

Building a Diverse Bench: A Guide for Judicial Nominating Commissioners

Kate Berry

Foreword by Former Justice Yvette McGee Brown

BRENNAN CENTER FOR JUSTICE
TWENTY YEARS

at New York University School of Law

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FOREWORD

Justice For All — three words we have been reciting since grade school. These three words are a promise: to treat everyone the same; to administer the laws fairly; and to provide justice. This idea of Justice For All can only be achieved when our court system reflects the rich diversity of our people.

Our court system should be filled with judges who not only are intelligent, thoughtful, and faithful to the rule of law, but also bring diversity of experience and background. We should have judges who have been prosecutors and public defenders, and who have been in business and government. When our courts are dominated by only one legal profession, one political party, or one gender or race, the public's perception of justice suffers. Justice demands not only equality in fact but the appearance thereof. It is critical that when people access our courthouses, they see people at all levels of the court system that look like them. When the only people of color in a courthouse are in handcuffs, the public's perception of Justice is "Just Us."

The reality is that all judges bring into the courtroom their unique life experience, tempered by their oath to make decisions based on the law and the constitution. It's the integrity and judgment of these men and women that allow our constitutional democracy to move forward.

When people lose faith in the judiciary, they lose faith in democracy. We must take action to build a bench that reflects and serves its community. By thinking critically about the need for judicial diversity and taking active steps to make the process for selecting judges as fair and open as possible, we will be able to strengthen our bench and inspire the public.

Yvette McGee Brown

*Former Supreme Court of Ohio Justice and Franklin County Common Pleas Court Judge
Current Partner-in-Charge of Diversity, Inclusion & Advancement at Jones Day*

INTRODUCTION

The judiciary plays a critical role in our democracy. Judges resolve disputes, protect rights, and interpret the law. The decisions they make affect all aspects of society, from banking to marriage to policing. Selecting fair and impartial judges is therefore vital. Thirty-six states and the District of Columbia select at least some judges with the help of a judicial nominating commission.¹ Many federal judges are also chosen with the assistance of a commission, including magistrate² and bankruptcy³ judges, as well as some federal district⁴ and appellate⁵ judges.

One key element to a successful judiciary is diversity, both demographic and professional. Judges' personal and professional experiences affect how they approach the cases that come before them. Bringing diverse perspectives to bear fosters decision-making that reflects the lived experiences of the whole population, resulting in better, richer jurisprudence. 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. Diversity on the bench has the added benefit of establishing role models for all groups by showing that individuals from diverse backgrounds can obtain judicial positions. It is for these reasons that a number of states with judicial nominating commissions have constitutional or statutory provisions directing nominating commissioners to consider diversity in making their recommendations.⁶

“Personal experiences affect the facts that judges choose to see.”

*— Justice Sonia Sotomayor,
U.S. Supreme Court (2001)⁷*

Despite the benefits of judicial diversity, it remains lacking across the country. No state has a bench that comes close to reflecting the demographics of its population or the diversity of the legal profession. But nominating commissioners can play a vital role in changing this trend. Commissioners are the gatekeepers for appointed judges; they recruit candidates, evaluate their qualifications for the bench, and ultimately decide which names to put forward to the appointing authority. By actively recruiting candidates from across the legal profession and taking steps to ensure the fair evaluation of all candidates, commissioners can help build an even stronger judiciary. While the focus of this manual is on the state bench, many of the best practices included herein are also applicable to the selection of federal judges.

This resource provides nominating commissioners with concrete guidance on the steps they can take to promote a diverse bench. The best practices listed below reflect lessons, recommendations, and research provided by nominating commissioners, judges, advocates, and scholars. In recognition of the already heavy workload of nominating commissioners, this manual focuses on simple changes that can have an outsized impact on the strength of both the applicant pool and the candidates put forward to the appointing authority.

Some of the key resources relied on are listed in the appendix. These resources reflect interviews with nominating commissioners and judges, quantitative and qualitative research by scholars and advocates, and expert recommendations.

WHAT IS DIVERSITY?

The bench 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, parental status, physical ability, religious affiliation or lack thereof, socio-economic background, and geography.⁸

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.⁹

WHY IS DIVERSITY IMPORTANT?

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

A diverse judiciary:

Creates better, richer jurisprudence that reflects a broad range of experiences, backgrounds, and perspectives;¹⁰

“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)¹¹

Promotes public confidence that the judicial system is fair and objective **by including all voices**;¹²

*“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)¹³

Establishes role models for all groups¹⁴ and **contradicts stereotypes** that individuals from certain groups cannot obtain judicial positions¹⁵.

“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)¹⁶

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

HOW DIVERSE IS THE JUDICIARY IN THE STATES?

State court benches across the country fail to reflect the demographic diversity of the populations they serve. Finding precise data poses a challenge because a number of states do not collect basic demographic information about their judiciary and no state collects and reports information across all diversity criteria. However, relying on the available data, we do know that in terms of gender, race, and ethnicity, states do not have benches that reflect their populations. For example, as of 2016, women make up approximately half of the U.S. population¹⁷ and just 31 percent of state court judges¹⁸. As of 2009, white males composed approximately 37.5 percent of the population but 66 percent of appellate state court judges.¹⁹ (The last complete, publicly available racial diversity data set was collected in 2009).²⁰

There is great variety across states in terms of the demographic composition of their overall population, their bar, and their bench. The following resources provide some information about current demographics. The appendix provides hyperlinks to the relevant demographic resources referenced below.

State Demographics: The United States Census Bureau provides demographic information about each state's population.²¹

Lawyer Demographics: The American Bar Association provides information about each state's bar population²² and nationwide lawyer demographic information²³.

- In most states, the population of lawyers is not nearly as diverse as the general population, thus magnifying the need for active recruitment of diverse candidates.²⁴

Judge Demographics: Recently updated gender information about each state's bench is available on the National Association of Women Judges' website.²⁵ Recently updated information about judges' race and ethnicity is provided by the National Center for State Courts through their State Court Organization resource.²⁶ However, states self-report this race and ethnicity data, and some states have made little or no data publically available. The American Bar Association's website provides a nationwide summary of race and ethnicity statistics from 2010.²⁷

The American Bar Association is currently engaged in a robust data collection project on judicial diversity and, at the time of publication, had compiled comprehensive information for almost half the states. For questions about or access to the collected data, contact Peter Koelling, Director Chief Counsel, Judicial Division, at Peter.Koelling@americanbar.org.

State court benches also fail to reflect the diversity of the legal profession. While no comprehensive national data exists on the professional background of state court judges, 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.²⁸

HOW CAN NOMINATING COMMISSIONERS PROMOTE DIVERSITY?

Judicial nominating commissioners are well situated to help build a diverse judiciary. Small changes to a commission's selection process can strengthen the applicant pool and the overall diversity of the candidates a commission forwards to the appointing authority.

Of course, each state faces unique challenges and some best practices may be difficult to implement given a state's statutory or constitutional guidelines or other local considerations. The practices in this manual can and should be modified as necessary to fit the needs of each commission.

ORGANIZATIONAL MEETING

Many judicial nominating commissions begin their work to fill a judicial vacancy by holding an organizational meeting. These meetings are typically used to establish commission goals, review procedural and ethical responsibilities, discuss the governing rules, assign responsibilities, and coordinate schedules.²⁹

The organizational meeting also provides a valuable opportunity for promoting judicial diversity. 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, and discussed in more depth below.³⁰ The organizational meeting allows commissioners the chance to ensure there are clear rules governing each stage of the process. It also allows commissioners the opportunity to discuss desirable candidate attributes in advance of their evaluation.

Best Practices:

- 1 **Schedule an Organizational Meeting:** Each commission should schedule an organizational meeting regardless of whether the commission's rules require one.
- 2 **Formalize Commission Procedures:** Use the meeting as an opportunity to review the commission's governing rules and develop formalized, written procedures for any unaddressed areas. Such formalized procedures help ensure that all candidates are treated equally³¹ and that commissioners can be transparent about the process. A list of issues that each commission may want to address with formalized rules is available in the American Judicature Society's *Handbook for Judicial Nominating Commissioners*.³² A few of the most important areas are listed below, with guidance provided in the relevant sections to follow:

Evaluative Criteria: Develop prescribed job criteria.³³ 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 — such as prior judicial service — a job requirement, as most skills can be garnered in a number of positions and strict requirements can quickly shrink the eligible applicant pool.³⁴

Recruitment and Immediate Next Steps: Begin conversations about recruitment goals for all commissioners and immediate next steps.

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

Voting: Develop codified procedures for voting on candidates to recommend to the appointing authority.

Data Collection: Discuss what data the commission intends to collect from applicants and whether this data will be available to commissioners during their evaluations.

- ③ **Affirm Judicial Diversity as a Goal:** Given the importance of affirmative steps, such as active recruitment, to promoting a diverse bench, early buy-in by the commission to the importance of diversity is essential.³⁵ Commissioners should not set target numbers, but should agree to consider the importance of diversity in their holistic evaluation of candidates.³⁶
- ④ **Schedule Implicit Bias Training:** Some states mandate or offer voluntary training for judicial nominating commissioners.³⁷ A separate implicit bias training should be scheduled for commissioners who do not already have one available.³⁸

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.³⁹ 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.⁴⁰

Luckily, implicit bias training can mitigate biases.⁴¹ 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.⁴²

The American Bar Association's Implicit Bias Initiative provides resources that can be used in trainings.⁴³ Questions about the program or about trainings in your area should be directed to Felice Schur, Associate Director, Judicial Division (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 staffs.

RECRUITMENT OF CANDIDATES

Judges with backgrounds underrepresented in their state's judiciary almost universally indicate that they were encouraged to consider a judicial position by an influential member of the community.⁴⁴ Interviews with judicial nominating commissioners⁴⁵ and judges bringing demographic and professional diversity to the bench⁴⁶ reveal that active recruitment has a dramatic effect on the quality and diversity of applicant pools. The American Bar Association's Commission on State Judicial Selection Standards has likewise affirmed the importance of active recruitment, based on extensive research and interviews.⁴⁷

Given the importance of recruitment, many nominating commission rules require commissioners to engage in at least some active recruitment.⁴⁸ Commissioners in all states should formalize active recruitment procedures⁴⁹ to ensure effective outreach to diverse applicants, and equal and consistent treatment.⁵⁰

Best Practices:

1 Begin Recruitment Early

Effective recruitment must begin, when possible, long before a job is posted.⁵¹ Often commissioners can anticipate a vacancy occurring months, and even years, in advance.

Commissioners must be careful, however, not to recruit in a way that suggests support for or a commitment to a candidate for a specific vacancy. Many states prohibit commissioners from having direct contact with applicants once the job has been posted or once they have submitted an application.⁵² In all states, commissioners may not suggest to a candidate that they will recommend her for a particular position.⁵³

*Further guidance on recruiting in compliance with commissioners' ethical responsibilities is available in the Institute for the Advancement of the American Legal System's Model Code of Conduct for Judicial Nominating Commissioners.*⁵⁴

2 Create Recruitment Goals for All Commissioners

All commissioners should develop recruitment goals that are appropriate for their particular composition 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 identified as successful by nominating commissioners⁵⁵ as well as judges⁵⁶. In developing recruitment goals, commissioners should work together so that outreach isn't concentrated in only one part of the state.

- Reach out to leadership at minority and affinity bar associations in order to encourage them to both recruit and recommend strong candidates.⁵⁷

- Make speeches to community groups, minority bar associations, law school alumni associations, or other affinity groups explaining the role of judges and the application process.
- Organize a panel of current judges to talk about their work. This would give potential candidates tools and information about judicial careers in their state. A judicial panel would also introduce current members of the bench to aspiring, well-qualified candidates, thus facilitating mentorship opportunities.⁵⁸
 - Co-sponsorship with a local minority bar association may also be possible and could encourage bar leaders to play a role in identifying and recruiting diverse judicial candidates.
- Publicize and host “office hours” in which nominating commissioners are available to meet with individuals or groups and discuss the process.⁵⁹ This form of outreach is particularly important in districts where it is common for commissioners to have private meetings or conversations with applicants.⁶⁰ All candidates should have equal access to commissioners.
- Once nominating commissioners are connected with interested candidates, facilitate introductions to other stakeholders, including:
 - Other nominating commissioners. Members of the same commission often have different perspectives on the process and the role of a judge. It is helpful for strong candidates to connect with as many members of the commission as possible.
 - Judicial mentors. In some jurisdictions, commissioners facilitate introductions to sitting judges who can act as mentors to potential candidates. Judges are in the best position to communicate the nuances of the job and how to best prepare for it. Many judges report that mentorship from sitting judges was pivotal to their successful candidacy.⁶¹

③ Build a Pipeline for Future Judicial Candidates and Nominating Commissioners

Future Judicial Candidates: Interviews with minority judges reveal that early consideration of a career on the bench contributed to their success in eventually becoming a judge.⁶² While outreach to law students and young attorneys will not affect a current vacancy, it will provide a more diverse applicant pool for future commissioners.⁶³

- Many of the steps commissioners will 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.

- Commissioners should also communicate the importance of the judiciary, the process for becoming a judge in their state, and the criteria they look for in applicants to:
 - 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. Clerks gain invaluable exposure to the work of judging early in their law careers.

*The American Bar Association leads the Judicial Clerkship Program, which connects minority law students from around the country with judges and former law clerks.*⁶⁴

Future Nominating Commissioners: Empirical research has found that when nominating commissions are more diverse, they recruit and recommend more diverse judicial candidates.⁶⁵ Many states have rules or statutes fostering diversity within the commission.⁶⁶ In all states, it is vital that current commissioners play a role in ensuring the demographic and professional diversity of future commissions.

- Speak to community groups, minority bar associations, law school alumni associations, or other affinity groups about the important role played by nominating commissioners and encourage them to consider future appointments.

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 nominated. Furthermore, the greater the rate at which they are nominated, the more likely they are to be appointed.⁶⁷ As a result, achieving a diverse bench requires that these candidates not only consider a judicial career, but that they actually apply.

To ensure that each commission has a qualified, diverse applicant pool, it is essential to widely distribute a detailed vacancy description.

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.⁶⁸ So that all qualified candidates have an equal opportunity to apply, the job posting should include the information listed below. A sample vacancy description is also provided in the appendix.

- **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;⁶⁹
- **Detailed application instructions**, which include: (1) the application form, (2) the submission deadline, (3) the submission instructions,⁷⁰ and (4) a contact person for any questions;
- **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) whether interviews will be open to the public or closed, (5) which documents and deliberations will be made public, (6) how applicants will be notified of the outcome of the applications process, (7) the application timeline, and (8) the number of candidates submitted to the appointing authority and whether their names become public;⁷¹ and
- **A statement that the state 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 affiliations or lack thereof, socio-economic backgrounds, and geographic locations to apply.

② Disseminate the Job Posting Widely: Commissioners are typically responsible for advertising judicial vacancies. Postings are often circulated on available listservs, posted on judicial and organizational websites, and placed in print or online newspapers and bar association journals. In order to ensure dissemination to a diverse group, it is essential that commissioners post the job description widely. A complete list of recommended placements for vacancy notices is available in the American Judicature Society’s *Handbook for Judicial Nominating Commissioners*.⁷² Of particular importance is publication with specialized and minority bar associations.⁷³ Below is a list of some sources of dissemination with which to begin constructing a locally-relevant list. The appendix provides the appropriate hyperlinks, emails, and phone numbers for these resources.

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.⁷⁴
 - 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 Women Judges
 - National Center for State Courts
 - National Legal Aid and Defender Association
 - The National Trial Lawyers

Alumni networks of national and local law schools, including minority and specialized student groups.⁷⁵

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

National and local law firms.

- ③ 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. In states where commissioners solicit feedback on candidates from the state bar association, they should also seek feedback from minority, women's, and affinity bar associations.

INTERVIEWS

Commissioners report that interviews provide an invaluable opportunity for evaluation of judicial candidates. Interviews can be particularly important for candidates with fewer political connections, who may be less known to the commission prior to applying.⁷⁶ However, because interviews are subjective, research suggests that commissioners are most likely to rely on their implicit biases during this stage of the process.⁷⁷ As a result, commissioners should develop clear and uniform guidelines for conducting interviews.

Best Practices:

- 1 Develop (at Least Some) Uniform Interview Questions:** A set of interview questions that is asked of all candidates provides commissioners with a basis for an equal comparison between interviewees.⁷⁸ Implicit bias research shows that standardized interview questions allow for the best comparison between candidates and minimize biases.⁷⁹ 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.⁸⁰

*There are examples of appropriate standard questions in many states' handbooks. Examples are also available in the American Judicature Society's Handbook for Judicial Nominating Commissioners.*⁸¹

- 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.⁸² 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 commissioners 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.⁸³ 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, commissioners are more likely to accurately remember interviews and evaluate candidates fairly.⁸⁴ Additionally, immediately following interviews, commissioners should consider filling out a brief evaluation form that requires both a quantitative and qualitative assessment. These evaluations will allow commissioners to capture their impressions of candidates and are particularly important for interviewers who prefer not to take notes.⁸⁵
- 5 Facilitate Conveniently Located Interviews:** In striving for geographic diversity on the bench, consider conducting interviews in various locations, including outside of major cities.

DELIBERATIONS AND VOTING

After commissioners have completed the interviews, it is important to evaluate and discuss all candidates prior to voting.⁸⁶

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. Doing so reminds the group of its agreed upon, collective goals, reduces ambiguity, and protects against implicit biases.⁸⁷
- 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.⁸⁸ 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.⁸⁹

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.⁹⁰ As a result, graduation from certain law schools should not be seen as a prerequisite.

Consider All Recommendations and Ratings: In surveys of nominating commissioners, participants have indicated that the highest-rated evaluation criteria include recommendations and ratings from other commissioners.⁹¹ To avoid favoritism for candidates with inside connections to commissioners, it's vital that commissioners carefully review all recommendations and ratings.

- 3 **Standardize Conversations with References:** Just as candidate interviews should be conducted off a list of set questions, so too should reference checks.⁹² Similarly, notes should be taken during reference checks. Commissioners should also standardize the process by which they report the results of their reference checks to the other commissioners so that all evaluators have access to the same information.⁹³

4 Develop a Codified Procedure Laying Out Voting Rules: Many commissioners find that deciding on a system of voting is a uniquely challenging aspect of their job.⁹⁴ Clear rules for voting that are straightforward and equitable avoid manipulation or the undue influence of certain members of the commission.⁹⁵ In states without set rules, guidance on voting can be found in the American Judicature Society's *Handbook for Judicial Nominating Commissioners*. In all states, commissioners should collectively review the rules to foster understanding.⁹⁶

DATA AND RECORD-KEEPING

The lack of available data about judicial candidates has been an obstacle to achieving judicial diversity. Recording information about candidates allows commissioners to discover whether they are both successfully recruiting diverse applicants and putting diverse candidates before the appointing authority. Active record-keeping will, therefore, help commissioners make data-based decisions about whether, and how, they want to modify their process.⁹⁷

Record-keeping can also protect judicial nominating commissioners against unfair criticisms that they did not nominate diverse candidates. Data can show, for example, that a commission put diverse candidates before the appointing authority and that the appointing authority failed to select them.

Finally, active data collection will provide invaluable information about the background of the candidates who make it to the bench, helping to fill current data gaps.

Best Practices:

1 Ask Applicants to Self-Identify Demographic Information in Their Applications: Applicants should be asked to provide basic diversity information about themselves in their applications (and given the option to decline to provide this information). Commissioners may decide that they want this information to be collected for record-keeping purposes only and not be available to commissioners during the evaluation process.⁹⁸ Collected information should include:⁹⁹

- Race
- Ethnicity
- Gender identity
- Sexual orientation
- Disability status

2 Publish Aggregate Diversity Data: To protect the anonymity of candidates, data should only be released on an aggregate basis.¹⁰⁰ The data should be made available to the public, as well as commissioners and the appointing authority. Released information should include the aggregate demographic make-up and professional experiences of:

- All applicants
- Candidates who were given interviews
- Candidates whose references were contacted
- Candidates who were recommended to the appointing authority

③ Review Data and Make Recommendations for Reform as Necessary:

After the vacancy has been filled, commissioners should review the applicant data and make recommendations to both the appointing authority and future commissioners for modifications, if necessary, in filling future vacancies.¹⁰¹ In addition to reviewing data, commissioners should reach out to successful and unsuccessful candidates about how they can improve the process.¹⁰²

CONCLUSION

The recommendations provided in this manual are designed to assist nominating commissioners in building a more diverse judiciary. By making diversity a priority, actively recruiting diverse candidates, taking concrete steps to evaluate all candidates fairly, and designing a transparent process, commissioners will be able to foster a more inclusive and representative bench.

Of course, each jurisdiction has its own needs and demands. The appendix provides resources that can assist in tailoring the best practices in this manual to each commission's unique challenges. Included in the appendix are: (1) a select list of resources relied upon in developing the best practices listed herein; (2) links to resources providing information about the demographic composition of each state and organizations for outreach; and (3) a sample judicial vacancy description that can be modified for each opening.

APPENDIX

Key Resources

1. ALLIANCE FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS (2016), *available at* <http://www.afj.org/reports/professional-diversity-report> (analyzing the professional diversity of President Barack Obama's federal judicial nominees).
2. RACHEL PAINE CAUFIELD, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS (2012), *available at* http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf (surveying 487 nominating commissioners from 30 states and the District of Columbia about the membership, rules, procedures, practices, and effectiveness of judicial nominating commissions).
3. CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH (2009), *available at* http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf (recounting the experiences of successful minority judges and providing recommendations for improving minority candidates' access to judicial positions).
4. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109 (2003) (publishing a talk by Judge Chen at the California Law Review's annual banquet discussing the meaning and value of judicial diversity).
5. Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325 (2002) (discussing the role of race in the judiciary and the value of diversity).
6. MARLA N. GREENSTEIN, AM. JUDICATURE SOC'Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS (2d ed. 2004), *available at* http://www.judicialselection.us/uploads/documents/Handbook_for_Judicial_Nominating_Co_C46CEF0C61755.pdf (providing guidance to judicial nominating commissioners on every step of the selection process).
7. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (asserting that the most important justification for judicial diversity is inclusion of a variety of voices and enrichment of decision-making).

8. 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 (2005), *available at* https://www.opensocietyfoundations.org/sites/default/files/answering_20050923.pdf (considering the impact of methods of judicial selection on diversity and providing recommendations for increasing diversity, relying, in part, on testimony from a convening bringing together civil rights organizations, minority bar associations, and judicial independence groups).
9. K.O. MYERS, AM. JUDICATURE SOC'Y, MERIT SELECTION AND JUDICIAL DIVERSITY REVISITED (2014), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/judicial/id/408> (considering the impact judicial nominating commissioners have on judicial diversity in their states).
10. 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? (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731012 (considering the effect that the method of judicial selection has on judicial diversity).
11. STANDING COMM. ON JUDICIAL INDEPENDENCE, AMERICAN BAR ASS'N, STANDARDS ON STATE JUDICIAL SELECTION (2000), *available at* http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/reformat.authcheckdam.pdf (enumerating ABA standards for state judges and the best methods to assess candidates' qualifications).
12. CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY (2d ed. 2010), *available at* https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf (considering how effective judicial appointment states are at recruiting female and minority judges, and proposing best practices based, in part, on interviews with judicial nominating commissioners).
13. SHERYL J. WILLERT, WASH. STATE MINORITY AND JUSTICE COMM'N, BUILDING A DIVERSE COURT: A GUIDE TO RECRUITMENT AND RETENTION (2d ed. 2010), *available at* <http://www.courts.wa.gov/committee/pdf/Buidling%20a%20Diverse%20Court%20RR%20Manual%202nd%20Ed.pdf> (recommending ways courts in Washington state can increase judicial diversity).
14. James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775 (2004) (arguing that diversity is essential to an impartial and representative judiciary).

Links to Demographic and Outreach Resources

Definition of Diversity

State Demographics:

- United States Census Bureau, Annual Estimates of the Resident Population by Sex, Race, Hispanic Origin for the United States, States and Counties, <https://www.census.gov/popest/data/counties/asrh/2012/PEPSR6H.html>

Lawyer Demographics:

- Each state's bar population: American Bar Association, National Lawyer Population by State, http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf
- Nationwide lawyer demographic information: American Bar Association, Lawyer Demographics, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf

Judge Demographics:

- Gender information: National Association of Women Judges, http://www.nawj.org/us_state_court_statistics_2016.asp
- Race and ethnicity information: National Center for State Courts, State Court Organization, <http://www.ncsc.org/sco> (updated in 2015 but incomplete); American Bar Association's website, National Database on Judicial Diversity in State Courts, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (complete but last updated in 2010)

Vacancy Description and Dissemination

Minority and Women's Bar Associations

National Bar Associations:

- Hispanic National Bar Association: <http://hnba.com>; support@hnba.com; 202-223-4777
- National Association of Women Lawyers: <http://www.nawl.org>; nawl@nawl.org; 312-988-6186
- National Asian Pacific American Bar Association: <http://www.napaba.org/?page=Careers> (jobs can be posted directly through the website); 202-775-9555
- National Bar Association: <https://www.nationalbar.org>; gina.ricard@nationalbar.org; communications@nationalbar.org; 202-842-3900

- National Black Law Students Association: <http://nblsa.org>; info@NBLSA.org; 202-618-2572
- National Conference of Women's Bar Associations: <http://ncwba.org>; info@ncwba.org; 503-775-4396
- National LGBT Bar Association: <http://lgbtbar.org>; info@lgbtbar.org; 202-637-7661
- National Native American Bar Association: <http://www.nativeamericanbar.org>; adminassistant@nativeamericanbar.org
- North American South Asian Law Students Association: <https://nasalsa.org>; northamericansalsa@gmail.com
- Puerto Rican Bar Association: <http://prbany.com>; info@prba.net
- South Asian Bar Association of North America: <http://www.sabanorthamerica.com>; executivedirector@sabanorthamerica.com

State Bar Associations:

- Women's bar associations: American Intellectual Property Law Association, http://www.aipla.org/committees/committee_pages/Women_in_IP_Law/Pages/Womens-Bar-Associations---States.aspx

National and State Affinity Groups

- The American Association for Justice: <https://www.justice.org>; hr@justice.org; 202-965-3500
- National Association of Criminal Defense Lawyers: <http://www.nacdl.org>; assist@nacdl.org (job posting should be attached as a pdf to the email); 202-872-8600
- National Association of Women Judges: <http://www.nawj.org>; mkomisar@nawj.org; 202-392-0222
- National Center for State Courts: <http://www.ncsc.org>; lduncan@ncsc.org; knowledge@ncsc.org; 757-259-1830
- National Legal Aid and Defender Association: <http://www.nlada100years.org>; info@nlada.org; 202-452-0620
- The National Trial Lawyers: <http://www.thenationaltriallawyers.org>; 866-665-2852

American Bar Association-Approved Law Schools

- American Bar Association, Official Guide to ABA-Approved Law Schools, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/official-guide-to-aba-approved-law-schools.html

Sample Vacancy Description

A word version of this document is available on the Brennan Center's website.

The Nominating Commission is now soliciting applications to fill a vacancy in the **[court name]** located in **[city name]**. The **[court name]** is a **[court description, e.g. trial court of general jurisdiction handling both civil and criminal cases]**. Each judge on the **[court name]** hears approximately **[number]** cases per year. The candidate appointed to fill this vacancy will serve a **[number of years]** year term. Should the selected judge wish to remain on the bench for an additional term, she must **[reselection method, e.g. face a retention election]** at the end of her initial term. **[Indicate whether there is a mandatory retirement age]**. The salary for this position will be **[salary]**.

Applications will only be considered by candidates who submit all requested materials as listed on the application form, attached, and meet the following criteria: **[fill-in]**. Applications must be received by **[month, day, year]**.

All applications should be submitted by email or mail to **[name, email, mailing address]**. Any questions about the application process should be directed to **[name, phone number, email, mailing address]**.

Once all applications have been received, the Nominating Commission will schedule and conduct interviews, deliberate, vote on the judicial candidates, and submit its recommendations to the appointing authority. The entire process will be concluded by **[date]** with an expected judicial start date of **[date]**.

The Nominating Commission will conduct interviews of **[description of how interviewees will be selected, e.g. all candidates who meet the minimum qualifications]**. Interviews will be **[number of minutes]** long and will be conducted by **[description of who will conduct the interviews, e.g. the entire Nominating Commission]**, whose names are listed below. Each interview **[will be/will not be]** open to the public. After concluding all interviews, **[description of who will evaluate applications, e.g. every member of the Nominating Commission]** will evaluate each application. The evaluative criteria identified by the commission are as follows: **[insert]**.

Deliberations about the applicants **[will/will not be]** open to the public. The Nominating Commission will then vote on which **[insert number]** candidates will be recommended to the **[insert appointing authority]**. The names of the Nominating Commission's recommended candidates **[will/will not be]** made public. All applicants will be notified of the outcome of the application process in the following manner: **[insert notification process]**.

Names of Commissioners: **[list below]**

We are an equal opportunity employer. We value a diverse workforce and an inclusive culture. We encourage candidates of all gender identities, races, ethnicities, national origins, sexual orientations, parental statuses, physical abilities, religious affiliations or lack thereof, socio-economic backgrounds, and geographic locations to apply.

ENDNOTES

- 1 *Judicial Selection Across the United States*, BRENNAN CTR. FOR JUSTICE, <http://judicialselectionmap.brennancenter.org/> (last visited May 3, 2016). There is some variation between organizations in how they define judicial nominating commissions and so total numbers can vary. At the time of publication, the Brennan Center's list of states that use nominating commissions is as follows: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, D.C., Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.
- 2 See MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, *THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES* (2010), available at <http://www.nced.uscourts.gov/pdfs/Selection-Appointment-Reappointment-of-Magistrate-Judges.pdf>.
- 3 See MALIA REDDICK & NATALIE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *A CREDIT TO THE COURTS: THE SELECTION, APPOINTMENT, AND REAPPOINTMENT PROCESS FOR BANKRUPTCY JUDGES 1* (2013), available at http://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf.
- 4 See *Federal Judicial Selection*, NAT'L CTR. FOR STATE COURTS, http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state (last visited May 16, 2016).
- 5 See *id.*
- 6 See AM. JUDICATURE SOC'Y, *JUDICIAL MERIT SELECTION: CURRENT STATUS* 18, Table 5 (2011), available at http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf (providing a list of states that have a provision requiring nominating commissions consider diversity for judicial applicants).
- 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.
- 8 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.").
- 9 See ALLIANCE FOR JUSTICE, *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.").
- 10 See, e.g., CTR. FOR JUSTICE, 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 ("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."); 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.”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 456 (2000) (“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 JUSTICE 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.”).

- 11 Ifill, *supra* note 10, 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).
- 12 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 (“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? 1 (2009), available at 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 10, 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.”).
- 13 Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117 (2003).
- 14 See, e.g., CTR. FOR JUSTICE, LAW AND SOC’Y AT GEORGE MASON UNIV., *supra* note 10, 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.”); Edwards, *supra* note 10, 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 12, 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 10, 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.”).

- 15 See, e.g., Chen, *supra* note 13, at 1116 (“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 10, 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 12, at 1 (citing Nicholas O. Alozie, *Black Representation on State Judiciaries*, 4 Soc. Sci. Q. 69, 979-86 (1988)) (explaining that judicial diversity provides decision-making power to formerly disenfranchised populations).
- 16 Edwards, *supra* note 10, at 329.
- 17 *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2018.html#203> (last visited May 16, 2016) (indicating that there are approximately .97 males for every 1 female in the United States); *Population, Female (% of total)*, WORLD BANK, <http://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?page=1> (last visited May 16, 2016) (demonstrating that the male to female ratio in the United States has remained extremely stable at approximately 50 percent female over the last thirty years).
- 18 *American Bench*, NAT’L ASS’N OF WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2016.asp (last visited May 16, 2016) (providing data from 2016).
- 19 CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 8 (2d ed. 2010), available at https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.
- 20 The American Bar Association provides judicial diversity data from 2010, but the entire dataset is not available online. *National Lawyer Population by State*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf (last visited May 16, 2016).
- 21 *Annual Estimates of the Resident Population by Sex, Race, Hispanic Origin for the United States, States and Counties*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited May 16, 2016).
- 22 *National Lawyer Population by State*, *supra* note 20.
- 23 *Lawyer Demographics: Year 2015*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf (last visited May 16, 2016).
- 24 WILLERT, *supra* note 10, at 26 (“[Recruiters] will have to work harder . . . because of the limited number of minority and disabled attorneys.”).
- 25 *American Bench*, *supra* note 18.
- 26 *State Court Organization*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/sco> (last visited May 16, 2016).
- 27 Standing Comm. on Judicial Independence, *National Database on Judicial Diversity in State Courts*, AM. BAR ASS’N, <http://apps.americanbar.org/abanet/jd/display/national.cfm> (last visited May 16, 2016).

- 28 See Gregory L. Acquaviva & John. D. Castiglione, *Judicial Diversity on State Supreme Court*, 39 SETON HALL L. REV. 1203, 1235 (2009).
- 29 See MARLA N. GREENSTEIN, AM. JUDICATURE SOC'Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 32-33 (2d ed. 2004), available at http://www.judicialselection.us/uploads/documents/Handbook_for_Judicial_Nominating_Co_C46CEF0C61755.pdf.
- 30 See generally JO HANDELSMAN & NATASHA SAKRANEY, WHITE HOUSE OFFICE OF SCI. & TECH. POLICY, IMPLICIT BIAS 3 (2015), available at https://www.whitehouse.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.”).
- 31 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.ncsc.org/-/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (“Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes.”).
- 32 GREENSTEIN, *supra* note 29, at 36-37.
- 33 CASEY ET AL., *supra* note 31, at G-3.
- 34 See AM. BAR ASS’N, STANDING COMMITTEE 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 (describing the professional experience sought in filling federal vacancies).
- 35 See LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, *supra* note 12, 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.”).
- 36 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, 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.”).
- 37 See *id.* at 26.
- 38 See HANDELSMAN & SAKRANEY, *supra* note 30, 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 19, at 40 (“[I]nitial clinical studies show that implicit bias can be partially minimized through heightened self-awareness.”); WILLERT, *supra* note 10, 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.”).
- 39 See HANDELSMAN & SAKRANEY, *supra* note 30, at 1; CHERYL STAATS, KELLY CAPATOSTO, ROBIN A. WRIGHT & DANYA CONTRACTOR, 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>.

- 40 See generally STAATS, CAPATOSTO, WRIGHT & CONTRACTOR, *supra* note 39, at 5; see also HANDELSMAN & SAKRANEY, *supra* note 30, at 1.
- 41 See HANDELSMAN & SAKRANEY, *supra* note 30, at 3.
- 42 See *id.*; TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, at 40; WILLERT, *supra* note 10, at 47.
- 43 *Implicit Bias Initiative*, AM. BAR ASS'N, <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html> (last visited May 16, 2016).
- 44 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 27 (“[N]early all of the judges mentioned (often without prompting) that political leaders, more senior judges, or other individuals had actively recruited them. However, these recruitment efforts were frequently not conducted through any formalized recruiting process.”).
- 45 See, e.g., TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, 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.”); see also *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 (“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.”).
- 46 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 29 (“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.”); see also *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.”).
- 47 STANDING COMM. ON JUDICIAL INDEPENDENCE, AM. BAR ASS'N, STANDARDS ON STATE JUDICIAL SELECTION 12 (2000), available at http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/reformat.authcheckdam.pdf (“Nominating commissions should actively recruit qualified individuals for judgeships and in performing this function should operate in a manner that imparts public confidence in the judicial selection system and encourages a broad range of applicants.”).
- 48 See, e.g., HAW. JUDICIAL SELECTION COMMISSION RULES 7(A) (“Commissioners may actively seek out and encourage qualified individuals to apply for judicial office. Commissioners should always keep in mind that often persons with the highest qualifications will not actively seek judicial appointment.”); ARIZ. UNIF. RULES OF PROCEDURE 6(a), at 2 (“Commissioners shall actively seek out and encourage applications from qualified individuals who will reflect the diversity of the community they will serve. Commissions shall enlist the aid of community groups and organizations in this effort. It is incumbent upon Commissioners to seek out well-qualified persons who may not otherwise apply.”).

- 49 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 29 (“[A] number of the judges recommended formalized and active recruitment programs to supplement . . . personal efforts Although these successful candidates were able to seek out individual mentors, this could be made more efficient through formalized recruitment.”); *id.* (“Formal recruitment would likely help qualified candidates of color to know that a judicial career is a realistic possibility and that those in the system are serious about recruiting a diverse candidate pool.”).
- 50 See WILLERT, *supra* note 10, at 46.
- 51 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 21.
- 52 See generally GREENSTEIN, *supra* note 29, at 10; MALIA REDDICK, INST. FOR THE ADVANCEMENT OF AM. LEGAL STUDIES, MODEL CODE OF CONDUCT FOR JUDICIAL NOMINATING COMMISSIONERS 7-8 (2016), available at <http://iaals.du.edu/quality-judges/publications/model-code-conduct-judicial-nominating-commissioners>.
- 53 See REDDICK, MODEL CODE OF CONDUCT, *supra* note 52, at 7 (Rule 4.1 and Commentary).
- 54 *Id.*
- 55 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, at 34-35 (providing anecdotes from interviews with commissioners in select states).
- 56 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 27-29 (providing lessons from interviews with judges from select states).
- 57 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, at 28.
- 58 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 29.
- 59 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, at 34 (“[T]he Chairman of [Florida’s] 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.”).
- 60 See CAUFIELD, *supra* note 45, at 26 (“[M]eetings and interviews between individual commissioners and applicants are not uncommon. In fact, fully a quarter (24.6%) of respondents indicate that these meetings happen outside of the formal interview process.”).
- 61 See CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., *supra* note 10, at 26 (“[I]n the case of minority candidates, especially those who were the first from their communities to seek a judgeship, these advisors were described as instrumental in explaining the workings of the selection process, helping potential candidates to network, assessing the timing for their candidacies, and developing a successful strategy for selection.”).
- 62 See *id.* at 20-22, 26.
- 63 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 19, 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.”).

- 64 *Judicial Clerkship Program*, AM. BAR ASS’N, http://www.americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/judicial_clerkship_program.html (last visited May 16, 2016).
- 65 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 (“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.”).
- 66 See MALIA REDDICK & REBECCA LOVE KOURLIS, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES 7-8, 17, App. B (2014), *available at* http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf (explaining the composition of state supreme court judicial nominating commissions); *see also* ESTERLING & ANDERSEN, *supra* note 65, at 11-12.
- 67 See MYERS, *supra* note 8, 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 . . .”).
- 68 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, at 8 (explaining that “the less transparent the vetting process is, the less likely candidates of all stripes will subject themselves to it”).
- 69 GREENSTEIN, *supra* note 29, at 58-60.
- 70 *Id.*
- 71 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, 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.”).
- 72 GREENSTEIN, *supra* note 29, at 58-60.
- 73 See CAUFIELD, *supra* note 45, 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.”).
- 74 *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 (last visited May 16, 2016).

- 75 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, 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 schools.”).
- 76 See CAUFIELD, *supra* note 45, 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.”).
- 77 See GREENSTEIN, *supra* note 29, 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.”).
- 78 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 45, at 25 (“Effective interviews provide an additional basis for comparing candidates, supplementing information gleaned from the applicant questionnaire and investigation.”).
- 79 See WILLERT, *supra* note 10, at 55.
- 80 See TORRES-SPELLISCY, CHASE & GREENMAN, *supra* note 19, 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 45, at 25; GREENSTEIN, *supra* note 29, at 132.
- 81 GREENSTEIN, *supra* note 29, at 133-37.
- 82 See ESTERLING & ANDERSEN, *supra* note 65, at 12 (citing MARLA N. GREENSTEIN, *THE AM. JUDICATURE SOC’Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* 101 (1st ed. 1985)).
- 83 See GREENSTEIN, *supra* note 29, at 137.
- 84 Cf. CASEY ET AL., *supra* note 31, 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) (stating that note taking can have a debiasing effect on jurors).
- 85 See generally CASEY ET AL., *supra* note 31, at G-8 to -9 (describing the use of decision-support tools “to promote greater deliberative (as opposed to intuitive) thinking”).
- 86 See GREENSTEIN, *supra* note 29, at 154.
- 87 See CASEY ET AL., *supra* note 31, at B-8, G-3, G-9 to -11, G-15. G-31.
- 88 See AM. BAR ASS’N, *STANDING COMM. ON THE FEDERAL JUDICIARY*, *supra* note 34, at 3.
- 89 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 29, 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.”).

- 90 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 courses 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 (demonstrating that distance from family was a deciding factor for where some Latino/a students applied and received post-secondary education).
- 91 See CAUFIELD, *supra* note 45, at 28 (“The ten highest rated criteria, following applicants’ mental health and professional reputation, were written communication skills, oral communication skills, number of years of legal practice, amount of trial experience, honors and professional distinctions, recommendations and ratings from other commissioners, participation in civic or community affairs, and prior service as a judge or magistrate.”); *id.* (“Certainly, this is not the most important consideration reported, but given earlier indications that recommendations by other commissioners are considered important for recruiting efforts, and that they also play a role in the evaluation process, the collegiality of commission interactions could potentially pose a problem should it result in favoritism.”).
- 92 See WILLERT, *supra* note 10, at 56.
- 93 See REDDICK, MODEL CODE OF CONDUCT, *supra* note 52, at 8 (Rule 4.3 and Commentary).
- 94 See GREENSTEIN, *supra* note 29, at 155 (“Choosing the system for casting votes is often considered to be the most difficult feature of a commission’s operation. The AJS study of U.S. Circuit Judge Nominating Commissions revealed that many commissioners found voting procedures to be a source of frustration and confusion.”).
- 95 See *id.* at 155-56.
- 96 See CAUFIELD, *supra* note 45, at 32 (finding that 20% of commissioners indicated that they didn’t know what the voting procedures were).
- 97 See MYERS, *supra* note 8, at 52 (“For researchers and policymakers to understand the role that state merit selection systems play in the diversity of the judges and justices who serve on the bench, it is critical that they have access to more detailed data about the process.”).
- 98 See *id.* (“There are good reasons to prevent commissioners from seeing demographic information about applicants. A significant body of research suggests that unconscious biases play a significant role in complicating cross-cultural interactions, and that those biases can and do influence the behavior and perceptions even of individuals for whom equality and diversity are conscious priorities.”).
- 99 See *id.* at 53-54.
- 100 See *id.* at 52.

- 101 See WILLERT, *supra* note 10, at 66 (“[T]he court should develop systems of measurement to continually monitor the effectiveness of its diversity programs and make adjustments when necessary. This may be accomplished by monitoring the court’s workforce profile. Periodic analysis of this data will help determine progress and success. In turn, the same data may be used to adjust recruiting strategies and other workforce planning as needed.”).
- 102 See JUDICIAL DIV., AM. BAR ASS’N, PERCEPTIONS OF JUSTICE SUMMIT REPORT 4 (2013) (explaining the importance of information feedback loops).

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