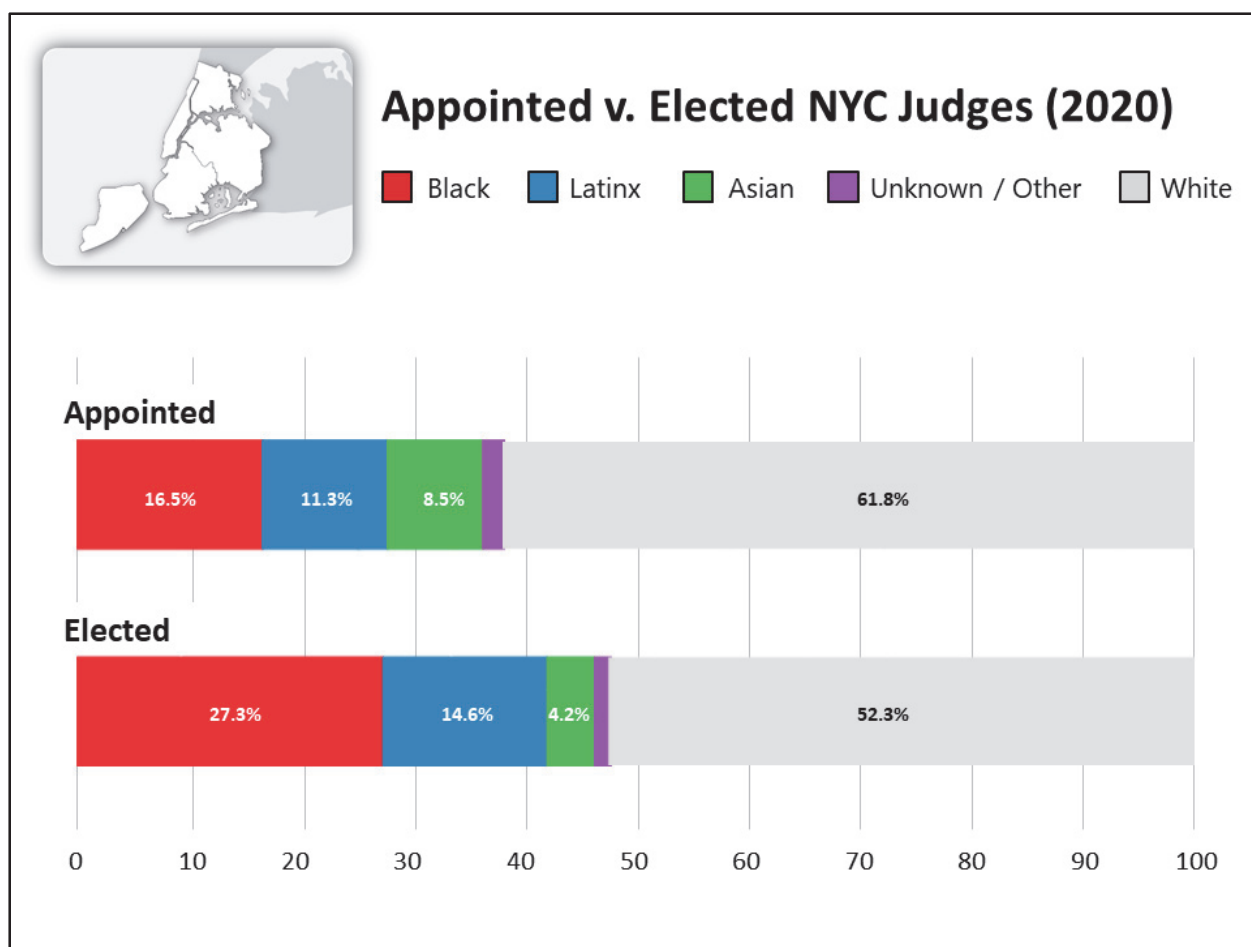
<sup>203</sup> *Report to the New York State Court's Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS'N. 7-14 (Aug. 31, 2020), <https://www.urbancny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf>.

a higher chance of becoming a judge through the electoral process, particularly in diverse communities, where the community is given a voice in its representation. One elected judge upstate recalled for us with pride that he challenged the party's handpicked choice in a primary and ran successfully as a renegade. These same interviewees believe that judicial screening committees participating in the appointment process are themselves not diverse and contain "too many 'Big Law' types."

On the other hand, interviewees who believed the appointive process secured better judicial diversity noted the inherent issues and barriers in the electoral process. These interviewees asserted that, realistically, the electoral process, just as often as the appointive process, depends upon "who you know." One judge of color explained that the political nominating system at judicial conventions causes candidates of color to be bypassed or discouraged by party leadership, particularly in upstate counties, and that interested candidates are often forced to abide by the party's selection for fear of retribution in future elections. To achieve this endorsement, interviewees indicated that candidates must publicly align themselves with the political party, which is often only achieved through substantial donations to the political party's county chairman. One interviewee suggested that unless party politics is eliminated, appointments better serve interests of diversity. (It is no secret that, in fact, there are few competitive judicial elections in downstate New York.)

We analyzed data on elections and appointments of judges sitting in New York City to evaluate which process leads to more judges from minority backgrounds. In New York City, elected judges include those on the Supreme Courts, Surrogate's Courts, and New York City Civil Court. Judges in the New York City Family, Housing, and Criminal courts are appointed. According to data received from OCA, the vast majority of judges outside of New York City are elected. Judges sitting on City Courts outside of New York City may be appointed or elected, but these data were not disaggregated. Thus, we did not analyze relative outcomes of appointments and elections outside of the City.

As reflected below, overall the data shows that elections in New York City appear to yield a more diverse judiciary. Judicial appointments yield a greater percentage of Asian judges, but elections place more Black and Latinx judges on the bench and create a more diverse bench overall. Black jurists account for 16.5% of appointed judges and 27.3% of elected judges. Latinx judges comprise 11.3% of the appointed judiciary and 14.6% the elected judiciary. However, only 4.2% of elected judges identify as Asian, whereas 8.5% of appointed judges do.



**Figure 28**

Ultimately, while we take no position on this issue, the appointment versus election question will depend on the circumstances – and the commitment to diversity by those who ultimately have the power to appoint a judge or help a judicial candidate secure a place on a ballot.

Interviewees also provided mixed views regarding whether or not they believed the Chief Judge’s proposed merger plan would increase judicial diversity.<sup>204</sup> On the one hand, some judges asserted that the plan’s implementation would reduce the number of elected judges in growing minority communities. On the other hand, proponents of the merger plan observed several key benefits if it were to be adopted: first, interviewees asserted that the merger plan would necessarily increase the pool for diverse judges to be promoted to

<sup>204</sup> See Press Release, Hon. Lawrence K. Marks, *Chief Judge Proposes Constitutional Reforms to Simplify Outdated Court Structure, Aiming to Enhance Access, Optimize Resources* (Sept. 25, 2019), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19\\_22.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf).

the Appellate Division, as many courts would be merged into the Supreme Court. Second, interviewees highlighted that many of the courts that would be merged into the Supreme Court – including Family Court, for example – would see reduced workloads as cases would be more evenly distributed across more judges. Interviewees opined that this improvement in resource allocation would improve the overall quality of justice administered in these courts. We take no position on this issue, as we do not believe we are equipped to offer an informed opinion.

#### **F. Diversity Within the UCS Bureaucracy**

Interviewees frequently highlighted a dearth of diversity, particularly in promotion opportunities, throughout the bureaucracy of the Unified Court System. This encompassed the leadership of OCA. Interviewees from within the court system, including a number of sitting judges, cited a perception of lack of diversity within OCA leadership – put more than once as “a lack of diversity on the 11<sup>th</sup> floor” of OCA’s offices at 25 Beaver Street in Manhattan. (Here perception may not have caught up with reality because we are told that five of the twelve officials in the OCA’s executive office are people of color.)

Throughout the bureaucracy employees of color we spoke with perceive unfair barriers in hiring and promotion. Interviewees noted that this perception is a problem in and of itself, in that it has a chilling effect on diverse applicants’ willingness to even seek employment or promotion within the system.

Judges commented that it appeared task forces, committees and commissions tended to include a recurring cast of non-diverse individuals.

Numerous interviewees from across the spectrum perceive that nepotism permeates hiring and promotional decisions, even though most jobs within the court system are civil service positions requiring civil service exams. Perceived nepotism in the court officer community in particular was identified by interviewees. According to a judge interviewed, given the number of intergenerational families in the ranks of clerical staff and court officers, nepotism results in an non-diverse employment population in certain courts. Interviewees noted that this problem – which extends across both competitive and non-competitive positions – leads to “bad morale” among employees and leads to the perception that people of color face unfair barriers in advancing in their careers.

Some interviewees highlighted a perceived lack of attention and accountability among OCA leadership in ensuring a diverse workforce. For example, one interviewee explained that while Administrative Judges formerly maintained statistics on racial and ethnic hiring and regularly met to review these statistics, this practice halted because, as the interviewee

explained, the Administrative Judges “just got tired” of the practice. Similarly, tracking progress on diversity goals throughout the court system was one of the original undertakings of the Williams Commission, which formerly issued detailed reports comparing workforce demographics to population, updated regularly to reflect population changes. Commission members told us that they currently receive and analyze the data, use it to challenge administrators when they meet with them, but do not publicize the data.

Interviewees complained that applicants of color are often unaware of job openings, opportunities to take civil service exams and opportunities for promotion.

Additionally, interviewees highlighted a lack of uniformity among the Judicial Districts in their outreach efforts and results in making diverse hires. We heard that in one Judicial District robust outreach efforts – including outreach to faith communities and local colleges and advertising through its own publications and in local newspapers – resulted in noticeably more applicants of color. Interviewees highlighted the success of another Judicial District’s efforts to communicate available positions and upcoming civil service exams to its employees via email and postings on an easily accessible website. These Judicial Districts cited the importance of community, grassroots efforts in improving diversity hiring numbers as well as the importance of “credible messengers” in advertising employment in the court system. But, a well-known affinity organization stated that Judicial Districts like these are the exception, not the rule. Interviewees acknowledged the inherent difficulties in recruiting diverse candidates – particularly in upstate communities – where the population is not nearly as diverse as New York City.

Next, interviewees complained of the ineffectiveness of “interview panels,” and told us that they actually provide barriers to merit-based advancement. We understand that interview panels – responsible for interviewing and recommending candidates to the Deputy Chief Administrative Judge for hiring and promotion – are a part of efforts to ensure a fair and equal hiring and promotion process. Despite this, some interviewees perceived inherent unfairness in the process. For example, one interviewee conveyed the impression that there is often a predetermined candidate, and that interview panels will simply re-constitute themselves until the desired candidate is chosen. One retired Black judge told us he had grown tired of sitting on interview panels simply to “achieve diversity” when the result was preordained. Interviewees complained about a lack of transparency in the process, and that candidates for promotion are often not notified that they are not selected for a position, and are never formally informed why they were not chosen, even when they ask for feedback. Interviewees said this general lack of transparency generates festering perceptions that the process is political, based on favoritism and rigged. Given

the noted inhibiting effects this has on potential applicants of color, these perceptions are nearly as important as the actual outcomes.

With respect to competitive civil service positions, interviewees say that the required civil service exams for these positions provides an extra barrier to employment. Specifically, interviewees relayed that examination dates are not always publicized, and that preparatory materials are often unavailable or difficult to access. Interviewees said that learning about and adequately preparing for these examinations depends on knowing people already in those roles who had previously prepared for the examination – an opportunity that is less available to applicants of color who are underrepresented in these roles.

Finally, interviewees characterized the “reclassification process” – whereby employees apply to be classified to a higher “grade” or different position – lacks transparency and is wrought with subjectivity. One knowledgeable interviewee said many employees are under the impression that supervisors typically show favoritism in these processes.

### **G. Bias Training**

One consistent message we heard was that existing training on racial and cultural bias and sensitivity is inconsistent and insufficient. Multiple judges in particular were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. One retired Black judge with decades of experience told us he often had to “check his biases” at the door when evaluating a litigant before him. Several judges interviewed noted that isolation is a challenge for ensuring that judges are engaging with and exploring issues of racial bias and cultural awareness. However, the primary complaint about bias training is that it is not currently mandatory for all judicial and non-judicial personnel across the New York State court system.

As for judicial training efforts, we are aware that all new judges receive bias training at a plenary session during summer sessions at the Judicial Institute in White Plains. Beyond that, the Judicial Institute provides a yearly session on implicit bias, which may be accessed remotely as a video, but is not mandatory. Several veteran judges surveyed noted that even when returning judges attend training at the Judicial Institute in person, many choose not to attend the implicit bias session. Several Supreme Court justices pointed out that these sessions for experienced judges are administered in a way that may even discourage attendance – specifically, the implicit bias session at the Judicial Institute for experienced judges has historically been provided at the end of the second day of the conference, at which point, most judges’ “brains are turned off.” We understand that last year, implicit bias training was one of twelve mandatory courses that Town and Village justices were

required to take. However, one justice told us that the quality of the bias training is “rudimentary.”

On substance, a few judges we interviewed noted that the Judicial Institute’s trainings “effective,” in that they help judges be conscious of not thinking they have “heard a [litigant’s] story before,” based on demographics. But, most of the feedback received about judicial training on issues of bias or cultural sensitivity was critical.

With regard to non-judicial staff, as we understand it, the only “mandatory” training that OCA HR uniformly provides is delivered at orientation for new employees and covers “discrimination and harassment,” but not implicit bias, specifically. While judges who are not new can opt to receive yearly training on implicit bias through the Judicial Institute, there is no such unified or well-known platform for periodic or recurring training for non-judicial staff.

We are aware that OCA has developed specific implicit bias training materials, but that they have been administered only at the request of specific courts. Individual Judicial Districts surveyed informed us that they require such training for non-judicial staff, but this is of their own initiative, not OCA’s. One administrative judge noted the vast differences between Judicial Districts’ approaches, and that there is “no centralized body for training” on these subjects. She explained that this is problematic, given that larger counties have more resources for trainings, while smaller and less populous counties cannot afford them. As a result, individuals in some parts of the state may fall through the cracks, while even the best-intentioned local leaders in the system worry about maintaining ongoing funding to provide adequate and current trainings.

We are also told that although court officers now receive a form of implicit bias training at the Court Officer Academy, a senior-level court officer upstate stated that the training provided was lacking, and that it did not actually prioritize understanding implicit bias. Similarly, a judge commented that the bias training at the Court Officer Academy in Brooklyn was no more than a “bare bones outline.”

Requests for improvements to both judicial and non-judicial training on implicit bias or cultural competency are not new. Interviewees told us, however, that previous efforts have faced resistance from stakeholders in the system. One judge noted that previous attempts to launch a more widespread training effort for non-judicial personnel were so “vehemently rejected” that the project was canceled. This judge expressed hope that refreshed efforts today would be received more favorably. Another interviewee said that judges can be so averse to discussing topics like “white privilege” that they will reject programming developed by organizations like the Williams Commission, or will refuse to attend non-

mandatory sessions. Several interviewees mentioned that those undergoing training – judges in particular – are often unwilling to acknowledge their own biases, and chafe at the idea of a training titled as such.

## **H. Juries**

Interviewees, principally from the criminal defense bar, expressed concerns regarding juror bias. Interviewees explained that recognition of juror bias and expanded opportunities for counsel to explore biases in jury selection would allow for fairer outcomes for litigants of color.

One interviewee stated that, “[t]he most significant and sustained issue confronting our criminal system . . . is that our judiciary permit jurors with racial bias (overt and implicit) to serve as jurors, notwithstanding challenges during *voir dire*.” As a threshold issue, interviewees cited that juror education on implicit bias in decision-making is lacking. Beyond this, while one interviewee noted that some judges – predominantly Black or Latinx judges – allow defense counsel to question prospective jurors on implicit racial bias during *voir dire*, others deny counsel the opportunity to do so altogether. Defense attorneys also expressed that they simply do not have time to explore issues of racial bias during *voir dire* properly. Another interviewee stated that some judges, wanting to keep proceedings moving quickly, will deny the defense attorney the opportunity to ask questions outside of the items on the questionnaire handed out at the start of jury proceedings.

An institutional defender told us that jurors of color tend to distrust the police more or have had negative encounters with law enforcement, and noted that when jurors of color express that distrust, they are automatically struck from the pool. Meanwhile, potential jurors with family members in law enforcement do not receive the same treatment.

Interviewees also raised concerns that some judges uncritically accept the reasons that prosecutors provide when striking jurors for cause, insisting that this practice ultimately results in non-diverse juries. A former judge recalled recommending a court rule that allows for easier challenges to preemptory strikes, but found that this recommendation was met with resistance by district attorneys and judges. A defender association noted that the difficulties in a successful *Batson* challenge stem, in part, from the lack of data on the New York State court system, and juries specifically. They noted that a party will have difficulty demonstrating that a juror was struck intentionally for a race-based reason if no available data on the numbers of minorities in the jury pool could substantiate that *Batson* claim.

Finally, some interviewees noted an underrepresentation of communities of color in jury pools, citing upstate county-wide juror pools that are largely white, and barriers to jury service such as lack of transportation, daycare or the financial means to serve on a jury.

## **I. Assigned Counsel**

On the whole, feedback about the quality of legal representation provided by assigned counsel throughout the state was largely, though not entirely, negative. Family Court judges told us the quality of court-appointed attorneys has increased since the early nineties, and in pockets of the state, interviewees were pleased with the quality of assigned counsel – such as parts of the Third Judicial District, Manhattan and Westchester County.

That said, many interviewees did express disappointment with the quality of assigned counsel, the failures of which one Family Court judge noted generally tend to fall on litigants of color. One prosecutor lamented that 18-B attorneys are “the worst,” and that in her experience, they “have no training, are not knowledgeable and most do not own computers.” She added that it was “depressing” to think that 18-B attorneys are charged with representing individuals in criminal cases. A district attorney noted that the 18-B panel is “not even a shadow” of its Federal counterpart, the Criminal Justice Act Panel.

Interviewees noted that reimbursement rates for 18-B attorneys have not been increased (which must be done by the state legislature) since 2004, and saw this as largely responsible for the poor quality of representation observed. Moreover, several interviewees pointed to the fact that rates for 18-B compensation are capped at \$4,400 per case – the equivalent of 59 hours of work on a felony case, with exceptions only in “extraordinary circumstances.” In most instances, interviewees pointed out that the cap tends to incentivize attorneys to take on too many cases.

Interviewees also raised problems with a lack of diversity among 18-B attorneys, citing difficulties recruiting people of color to serve, and noting that there are too few bilingual options for litigants who are assigned counsel.

As a related matter, several interviewees focused on issues relating to when counsel is assigned in certain types of cases, claiming that assignment happens too late in the proceedings in both Family Court and Housing Court cases. Interviewees acknowledged the impact of the 2017 law establishing the right to counsel in eviction cases on tenants in New York City.<sup>205</sup> In the first year the law was implemented, there was a significant

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<sup>205</sup> The law provides that “[s]ubject to appropriation, the coordinator [of the Office of Civil Justice] shall establish a program to provide access to legal services” for low-income individuals in eviction cases in Housing Court and “shall ensure that, no later than July 31, 2022 ... all income-eligible individuals receive access to full legal

decrease in evictions in the jurisdictions where it had been rolled out. That said, one Housing Court advocate noted that the right to counsel would be even more effective if it attached at the earlier point where a litigant receives an eviction notice, not at the first court appearance, so that a lawyer has the opportunity to speak to his or her client and learn about the case before appearing at the eviction hearing.

Likewise, an organization that studies judicial administration nationally noted that its primary critique relating to assigned counsel in Family Court proceedings is that litigants are not able to secure an attorney early enough in the process.

## **J. Translation and Interpretation Services**

New Yorkers speak over 150 languages and dialects, and over 30% of New Yorkers speaking a language other than English at home.<sup>206</sup> When it comes to translation and interpretation services in court proceedings, Spanish remains the most requested language in the state. However, the number of requests for new language grows each year, particularly for Asian languages, French, Russian, Creole, and West African.

The Office of Language Access, a division of the OCA, is charged with providing translation and interpretation services to New Yorkers. The concerns we heard surrounding access to language services are far from novel. Indeed, the New York State Advisory Committee on Language Access has periodically issued reports analyzing and assessing the court system's language services and the issues regarding access. In its most recent report, "Ensuring Language Access, A Strategic Plan for the New York State Courts," published in March 2017, the New York State Advisory Committee on Language Access concentrated on the issues surrounding access and quality of language in the court system.

Like the 2017 Report, interviewees noted that access to interpreter services varies significantly across districts.<sup>207</sup> While interviewees acknowledged that the primary reason for this difference in access is lack of resources, many focused their discussions on the inefficiencies related to data collection for language services. Interviewees noted there is a disconnect between the actual supply and demand for interpreters because the current data collection system does not accurately reflect the number of cases requiring interpreters. According to the interpreters interviewed, while an interpreter may translate for twelve cases and assist five court users with filing petitions in one day, the system tracks

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representation no later than their first scheduled appearance in a covered proceeding in [Housing Court], or as soon thereafter as is practicable." N.Y.C. ADMIN. CODE. § 26-1302(a)(2).

<sup>206</sup> *Ensuring Language Access: A Strategic Plan for the New York State Courts*, New York State Advisory Committee on Language Access 1, (2017), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/language-access-report2017.pdf> [hereinafter *Language Access Strategic Plan*].

<sup>207</sup> *Id.*

daily interpreter use (not individual use) and would therefore record these numerous services as only one appearance. Thus, the data on use of court interpreters is significantly underreported and therefore the budget for language services is often insufficient.

It should be noted that interpreters we interviewed believe there is “systemic and institutional language discrimination” against both court interpreters and the litigants interpreters serve. An interpreter shared that court staff had posted signs and caricatures of interpreters inside of courtrooms and offices. One office had a sign that read, “No Interpreters Allowed.” Another sign placed on the only desk outside of a courtroom, read, “Interpreter Sits Here,” and was accompanied by an illustration of a Mexican person sleeping (or rather taking a siesta) under a sombrero. In another office, court staff posted on a notice board a caricature of an interpreter as part of “Misfit Island,” meant as an offensive reference to the Island of Misfit Toys. Court staff and judges sometimes call interpreters “*interrupters*.”

Several interpreters told us that non-Spanish interpreters do not receive the same career benefits as Spanish interpreters. With some exceptions, unlike Spanish interpreters, who are full-time employees, non-Spanish interpreters work on per diem and are therefore not eligible for labor protections or promotion to court clerk positions. This distinction is no doubt owing to basic demographics, and the much higher demand for full-time Spanish interpreters on the payroll, and the less frequent or predictable need for those who interpret other languages.

Finally, multiple interviewees shared that judges, attorneys and court personnel treat litigants of limited English proficiency poorly. Interviewees said that some judges lack the patience to deal with any confusion or delays arising from mistranslations or the assigning of an interpreter. Interviewees also shared examples of court users being forced by judges to use a language other than their first or preferred language. One interviewee told us that in a Family Court case, a Spanish interpreter was assigned to an Italian-speaking-litigant. When the interpreter told the judge that the litigant spoke Italian, not Spanish, the judge responded, “that’s basically the same thing, go on.” Interviewees asserted that court staff incorrectly assume that an individual’s inability to speak English means that the individual is unintelligent.

#### **K. Town and Village Courts**

There are approximately 1,277 Town and Village Courts currently operating across the 57 counties outside of New York City.<sup>208</sup> A number of interviewees discussed these local

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<sup>208</sup> NEW YORK STATE UNIFIED COURT SYSTEM 2019 ANNUAL REPORT 17, 43 (2020).

courts. One Town and Village justice noted that, given the number of cases these courts process each year, the justices running these courts do not receive the respect they deserve. A court interpreter working with Town and Village Courts expressed that the courts in her district are “providing good services” and added, “we all know each other. It is a good rapport.”

On the other hand, most of the comments about Town and Village Courts were negative. An OCA administrative official told us Town and Village justices disproportionately account for an outsized share of instances of judicial misconduct in the state. Legal practitioners appearing before these courts elaborated on these issues. One interviewee with 20 years of upstate practice in these courts noted that he had witnessed multiple instances of Town and Village justices “lord it over” and threaten litigants with jail time for minor infractions, such as a speeding ticket. Senior leadership at an upstate District Attorney’s office observed that Town and Village justices are often “pro-prosecution.” An upstate City Court judge remarked, “racism is at its strongest in Town and Village Courts.” One interviewee relayed a story of a justice who would tell new employees in the defender’s office about a “hanging tree” that the justice had in his backyard. Interviewees also reported a lack of diversity among the ranks of Town and Village justices. However, one district attorney noted that this lack of diversity roughly tracks the demographic breakdown of different parts of the state and that he could not recall a person of color running for justice in his area.

## VII. RECOMMENDATIONS

As stated before, many of the criticisms we heard in the course of this review can be traced to a high volume of cases and a shortage of time and resources to deal with them. These are matters that can only be addressed by an expanded investment in resources, technology, people and infrastructure – a matter for all three branches of New York State government and local governments across the state. We also heard a number of very specific and credible recommendations that were beyond the scope of this review, were beyond our capacity to objectively evaluate, or would require legislative or constitutional change. For example, practitioners in Housing Court recommended that the right to appointed counsel attach sooner than at the first court appearance;<sup>209</sup> criminal defense practitioners expressed concern about the diversity of juror pools and recommended that New York adopt a rule similar to that in Washington state to lower the bar for *Batson* challenges in jury selection.<sup>210</sup> In our view, each of these recommendations deserve careful debate and consideration by practitioners and judges who work in these courts on a daily basis.

Chief Judge DiFiore asked for recommendations on “operational issues that lie within the power of the court system to implement administratively and unilaterally, rather than on proposals for legislative practices.” We worked hard to meet that mandate, and develop recommendations that are specific, practical and implementable.

Here are those recommendations:

### **A. A Commitment From the Top**

A consistent message we heard in our review, from judges, attorneys, court officers and other non-judicial personnel is that “change needs to come from the top.” Interviewees highlighted that public pronouncements and reports on the court system frequently do not articulate a race and equity agenda. For example, neither the Chief Judge’s “Excellence Initiative,” nor the New York City Family Courts’ recently released “vision document,” articulate any explicit standards or goals related to race and equity or diversity and

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<sup>209</sup> Specifically, as discussed in Section VI *supra*, advocates suggested that the right to counsel in eviction cases, which was legislatively expanded in 2017, would be even more effective if it attached at the point where a litigant receives an eviction notice, so that a lawyer has the opportunity to speak to his or her client and learn about the case before appearing at the eviction hearing. See N.Y.C. Admin. Code. § 26-1302.

<sup>210</sup> As discussed in Section VI *supra*, in 2018, Washington State Courts recently adopted General Rule 37 to eliminate the exclusion of potential jurors based on race or ethnicity. See *generally* Wash. Gen. R. 37. The Rule disallows peremptory strikes when, under the totality of the circumstances, an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge. *Id.* Under Rule 37, an objective observer is aware of “implicit, institutional, and unconscious biases, in addition to purposeful discrimination.” Wash. Gen. R. 37(f).

inclusion. As one group of judges also told us, “battling systemic racism needs to be perceived as an ongoing goal for the courts, not a response to a public scandal.” As a point of comparison, interviewees frequently cited the “zero tolerance” approach mandated by the legislature for all state personnel when it comes to sexual harassment over the last several years, leading to a “culture shift” and increased reporting of complaints of sexual harassment.

We therefore recommend that OCA leadership embrace a “zero tolerance” policy for racial bias, along with an expression that the duty to uphold this policy extends to all those working within the New York state court system – from judges, interpreters to court officers. While we note that OCA’s current discrimination policies state that “The Unified Court System prohibits and will not tolerate . . . discrimination or harassment” on the basis of race, we suggest a more robust, publicized policy specifically addressing racial bias is warranted.<sup>211</sup>

## **B. Promote Existing Institutions**

Interviewees across the board were unfamiliar with the existing institutions tasked with addressing issues of racial justice. For example, and as we noted before, few interviewees understood the scope and responsibilities of the Williams Commission or OCA’s Office of Diversity and Inclusion. Several interviewees had not even heard of these organizations, which is a great disservice to their efforts in this area over the years. We endorse the continued missions of the Williams Commission and the Office of Diversity and Inclusion; they simply need more of a platform, further incorporation into broader OCA initiatives, increased consultation and face-time with OCA leadership and more funding in order to carry out their missions.

A judge who is a member of the Caribbean American Lawyers Association stressed to us that when it comes to combating racial bias on an institutional level, the key is “transparency, transparency, transparency.” Another judge and member of the Association added that “if you cannot explain how a process works, there is probably something wrong with that process.”

From our interviews, however, it is apparent that there is a considerable lack of transparency within the court system when it comes to addressing matters of race and racial bias. We also found that there is scarce accurate, up-to-date information about existing practices publicly available – particularly in the realms of data stewardship practices, hiring and promotion practices, complaint procedures, to name a few.

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<sup>211</sup> OCA Discrimination Claim Policy & Procedure, *supra* note 176, “Introduction.”

In addition to promoting and incorporating dedicated organizations like the Williams Commission, we recommend that OCA review the scope, precise duties and authorities of any and all organizations addressing racial bias in the court system. We believe these efforts will ultimately help OCA better clarify and delineate the precise roles of these overlapping and complex organizations, facilitate a broader conciliation of where these organizations have ossified or evolved and identify any gaps within these structures. We also recommend that OCA promulgate a guide that can be used as a resource for OCA personnel, litigants and partner organizations.

### **C. Expand Bias Training**

On August 5, 2020, the co-chairs of the Williams Commission wrote to Chief Judge DiFiore to recommend regular, mandatory training on bias for all judicial and non-judicial personnel across the court system. We agree.

Countless interviewees told us that both mandatory implicit bias and cultural sensitivity training are long overdue for judicial and non-judicial personnel in the New York state court system. At present, it appears that such training is both inconsistent and insufficient.

Judges are not above the reach of the implicit racial and cultural biases that pervade our society, yet equality before the law requires them to be. Multiple judges we spoke with were willing to acknowledge their own implicit biases and recognized the value of training to open minds and challenge stereotypes. Enhanced training of judges on the nuances of racial and cultural bias is in our judgment a crucial step towards alleviating racial injustice throughout the court system. A study, recognized by the New Jersey State Bar Association on the implicit bias held by judges and the connection to the disparate outcomes in the criminal justice system, showed that training judges “can reduce and/or mitigate the prospect that implicit bias will affect judicial decision-making and outcomes.”<sup>212</sup> Further, as a judicial association told us, there is little to no testing of judges’ susceptibility to implicit bias nor any analysis of judges’ own decisions, and that therefore “judges are less likely to appreciate and internalize the risks of implicit bias.”<sup>213</sup> Yet, as further described in Section VI above, judges are not uniformly required to attend trainings on these topics at present, and often elect not to, when given the choice.

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<sup>212</sup> Sharon Price-Cates, *Implicit Bias New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials*, N.J. LAW, Aug. 2018 65, 66 (citing Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009)).

<sup>213</sup> *Report to the New York State Court’s Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS’N. 1, 27 (Aug. 31, 2020), <https://www.urbanyny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf>; see also Siri Carpenter, *Buried Prejudice: The Bigot in Your Brain*, SCI. AM. MIND, Apr./May 2008, 1, 32.

We perceive an equal if not greater need for more robust bias racial bias and cultural sensitivity training for non-judicial personnel, particularly the court officer community. As discussed previously, interviewees have relayed innumerable stories of dehumanizing language by court officers towards litigants of color, as well as instances where tensions were directly escalated by courts officers' actions. Because court officers, as a group, interact with all court users – from the moment they enter the courthouse, in the hallways and waiting areas and in the courtroom – court officers should be better trained to deal with the many issues that can arise by these touchpoints. Interviewees suggested that training needs to help court officers understand that they are pivotal players in the administration of justice, and are not simply there to keep order.

In all, it appears there is no centralized body charged with developing, administering, tracking and updating training on implicit bias and cultural sensitivity for judicial and non-judicial personnel. For non-judicial personnel, tailored racial bias and cultural sensitivity training is not widely promulgated by OCA, if at all. Specific trainings for court officers are not adequate. While judicial bias training is slightly more centralized, and is required for new judges, we believe OCA should undertake uniform attendance and ongoing, robust engagement. Interviewees frequently contrasted training efforts on issues of racial and cultural bias to those relating to sexual harassment, suggesting that if OCA can require and track attendance for trainings on the latter, they have the capacity to do the same for the former.

As such, we recommend that OCA develop and require comprehensive racial bias and cultural sensitivity training for both non-judicial and non-judicial employees, informed by experts in these fields to ensure more relevant and nuanced discussions. Such training must acknowledge that issues of racial and cultural bias are intersectional<sup>214</sup> – addressing that discrimination on the basis of race often overlaps with those relating to class, gender, sexual orientation, immigration status, and beyond. In particular, racial bias and cultural sensitivity training must incorporate education on trauma, which many interviewees noted is critical for any personnel – judicial or non-judicial – who interact with litigants regularly. Further, we agree with the Center for Court Innovation that training is most effective when it does “not merely cover abstract ideas but [is] specific to the relevant OCA setting and include[s] concrete examples of behaviors and decisions that the trainee should and should not make, including how to respond when witnessing unacceptable or questionable

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<sup>214</sup> The term “intersectional” was coined by celebrated legal scholar Kimberlé Crenshaw over thirty years ago to refer to the compounding discrimination that black women face on account of both their race and their gender, however, in popular discourse today, it encompasses a variety of crosshatched identities, such as those listed above. See Merrill Perlman, *The Origin of the Term “Intersectionality,”* COLUM. JOURNALISM REV. (Oct. 23, 2018), [https://www.cjr.org/language\\_corner/intersectionality.php](https://www.cjr.org/language_corner/intersectionality.php).

behavior by others in a court space.” We also agree with CCI’s recommendation to us that all trainings be designed “to ensure real accountability for the information having been appropriately conveyed and internalized.” Finally, training should be mandatory, tracked by OCA to ensure participation, and conducted regularly for all judges and non-judicial employees.

#### **D. Address Juror Bias**

Interviewees expressed to us a number of concerns about juror bias. While there is no single panacea to this problem, we have carefully considered and recommend below certain steps that can be implemented to alleviate issues of racial bias in jury selection and deliberation:

*First*, create and display a video educating jurors about implicit bias before *voir dire*. We understand that in many, if not all, state courthouses where jurors are summoned and selected for trials, prospective jurors are shown a general orientation video. A range of interviewees, including one district attorney, raised the possibility of including within the orientation video a segment on implicit racial and cultural bias. As noted by the National Center for State Courts, an orientation video that includes a segment on implicit bias would not be unprecedented.<sup>215</sup> For example, the United States District Court for the Western District of Washington introduced an implicit bias video for jurors in 2017.<sup>216</sup> Since then, a number of other courts have either used this video or produced their own implicit bias program.<sup>217</sup> We recommend that OCA review exemplars of such videos, such as the Washington State video, and work with court personnel, outside experts and members of the bar to create OCA’s own carefully balanced video on implicit bias that can be shown to venire panels of jurors.

*Second*, we recommend that the Chief Judge appoint a new or standing committee to investigate and formulate a proposal to create uniform rules to explicitly permit and endorse addressing juror bias during *voir dire*. Trial attorneys have told us that the practice

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<sup>215</sup> *Juror Videos*, NAT. CTR. FOR STATE CTS. – CTR. JURY STUDIES, <http://www.ncsc-jurystudies.org/juror-videos> (last visited Sept. 24, 2020).

<sup>216</sup> See U.S. Dist. Ct., W.D. Wash., *Unconscious Bias*, YOUTUBE (Mar. 31, 2017), <https://www.youtube.com/watch?v=XHu-zUet8Tw>.

<sup>217</sup> See, e.g., *Unconscious Bias Video for Potential Jurors*, U. S. DIST. CT. N. D. CAL., <https://www.cand.uscourts.gov/attorneys/unconscious-bias-video-for-potential-jurors/> (last visited Sept. 24, 2020); Chao Xiong, *Minnesota courts lag federal counterpart in using implicit bias video*, MINN. STAR TRIB. (Sept. 3, 2019), <https://www.startribune.com/minnesota-courts-lag-federal-counterpart-in-using-implicit-bias-video/558975162/> (noting that the Washington implicit bias video is a “common part of juror orientation in federal court in Minnesota”); *Memorandum from the Office of the State Court Administrator to Members of the Oregon State Bar*, OFFICE OF THE STATE CT. ADMINISTRATOR (Jul. 8, 2020), <https://www.osbar.org/docs/resources/OSCMessages/Unconscious-Bias-Juror-Video.pdf>.

of permitting *voir dire* on the subject of implicit bias is inconsistent, and that certain judges allow *voir dire* on such questions, while others do not. We believe the system would benefit from explicit guidance on this issue, and we recognize that it is beyond the scope of our expertise to prescribe such guidance as a part of this review. As such, we propose that a diverse committee of judges, attorneys, professors and/or subject area experts be consulted in drafting a proposal. It is our understanding the Chief Judge has the authority to then authorize such changes.<sup>218</sup> Ideally, these standards would explicitly permit and endorse *voir dire* on questions of implicit bias.

*Third*, we recommend pattern jury charges on implicit bias. A number of courts around the country, such as in California and Washington, have adopted jury charges that explain the concept of implicit bias and remind the members of the jury to be aware of their implicit biases.<sup>219</sup> More recently, the New Jersey Supreme Court adopted a proposal to examine, among other issues, the propriety of model jury instructions on impartiality and implicit bias.<sup>220</sup> We recommend that OCA request that a new or standing committee, such as the Committee on Criminal Jury Instructions, develop model jury instructions on implicit bias for both civil and criminal cases.

#### **E. Adopt a Social Media Policy**

As discussed previously, the recent highly offensive social media post by a Brooklyn-based court officer came up countless times during our interviews. One interviewee noted that social media posts are a growing source of racial bias complaints among court employees, and others opined that such posts are strongly correlated with racially biased behavior and mistreatment of people of color within the courthouse. OCA currently has no policy explicitly governing employees' personal use of social media.

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<sup>218</sup> The New York State Constitution provides the Chief Judge with supervisory responsibility to “establish standards and administrative policies for general application.” See N.Y. CONST. art. VI, § 28(c). This authority includes power over the “adoption, amendment, rescission, and implementation of rules and orders regulating practice and procedure in the courts.” N.Y. JUD. § 211(b). Once the appointed committee drafts its proposed rule establishing uniform rules on the subject of bias during *voir dire*, the Chief Judge, in consultation with the Chief Administrative Judge and the Administrative Board of OCA could implement such a change. See *id.*

<sup>219</sup> See, e.g., Kris Olson, *New jury instructions take aim at implicit bias*, MASS. LAWYERS WEEKLY (Jun. 20, 2019), <https://masslawyersweekly.com/2019/06/20/new-jury-instructions-take-aim-at-implicit-bias/>; *Criminal Jury Instructions*, U.S. DIST. CT. W. D. WASH., <https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf>; *California Civil Jury Instructions*, CACI No. 113, JUD. COUNCIL CAL. (2020) [https://www.courts.ca.gov/partners/documents/Judicial\\_Council\\_of\\_California\\_Civil\\_Jury\\_Instructions.pdf](https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf); Illinois Circuit Court Civil Jury Instruction 1.08, ADMIN. OFFICE ILL. CTS. (May 2019) <https://courts.illinois.gov/CircuitCourt/CivilJuryInstructions/1.08.pdf>.

<sup>220</sup> See *Commitment to Eliminating Barriers to Equal Justice: Immediate Action Items and Ongoing Efforts*, N. J. JUD. (Jul. 16, 2020), <https://www.njcourts.gov/public/assets/supremecourtactionplan.pdf>.

We recommend that OCA develop a policy for judicial and non-judicial personnel that provides clear guidance and limits on the use of social media – whether in an official or personal capacity – in a manner that has negative implications for the New York state court system. Our reading of the law is that such a policy is legally permissible.

To be sure, public employees have a right under the First Amendment and Article I, Section 8 of the New York State Constitution to freely express themselves in their own personal use of social media, particularly when it comes to matters of public concern. Employees also have a statutory right under the National Labor Relations Act to use social media to organize and address the terms and conditions of their employment.<sup>221</sup> However, courts have held that a public employer may limit and discipline certain public speech that is offensive and reflects poorly on the employer.

In general, state employers cannot “condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *Connick v. Meyers*, 461 U.S. 138, 142 (1983). However, employees who speak on subjects related to their official duties receive less First Amendment protection. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that district attorney who wrote a memo recommending dismissal of criminal charges based on a deficient warrant and who later testified on behalf of the defense did not enjoy First Amendment protection because his speech pertained to his official duties). Likewise, employees may be disciplined for off-duty speech that is unrelated to their official duties if there is a government justification “far stronger than mere speculation” that the speech will interfere with efficient delivery of public services. *See, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004) (holding that police department could discipline officer who identified himself as a member of law enforcement when selling videos of himself stripping online because he “took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer.”)

Federal Courts in the Second Circuit have held that disciplining an employee for off-duty, non-work-related speech does not violate the First Amendment if “(1) the employer’s prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.” *Locurto v. Giuliani*, 447 F.3d 159, 172-73 (2d Cir. 2006) (citing *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir.1995)). In *Locurto*, a police officer and firefighter were fired after participating in a Labor Day “funniest float” parade contest in which their float mocked Black people and the Civil

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<sup>221</sup> 29 U.S.C. §§ 151–69.

Rights movement in various ways including recreating the dragging death of James Byrd Jr.<sup>222</sup> More recently, a federal district court applied *Locurto*'s reasoning in the context of social media when ruling on a motion to dismiss in *Festa v. Westchester Medical Ctr. Health Network*, 380 F. Supp. 3d 308 (S.D.N.Y. 2019). The plaintiff in that case, a compliance coordinator for a public hospital, logged onto Facebook one evening on her personal computer and commented on a local news channel's page that it was "too bad" a funnel cloud projected to affect the area of a Hasidic community "didn't suck them all away." The court stated that the public hospital could reasonably conclude that the employee's post would disrupt its ability to serve the local community and "cause harm within the ranks" of the hospital "by promoting resentment and mistrust." *Id.* at 319, 321.

We note that other court systems around the country have implemented social media policies to ensure that employees' online activity does not undermine public confidence in the operation of the courts and the application of justice.<sup>223</sup> For example, the Nebraska State Supreme Court prohibits its employees, in their personal capacities, from posting "[s]tatements, comments, or images that disparage any race, religion, gender, sexual orientation, disability, or national origin," as well as "any communication that engages in personal or sexual harassment" or that "would contribute to a hostile work environment" on racial, sexual, or religious grounds.<sup>224</sup> The Colorado Judicial Department more broadly prohibits employees from "making statements which negatively reflect on the professionalism of the courts . . . or which otherwise have an adverse effect on the confidence of the public in the integrity, propriety and impartiality of the judicial system."<sup>225</sup>

We recommend that OCA, after consultation with stakeholders, issue a social media policy for its personnel along the same lines. A social media policy may prohibit communications that constitute harassment or racially offensive remarks, but should be

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<sup>222</sup> James Byrd Jr. was a Black man who, months before the parade, had died after being chained to the back of a moving pickup truck by three white men. See, Juan A. Lozano, *Texas Town Reflects on Dragging Death Ahead of Execution*, AP NEWS (Apr. 21, 2019), <https://apnews.com/b3097455f1ab499695fa2553ed636258>.

<sup>223</sup> See, e.g., Directive Concerning Colorado Judicial Department Employee Policies, Chief Justice Directive 08-16, OFFICE CHIEF JUST. 1, 19 (June 28, 2013), <https://www.courts.state.co.us/userfiles/file/Administration/HR/Policies/CJD%2008-06%20amended%2007-13.pdf> [hereinafter Colorado Judicial Department Social Media Directive]; *Nebraska Non-Codified Supreme Court Rules and Best Practice Guidelines and Standards, Other Personnel-Related Policies: Social Media*, NEB. JUD. BRANCH, <https://supremecourt.nebraska.gov/personnel-and-miscellaneous-rules/other-personnel-related-policies/2-use-social-media> (last visited Sept. 24, 2020) [hereinafter *Nebraska Judicial Branch Social Media Policy*].

<sup>224</sup> *Nebraska Judicial Branch Social Media Policy*, *supra* note 224.

<sup>225</sup> Colorado Judicial Department Social Media Directive, *supra* note 224.

drafted in a way that will not prohibit protected activities under the National Labor Relations Act.

## **F. Strengthen the IG Process for Bias Complaints**

Numerous interviewees also expressed concerns and uncertainties about OCA's policies and procedures for handling complaints of racial bias and discrimination. After consulting a retired Inspector General with extensive experience in the U.S. government and other sources, we recommend that OCA adopt the following best practices to improve its complaints and investigations processes.

*First*, given the number of interviewees – judicial and non-judicial – who were unaware that mechanisms for making bias complaints even existed, we recommend that OCA engage in a robust campaign to educate court system participants about the existence and purpose of these offices and the procedures to lodge a bias complaint. This should include training for all personnel on how to submit a complaint of racial bias and discrimination, and conspicuous signage in courthouses advertising the existence of these offices. As one expert in inspector general policies and procedures suggested, it should be made clear that OCA's IG office, including its Bias Matters Unit, exists not only to identify waste, fraud and abuse, but also to address matters of racial bias.

*Second*, we recommend that OCA clarify its “no retaliation” policy in order to better assuage concerns that interviewees across the spectrum cited about filing complaints. While the current policies state that retaliation is prohibited, the definition of retaliation provided in OCA's discrimination booklet is narrow, difficult to understand and only provides a few examples of very formal, work-related retaliation, such as termination or a demotion with a decrease wage or in salary.<sup>226</sup> The policy does not indicate that more informal or non-work related forms of retaliation are also prohibited, such as making disparaging comments about the complainant to others, or scrutinizing work or attendance more closely than other employees without justification – which may be considered “retaliation” under federal law.<sup>227</sup> We recommend that, similar to the EEOC's Enforcement Guidance on Retaliation and Related Issues, the revised policy more broadly define retaliation, and provide specific examples of both informal and formal, as well as work related and non-work related forms of retaliation.<sup>228</sup> Similarly, the policy should

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<sup>226</sup> The policy states that “examples of forms of retaliation may include termination of employment, a demotion with a decrease in wage or salary, a significant loss of benefits, or a transfer,” that may raise to a violation of “UCS policy [and] state and federal laws.” *OCA Discrimination Claim Policy & Procedure*, *supra* note 176 at 16.

<sup>227</sup> *Equal Employment Opportunity Commission Enforcement Guidance on Retaliation and Related Issues*, No. 915.004, OFFICE OF LEGAL COUNSEL (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#B>.

<sup>228</sup> *Id.* (citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)).

clearly identify a simple and confidential path to lodging a complaint against one's supervisor, and steps that may be taken to proactively protect complainants who do so from retribution, aside from the availability of an ex-post retaliation claim.

*Third*, we recommend that OCA update its policies and publicly available resources to more clearly explain that complaints may be made anonymously. As further discussed in Section VI above, while the Managing Inspector General for Bias Matters technically does accept and investigate anonymous complaints received through its complaint form and complaints hotline, over email, and from referrals from other bodies, we understand that OCA does not advertise this fact outside of in-person presentations to stakeholders. Additionally, its complaint form appears to require claimants to authorize the use of their name in investigating claims.<sup>229</sup> We understand that the Commission for Judicial Conduct will receive and investigate anonymous complaints, and will take steps to protect the confidentiality of complainants such as by filing a complaint itself, rather than in the complainants' name.

That said, neither the website for the Managing IG for Bias Matters nor the Commission on Judicial Conduct's website contain any information pointing to one's ability to submit anonymous complaints. Thus, it was unsurprising that interviewees were almost unanimously unaware that complainants can file complaints anonymously. Across the board, interviewees suggested that permitting anonymous complaints is not only a "best practice," but is necessary to building trust and encouraging complaints. OCA's outward guidance should be updated to make the anonymous complaint process abundantly clear, particularly in its written materials and guidance. In order to further facilitate lodging complaints, particularly anonymous ones, the IG's office might also consider enabling a system for the electronic filing of complaints with the IG for Bias Matters, so that complainants do not have to use email in order to submit a complaint virtually.<sup>230</sup>

*Fourth*, we recommend that OCA update and clarify its current public guidance as to informal complaint mechanisms. The current guidance includes (i) referring the complaint to "anti-discrimination panels," (ii) directing a complaint to one's supervisor and (iii) directing a complaint to the administrative office or administrative judge of the judicial district in which the offending act is alleged to occur.<sup>231</sup> We understand, however, that anti-discrimination panels are now largely defunct and, according to several interviewees, were not a dependable or consistent means of resolving issues when they did operate. As

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<sup>229</sup> *Claim of Discriminatory Treatment Form UCS-18*, N.Y. STATE UNIFIED CT. SYS. OFFICE INSPECTOR GEN. <http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/ClaimDiscrimTreatment.pdf> (last visited Sept. 22, 2020).

<sup>230</sup> Our understanding is that this is consistent with the practice of the Commission on Judicial Conduct.

<sup>231</sup> *OCA Discrimination Claim Policy & Procedure*, *supra* note 176 at 11-12.

such, we recommend that OCA formally disband the now-defunct panels and update its materials to clearly reflect that this is not an available means of resolving complaints.

*Fifth*, consistent with confidentiality concerns, we recommend that, following a complaint, OCA follow up and apprise the complainant of the status of the investigation initiated by the complaint, and, to the extent permitted, apprise the complainant of the outcome of the investigation. We are advised by an experienced retired IG that this simple act goes a long way to promote credibility and confidence in the process. Interviewees frequently lamented a lack of transparency in the complaint procedures arising from a dearth of communication from investigating bodies to complainants, leading to perceptions that the complaint system is ineffective. Indeed, OCA's online booklet titled "*Discrimination Claim: Policy & Procedure*," describing its discrimination policies and procedures, states that the IG's Office will confirm receipt of a claim within two weeks and complete the investigation, in most circumstances, in 45 days.<sup>232</sup> Moreover, while the policies note that complainants will be notified of the final determination of the Deputy Chief Administrative Judge,<sup>233</sup> at least one interviewee familiar with the process expressed that this does not always happen in practice. The policies do not otherwise require the IG to share with the complainant anything about the status of the investigation while it is pending; rather, the onus appears to be on the complainant to seek additional information from the investigator.<sup>234</sup>

To instill confidence in the investigatory process, we recommend that, consistent with its obligations to keep investigations confidential, the IG's office proactively communicate important timelines and procedures with complainants up front, and that they communicate meaningful investigatory updates to complainants with reasonable frequency. We suggest that, should an investigation extend beyond the typical 45-day window, that complainants are affirmatively provided an update every 30 days. Finally, we recommend that complainants be informed when the IG's office has completed its investigation and whether the complaint was substantiated or not. Complainants should also be informed when the Deputy Chief Administrative Judge has come to a decision about whether take personnel action, and where appropriate, of the actions taken.

*Sixth*, we recommend that OCA designate an ombudsperson within the IG office. Interviewees raised a lack of understanding as to how to discern between the numerous avenues for lodging a complaint. Likewise, our review of the various OCA policies shows that there is little guidance on how to do so. We suggest an ombudsperson to advise

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<sup>232</sup> *Id.* at 13.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

potential complainants of their options for registering their concerns. We note that several state court systems and federal agencies maintain similar offices to help individuals navigate various complaints systems.<sup>235</sup> In enabling the ombudsperson, it must be made clear that this individual is not an investigating authority in any capacity; instead, to avoid conflicts with the integrity of the investigating bodies procedures, the ombudsperson should purely be made available to help complainants navigate OCA's mechanisms for lodging complaints.

*Seventh*, we recommend that OCA track and annually report the number of racial bias or race discrimination complaints received, investigated and where possible, those substantiated. Interviewees told us that without a public accounting of how complaints are resolved, the community's perception is that there are no consequences for incidents of racial bias. Such a report could be sent to the Chief Judge by both the Commission for Judicial Conduct and the IG for Bias Matters, and, to the extent possible, should be made public.

### **G. Review of Rules Changes for Bias**

Next, we recommend that one of the existing institutions for addressing bias – the Williams Commission, the IG for Bias Matters, or the Office of Diversity and Inclusion – be tasked with the standing responsibility to review legislation, proposed constitutional amendments, regulations and rules changes pertaining to the state judiciary for any potential disparate impact or bias on people of color. Any concerns should be conveyed to the Chief Administrative Judge as they arise. This was suggested to us by the National Center for State Courts and there is precedent for it among government agencies. For example, the U.S. Department of Homeland Security's Privacy Office has among its responsibilities the evaluation of all DHS-related legislation and proposed regulations that involve the disclosure of personally identifiable information.<sup>236</sup>

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<sup>235</sup> See, e.g., *Ombudsman for Attorney Discipline*, TEX. JUD. BRANCH, <https://www.txcourts.gov/organizations/bar-education/ombudsman-for-attorney-discipline/> (last visited Sept. 22, 2020); Administrative Order No. 05-9 Establishing an Ombudsman Program for the Fourth Judicial Circuit of Illinois (Ill. Ct. App. 2005); *Ombudsman Edward T. Zrubek*, DEP'T DEFENSE OFFICE INSPECTOR GEN., <https://www.dodig.mil/Offices/Ombudsman/> (last visited Sept. 8, 2020); *Whistleblower Protection Ombudsman*, U.S. OFFICE INSPECTOR GEN. DEP'T TRANSP., <https://www.oig.dot.gov/about-oig/whistleblower-ombudsman#:~:text=The%20Inspector%20General%20has%20designated,their%20specific%20rights%20and%20remedies> (last visited Sept. 8, 2020).

<sup>236</sup> *Department of Homeland Security Privacy Office*, U.S. DEP'T HOMELAND SEC., <https://www.dhs.gov/topic/privacy#:~:text=The%20Department%20of%20Homeland%20Security,to%20reduce%20the%20privacy%20impact> (last visited Sept. 21, 2020).

## **H. Continue Progress on Translation and Interpretation Services**

As noted before, New Yorkers speak over 150 languages and dialects, and over 30% of New Yorkers speaking a language other than English at home.<sup>237</sup> When it comes to translation and interpretation services in court proceedings, Spanish remains the most requested language in the state. However, the number of requests for new languages grows each year.

We note that in 2017 the New York State Advisory Committee on Language Access issued a “Strategic Plan” for implementing a number of strong recommendations to improve translation and interpretation services throughout the state, and we are told implementation of these recommendations is underway.<sup>238</sup> We have heard positive feedback about implementation of the Strategic Plan, and we endorse the Plan’s recommendations.

Beyond the 2017 Strategic Plan, as described in Section VI, in the course of this review we heard a number of concerns about the disparate treatment of interpreters. Therefore, problems facing translation and interpretation staff should be fully incorporated into the court system’s efforts to improve education of judicial and non-judicial personnel on cultural sensitivity and implicit bias, diversity and inclusion and ensuring accountability for incidents of racial bias.

## **I. Improve Data Collection and Stewardship Practices**

We regret to report that the New York State court system is far from cutting edge when it comes to understanding and combatting racial bias in case outcomes, and that its data collection and publication practices have fallen behind those of other states. Interviewees stressed that data collection and analysis on case outcomes is critically important to identifying the points at which racial disparities exist, and the first step to remedying bias in the court system. However, as a threshold issue, several interviewees pointed out that OCA’s current data landscape is incredibly opaque: even in our experience conducting this review, it was exceedingly difficult to ascertain the types of case outcome data that are collected, how they are collected, who they are shared with and where and whether they may be accessed publicly. We spoke with several organizations that have sought to partner with OCA in studying racial disparities through case outcome data, including national leader in this space, Measures for Justice, and the consensus was that the lack of transparency in OCA’s data practices has prevented a meaningful accounting of where to

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<sup>237</sup> *Language Access Strategic Plan*, *supra* note 207, at 1.

<sup>238</sup> *Id.*

even begin in improving them. As such, in addition to the following narrow recommendations, we first suggest that OCA publish a report or detailed “FAQ” explaining the nature and extent of its current data collection and stewardship practices across UCS.

**Data Collection for Criminal Cases.** Interviewees informed us that the Police Statistics and Transparency Act (the “STAT Act”) signed into law by Governor Cuomo on June 15, 2020, requires OCA to compile and publish data, including the race and ethnicity of the individual charged, for “misdemeanor offenses and violations” – with required monthly updates.<sup>239</sup> Felony data is not included within the ambit of the STAT Act. Additionally, New York State’s budget for the 2020-2021 fiscal year included amendments to the bail reform law that was passed in 2019, requiring that OCA, in conjunction with the State Division of Criminal Justice Services (“DCJS”), compile and publish data on pretrial release determinations, which will include the race, ethnicity, and gender of the individual charged.<sup>240</sup> The law requires OCA to publish reports containing the aforementioned data on its website every six months.

While we support these legislative efforts to increase data collection and transparency, we stress that they must be implemented carefully and uniformly, and should be expanded upon to include robust, multivariable data on felonies as well.

*First*, as Measures for Justice pointed out, unless data collection under the STAT Act or any other legislation is executed with sufficient standards of uniformity and quality control, it will not be useful for meaningful analysis. OCA should transparently disclose its procedures and standards for collecting and auditing data under this type of legislation, and disclose the underlying data publicly, so that independent organizations can, test, corroborate and analyze it as well. One critical component of this recommendation is ensuring accurate data entry. Interviewees have cited widespread problems with accurate data entry in the past, noting that the data collected is often inconsistent or was missing for critical fields. For example, one criminal justice organization that requested data from

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<sup>239</sup> S.B. 1830C, 2019-2020 Legis. Reg. Sess., (N.Y. 2019). Pursuant to the STAT Act, OCA is required to compile and publish data on the race, ethnicity, and sex of the individual charged; whether the individual was subject to a custodial arrest and/or was held prior to arraignment; the disposition of the case; in the case of dismissal, the reasons therefor; and the sentence imposed, including fines and surcharges. *Id.*

<sup>240</sup> S.B. 7506B, 2019-2020 Legis. Sess. (N.Y. 2020). Also collected are the criminal offense; whether the individual was released on recognizance, released with conditions, or remanded; the length of pre-trial detention, if applicable; failure to appear at court dates, if applicable; and pretrial re-arrests, if applicable. *Id.* We also acknowledge that the New York State Justice Task Force, in a February 2019 report, similarly recommended that OCA report data on pretrial release determinations, including detention requests by prosecutors. *Report on Bail Reform*, N.Y. STATE JUST. TASK FORCE (Feb. 2019), <http://www.nyjusticetaskforce.com/pdfs/ReportBailReform2019.pdf>. Although the bail reform amendments do not require the publication of detention requests by prosecutors, the substance of the Justice Task Force’s recommendations are encompassed by the new reporting requirements.

OCA several years ago reported that the bail amount was missing in 82% of the dockets they received and the bail decision was missing in 40% of the dockets. While the recently enacted legislative reporting requirements cited above should ameliorate this problem to a certain degree, placing more emphasis on proper training and resources for clerks will help ensure that data collection is consistent in all the courts within the court system. As such, we also recommend that OCA increase training provided to court clerks and establish data collection rules mandating that all applicable data fields are populated.

*Second*, we recommend that OCA expand on the publication required by the STAT Act and the bail reform amendments and publish those same categories of data – the race, ethnicity, and sex of the individual charged, whether the individual was subject to custodial arrest and/or was held prior to arraignment, pretrial release determinations, the disposition of the case or reasons for a dismissal and the sentence imposed – for felony offenses. We understand that OCA collects some data, disaggregated by race, on the disposition of felony, violent felony, drug felony, and misdemeanor arrests, and that this data is publicized by DCJS.<sup>241</sup> However, as Measures for Justice noted, “the devil is in the details,” and at present, the data currently collected is insufficient in that (1) it only provides the disposition of the arrests and does not include other important data, such as pretrial release determinations, and (2) it only provides aggregate numbers and does not break the data down according to each individual charged. While appropriate for rudimentary analysis, collection of additional measures would allow for a “multivariable” analysis at the individual case level (fully anonymized, of course), which is necessary to allow the data collected to produce meaningful study of disproportionate racial impacts throughout different touchpoints within the criminal justice system.

To illustrate, we understand that while basic measures such as case disposition and the race of the defendant are available, without more nuanced additional factors, such as whether the defendant was represented, avenues for robust analysis are extremely limited. Interviewees identified other aspects or factors within the criminal justice system that they claim are prone to racial bias and disproportionately disadvantage people of color, for example, use of plea agreements, rates of referral to alternative sentencing and diversion programs, and the use of algorithmic bail reform tools. As such, in addition to mandating *uniform* data collection, we also recommend that OCA consider collecting, monitoring and publishing these additional data points – both for felony and misdemeanor cases in New

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<sup>241</sup> *Dispositions of Adult Arrests by Race/Ethnicity, County, and Region*, DIV. CRIM. JUST. SERVS., <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispositions-adult-arrest-demographics.html> (last visited Sept. 22, 2020).

York – to ensure that justice is dispensed in a racially equitable fashion in all parts of the criminal justice system.

In support of these recommendations, we note that multiple other states and cities engage in more widespread data collection and publication efforts than New York’s, even considering these legislative advancements. In March of 2018, the state of Florida passed legislation requiring courts and law enforcement agencies across the state to collect about 140 different data points for criminal cases and report it to a central repository, Florida’s Department of Law Enforcement, where it will be published online.<sup>242</sup> Some of the data points include pretrial release determinations, the precise terms of plea deals, and sentencing decisions.<sup>243</sup> California launched a data initiative, Open Justice, which publishes criminal justice data per county in an online portal, and includes misdemeanor and felony arrests and disposition of juvenile cases.<sup>244</sup> The City of New Orleans has a Racial Disparity Dashboard, which tracks racial disparities at three points in the criminal justice system: arrests/charges, bail amount and sentencing.<sup>245</sup>

**Use of Criminal Outcomes Data.** With regards to use of data collected in criminal cases, we recommend that OCA *consider* the recommendation submitted to us by the Judicial Friends Association that data be made available to individual judges on the disposition of their criminal cases, disaggregated by penal law, race, ethnicity, age and sex of defendants.<sup>246</sup> Although Judicial Friends only recommends that criminal judges be given reports on the disposition of their cases, we suggest that the reports include the other data points required by recent legislation and recommend above, including: whether the individual was subject to custodial arrest and/or was held prior to arraignment, pretrial release determinations, use of plea agreements, referral to alternative sentencing and diversion programs and the use of algorithmic bail reform tools. We recognize the many potential limitations and possible misleading indicators inherent in such an analysis, including, for example, the demographics of the venue where a judge sits and the nature of the cases the judge hears. We also recognize that such an analysis, if not performed

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<sup>242</sup> Jason Tashea, *Liberating criminal justice data: How a Florida law provides a blueprint for the nation*, ABAJOURNAL, June 18, 2019, <https://www.abajournal.com/web/article/liberating-criminal-justice-data-how-a-florida-law-offers-a-blueprint-for-the-nation>.

<sup>243</sup> S.B. 1392, Reg. Sess. (Fla. 2018).

<sup>244</sup> *Data Portal*, OPEN JUSTICE, (Sept. 23, 2020, 10:25 PM), <https://openjustice.doj.ca.gov/data>.

<sup>245</sup> *Racial Disparity Dashboard*, NEW ORLEANS CITY COUNCIL, <https://council.nola.gov/committees/criminal-justice-committee/#racial-disparity-dashboard> (last visited Sept. 24, 2020).

<sup>246</sup> *Report to the New York State Court’s Commission on Equal Justice in the Courts*, JUD. FRIENDS ASS’N. 1, 30 (Aug. 31, 2020), <https://www.urbancny.com/wp-content/uploads/2020/09/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.9.14.20.pdf>; Jane Wester, *Judges of Color Release Detailed Recommendations to Address Systemic Racism in the New York Courts*, N.Y.L.J. (Sept. 10, 2020), <https://www.law.com/newyorklawjournal/2020/09/10/judges-of-color-release-detailed-recommendations-to-address-systemic-racism-in-the-new-york-courts/>.

carefully, has the potential to impact judicial objectivity and independence. Finally, we understand that there are various avenues available for judges to receive some of this data. For example, individual judges may run reports on case outcomes using the case management system or contact the Court Research department within OCA to receive aggregate reports on areas of interest. However, we believe that proactively providing all criminal judges with these types of reports, rather than placing the onus on individual judges, will allow for more widespread systemic change.

**Data Collection for Non-Criminal Cases.** OCA currently has universal case management systems for both the Housing and Family Courts, which collect data on case outcomes. However, this data is neither published nor accessible to stakeholders. We recommend that OCA publish non-identifying or anonymized data it collects on Housing and Family Court outcomes – similar to the manner in which it is required to publish criminal court data under the STAT Act and bail reform amendments. We also recommend that OCA collaborate with key Housing and Family Court stakeholders to develop data points that OCA does not already collect, which are relevant to identifying and reducing any racial bias in these courts.<sup>247</sup> We also recommend that OCA include a data field on initial appearance papers filed with these courts that allows court users to voluntarily self-identify race, ethnicity and gender.

## **J. Improve Diversity and Inclusion within HR Practices**

Throughout the course of our investigation, interviewees frequently raised the lack of diversity within the court system's workforce, and their perception that diversity is not a serious consideration for the system's leadership. Also, as several interviewees noted, and workforce demographic data reveals, diverse employees are particularly underrepresented in senior leadership roles across the OCA workforce. To cure this, we recommend that OCA increase its emphasis on and highlight the importance of its diversity initiatives. The recommendations that follow were developed with assistance from an expert in the field, Professor Harold Goldstein. While they are most aptly suited toward the non-judicial workforce, many may also be applicable to the judiciary, to the extent that they are within OCA's power to implement.

**Setting and Achieving Diversity Goals.** As discussed above, we observed that institutions to address diversity and inclusion are perceived to be largely ineffective. As such, the Office of Diversity and Inclusion must be fully supported by OCA leadership to

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<sup>247</sup> For example, we understand that biographical data, such as race, is not a data point that is typically collected in housing or family court but would be helpful in, for example, determining the types of resources and training needed.

help achieve their goals, including having the appropriate budget to hire personnel and fund diversity and fairness programs. We also recommend that the head of the Office of Diversity and Inclusion establish a new mission statement with a strategic plan for diversity and fairness, communicate it to court system personnel and the public and provide public quarterly mandated reporting to the Chief Administrative Judge on progress against stated diversity metrics and goals. We recognize that this type of demographic data collection and reporting would be partially mandated, at least with regards to judicial race data, as a part of pending legislation, Senate Bill S7703, which we fully support.<sup>248</sup> These metrics should be analyzed on a system-wide, unit-wide and position-wide basis to determine if there are patterns of discrimination in hiring and promotional decisions. Progress on diversity goals should also be connected to organizational reward and penalty systems (*e.g.*, compensation, resource allocation, promotion eligibility) in order to motivate achievement.

**Recruiting & Application Process.** Recruiting diverse candidates for jobs throughout the court system was an issue routinely identified in interviews – particularly in upstate courts. As described in Section VI above, while some judicial districts cited specific successful initiatives in reaching populations of color, they are not implemented system-wide. For this reason, we recommend that OCA poll judicial districts on what outreach tactics have been successful, and issue “best practices” for raising awareness of career opportunities and identifying sources of diverse talent.<sup>249</sup> As for improving the judicial pipeline for diverse candidates, interviewees repeatedly mentioned that “how to become a judge” programs organized by individual bar associations and affinity groups have been successful in the past. We recommend that OCA embrace these programs as part of its plan to increase judicial diversity.

Interviewees also suggested that OCA needs to focus on making the hiring process more user friendly for diverse candidates, including recognition in procedures and practices that minorities may have less access to technology and less flexibility to travel to hiring and testing centers. We heard that the civil service exams for competitive non-judicial positions are an extra barrier to employment for people of color, in that they are often unaware of job openings and opportunities to take the required civil service exams. To help mitigate these barriers, OCA should examine hiring requirements, including data from civil service exams, which is already tracked and broken down demographically, to determine if job requirements, exam structure or minimum qualifications are

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<sup>248</sup> S.B. S7703, 2019-2020 Legis. Sess. (N.Y. 2020).

<sup>249</sup> As an example, individual judicial districts mentioned that they have improved diversity in their ranks by building relationships with local high schools and universities and their diverse clubs, government agencies, local recruiting agencies and local and national diversity associations, through open houses and the creation of internship programs.

disproportionately impacting diverse candidates, and modify them accordingly. OCA should also explore whether test preparation materials can be provided in a different way, to take into consideration cost and ease of access of preparation materials for diverse candidates and the time required to use such preparation materials. OCA might look to the New York Department of Civil Service as an example, which provides free test preparation materials for various similar civil service positions within New York's state government 60 days prior to the date of the examination.<sup>250</sup>

**Performance Evaluation.** Performance evaluation and appraisal systems have a strong impact on behavior and organizational perceptions of accountability. Therefore, we recommend that OCA consider enhancing its performance evaluation processes by introducing diversity and inclusion elements to its performance reviews of its employees – for example, evaluating whether managers properly handle issues of racial bias and evaluating whether employees engage in racially biased or discriminatory behaviors. Performance appraisal data should be examined to determine if specific individuals show patterns of greater discrimination based on race. If patterns emerge, they should be investigated and appropriate actions should be taken (such as additional training or discipline).

**Hiring Decisions & Promotion.** We recommend that OCA thoroughly and comprehensively review its hiring and promotion practices to advance diversity throughout its ranks. In furtherance of these goals, OCA should undertake to enhance communication with candidates about the hiring process so they know, for example, where they stand in the process, next steps, and the timeline for hearing back about the position.

Though, as we understand it, the practice is encouraged by a memorandum, we recommend that OCA require diverse interview panels. Steps should be taken to ensure that diverse members of interview panels are truly heard in these decisions, and are not simply included to satisfy a numerical quota. Individuals involved in these decisions should be trained on how to administer and score interviews and calibrate feedback between interviewees fairly. Additionally, the interview process should assess individual applicants' ability to work with diverse individuals and whether they value diversity. Particularly for manager positions, it should evaluate the person's ability to manage diverse individuals.

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<sup>250</sup> According to its website, the New York Department of Civil Service provides various general and position-specific test guides, including general tips for taking exams, exam-specific details on subject matter to be tested, sample questions and answers and explanations. See *Test Guides and Resource Booklets*, N.Y. STATE DEP'T CIV. SERV., <https://www.cs.ny.gov/testing/testguides.cfm> (last visited Sept. 14, 2020).

Both judicial and non-judicial interviewees of color emphasized their perception that non-judicial employees of color do not share the same career advancement prospects as their colleagues. OCA's promotion policies and procedures have led to a perception that nepotism and bias often drive promotional decisions, leading to unqualified hires and "bad morale" among employees of color. To address these perceptions, we recommend that OCA improve transparency in the promotions process, by including posting all promotions in a manner visible to all viable diverse applicants, ensuring that a diverse slate of candidates is considered for all promotions and, at the very least, by communicating with interviewees when they are not selected. Where possible, decision-makers should undertake to provide feedback to unsuccessful candidates about how they might be able to improve moving forward.

### **K. Enhance Trust between Court Officers and the Community**

According to judges, public defender organizations, bar associations and numerous others, court officer mistreatment of litigants of color, their families, and attorneys of color is a significant barrier to achieving equity in the court system. We heard countless stories of court officers treating litigants and attorneys of color differently than their white counterparts or using dehumanizing language and excessive force. That said, we recognize that court officer conduct is subject to union contracts with OCA, and that OCA likely cannot make sweeping changes unilaterally. On the other hand, we understand that all union contracts are set to expire on March 31, 2021 and must be renegotiated.

In addition to the recommendations above, which would impact the court officer community, we recommend the following for court officers specifically: *first*, court officers should be required to wear name tags. While seemingly simple, being able to identify court officers by name is an important step in fostering an environment of trust and accountability. Officer name tags are common for many law enforcement agencies around the country.<sup>251</sup> *Second*, similar to the NYPD Patrol Guide, OCA should publicly post the rules that court officers must follow in carrying out their official duties, including use-of-force guidelines.<sup>252</sup> Increasing transparency in these ways will help with

<sup>251</sup> See, e.g., *Directive 6.7*, PHILA. POLICE DEP'T (Mar. 15, 2017), <https://www.phillypolice.com/assets/directives/D6.7-UniformsAndEquipment-1.pdf>.

<sup>252</sup> See, e.g., *Use of Force Policy, Guidelines and Procedures Handbook*, U.S. CUSTOMS AND BORDER PROTECTION (May 2014), <https://www.cbp.gov/sites/default/files/documents/UseofForcePolicyHandbook.pdf>; *Use of Force Policy*, SANTA MONICA POLICE DEP'T (July 19, 2019), <https://santamonicapd.org/uploadedFiles/Police/Policies/Policy%20-%20Use%20of%20Force.pdf>; *Use of Force Policy*, PORT WASH. POLICE DEP'T (Jul. 24, 2020), [https://portwashingtonpd.ny.gov/wp-content/uploads/2020/08/Use\\_of\\_Force\\_Policy.pdf](https://portwashingtonpd.ny.gov/wp-content/uploads/2020/08/Use_of_Force_Policy.pdf).

humanizing court officers and understanding the scope of their responsibilities and also holding them accountable where appropriate.

#### **L. Facilitate Navigation of Courthouses**

As early as 1991, the Williams Commission called to make the courts more “user friendly.”<sup>253</sup> A frequent theme throughout our interviews was that – as a result of hostile interactions with security staff or a lack of informational resources – the critical first touchpoint that litigants of color have with the court system is often a negative, or even traumatizing experience.

Interviewees recommended that, in line with a more “customer service”-oriented approach, OCA consider establishing a “greeter” position in courthouses on a more widespread basis. We agree, and recommend that OCA ensure that there is a designated individual within each courthouse whose role is to welcome litigants and answer basic questions about how to navigate the building and adhere to general procedures and practices.<sup>254</sup> While we do not prescribe that any specific individual within or outside of the existing system fill the greeter role, we urge that whoever takes on this position is adequately trained. Such training should incorporate not only the basic tenets of customer-service, but also, cultural competency, accommodating those with mental illness, trauma or disabilities.

We also reiterate that helpful, clear, written guidance within courthouses is essential to ensuring that litigants are able to navigate the courthouse and understand the proceedings before them. One judge interviewed pointed out that these resources are particularly critical for unrepresented litigants, citing as an example that without adequate signage, litigants may have trouble even finding their way to the designated help center for the unrepresented, if at all. We also emphasize that while online resources and guides for litigants are helpful and to be encouraged, they are not a substitute for such resources within courthouses, given widespread bans on cell phones in courthouses. We also recognize that language needs can vary widely from courthouse to courthouse, and echo calls that this signage be thoughtful and responsive to those local needs.

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<sup>253</sup> See REPORT ON THE UNIFIED COURT SYSTEM’S IMPLEMENTATION OF THE RECOMMENDATIONS OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EQUAL OPP. EMPLOY. OFFICE, Jan. 1995, 1, 12–13.

<sup>254</sup> We acknowledge that designated greeter programs are in place in certain courthouses throughout the state, but that they are operated by outside organizations on a volunteer basis. We also note that in certain courthouses, some of the functions that would be carried out by a greeter, such as answering litigant questions or obtaining directions, are often fulfilled by court officers or clerks. See *id.* at 12 (noting that clerks have a role in assisting litigants throughout some courthouses in the state).

## **M. Ensure Implementation of Change**

Finally, experience shows that recommendations matter little if there is no follow through on their implementation; far too often, reports and recommendations such as these are placed on a shelf and gather dust unless there is a commitment to put words into action. We recommend that the Chief Judge assign an entity or committee that includes those independent of the court system, to monitor and report on implementation of those recommendations adopted here on an ongoing basis. Several outside organizations suggested this, and we agree.

One outside organization envisioned the appointment of a third-party independent committee or entity, that would “oversee the implementation of reforms, issue public reports, and provide future recommendations where necessary.” Other similar organizations also recommended an outside oversight mechanism for implementation of reforms suggested in this review. We take no position on whether the group or organization tasked with monitoring and ensuring compliance also include some insiders, such as respected senior members of the judiciary. Most important is that *someone* be given this responsibility.