

BUILDING A  
DIVERSE BENCH:

SELECTING FEDERAL  
MAGISTRATE AND  
BANKRUPTCY JUDGES

Kate Berry

*Foreword by the Hon. Frank J. Bailey*

Brennan Center for Justice *at New York University School of Law*  
& American Bar Association Judicial Division

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Peter Koelling, the former Director Chief Counsel for the American Bar Association Judicial Division, identified magistrate and bankruptcy judge diversity as an ABA organizational priority and built the partnership that produced this resource. The Honorable Frank J. Bailey, Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Massachusetts, led the execution of this project and is responsible for, among other contributions, assembling the advisory committee, vetting the recommendations, drafting the foreword, and facilitating its roll-out and implementation.

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## FOREWORD

United States judges and justices must swear or affirm as follows before they undertake the duties of office:

*I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a federal judicial officer] under the Constitution and laws of the United States. So help me God.<sup>1</sup>*

This oath is a powerful testament to each judge's commitment to dispense justice fairly and impartially. The very terms of the oath require federal judges to rule based on the legal merits of a case, rather than on the identity, race, color, creed, or access to wealth of the "person" before them.

This premise, and the daily work of federal judges across the country to make it a reality, should make our judiciary the envy of the world. The World Justice Project recently released its report on the Rule of Law, which ranks the legal systems of nations based on eight factors, including their civil and criminal justice systems. The United States ranks number eighteen out of one hundred thirteen nations surveyed.<sup>2</sup> Why not better? According to one observer, "[t]he criminal justice system in the U.S. is what pulls the rug out from higher rankings here. The general public view it as discriminatory, and stories like the murder of Trayvon Martin in Central Florida in 2012 help perpetuate that negative perception."<sup>3</sup>

Judicial diversity is one essential, though certainly not the only, step in making our promise of equal justice a reality. Judges must understand the wide variety of life experiences and views that make up our pluralistic society. Diverse colleagues assist judges in achieving that understanding. As to perceptions of justice, a non-diverse bench may be viewed as a biased bench. A vital aspect of eliminating that perception is ensuring that the federal bench "looks like" the people it serves. When litigants enter our courtrooms and see diverse judges and lawyers, their perceptions of our justice system will change. Just as important, a judiciary filled with a wide array of perspectives will enrich our understanding of the communities we serve and improve our ability to fulfill the obligations and ideals that we have sworn to uphold.

For a judiciary committed to the notion that the courts must operate fairly and impartially, even the perception of discrimination is harmful. We, the judges that make up the federal justice system, must administer justice to all people, and we should work to improve the public's perception of how well we are living up to this obligation. The Judicial Division of the American Bar Association and the Brennan Center for Justice often lead the way in fostering a positive image of the federal and state judiciaries, and they do so again with this manual designed to encourage the appointment of a diverse federal bench.

This excellent manual, which is the product of the collaboration of many federal judges, academics, court administrators, and bar leaders, provides a valuable resource to those who appoint federal Article I judges. Achieving a diverse bench is hard and it takes time to see results, but when properly focused, those who appoint federal judges can succeed in this vital task.

Hon. Frank J. Bailey

*Bankruptcy Judge, U.S. Bankruptcy Court for the District of Massachusetts*

## INTRODUCTION

**The majority of Americans who encounter federal courts do so before a magistrate or bankruptcy judge.** With authority under Article I of the U.S. Constitution, magistrate and bankruptcy judges adjudicate an extensive range of issues. Bankruptcy judges, who sit for renewable 14-year terms, adjudicate nearly all bankruptcy cases and proceedings in the first instance.<sup>4</sup> Magistrate judges, who sit for renewable 8-year terms, handle a wide range of criminal and civil matters — from setting bail, to conducting settlement conferences, to hearing motions — and can even decide federal civil cases with the consent of the litigants.<sup>5</sup> The breadth of magistrate and bankruptcy judges’ responsibilities corresponds with caseloads and appointments that outnumber their Article III peers. In aggregate, there are 925 active magistrate and bankruptcy judges, compared with 795 active district and circuit court judges.<sup>6</sup>

**Diversity is an essential element of a successful judiciary.** Judges’ personal and professional experiences affect how they approach the cases that come before them.<sup>7</sup> Bringing diverse perspectives to bear fosters decision-making that reflects the experiences of the whole population, resulting in better jurisprudence.<sup>8</sup> A diverse bench also promotes public confidence that the judicial system is fair and objective. When the judiciary includes all voices and perspectives, members of the public are more likely to trust that theirs will be heard as well.<sup>9</sup> Diversity on the bench has the added benefit of establishing role models for all groups<sup>10</sup> by showing that individuals from diverse backgrounds can obtain judicial positions, as well as positions of prominence in the bar.<sup>11</sup> It is for these reasons that the federal judiciary has made diversity a priority<sup>12</sup> and the American Bar Association (“ABA”) passed Resolution 102 calling upon circuit and district courts to build diversity on the magistrate and bankruptcy benches.

**While the federal judiciary overall has become more diverse, magistrate and bankruptcy courts continue to lag behind.** Women comprise over half of the U.S. population, but only a third of magistrate and bankruptcy judges. People of color comprise almost 40 percent of the population but only 15 percent of magistrate judges and 7 percent of bankruptcy judges. While the statistics for gender diversity in the magistrate and bankruptcy courts are comparable to Article III courts, they trail Article III courts in racial diversity,<sup>13</sup> where nearly a quarter of judges are people of color. Given that many Article III judges begin their judicial careers as an Article I judge,<sup>14</sup> addressing diversity on the Article I bench may also help the trend to diversify the Article III bench.

**Inadequate diversity among magistrate and bankruptcy judges is a problem the judiciary can address.** While the President, with the advice and consent of the Senate, appoints judges to many Article I courts — such as the Court of Federal Claims, the United States Tax Court, and the Court of Veterans Appeals — Article III judges are responsible for the appointment and re-appointment of magistrate and bankruptcy judges. Magistrate judges are selected by a majority vote of the district court judges in the jurisdiction in which they sit from a list of candidates recommended by a merit selection panel — a group of lawyers and other community members selected to vet candidates.<sup>15</sup> Bankruptcy judges are appointed by a majority vote of the circuit court judges in the jurisdiction in

which they sit upon the recommendation of the judicial council — a group of court of appeals and district court judges, chaired by the chief judge of the circuit.<sup>16</sup> While reliance on a merit selection panel is optional for the selection of bankruptcy judges, in practice all circuits use one to vet and recommend candidates, and often even use additional methods of screening.<sup>17</sup>

**This resource provides concrete guidance on the steps courts can take to increase diversity among magistrate and bankruptcy judges.** Although there are rules regulating the process, district and circuit courts have wide discretion in their procedures.<sup>18</sup> By actively recruiting candidates from across the legal profession and taking steps to ensure the fair evaluation of all candidates, Article III courts can help build an even stronger judiciary.

**The best practices listed below reflect lessons, recommendations, and research provided by judges, court executives, advocates, and scholars.** In particular, they reflect the advice of an advisory committee composed of federal circuit court, district court, magistrate, and bankruptcy judges, circuit executives, clerks of court, and court experts assembled to share their expertise and vet the recommendations contained herein. In recognition of the already heavy workload of federal courts, this manual focuses on simple changes that can have an outsized impact on the strength of both the applicant pool and the candidates selected.

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## WHAT DOES JUDICIAL DIVERSITY ENCOMPASS?

The premise of this guide is that the judiciary should be composed of judges who come from different backgrounds, and have had a variety of personal and professional experiences. A diverse judiciary should have the following characteristics:

**A diverse judiciary should reflect the demographic characteristics of the population it serves.** Diversity encompasses gender, race, ethnicity, national origin, sexual orientation, gender identity, parental status, physical ability, religious affiliation or lack thereof, socio-economic background, veteran status, and geography.<sup>19</sup>

**A diverse judiciary should reflect the diversity of the legal profession.** Because judges draw from their experiences as lawyers, it is important that the bench collectively has experience across all areas of the law and representing clients along the socio-economic spectrum.<sup>20</sup>

## WHAT VALUES DOES JUDICIAL DIVERSITY SERVE?

There are a number of values served by diversity in the judiciary. Most judges, advocates, and scholars agree that diversity reaps the following benefits.

### **A diverse judiciary:**

**Creates better, richer jurisprudence** that reflects a broad range of experiences, backgrounds, and perspectives;<sup>21</sup>

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*“A system of justice will be the richer for diversity of background and experience. It will be the poorer in terms of appreciating what is at stake and the impact of its judgments if all of its members are cast from the same mold.”*

– Justice Ruth Bader Ginsburg, U.S. Supreme Court (1993)<sup>22</sup>

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**Promotes public confidence** that the judicial system is fair and objective **by including all voices**;<sup>23</sup>

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*“It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. **How can the public have confidence and trust in such an institution if it is segregated — if the communities it is supposed to protect are excluded from its ranks?**”*

– Judge Edward M. Chen, U.S. District Court for the Northern District of California (2003)<sup>24</sup>

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**Establishes role models for all groups**<sup>25</sup> and **contradicts stereotypes** that individuals from certain groups cannot obtain judicial positions.<sup>26</sup>

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*“The strong presence of black judges has a powerful impact on how non-minority judges, lawyers, and litigants view minority persons, and it also serves as an inspiration for minorities who aspire to positions in the legal profession.”*

– Judge Harry T. Edwards, U.S. Court of Appeals for the D.C. Circuit (2002)<sup>27</sup>

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**In recruiting and evaluating judicial candidates, it is important to consider the many benefits of a diverse judiciary.**

## WHAT IS THE CURRENT STATE OF JUDICIAL DIVERSITY?

While the federal judiciary is increasingly diverse, neither the Article III nor the Article I bench reflects the demographic diversity of the populations it serves. Indeed, Article III judges “remain significantly more diverse than non-Article III judges,”<sup>28</sup> particularly bankruptcy judges.<sup>29</sup>

The Administrative Office of the United States Courts (“AO”), which functions as the administrative arm of the federal judiciary, collects and makes available data on the gender, race, and ethnic composition of the federal judiciary. It does not collect data on several of the demographic categories that are included in the definition of diversity set forth in this resource, including sexual orientation and national origin. At the time of publication, the most recent available data was from fiscal year 2015.

### Federal Judiciary Overall

#### Gender

33.3 percent of active judges are women [66.7 percent are men].<sup>30</sup> Women make up approximately half of the United States population and 36 percent of the lawyer population.<sup>31</sup>

- In fiscal year 2011, 29.2 percent of active federal judges were women [and 70.8 percent were men].<sup>32</sup>

#### Race

16.9 percent of active judges are people of color [77.8 percent are white and 5.3 percent did not report their race].<sup>33</sup> People of color make up 38.7 percent of the U.S. population<sup>34</sup> and 14.7 percent of the lawyer population.<sup>35</sup>

- In fiscal year 2011, 14.2 percent of active judges were people of color [79.1 percent were white and 6.7 percent did not report their ethnicity].<sup>36</sup>

### Article III Judges

#### Gender

33.3 percent of active Article III judges are women [66.8 percent of active judges are men].

- In fiscal year 2011, 29.6 percent of active Article III judges were women [70.4 percent were men].

#### Race/Ethnicity

24.8 percent of active Article III judges are people of color [70.4 percent are white and 4.9 percent did not report their race].

- In fiscal year 2011, 20.2 percent of active Article III judges were people of color [72.3 percent were white and 7.5 percent did not report their race].

## Magistrate Judges

### Gender

37.6 percent of full-time magistrate judges are women [62.4 percent are male].

- In 2011, 29.6 percent of full-time magistrate judges were women [70.4 percent were male].

### Race/Ethnicity

14.7 percent of full-time magistrate judges are people of color [80.2 percent are white and 5.2 percent did not report their race].

- In 2011, 13.2 percent of full-time magistrate judges were people of color [81.3 percent were white and 5.5 percent did not report their race].

## Bankruptcy Judges

### Gender

31 percent of bankruptcy judges are women [69 percent are male].

- In 2011, 26.9 percent of bankruptcy judges were women [73.1 percent were male].

### Race/Ethnicity

7 percent of active bankruptcy judges are people of color [86.6 percent are white and 6.4 percent did not report their race].

- In 2011, 5.1 percent of active bankruptcy judges were people of color [88.7 percent were white and 6.2 percent did not report their race].

**The federal judiciary also fails to reflect the diversity of the legal profession.** While no comprehensive national data exists on the professional background of the federal bench, the existing data indicates that certain legal experiences remain underrepresented, such as work as a public defender or counsel for indigent criminal defendants, as an attorney for a public interest organization, or as a plaintiff's side advocate focusing on certain issues such as civil rights or labor law.<sup>37</sup>

## BEST PRACTICES

### DIVERSIFYING THE APPLICANT POOL

District and circuit courts are well situated to help build a more diverse pool of applicants for magistrate and bankruptcy court vacancies. Small changes to a court's selection process can strengthen the applicant pool and the overall diversity of the candidates selected.

Of course, each jurisdiction faces unique challenges and some best practices may be difficult to implement given a jurisdiction's size, resources, workload, or other considerations. The practices in this manual can and should be modified as necessary to fit the needs of each court.

### PIPELINE BUILDING

In addition to recruiting qualified applicants and soliciting applications from diverse candidates, courts can play a vital role in educating young lawyers — and future law students — about judicial responsibilities and pathways. Investing in pipeline building efforts will reap a number of benefits, including encouraging diverse judicial and merit selection panel applicants.

#### Best Practices:

- 1 **Build a Pipeline to Law School:** The data reveals that the legal profession does not reflect the diversity of the population as a whole.<sup>38</sup> According to the American Bar Association, the bar in the United States is over 85 percent white.<sup>39</sup> Judges, as leaders in the legal profession, share responsibility for increasing pathways into law school for all.

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Just the Beginning – A Pipeline Organization aims to increase diversity in the legal profession through outreach to under-served and minority high school and college students.<sup>40</sup>

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- 2 **Conduct Targeted Outreach to Young Attorneys:** Interviews with judges from diverse backgrounds reveal that early consideration of a career on the bench contributed to their success in eventually becoming a judge.<sup>41</sup> While outreach to law students and young attorneys will not affect a current vacancy, it will provide a more diverse applicant pool for the future.<sup>42</sup>

Many of the steps recommended for judges and court officials to take in the recruitment process, such as speaking with community groups, minority bar associations, law school alumni, and other affinity groups, will also help build a pipeline for future applicants.<sup>43</sup>

Judges and court officials should also communicate the importance of magistrate and bankruptcy judges, the process for becoming a judge, the wide range of experiences that can lead to judicial appointment, and the criteria they look for in applicants, including ways to get relevant experiences through pro bono and other opportunities. Potential audiences include:

- Students at local law schools. These meetings are also excellent opportunities to encourage students to apply for judicial clerkships.
- Current and former judicial law clerks, who gain invaluable exposure to the work of judging early in their law careers.
- Current and former judicial interns and externs.

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The Committee on Judicial Resources began piloting the Judiciary Diversity Recruiting and Outreach Program in 2010 to build relationships with undergraduate institutions, law schools, bar associations, and other groups including Just the Beginning to “increase student awareness of the breadth and scope of legal and non-legal positions in the Judiciary.”<sup>44</sup>

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- 3 Facilitate Interest in Merit Selection Panel Participation:** Empirical research has illustrated that when decision-making bodies are more diverse, they recruit and recommend more diverse candidates.<sup>45</sup> It is therefore vital that court officials play a role in ensuring the demographic and professional diversity of future merit selection panel members.

Speak to community groups, minority bar associations, law school alumni associations, and other affinity groups about the important role played by merit selection panel members.

Encourage members of these groups to consider applying for future appointments to merit selection panels.

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The American Bar Association leads the Judicial Clerkship Program, which connects minority law students from around the country with judges and former law clerks.<sup>46</sup>

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## **RECRUITMENT OF CANDIDATES**

Active recruitment can have a dramatic effect on the quality and diversity of applicant pools.<sup>47</sup> The AO encourages members of every court to conduct outreach to legal organizations and associations to solicit applications.<sup>48</sup>

### **Best Practices:**

#### **1** Begin Recruitment Early

**Effective recruitment must begin, when possible, long before a job is posted.**<sup>49</sup>

Often judges and court staff can anticipate a vacancy occurring months, and even years, in advance.

**Judges and Court staff must be careful, however, not to recruit in a way that suggests support for or a commitment to a candidate for a specific vacancy.**

Moreover, while jurisdictions have unique practices, the AO discourages members of the merit selection panel from actively recruiting, in order to avoid the appearance of favoritism in the selection process.<sup>50</sup> Frequent outreach and information sessions, however, should be permissible.

#### **2** Identify a Court Official to Coordinate Recruitment Efforts

A courthouse leader can encourage staff to engage in recruitment and prevent duplicative efforts, which can facilitate greater participation and maximize effectiveness.

In many jurisdictions, the chief judge may be well positioned, perhaps in conjunction with the clerk of court or circuit executive, to coordinate these efforts and identify diversity as a district or circuit priority.

#### **3** Create Recruitment Goals for Court Staff

**Court staff, in conjunction with the coordinating official, should develop recruitment goals that are appropriate for their particular position and resources.**

Below is a list of several forms of active recruitment that can be effective for soliciting applications from strong and diverse candidates. These practices are based on recruitment strategies that court executives and judges identified as yielding successful outcomes.<sup>51</sup>

- Reach out to leadership at minority and affinity bar associations in order to encourage them to both recruit and recommend strong candidates;<sup>52</sup>

- Make speeches to community groups, minority bar associations, state court judges, state judicial education entities, law school alumni associations, or other affinity groups explaining the role of magistrate and bankruptcy judges and the application process;

Organize a panel of current judges to talk about their work and their pathways to the bench. This would give potential candidates tools and information about judicial careers. A judicial panel would also introduce current members of the bench to aspiring, well-qualified candidates, thus facilitating mentorship opportunities.<sup>53</sup>

- Publicize and host “office hours” in which the coordinating court official or other court staff is available to meet with individuals or groups and discuss the process.<sup>54</sup>

## **VACANCY DESCRIPTION AND DISSEMINATION**

Empirical research shows that the greater the rates at which female and minority applicants apply for judicial seats, the more likely they are to be selected.<sup>55</sup> In other words, achieving a diverse bench requires that these candidates not only consider a judicial career, but actually apply.

Wide distribution of detailed job descriptions helps facilitate applications from diverse candidates. The Judicial Conference Regulations provide specific circulation requirements to ensure that “all qualified members of the bar are apprised of the opportunity to apply for the position.”<sup>56</sup> The AO further encourages courts to “make an active effort to identify qualified individuals from as broad a background as possible and tailor publication of the notice to reach a diverse audience.”<sup>57</sup>

### **Best Practices:**

① **Develop a Detailed Vacancy Description:** Researchers have found that the more transparent the process is, the more likely it is that qualified candidates who are otherwise underrepresented in the field will participate.<sup>58</sup> In order to ensure that all qualified candidates have an equal opportunity to apply, it is essential that the job posting include the information listed below. The AO provides sample vacancy descriptions for both bankruptcy and magistrate openings.

**A description of the nature of the vacancy**, which includes: (1) the position to be filled, (2) the needs of the court, and (3) the minimum qualifications;<sup>59</sup>

**Detailed application instructions**, which include: (1) the application form, (2) the submission deadline, (3) the submission instructions,<sup>60</sup> and (4) a contact person for any questions (ideally the clerk of the court or the circuit executive);<sup>61</sup>

**A description of the application process**, which identifies: (1) who will review the applications, (2) the process for determining who will receive an interview, (3) who will conduct the interview, (4) which documents and deliberations will be made public, (5) how applicants will be notified of the outcome of the applications process, (6) the application timeline, and (7) the number range of candidates to be recommended by the merit selection panel and whether their names become public;<sup>62</sup> and

**A statement that the federal judiciary is an equal opportunity employer**, values a diverse workforce and an inclusive culture, and encourages candidates of all gender identities, races, ethnicities, national origins, sexual orientations, parental statuses, physical abilities, religious affiliation or lack thereof, socio-economic backgrounds, veteran statuses, and geography to apply.

- ② **Post the Vacancy Before the Panel Assembles:** When possible, the vacancy should be posted before the merit selection panel is assembled. This is particularly important given the directive that the merit selection panels report the results of their activity within 90 days of being assembled.<sup>63</sup> Vacancy postings should remain throughout the pendency of the application period.<sup>64</sup>
- ③ **Disseminate the Posting Widely:** The Judicial Conference regulations require that magistrate and bankruptcy judge vacancy announcements be circulated widely.<sup>65</sup> Of particular importance is publication with specialized and minority bar associations.<sup>66</sup> Below is a list of some sources with which to begin constructing a locally-relevant list.

### **Court Websites**

- The vacancy should be posted on the circuit and district court websites — and, in the case of bankruptcy openings, bankruptcy court websites — for the jurisdiction the vacancy is in as well as all nearby jurisdictions, to enhance the likelihood that practitioners are exposed to it.<sup>67</sup>

### **CM/ECF listserv**

#### **National, state, and local bar associations**

#### **Minority and women's bar associations**

- National bar associations:
  - Hispanic National Bar Association
  - National Association of Women Lawyers
  - National Asian Pacific American Bar Association
  - National Bar Association
  - National Black Law Students Association
  - National Conference of Women's Bar Associations
  - National LGBT Bar Association
  - National Native American Bar Association
  - North American South Asian Law Students Association
  - Puerto Rican Bar Association
  - South Asian Bar Association of North America
- State bar associations:
  - A list of some women's bar associations in each state is available on the American Intellectual Property Law Association's website.<sup>68</sup>
  - A list of each state's minority bar associations is available on most state bar associations' websites.

## **National and state affinity groups such as criminal defenders, prosecutors, government attorneys, trial attorneys, and civil rights attorneys**

- Select national groups:
  - The American Association for Justice
  - National Association of Criminal Defense Lawyers
  - National Association of Assistant United States Attorneys
  - National Association of Women Judges
  - National Center for State Courts
  - National Legal Aid and Defender Association
  - The National Trial Lawyers
  - The American Bankruptcy Institute
  - The American College of Bankruptcy
  - The American College of Trial Lawyers

## **Alumni networks of national and local law schools, including minority and specialized student groups<sup>69</sup>**

A list of all American Bar Association-approved law schools is available on the ABA's website.

## **National and local law firms**

- ④ **Conduct Outreach to Bar Leadership:** Sharing the job posting with minority and affinity bar associations also provides an opportunity to reach out to bar leadership and suggest that they encourage their members to apply for the vacant position.

## **MERIT SELECTION PANEL COMPOSITION**

While the governing rules do not necessitate diverse merit selection panels — apart from the presence of both attorneys and non-attorneys on magistrate judge selection panels — diverse panels are essential to diversifying the bench.<sup>70</sup> By bringing a variety of viewpoints and life experiences to bear on the decision-making process, diverse merit selection panels are more likely to have the capacity to assess a range of professional experiences and demonstrate that the process is open to all. If a circuit judicial council chooses not to use a merit selection panel in filling a bankruptcy court vacancy — instead relying on the council itself or a council subcommittee — it should nevertheless keep the recommendations below in mind.

### **Best Practices:**

- 1 Solicit Diverse Merit Selection Panel Members:** Many courts assemble merit selection panels based on the recommendations of current judges and court officials. In addition to relying on these valuable networks, courts may advertise vacancies for merit selection panels on court websites. Additionally, courts should reach out to minority and affinity bar associations, local law schools, and community groups for recommendations. Finally, all former panel members should be encouraged to engage in outreach for future panelists.
- 2 Involve the Chief Judge, or Another Designated Judge, in Panel Recruitment:** Successful recruitment of diverse merit selection panel members depends on judicial leadership. In some jurisdictions the chief is best situated to lead recruitment efforts, while in others, the chief may select another judge to lead the process.
- 3 Consider Increasing the Panel's Size:** The size of merit selection panels varies enormously in jurisdictions across the country. Magistrate selection panels must include at least 7 members<sup>71</sup> and bankruptcy selection panels must include at least 3 members.<sup>72</sup> In districts using only the minimum number of panelists — or close to the minimum — consider increasing the panel's size in order to ensure that various perspectives are brought to bear on the decision-making process. Should additional seats be added, these new seats should be used to increase the panel's diversity. However, in adding seats, keep in mind that too large of a panel may reduce frankness about candidates, particularly references.
- 4 Make Merit Selection Panel Members' Names Public:** While making panel members' names public is optional, doing so increases transparency by revealing to the public who sits on panels and may encourage panelists to engage more with the community.
- 5 Consult with Magistrate and Bankruptcy Judges:** Utilize the expertise of magistrate and bankruptcy judges in the relevant district for suggestions of potential panel members.

## NETTING AND SELECTION

Once the court has posted the vacancy and assembled the merit selection panel, it is vital that the decision-makers design a clear and transparent process for evaluation and selection. As the AO explains, “the Regulations of the Judicial Conference provide the panel with a large degree of discretion in the review of applications and the selection of individuals to recommend to the court.”<sup>73</sup> Social science research has consistently shown that early conversations about candidate qualifications facilitate attention to the desired outcome and can help limit unconscious preferences and judgments, commonly referred to as implicit biases, as discussed in more depth below.<sup>74</sup>

While the recommendations below are aimed at merit selection panel members, many also apply to the judges ultimately making the final selection.

### ORGANIZATIONAL MEETING

Many merit selection panels begin their work to fill a judicial vacancy by holding an organizational meeting. These meetings are typically used to establish panel goals, review procedural and ethical responsibilities, discuss the governing rules, assign responsibilities, and coordinate schedules.<sup>75</sup>

The organizational meeting also provides a valuable opportunity for promoting judicial diversity. The organizational meeting allows panel members the chance to ensure that there are clear rules governing each stage of the process and the opportunity to discuss desirable candidate attributes in advance of their evaluation.

#### **Best Practices:**

- 1 Schedule an Organizational Meeting Before Receiving Applications:** Each panel may want to schedule an organizational meeting before applications are received so that the panel has ample opportunity to consider its procedures without time pressure or the influence of knowing the identities of individual applicants.<sup>76</sup> If possible, the organizational meeting should include a liaison judge from the court hiring committee. The liaison judge may be able to address the court’s interest in developing a diverse applicant pool, discuss historical hindrances to that goal, and provide a resource to the committee for any operation or historical questions.
- 2 Formalize Selection Procedures:** Use the meeting as an opportunity to review the panel’s governing rules and develop formalized, written procedures for any unaddressed areas. Such formalized procedures help ensure that all candidates are treated equally<sup>77</sup> and that panel members can be transparent about the process. A few of the most important areas are listed below, with guidance provided in the relevant sections to follow:

**Evaluative Criteria:** Begin by reviewing any existing guidance, rules, or statutes. Additionally, consider the particular needs of the court the judicial vacancy is in and the current demographic and experiential composition of that court. Avoid making a narrowly defined professional experience a job requirement, as most skills can be garnered in a number of positions and strict requirements can quickly shrink the eligible applicant pool.<sup>78</sup>

**Re-Publication of Notice:** A second notice of vacancy can be published if the first round does not produce a sufficient pool of applicants.<sup>79</sup> A pool lacking in diversity may be a sign of inadequate vacancy dissemination. Merit selection panel members should agree upon the threshold, procedures, and timeline for such a process.

**Interviewing:** Consider whether all applicants will receive interviews, the length of interviews, who will conduct the interviews, and interview questions.

**Voting:** Develop procedures for voting on candidates to recommend.

- ③ **Affirm Judicial Diversity as a Goal:** Given the importance of affirmative steps to promoting a diverse bench, early prioritization of diversity is essential.<sup>80</sup> Panel members should not set target numbers, but should agree to consider the importance of diversity in their holistic evaluation of candidates.<sup>81</sup>
- ④ **Familiarize the Panel with the Work of the Court:** Because judges' dockets can vary by jurisdiction, the AO recommends that the merit selection panel invite a court official to share with it the precise nature of the duties to be assigned to the selected judge.<sup>82</sup> Better understanding the successful candidate's responsibilities may help the panel identify necessary evaluative criteria.
- ⑤ **Schedule Implicit Bias Training:** An implicit bias training should be scheduled for merit selection panels and other court officials involved in selection of bankruptcy and magistrate judges, such as the merit selection panel hiring committee.<sup>83</sup>

**Current social science reveals that all individuals are susceptible to unconscious biases** about others based on characteristics including race, ethnicity, gender, and income. These associations can affect individuals' behavior towards others, even when individuals want to be fair and believe they treat all people equally.<sup>84</sup> In the employment context, research has demonstrated that implicit biases can influence who receives an interview, how applications are evaluated, and who is ultimately selected for the job.<sup>85</sup>

**Implicit bias training can mitigate biases.**<sup>86</sup> Implicit bias trainings are informative about the science surrounding bias and help individuals develop a hiring process that is as free from bias as possible.<sup>87</sup>

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The American Bar Association's Implicit Bias Initiative provides resources that can be used in trainings.<sup>88</sup> Questions about the program or about trainings in your area should be directed to Felice Schur, Associate Director, Judicial Division ([felice.schur@americanbar.org](mailto:felice.schur@americanbar.org); 312-988-5105). Local universities are also useful resources for identifying implicit bias trainings as they often run trainings or at least provide them to their staff.

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## INTERVIEWS

Interviews provide an invaluable opportunity for the evaluation of judicial candidates. Interviews can be particularly important for candidates who may be less known to the court prior to applying.<sup>89</sup>

However, because interviews are subjective, research suggests that decision-makers are most likely to rely on their implicit biases during this stage of the process.<sup>90</sup> As a result, merit selection panels should develop clear and uniform guidelines for conducting interviews.

### **Best Practices:**

- 1 Develop (at Least Some) Uniform Interview Questions:** Developing a set of interview questions that is asked of all candidates ensures a basis for an equal comparison between interviewees.<sup>91</sup> Implicit bias research shows that standardized interview questions allow for the best comparison between candidates and minimize biases.<sup>92</sup> Of course, candidates have varied experiences and so asking only standardized questions can be unproductive. It is acceptable to ask candidates unique questions so long as they focus on candidates' substantive legal experiences and qualifications.<sup>93</sup>
- 2 Include a Question Facilitating a Discussion of Greater Life Experience:** Provide candidates with an opportunity to discuss how their particular experiences will benefit the court.<sup>94</sup> For example: Is there any aspect of your personal or professional background that you believe will be a particular asset to this court?
- 3 Provide Ample Time for a Meaningful Interview and Standardize the Length:** In order for an interview to be productive, it is essential that panel members have ample time to ask all of their questions, and that applicants have the opportunity to give thoughtful and complete answers. Interviews should therefore last at least 30 minutes.<sup>95</sup> To ensure that all applicants are treated equally, interview length should be standardized.
- 4 Take Notes During Interviews:** Individuals are particularly susceptible to implicit biases when they are asked to recall previous conversations. By taking notes during interviews, decision-makers are more likely to accurately remember interviews and evaluate candidates fairly.<sup>96</sup> Additionally, immediately following interviews, panel members should consider filling out a brief evaluation form that requires both a quantitative and qualitative assessment. These evaluations will allow them to capture their impressions of candidates and are particularly important for interviewers who prefer not to take notes.<sup>97</sup>

## **DELIBERATIONS AND VOTING**

After panel members have completed the interviews, it is important to evaluate and discuss all candidates prior to voting.<sup>98</sup> Generally, procedures for evaluations and rankings are left to the panels themselves.<sup>99</sup>

### **Best Practices:**

- 1 Review the Definition of Diversity, Values, and Evaluation Criteria:** Begin with a reiteration of the definition of diversity, purposes of diversity, and evaluation criteria identified in the organizational meeting. Doing so ensures that the group is reminded of its agreed upon, collective goals, reduces ambiguity, and protects against implicit biases.<sup>100</sup>
- 2 Carefully Weigh Experiences and Recommendations:** In order to ensure that candidates from all demographic and professional backgrounds are fairly evaluated, it is essential that each candidate be assessed holistically.

**Weigh Skills and Experience, Not the Candidate's Title.** In evaluating a candidate's experience, pay particular attention to the depth of a candidate's legal experience and its relationship to the type of judicial vacancy being filled. Avoid viewing experience in a particular position as a requirement and instead look to the skills candidates have been able to develop in each job.<sup>101</sup> Additionally, keep in mind that while the speed at which a candidate's career has advanced may indicate talent, it may also reflect bias or other hurdles related to his or her gender, race, ethnicity, or other personal characteristics.<sup>102</sup>

**No Single Legal Experience Should Be Determinative.** While prior bankruptcy experience can certainly be advantageous in preparing to be a bankruptcy judge, it should not, alone, be dispositive of a candidate's eligibility. Other experiences, such as complex litigation, expertise in other federal codes (such as the tax code), and class action litigation, are all valuable in developing the necessary skills. Similarly, as with district court judges, magistrate judges do not necessarily need extensive experience in both criminal and civil practice prior to joining the bench.

**Avoid Placing Undue Weight on the Ranking of an Applicant's Law School.** A number of factors affect individuals' access to and selection of educational institutions, including application coaching, test preparation, availability of scholarships, and proximity to family.<sup>103</sup> As a result, graduation from a highly ranked law school should not be seen as a prerequisite.

- ③ **Standardize Conversations with References:** Just as candidate interviews should be conducted off a list of set questions, so too should reference checks.<sup>104</sup> Similarly, notes should be taken during reference checks. Merit selection panel members should also standardize the process by which they report the results of their reference calls to the other decision-makers so that all evaluators have access to the same information.<sup>105</sup>
- ④ **Articulate Reasons for Recommending Candidates:** Merit selection panel members should explain their reasons for recommending particular candidates, both to help identify their own rationale and to give the final decision-makers insight into their evaluative criteria.

## CONCLUSION

The recommendations provided in this manual are designed to assist district and circuit courts in building more diverse magistrate and bankruptcy benches. By making diversity a priority, actively recruiting diverse candidates, taking concrete steps to evaluate all candidates fairly, and designing a transparent process, courts can make important progress in building a more inclusive and representative bench.



## APPENDIX

### American Bar Association Resolution 102

Adopted by the House of Delegates  
August 8-9, 2016

**RESOLVED**, That the American Bar Association urges the President of the United States and United States Senators to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for United States Circuit Judges and United States District Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees, and appointees to the U.S. District Court and U.S. Circuit Court of Appeals, including without limitation, the use of diverse merit selection panels.

**FURTHER RESOLVED**, That the American Bar Association urges the United States Circuit Courts of Appeals and the Circuit Judicial Councils to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for United States Bankruptcy Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees, and appointees to the Bankruptcy Court, including without limitation, the use of diverse merit selection panels.

**FURTHER RESOLVED**, That the American Bar Association urges the United States District Courts to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the selection process for United States Magistrate Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees, and appointees to United States Magistrate Judge positions, including without limitation, the use of diverse merit selection panels.

**FURTHER RESOLVED**, That the American Bar Association urges the Judicial Conference of the United States, federal courts, defender organizations, and the court support agencies to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity, and gender diversity in the hiring process and to expand the diversity of the pool of qualified employees in the Judicial Branch of the United States.

**FURTHER RESOLVED**, That the American Bar Association urges its members to facilitate the selection of judges reflecting racial, ethnic, disability, sexual orientation, gender identity and gender diversity by identifying, encouraging, assisting, and mentoring qualified diverse candidates to seek selection as judges.



## ENDNOTES

- 1 28 U.S.C. § 453 (1990).
- 2 WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX 5 (2016).
- 3 Kenneth Rapoza, *Top 10 Countries Where Justice Prevails*, FORBES, Mar. 16, 2014.
- 4 ADMIN. OFFICE OF THE U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES 5-7 (2016) [hereinafter BANKRUPTCY JUDGES].
- 5 Part-time magistrate judges serve for a term of four years. ADMIN. OFFICE OF THE U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 2 (2016) [hereinafter MAGISTRATE JUDGES].
- 6 JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FAIR EMPLOYMENT PRACTICES ANNUAL REPORT, FISCAL YEAR 2015 at 17, App'x 3 (374 bankruptcy, 519 full-time magistrates, 32 part-time magistrates, 71 recalled magistrates, 170 appellate, 625 district).
- 7 Sonia Sotomayor, *A Latina Judge's Voice, Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation, Judge Mario G. Olmos Memorial Lecture*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002), available at [http://abcnews.go.com/images/Politics/Berkeley\\_La%20Raza\\_2002.pdf](http://abcnews.go.com/images/Politics/Berkeley_La%20Raza_2002.pdf). (“Personal experiences affect the facts that judges choose to see.”).
- 8 See, e.g., CTR. FOR JUST., LAW AND SOC'Y AT GEORGE MASON UNIV., IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH 6 (2009), available at [http://www.justiceatstake.org/media/cms/DiversityReport2009\\_4F739E0E55910.pdf](http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf) (“Perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision-making. Judges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions. Judges can debate with one another, offering divergent perspectives and educating their colleagues about how their decisions will affect various populations.”) (citing Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 409-10 (2000)); see also Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) (“And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles.”); Ifill, *supra*, at 456 (“The inclusion of alternative or ‘non-mainstream approaches’ in judicial decision-making can invigorate the law with new and challenging approaches to decision-making and create opportunities for better, richer judicial decision-making. In this sense, diversity benefits not only minority litigants but the entire justice system. Focusing narrowly on case outcomes obscures this potential benefit of diversity.”); SHERYL J. WILLERT, WASH. STATE MINORITY AND JUST. COMM'N, BUILDING A DIVERSE COURT: A GUIDE TO RECRUITMENT AND RETENTION v, 12, 73 (2d ed. 2010), available at <http://www.courts.wa.gov/committee/pdf/Buidling%20a%20Diverse%20Court%20RR%20Manual%202nd%20Ed.pdf> (“A diverse court is a smart court — one that is more likely to be innovative, productive and efficient in meeting the challenges facing the justice system in the twenty-first century because a diverse court is rich in human resources including a broad range of experience, background and perspective.”); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 789 (2004) (“However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender. For instance, a recent study of one federal circuit reveals that female judges are more likely than male judges to observe, report, and intervene when instances of gender-related incivility are directed at women.”).

- 9 See, e.g., LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION MODELS AND THEIR IMPACT ON DIVERSITY 2, 29 (2005), available at [https://www.opensocietyfoundations.org/sites/default/files/answering\\_20050923.pdf](https://www.opensocietyfoundations.org/sites/default/files/answering_20050923.pdf) ("The Lawyers' Committee for Civil Rights Under Law . . . believes that increased judicial diversity is essential to restoring faith in the judiciary and to countering the perceptions of bias and illegitimacy that currently exist. The corollary benefits of a more representative judiciary serve to promote public confidence and trust in a fair and objective justice system; provide legitimacy to the judicial decision making process; validate multi-cultural perspectives and voices; and provide role models for minority youth."); MALIA REDDICK, MICHAEL J. NELSON & RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS: HOW DOES THE JUDICIAL SELECTION ENVIRONMENT ADVANCE — AND INHIBIT — JUDICIAL DIVERSITY? I (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2731012](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731012) ("[A] judiciary that is representative of the population's diversity increases public confidence in the courts.") (citing GARY S. BROWN, FUND FOR MODERN COURTS, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES 1992-1997 (1998)); WILLERT, *supra* note 8, at v, 14, 72-73 ("A workforce that reflects the communities the courts serve increases the public's trust and confidence in the judicial branch of government and in the overall justice system.").
- 10 See, e.g., CTR. FOR JUST., LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 8, at 6 ("A diverse bench also provides new role models for current and future law students and younger members of the bar, who in turn may be encouraged to seek the bench.") (citing CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CTR. FOR JUST., IMPROVING JUDICIAL DIVERSITY 10 (2d ed. 2010), available at [https://www.brennancenter.org/sites/default/files/legacy/Improving\\_Judicial\\_Diversity\\_2010.pdf](https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf)); Edwards, *supra* note 8, at 328-29 (describing a meeting with Black Law Students Association students in 1970 at the University of Michigan where students emphasized: "We do not need you on any picket lines. We need you to be a role model. We want you to be as good as any professor in the law school. We want students to subscribe to your classes in the same numbers as they do other classes. If you are respected, we will be respected"); LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 9, at 2, 29 (emphasizing the importance of "role models for minority youth"); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 590 (2011) (listing common arguments used by Democrats, including that "diversity serves as a symbol for the members of groups that have been historically underrepresented on the bench"); WILLERT, *supra* note 8, at v ("The opportunity to observe persons of color working in all areas of the court system also provides role models for young people, graphically demonstrating that career opportunities in the courts are open to everyone.").
- 11 See, e.g., Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1116 (2003) ("A further harm of segregation and underrepresentation is the perpetuation of detrimental stereotypes, continuing the myth that certain groups are inherently incapable of attaining certain accomplishments or performing certain jobs."); WILLERT, *supra* note 8, at 73 ("Diversity among the judges and judicial staff helps to dispel stereotypes and misconceptions held not only by other judges who may view articulate people of color or individuals with disabilities as an exception, but also helps to dispel such stereotypes and misconceptions among members of the public.") (providing explanations of why diversity is important based on a survey of randomly selected judges); see also REDDICK, NELSON & CAUFIELD, *supra* note 9, at 1 (explaining that judicial diversity "provides decision-making power to formerly disenfranchised populations") (citing Nicholas O. Alozie, *Black Representation on State Judiciaries*, 4 SOC. SCI. Q. 69, 979-86 (1988)).
- 12 See DUFF, *supra* note 6, at 1 ("The Judiciary has long recognized the importance of diversity in its workforce and is committed to enhancing the pool of qualified applicants. This standing principle is best summarized in the *Strategic Plan for the Federal Judiciary*, and emphasizes the following goal under Strategy 3.2: 'Recruit, develop, and retain highly competent staff while defining the judiciary's future workforce requirements.'").

- 13 *Id.* at 1 (“Significant findings for this fiscal year include an increase in the number of female judicial officers and Article III minority judges. However, there is a continuing trend of less diversity among magistrate and bankruptcy judges than among Article III judges over a five year period.”).
- 14 *See* MAGISTRATE JUDGES, *supra* note 5, at 28 (“The position of magistrate judge is viewed by many as a proving ground that can provide invaluable practical experience for future Article III judges. Thus, the panel should recommend individuals who possess the same type of personal and professional qualities expected of district judges.”); Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World: The Career Path of Magistrate Judges*, 16 NEV. L.J. 823 (2016); *see generally* FED. JUD. CTR, BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, *available at* <https://www.fjc.gov/node/7946>.
- 15 MAGISTRATE JUDGES, *supra* note 5, at 17-18.
- 16 MALIA REDDICK & NATALIE KOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 2 (2013), *available at* [http://iaals.du.edu/sites/default/files/documents/publications/a\\_credit\\_to\\_the\\_courts.pdf](http://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf).
- 17 *See id.* at 9.
- 18 MAGISTRATE JUDGES, *supra* note 5, at ii (“The pertinent statute and Judicial Conference regulations have established a number of rules governing the selection, appointment, and reappointment of magistrate judges. A large degree of freedom and discretion has been extended, nonetheless, to each district court and the panels in defining appropriate procedures for carrying out their missions.”); BANKRUPTCY JUDGES, *supra* note 4, at ii (“The pertinent statutes and Judicial Conference Regulations governing the selection, appointment, and reappointment of bankruptcy judges . . . clearly provide the courts of appeals, judicial councils, and merit selection panels with considerable discretion in carrying out their representative missions.”).
- 19 *See* K.O. MYERS, AM. JUDICATURE SOC’Y, MERIT SELECTION AND JUDICIAL DIVERSITY REVISITED 9 (2014), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/408> (“Generally speaking, a ‘diverse judiciary’ would include the demographic characteristics of the population it serves, in terms of gender and gender expression, race and ethnicity, religious faith and non-faith, sexual orientation, etc.”) (citing Francis E. Rourke, BUREAUCRATIC POWER IN NATIONAL POLITICS 396 (3d ed. 1978)).
- 20 *See* ALLIANCE FOR JUST., BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 4 (2016), *available at* <http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf> (“But, a truly diverse judiciary is one that not only reflects the personal demographic diversity of the nation, but is also comprised of judges who have been advocates for clients across the socio-economic spectrum, seeking justice on behalf of everyday Americans.”).
- 21 *See supra* note 8.
- 22 Ifill, *supra* note 8, at 410 n.9 (citing Remarks by President Clinton and Justice Ruth Bader Ginsburg at Swearing-In Ceremony (Aug. 10, 1993), *in* U.S. NEWSWIRE, Aug. 10, 1993).
- 23 *See supra* note 9.
- 24 *See* Chen, *supra* note 11, at 1117.
- 25 *See supra* note 10.
- 26 *See supra* note 11.
- 27 Edwards, *supra* note 8, at 329.
- 28 DUFF, *supra* note 6, at 5.

- 29 *See id.* (“[B]ankruptcy judges reflect the least diversity with respect to race and ethnic composition.”).
- 30 DUFF, *supra* note 6, at 3.
- 31 COMM’N ON WOMEN IN THE PROFESSION, AM. BAR ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW: JANUARY 2017 2 (2017), *available at* [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_january2017.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf).
- 32 DUFF, *supra* note 6, at 4.
- 33 *Id.*
- 34 U.S. CENSUS BUREAU, POPULATION ESTIMATES PROGRAM, QUICK FACTS: UNITED STATES, <https://www.census.gov/quickfacts/table/PST045216/00> (last visited July 5, 2017).
- 35 AM. BAR ASS’N, LAWYER DEMOGRAPHICS: YEAR 2015, [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf) (last visited June 16, 2017).
- 36 DUFF, *supra* note 6, at 4.
- 37 *See* ALLIANCE FOR JUST., *supra* note 20, at 4.
- 38 U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, HISPANIC ORIGIN FOR THE UNITED STATES, STATES AND COUNTIES, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited July 5, 2017).
- 39 LAWYER DEMOGRAPHICS: YEAR 2015, *supra* note 35.
- 40 JUST THE BEGINNING—A PIPELINE ORGANIZATION, <http://jtb.org/about/> (last visited June 16, 2017).
- 41 *See* CTR. FOR JUST., LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 8, at 20-22, 26.
- 42 *See id.* at 21 (“[T]he overwhelming majority of the judges either explicitly or implicitly detailed an active plan for networking to bring them closer to their goal of a judicial position. In fact, the majority of judges reported that they aspired to become a judge from the time that they were very young or, at least, from the time that they attended law school. It seems reasonable, then, to draw the inference that their dedication to this goal aided their ability to navigate the process by actively planning and searching out ways to overcome obstacles in their paths.”); TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 35 (“The Arizona Commission hosts a ‘[d]o you want to be a judge?’ program with the minority bar association at neighboring law schools. Commissioner Leavitt (AZ) thinks this program is useful because it catches students early on in their educational careers and explains how to make the correct career choices in preparation for a judgeship.”).
- 43 Marian Payson, *Diversity in the Magistrate Judge System*, FED. LAWYER 55, 56 (2014) (“The committee believes that greater diversity becomes a more realistic and achievable goal when the community understand and appreciates what Magistrate Judges do, the paths that lawyers from diverse backgrounds have traveled to become judges, and how the federal judiciary is enhanced by a diverse population of judges.”).
- 44 DUFF, *supra* note 6, at 1.
- 45 *See* KEVIN M. ESTERLING & SETH S. ANDERSEN, AM. JUDICATURE SOC’Y, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT 24-29 (1999), *available at* [http://www.judicialselection.us/uploads/documents/Diversity\\_and\\_the\\_Judicial\\_Merit\\_Se\\_9C4863118945B.pdf](http://www.judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf) (“We found relatively clear evidence in all states where data are available that diverse commissions tend to propose more diverse nominees and attract more diverse applicants.”).
- 46 AM. BAR ASS’N, JUDICIAL CLERKSHIP PROGRAM, [http://www.americanbar.org/groups/diversity/diversity\\_pipeline/projects\\_initiatives/judicial\\_clerkship\\_program.html](http://www.americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/judicial_clerkship_program.html) (last visited July 5, 2017).

- 47 See, e.g., TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 28 (“Commissioner Grigsby (FL) said, ‘[w]hat has affected the applicant pool are the efforts to ‘beat the bushes.’ He said that the minority bars have gotten involved in recruiting and with applications and the Governor’s general counsel has gone around the state in support of diversity. Commissioner Grigsby believes that when more effort is made to publicize a vacancy, the applicant pool will become more diverse.”); *id.* at 27 (“Commissions in Maryland and Florida do extensive outreach specially targeting underrepresented groups — this primarily involves seeking assistance with outreach from Black, Hispanic, Asian or Women bar associations.”); RACHEL PAINE CAUFIELD, *INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS* 21 (2012), available at [http://www.judicialselection.us/uploads/documents/JNC\\_Survey\\_ReportFINAL3\\_92E04A2F04E65.pdf](http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf). (“Also significant is the reliance on word of mouth as a tool to solicit applications, cited by 49.6% of respondents, indicating that commissioners rely on a close-knit legal community to function as a means to notify qualified individuals of the vacancy and the procedures for application.”); CTR. FOR JUST., LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 8, at 27 (“Nearly all of the judges who were interviewed highlighted the need for concentrated, active recruitment efforts to ensure that the most qualified candidates become knowledgeable about the judicial selection process.”); *id.* at 21 (“It seems more likely, instead, that successful judges had to do both – actively plan and network to amass the proper qualifications so that they could be recruited when the time came. Many of the judges highlighted the need to become involved in activities and engage in networking ‘before becoming interested in a judgeship’ because a successful candidate ‘should seem like the logical choice when an opening comes up.’”).
- 48 MAGISTRATE JUDGES, *supra* note 5, at 15 (“After a magistrate judge position vacancy has been announced, members of the court are encouraged to personally contact bar groups, the United States attorney’s office, the public defender’s office, and individual attorneys, especially those from diverse backgrounds, to announce the available position and to invite all qualified candidates to consider applying.”); BANKRUPTCY JUDGES, *supra* note 4, at 10, 17-18.
- 49 See CTR. FOR JUST., LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 8, at 21.
- 50 BANKRUPTCY JUDGES, *supra* note 4, at 18 (“While it is permissible for most court officials to undertake active recruitment of qualified individuals, members of the merit selection panels should refrain from active recruitment to avoid the appearance of favoritism.”).
- 51 See CTR. FOR JUST., LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 8, at 27-29 (providing lessons from interviews with judges from select states).
- 52 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 27-28.
- 53 See CTR. FOR JUST., LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 8, at 29.
- 54 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 34 (“[T]he Chairman of the Commission offers to attend meetings or answer any questions individuals or groups may have about the process.”); *id.* at 35 (“Making Commissioners available to candidates to answer questions is a positive solution in those states with reasonably sized applicant pools.”).
- 55 See MYERS, *supra* note 19, at 39 (“The data showed a significant correlation between the percentage of women applicants and nominees, and a strongly significant correlation between the percentage of women nominees and appointed judges in the states over this time period . . .”).
- 56 BANKRUPTCY JUDGES, *supra* note 4, at 18.
- 57 *Id.* at 18; see also MAGISTRATE JUDGES, *supra* note 5, at ii (“The Magistrate Judges Committee and the Judicial Resources Committee encourage all courts to continue efforts to achieve diversity not only in the final selection of a new magistrate judge, but in all aspects of the magistrate judge selection process. This includes . . . wide dissemination of vacancy notices and other efforts to reach a broad array of applicants, especially those from underrepresented groups, and ensuring that panel members

are aware of their responsibilities to ‘make an affirmative effort to identify and give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin or disability.’”).

- 58 See TORRES-SPPELLISCY, CHASE & GREENMAN, *supra* note 10, at 8 (explaining that “the less transparent the vetting process is, the less likely candidates of all stripes will subject themselves to it”).
- 59 See MARLA N. GREENSTEIN, THE AM. JUDICATURE SOC’Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 58-60 (2d ed. 2004), *available at* [http://www.judicialselection.us/uploads/documents/Handbook\\_for\\_Judicial\\_Nominating\\_Co\\_C46CEF0C61755.pdf](http://www.judicialselection.us/uploads/documents/Handbook_for_Judicial_Nominating_Co_C46CEF0C61755.pdf).
- 60 *Id.*
- 61 MAGISTRATE JUDGES, *supra* note 5, at 14-15 (“Since potential applicants may wish to obtain additional information about the magistrate position to be filled, including authority, support services, conflicts of interest, and the like, the court should consider designating the clerk of the court as a central person to respond to all inquiries from the bar and the press concerning the advertised position.”).
- 62 See TORRES-SPPELLISCY, CHASE & GREENMAN, *supra* note 10, at 38 (“Application packages should include a brief summary of the application process, such as who will review the applications; who will be granted an interview; will the interview be with a single Commissioner or with an entire Commission; will interviews be open to the public or in closed session; will there be a public hearing; will any part of the process be recorded or televised; what types of documents in an application are deemed public; how the applicant will be notified of the outcome of the application process; and if the applicant has questions, to whom should those questions be addressed.”).
- 63 See MAGISTRATE JUDGES, *supra* note 5, at 13; BANKRUPTCY JUDGES, *supra* note 4, at 18.
- 64 BANKRUPTCY JUDGES, *supra* note 4, at 17 (“Although the regulations do not prescribe the minimum amount of time the public notice should appear, it is recommended that a full notice . . . appear in a newspaper and legal periodical for a single issue, and online until the expiration of the application period.”); MAGISTRATE JUDGES, *supra* note 5, at 13-14.
- 65 See MAGISTRATE JUDGES, *supra* note 5, at 13-14; BANKRUPTCY JUDGES, *supra* note 4, at 17-18.
- 66 See MAGISTRATE JUDGES, *supra* note 5, at 14 (“[T]he court is encouraged to transmit the public notice to state and local bar associations and interest groups that focus on women and minorities and should also consider utilizing national publications and the Judiciary’s JNet Job Vacancies site.”); *see also* CAUFIELD, *supra* note 47, at 21 (“For those interested in advancing demographic and professional diversity on the bench, [posting in specialized and minority bar publications] is particularly important, as women and minorities as well as attorneys in certain practice areas may be ill-served by a commission that looks to existing political and legal elites as a means of identifying applicants rather than utilizing smaller publications that reach targeted populations in under-represented demographic or professional groups.”).
- 67 See BANKRUPTCY JUDGES, *supra* note 4, at 18 (“The notice should be filed and posted in the offices and on the websites of the clerk of the court of appeals, bankruptcy, and district courts where the bankruptcy judgeship vacancy exists.”).
- 68 *Womens Bar Associations – States*, AM. INTELLECTUAL PROPERTY LAW ASS’N, [http://www.aipla.org/committees/committee\\_pages/Women\\_in\\_IP\\_Law/Pages/Womens-Bar-Associations---States.aspx](http://www.aipla.org/committees/committee_pages/Women_in_IP_Law/Pages/Womens-Bar-Associations---States.aspx) (last visited May 16, 2016).
- 69 See TORRES-SPPELLISCY, CHASE & GREENMAN, *supra* note 10, at 3 (“All local law schools have female and minority graduates and these can be the source of many judicial applicants. Recruitment should also expand to candidates who graduated from top national schools, as these schools often have far more diverse alumni than local law schools.”).

- 70 MAGISTRATE JUDGES, *supra* note 5, at 18 (“To further efforts to achieve diversity in all aspects of the magistrate judge selection process, courts are strongly encouraged to appoint a diverse merit selection panel.”).
- 71 *Id.* at 17.
- 72 BANKRUPTCY JUDGES, *supra* note 4, at 15.
- 73 MAGISTRATE JUDGES, *supra* note 5, at 23.
- 74 *See generally* JO HANDELSMAN & NATASHA SAKRANEY, WHITE HOUSE OFFICE OF SCI. AND TECH. POLICY, IMPLICIT BIAS 1 (2015), *available at* [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/bias\\_9-14-15\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/bias_9-14-15_final.pdf) (“Research demonstrates that most people hold unconscious, implicit assumptions that influence their judgments and perceptions of others. Implicit bias manifests in expectations or assumptions about physical or social characteristics dictated by stereotypes that are based on a person’s race, gender, age, or ethnicity. People who intend to be fair, and believe they are egalitarian, apply biases unintentionally. Some behaviors that result from implicit bias manifest in actions, and others are embodied in the absence of action; either can reduce the quality of the workforce and create an unfair and destructive environment.”).
- 75 *See* GREENSTEIN, *supra* note 59, at 32-33.
- 76 MAGISTRATE JUDGES, *supra* note 5, at 22 (“The merit selection panel may hold an organizational meeting before applications have been received or may wait until all applications have been received, enabling it to begin the process of reviewing the applications at the time of its first meeting.”).
- 77 *See* PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION at G-3 (2012), *available at* <http://www.national-consortium.org/-/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Helping-Courts-Address-Implicit-Bias.ashx> (“Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes.”).
- 78 *See* AM. BAR ASS’N, STANDING COMM. ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2009), *available at* [http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal\\_judiciary09.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf) (describing the professional experience sought in filling federal vacancies).
- 79 MAGISTRATE JUDGES, *supra* note 5, at 33 (“A second notice might be published, for example, and assistance in obtaining additional applicants might be solicited from bar association officials, law school faculties, and community leaders.”).
- 80 *See* LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 9, at 29 (“The principle of judicial diversity should be embraced as a top priority for all entities involved in the selection process; such as state and local bar associations, judicial nominating commissions, election campaign committees, and state appointing authorities.”).
- 81 *See* TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 38 (“We suggest that the Commission consider racial and gender diversity as one of a number of qualities that it looks for in a judge. That way, diversity can be considered alongside a panoply of other intangible characteristics typically sought in a future judge, such as judgment, temperament, evenhandedness and collegiality.”).
- 82 *See* MAGISTRATE JUDGES, *supra* note 5, at 23 (“A district judge, a magistrate judge, the clerk of the court, or other district court employee might be invited to the meeting to acquaint the members of the panel with the work of the district court and the nature of the duties to be assigned to a magistrate judge.”); *id.* at 27 (“The panel’s objective is to recommend individuals most suited to the needs of the particular district court . . . . Accordingly, the members of the panel should acquaint themselves with the specific duties that the successful applicant will be assigned by the district judge.”).

- 83 See HANDELSMAN & SAKRANEY, *supra* note 74, at 3 (“Open discussion of implicit bias can reduce the impact of such bias on behaviors of members of an organization or community, as evidenced by several studies.”); see also TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 40 (“[I]nitial clinical studies show that implicit bias can be partially minimized through heightened self-awareness.”); WILLERT, *supra* note 8, at 47 (“Persons involved in the recruitment and hiring process should receive diversity training; otherwise, those individuals might not be capable of offering a fair evaluation of applicants during the hiring process.”).
- 84 See HANDELSMAN & SAKRANEY, *supra* note 74, at 1; CHERYL STAATS ET AL., KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 5 (2015), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.
- 85 See generally STAATS ET AL., *supra* note 84, at 5; see also HANDELSMAN & SAKRANEY, *supra* note 74, at 1.
- 86 See HANDELSMAN & SAKRANEY, *supra* note 74, at 3.
- 87 See *id.*; TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 40; WILLERT, *supra* note 8, at 47.
- 88 *Implicit Bias Initiative*, AM. BAR ASS’N, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last viewed May 16, 2016).
- 89 See CAUFIELD, *supra* note 47, at 54 (“Screening processes, which allow the commission to narrow the field before meeting for in-person interviews, might allow for greater attention to each individual interview, resulting in more useful and in-depth information. This may be particularly important for applicants who lack extensive connections in the legal community, a group of individuals who are rarely targeted in recruitment efforts.”).
- 90 See GREENSTEIN, *supra* note 59, at 138 (“Problems of commission partiality will be most pronounced in the applicant interview. Even when prejudices are not obvious they can interfere with the effectiveness of an interview.”).
- 91 See *id.* at 132 (“Standard questions should be asked of everyone interviewed; the answers will give commissioners an objective tool for comparing all candidates.”); see also CAUFIELD, *supra* note 47, at 25 (“Effective interviews provide an additional basis for comparing candidates, supplementing information gleaned from the applicant questionnaire and investigation.”); MAGISTRATE JUDGES, *supra* note 5, at 24 (“The panel members should determine beforehand the types of questions that should be asked, and the same general questions and areas of inquiry normally should be addressed to each interviewee.”); BANKRUPTCY JUDGES, *supra* note 4, at 22 (“The panel should determine beforehand what types of questions will be asked, and the members should agree that the same general questions and areas of inquiry will be covered with each interviewee.”).
- 92 See WILLERT, *supra* note 8, at 55.
- 93 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 10, at 39 (“There does not have to be a strict menu of questions because applicants are likely to have such varied life experiences. Indeed asking the same questions to all may waste the time of both the Commission and the applicant, in light of the fact that the Commission should have a full application which indicates relevant experiences. Nonetheless, interview questions should primarily focus on the substantive legal experiences of the applicant.”); see also CAUFIELD, *supra* note 47, at 25; GREENSTEIN, *supra* note 59, at 132.
- 94 See ESTERLING & ANDERSEN, *supra* note 45, at 12 (citing MARLA N. GREENSTEIN, THE AM. JUDICATURE SOC’Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 101 (1st ed. 1985)).
- 95 See GREENSTEIN, *supra* note 59, at 137.
- 96 Cf. CASEY ET AL., *supra* note 77, at G-8 (explaining that judges and juries should take notes so as not to rely on memory, which is easily biased); Justin D. Levinson, *Forgotten Racial Equality: Implicit*

- Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 410 (2007) (noting that note taking can have a debiasing effect on jurors).
- 97 See generally CASEY ET AL., *supra* note 77, at G-8 to -9 (describing the use of decision-support tools “to promote greater deliberative (as opposed to intuitive) thinking”) (citing Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 101 (2007)).
- 98 See GREENSTEIN, *supra* note 59, at 154.
- 99 MAGISTRATE JUDGES, *supra* note 5, at 27 (“The Regulations of the Judicial Conference do not prescribe how the panel should evaluate the applicants.”); BANKRUPTCY JUDGES, *supra* note 4, at 25 (“Judicial Conference regulations do not prescribe the specific manner in which merit selection panels should evaluate and rank candidates. These procedures generally are left to the discretion of the individual panels and judicial councils.”).
- 100 See CASEY ET AL., *supra* note 77, at B-8, G-3, G-9 to -11, G-15, G-31.
- 101 See AM. BAR ASS’N, STANDING COMM. ON THE FEDERAL JUDICIARY, *supra* note 78, at 3.
- 102 See *id.* (“In addition, in evaluating a prospective nominee’s professional experience, the Committee may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited.”); GREENSTEIN, *supra* note 59, at 79 (“Finally, evaluative criteria may be culturally restrictive. Evaluations that look toward the applicant’s personal career advancement, for example, without regard to race or gender may inherently exclude women and minorities. Although a valid criterion, personal career advancement may be biased toward white males who probably have met with fewer obstacles in their career paths than have applicants from groups that have traditionally faced discrimination.”).
- 103 See generally Stephen B. Plank & Will J. Jordan, *Effects of Information, Guidance, and Actions on Postsecondary Destinations: A Study of Talent Loss*, 38 AM. EDUC. RES. J. 947, 966, 972-73 (2001) (finding that guidance from school, prep course for the SAT/ACT, financial aid information sources, and applying for financial aid all exerted a statistically significant, positive effect on the odds of a high achieving individual attending a 4-year institution compared to 2-year institutions and not enrolling at all); Patricia A. Perez & Patricia M. McDonough, *Understanding Latina and Latino College Choice: A Social Capital and Chain Migration Analysis*, 7 J. HISP. HIGHER EDUC. 249, 258-59 (2008), available at [https://www.researchgate.net/profile/Patricia\\_Perez\\_PhD/publication/240691258\\_Understanding\\_Latina\\_and\\_Latino\\_College\\_ChoiceA\\_Social\\_Capital\\_and\\_Chain\\_Migration\\_Analysis/links/549850340cf2c5a7e342ba5d.pdf](https://www.researchgate.net/profile/Patricia_Perez_PhD/publication/240691258_Understanding_Latina_and_Latino_College_ChoiceA_Social_Capital_and_Chain_Migration_Analysis/links/549850340cf2c5a7e342ba5d.pdf) (demonstrating that distance from family was a deciding factor for where some Latino/a students applied and received post-secondary education).
- 104 See WILLERT, *supra* note 8, at 56.
- 105 See MALIA REDDICK, INST. FOR THE ADVANCEMENT OF AM. LEGAL STUDIES, MODEL CODE OF CONDUCT FOR JUDICIAL NOMINATING COMMISSIONERS 8 (Rule 4.3 and Commentary) (2016), available at <http://iaals.du.edu/quality-judges/publications/model-code-conduct-judicial-nominatingcommissioners>.



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