

THE STATUS OF  
MINORITY ATTORNEYS  
IN NEW MEXICO—  
AN UPDATE

1990 – 1999

THE STATE BAR OF  
NEW MEXICO  
TASK FORCE ON  
MINORITIES  
IN THE LEGAL  
PROFESSION II

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## **INTRODUCTION – AN UPDATE ON THE STATUS OF MINORITIES IN THE LEGAL PROFESSION IN NEW MEXICO –**

### **The Original Task Force — History, Mission and the January 1990 Final Report on the Status of Minorities in the Profession**

Keenly aware that the State Bar of New Mexico had long been perceived as a “large firm, white-male dominated” organization, the Board of Bar Commissioners initiated a campaign in the mid-1980s to encourage and promote participation in the organization by solo and small firm practitioners, women and minorities.

Troubled by the traditional lack of involvement by minorities in the activities and leadership of the State Bar, the Board of Bar Commissioners on December 29, 1987, created the Task Force on Minorities in the Profession.

The original Task Force developed a “Statement of the Issues,” representing the principal questions and concerns impacting minority attorneys and law students in New Mexico. Those issues and concerns were as follows:

1. Are the programs and activities directed towards recruitment and retention of minority law students in New Mexico adequate and effective? What action, if any, should be taken by the State Bar of New Mexico to supplement these efforts?
2. What has been the level of interest and success by minority lawyers in obtaining faculty positions at the University of New Mexico School of Law, and what steps, if any, should be taken by the State Bar of New Mexico to encourage and promote the appointment of minority lawyers to faculty positions?
3. How have minorities fared over the past ten years in the New Mexico Bar Examination?
4. Are minority attorneys adequately represented among the ranks of public sector and private sector legal employees? If not, what are the reasons for disproportional representation and what role should the State Bar play in remedying this circumstance?
5. Has there historically been a disproportionate number of minority attorneys in New Mexico who have been the subject of disciplinary proceedings? If so, what are the reasons for this circumstance and what steps can be taken by the State Bar of New Mexico to correct it?

6. What factors explain the traditional lack of involvement by minority attorneys in the activities and leadership of the State Bar of New Mexico? What steps can be taken by the State Bar to encourage and promote the meaningful and active participation of minority attorneys in the State Bar?
7. What has been the level of interest and success by minority attorneys in seeking appointments to judicial positions in New Mexico, and what impact will the recent constitutional amendment on judicial selection have upon minority attorneys seeking judicial appointment?

For two years the Task Force gathered historical and demographic data, conducted multiple surveys and interviewed minority attorneys throughout New Mexico in search of answers to these comprehensive questions. On January 20, 1990, the Task Force published its report entitled: “Final Report – The Status of Minority Attorneys in New Mexico,” hereinafter referred to as the “1990 Task Force Report.”

This ninety-eight (98) page report presented comprehensive findings and analysis on each of the seven issues being investigated, together with twenty-five (25) specific recommendations, all of which were subsequently adopted by the Board of Bar Commissioners and assigned to the newly created Standing Committee on Minorities in the Profession for implementation.

The creation of a Standing Committee on Minorities in the Profession was the centerpiece of the recommendations included in the 1990 Task Force Report. Organized in late-1990, the Standing Committee was comprised of members of each of the minority bar associations, a member of the Board of Bar Commissioners, the Executive Director of the State Bar and a diverse group of members appointed by the President of the State Bar. The Standing Committee aggressively addressed each of the twenty-five recommendations in the 1990 Task Force Report and was an active and influential committee of the State Bar until approximately 1996, when interest in the issues impacting minority attorneys began to wane. Nevertheless, the Standing Committee produced some highly innovative and successful programs, some of which served as models for similar programs nationwide.

In late 1996, prompted by erosion of affirmative action programs in Texas and California law schools, and the passage of Proposition 209 in California, the Standing Committee petitioned the Board of Bar Commissioners

to update the 1990 Task Force Report. The Standing Committee believed there would not be a more important time to reassess the status of minorities in the legal profession in New Mexico than in the midst of this changing legal and political environment. The Board of Bar Commissioners authorized the creation of the Task Force on Minorities in the Profession II in January 1997.

The mission of the Task Force II was to update the findings of the original Task Force on each of the seven issues described above, and to determine what changes, if any, have occurred over the last decade with respect to each of these subjects.

Succinctly stated, the Task Force II assembled demographic and other data relevant to the seven issues addressed in the 1990 Task Force Report and conducted additional surveys in order to report to the State Bar of New Mexico on the status of minority attorneys in New Mexico during the ten years since the original report. Where comparable data was available, comparisons were made with the data and findings contained in the 1990 Task Force Report.

#### **Research Methods and Limitations of the Study**

In addressing the issues described above, the Task Force II employed a descriptive research design to profile many of the characteristics and experiences of New Mexico law students, attorneys, judges, law firms and other employers of attorneys. The design describes current and recent realities about the demographics and experiences of New Mexico law students, attorneys and judges, with a particular focus on minorities in the profession. In addition to this basic description, data from the January 1990 Task Force Report are compared, where possible, to determine the changes, if any, that have occurred over the last decade since the publication of the original Report.

The data collected for this project was generated from three surveys disseminated in 1998, as well as from a number of secondary sources. The surveys were directed at three sectors of the legal profession: (1) Survey of Members of the State Bar of New Mexico; (2) Survey of New Mexico Law Firms; and, (3) Survey of Employers of Attorneys other than Law Firms. The Survey of Members of the State Bar was sent to a cross-section of the membership of the State Bar using a stratified sample. The sample included respondents from each respective ethnicity, gender and judicial district in New Mexico. Because the universes were relatively small for the surveys of law firms and employers of attorneys other than law firms, surveys were sent to all known firms and employers.

The secondary sources used in this report included data provided by the State Bar of New Mexico, the American Bar Association, the University of New Mexico School of Law, the New Mexico Board of Bar Examiners, the New Mexico Disciplinary Board, the Chair of the Judicial Nominating Commissions, Meyners+ Company, and miscellaneous letters and research articles.

The Survey of Members of the State Bar was sent to 634 persons. A total of 152 surveys were completed and returned by members of the State Bar (24% response rate). While this response rate is very typical of New Mexico bar membership surveys generally, the relatively low response rate and small sample size limit the ability of the Task Force to generalize the findings of the survey to the larger membership of the State Bar of New Mexico. Nevertheless, the survey results reflect a number of consistent trends from which reasonable inferences and conclusions have been drawn in the body of the Report.

Ninety-five New Mexico law firms responded to The Task Force Survey out of a possible 337 (28% response rate). Of these 95 respondents, the average age of the firm responding to the survey was 18 years and 70% of respondents currently held positions as partners or presidents. Of the 95 firms, 78% were located in Albuquerque and Santa Fe, and all other locations comprised 22%.

There were a total of 68 employers responding to the Task Force Survey out of a possible 235 (29% response rate). The most frequent type of work of these employers is government/public agency (50%), followed by corporate (17%), public interest or legal services (14%), other types of legal work (12%), judiciary (6%) and tribal government (2%).

The agencies surveyed also are engaged in multiple types of law ranging from administrative law to worker's compensation. Responding employers have an average of 2.2 white non-minority males employed either full-time or part-time, less than one Hispanic male, 2.2 white non-minority females, less than one Hispanic female, and no African American, American Indian/Native Alaskan, Asian American/Pacific Islander, or other minorities.

The report profiles the respondents to each of the three surveys. Following these profiles, findings from the data are presented by specific topic areas. The main topic areas include discussions of demographic data on minorities in the legal profession, enrollment of minorities at the University of New Mexico School of Law, comparative passage rates for the New Mexico Bar Examination, career preferences and employment

opportunities of minority attorneys, disciplinary sanctions imposed by the New Mexico Disciplinary Board, the impact of the Judicial Reform Act on minority attorneys, and perspectives on racial and ethnic fairness in the legal system.

## **DEMOGRAPHIC DATA ON MINORITY ATTORNEYS IN NEW MEXICO**

Between 1988 and 1998, the number of minorities who are members of the State Bar of New Mexico (active in-state members) increased by four (4) percentage points. According to data provided by the State Bar, 18% of all active in-state members were minorities in 1988 (Hispanic and other minorities) compared with 22% in 1998. During this ten-year period, there was a four (4) percentage point increase in the percentage of Hispanics who are members of the State Bar (a change from 13% in 1988 to 17% in 1998). No change occurred in the percentage of other minority members of the State Bar between 1988 and 1998; other minorities comprised approximately 5% in 1988 and 1998.

The Task Force noted that the potential for a significant increase in the percentage of minority attorneys in New Mexico will be limited in the future by a number of factors. First, any significant increase in the number of minority attorneys will likely have to come from outside of the state. The University of New Mexico School of Law is consistently enrolling classes of approximately 40% minorities each year, and is a major factor in the number of minorities admitted annually to the State Bar. However, there is no guarantee that these students will continue their professional career in New Mexico. Second, lower than average salaries, static economic conditions, modest employment opportunities, and the lack of minority recruitment by New Mexico law firms and other employers discourage minorities from considering New Mexico as an option.

Data provided by the State Bar indicate that the percentage of females in the State Bar has increased by four (4) percentage points from 1989 to 1998. Twenty-eight percent (28%) of the total membership of the State Bar was female in 1989 compared to 32% in 1998.

The 4 percentage point increase of minorities in the general population of attorneys is also reflected in the increase of minorities practicing in firms, government, corporate settings, and as sole practitioners. Minority representation in all types of legal practices increased between 1988 and 1998.

Based on the 1998 percentages of minorities in the State Bar (22%), minorities remain underrepresented in employment at firms. Also, ethnic minority and female attorneys are still overrepresented in government positions based on the number of ethnic minorities and females in the State Bar.

Ethnic and racial minorities still make less income each year than their White non-Hispanic counterparts. In general, female attorneys continue to make significantly less than male attorneys. It should be noted that female attorneys of all ethnicities make roughly the same amount of income, around \$56,000 to \$60,000 per year, whereas male attorneys of all ethnicities make on average between \$63,000 and \$91,000 per year.

## **THE UNIVERSITY OF NEW MEXICO SCHOOL OF LAW – A MODEL OF DIVERSIFICATION IN STUDENT ENROLLMENT AND FACULTY HIRING**

Established in 1947, the University of New Mexico School of Law (“the Law School”) remains the only law school in New Mexico. The Law School was accredited by the American Bar Association (ABA) in 1948 and is a member of the Association of American Law Schools (AALS). The Law School is reviewed every seven years by the accrediting committees of the ABA and the AALS in order to retain its accreditation. Among the accreditation criteria considered by the ABA is the extent to which the Law School fosters and maintains equality of opportunity in legal education, without discrimination, in admissions and in the employment of faculty and staff.

The commitment of the Law School to the ABA Standard is aptly described in the Law School’s Admissions Policy.

Because the Law School is a publicly funded institution and the only law school in the state, New Mexico residents are given preference, although nonresident applications are encouraged. Under the Admission Policy, the admission committee seeks to admit an entering class comprised of approximately 85 to 90 percent New Mexico residents and 10 to 15 percent nonresidents. Geographical distribution from within the state also may be a factor in selecting the entering class as part of the Law School’s search for diversity.

As reported in the 1990 Task Force Report, minority enrollment for the entering class at the Law School in 1987 was 34%, compared with a combined average first

year minority enrollment in all ABA accredited law schools of 12%. The percentage of first year minority enrollment at the Law School from 1987 to 1997 was more than twice the combined percentage of first year minority enrollment in all ABA accredited law schools across the country.

Similarly, total minority enrollment (all three years) at the Law School over the past five years has ranged from 38% to 45% (an average of 41%). By way of comparison, total minority enrollment at all ABA accredited law schools over the same five year period averaged 19.6%.

A comparison of degrees awarded (by ethnicity) for the period 1990 to 1998 with first year minority enrollment data for the corresponding period 1987 to 1995 indicates no significant deviation between minority admission and corresponding graduation rates. This analysis shows that the Law School has experienced a retention and graduation rate during the 1990s of approximately 94% for Hispanics, 90% for Native Americans, and perhaps even higher rates for African Americans and Asians.

The 1990 Task Force Report concluded that since the late 1960s, the School of Law had played an important role in increasing the number of minority lawyers in New Mexico. Even though graduates of the law school typically account for far less than one-half of attorneys who are admitted annually to the State Bar of New Mexico, the Law School is without question the largest and most important supplier of minority attorneys for the State Bar of New Mexico.

Having increased its minority enrollment from approximately 31% in the late 1980s to approximately 40% in the late 1990s, it is fundamentally clear that the Law School continues to play an effective and vital role in enhancing the ethnic and racial diversity of the State Bar of New Mexico. The overall percentage of minority attorneys in New Mexico has increased four percent (4%) over the last ten years; the increase is attributable largely to the admission policy of the Law School and the Law School's continuing commitment to diversity in the legal profession.

## **NEW MEXICO BAR EXAMINATION – HISTORY AND PROGRESS – AN UPDATE**

### **Judge Steve Herrera and *Melendez v. Burciaga* – A Point of Departure**

The original Task Force on Minorities in the Profession was privileged to have among its members the Honorable Steve Herrera, Chief Judge of the First Judicial District.

Judge Herrera died tragically in an automobile accident in August of 1998. No one understood or appreciated the history of the New Mexico Bar Examination and its impact on minorities any better than Judge Herrera. As a young attorney in the 1970s he changed the course of that history, first as an outspoken and resolute advocate for change, and ultimately as an architect of reform in his role as lead counsel for the Petitioners in *Melendez v. Burciaga* (NMSC No. 12449, April 1979).

*Melendez* was an original evidentiary proceeding before the New Mexico Supreme Court in which 15 attorneys, including Steve Herrera, challenged the New Mexico Bar Examination on equal protection and due process grounds. As described more fully below, the challenge was prompted by a decade of highly disparate bar passage rates experienced by Hispanics and other minority applicants. At the close of the proceedings in *Melendez*, the Supreme Court ordered that a number of substantive modifications be made in the content, structure and administration of the Bar Examination. Over the next decade the disparity in bar passage rates between minority and non-minority applicants was significantly reduced.

Judge Herrera was the author of the history of the struggle by minorities with the New Mexico Bar Examination in the January 1990 Task Force Report. (Task Force Report, January 20, 1990, pp. 35-39). His first-hand knowledge of the issues, the people involved and the importance he ascribed to this subject in his professional life made Judge Herrera uniquely qualified for the assignment. Because that history provides a proper context and a baseline for evaluating how well minorities have fared in the New Mexico Bar Examination during the 1990s, the principal aspects of Judge Herrera's history of the Bar Examination are summarized as follows.

The centerpiece of Judge Herrera's history was a comparison of bar examination failure rates for Hispanics and non-Hispanics from 1970 to 1978 (Pre-*Melendez*), and from 1980 to 1989 (Post-*Melendez*).

The pre-*Melendez* period demonstrates a huge disparity in failure rates throughout the 1970s, just as minorities began graduating from law schools in significant numbers. Hispanics averaged a 61% failure rate during this decade compared with an average failure rate of 24% for non-Hispanics (including other minorities), a huge differential of 37%. The magnitude of this disparity gave rise to a long series of newspaper articles, sit-ins and other protests challenging the fairness of the New Mexico Bar Examination. The United States House of

Representatives Committee on Education and Labor conducted hearings in Santa Fe on a proposed bill to remove discriminatory barriers to minorities seeking legal services or admission to the practice of law. (Task Force Report, January 20, 1990, at 36). The continuing wide disparity in failure rates would become a turning point in the history of the New Mexico Bar Examination by the end of the decade.

The 1970s was a particularly frustrating period for unsuccessful minority applicants. In 1972, a Hispanic applicant petitioned the New Mexico Supreme Court seeking a review and evaluation by the Court of his answers to the bar examination. *Petition of Pacheco*, 85 N.M. 600 (1973). A number of novel issues were presented, including a claim that the bar examination, by concentrating on business law and other traditional subjects as distinguished from legal problems of the poor, was unfair to minorities and discriminated against persons whose culture or values were different from those of the examiner. 85 N.M. at 600-601. The Court observed that an unsuccessful applicant had the right to review the questions asked, the applicant's responses thereto and a sample of a passing answer to each question. The Court determined that this post-examination procedure was adequate and that Petitioner had not been denied due process or equal protection. *Id.*, at 604.

Thereafter, in October of 1974, the New Mexico Supreme Court refused to administer the attorney's oath to several prospective attorneys who had passed the Bar Examination when they appeared at the swearing-in ceremony wearing black arm-bands in silent protest of disproportionate bar passage rates for Hispanics and other minorities. (Task Force Report, January 20, 1990, at 35). More than four years later, in April of 1979, mounting discontent over highly disproportionate failure rates by Hispanics provoked the filing of the petition in *Melendez*.

If the 1970s were a time of frustration and confrontation over disproportionate failure rates, the 1980s were a time of transition that witnessed a gradual and sporadic narrowing of the disparity. Within three years after the reforms ordered by the Supreme Court in *Melendez* were implemented, the disparity in failure rates was reduced to approximately five percentage points (5%) in the February 1983 bar examination. (Task Force Report, January 20, 1990, at 38). The good news was short-lived, however. Over the next six years, failure rates for Hispanics exceeded 40% in the August 1983 exam, the February and August 1985 exams and the February 1987 exam. Over the entire decade of the 1980s, the failure

rate for Hispanics averaged 39%, compared with 19% for non-Hispanics, a differential of 20%. *Id.* While the differential of 20% in the 1980s was certainly better than the 37% differential seen in the 1970's, the continuing disparity was still significant and very troublesome to the original Task Force on Minorities in the Profession.

The passage rate for Hispanics averaged 21% less than white applicants. The passage rates for other minorities were between 15% (Asian) and 50% (African American) less than for white applicants. The Board of Bar Examiners data was based on a passing score for the Bar Examination of 133.

Effective with the July, 1995 Bar Examination, the passing score for the Bar Examination was lowered from 133 to 130. At the same time, the Board of Bar Examiners began compiling a computerized database that included a statistical breakdown for comparing first-time applicants and repeat applicants. The Board emphasizes in its February 13, 1998 letter that "in the February, 1996 and February, 1997 bar exams, although the overall pass rate of Hispanics was 85% and 88% respectively, the pass rate for first-time applicants in each of those categories was 100%.

This more recent data leads to a number of important observations. First, the overall differential in passage rates between Hispanic applicants and white applicants from July 1995 to July 1997 has been narrowed to an average of 12% (Hispanic 83% 119P/25F vs. White non-Hispanic 95% 542P/31F). This is an important and significant reduction from the 20% differential seen in the 1980s and the early 1990s.

Lowering the passing score from 133 to 130 appears to have been one factor in closing this gap, at least for most minority groups. The passage rate for White non-Hispanic applicants after the score was lowered went from an average 88% overall to 95% for first-time applicants, a gain of 7%. The average passage rate for Hispanics went from 67% overall to 87% for first-time applicants, an increase of 20%, for a net gain of 13% when compared with White non-Hispanic applicants. (See Tables 18 and 19). This analysis logically suggests that many first-time applicants, minority and non-minority alike, had been on the borderline in passing the bar examination prior to July 1995.

The disproportionate bar passage rates experienced by minorities has been a continuing concern of the Board of Bar Examiners for the past two decades. The Board's actions over that time have been both responsive and effective. As the current Chair explained in the Board's

letter of February 13, 1998, much has been done to address this problem. Specific action identified by the Board include the following:

1. The passing score has been lowered from 133 to 130.
2. The Board has re-instituted a third phase of the re-grade for borderline applicants whose scores are within 3 points of passing.
3. Effective July 1997, the Board has included a performance test component in the Bar Examination.
4. The Board has continued to work with nationally recognized consultant, Dr. Stephen P. Klein. Dr. Klein is the author of an article attached to the Board's letter of February 13, 1998 entitled, "The Size and Source of Differences in Bar Exam Passing Rates among Racial and Ethnic Groups."
5. Based on Dr. Klein's recommendation, the Board approved and is implementing a change in the statistical scoring method for conversion of raw scores and equating the MBE and essay scores using the standard deviation method.
6. The Board's Executive Director was appointed to the National Conference of Bar Examiners Committee on Minority Issues.

As Judge Herrera concluded in the 1990 Task Force Report, while much good work has been done to date by the Board of Bar Examiners, the Bar Exam will remain a "minority issue" as long as disparate bar passage rates continue.

## **CAREER PREFERENCES AND EMPLOYMENT OPPORTUNITIES OF MINORITY ATTORNEYS**

Data were collected on the number of minorities working in New Mexico law firms, the hiring of minority attorneys, the referring of minority attorneys, recruiting efforts, criteria for hiring, and perceived explanations of barriers to hiring minority attorneys in the Task Force's "Survey of New Mexico Law Firms." This section summarizes the findings from these surveys completed by 95 New Mexico law firms. It should be noted that the response rate is relatively low (28%), thus limiting the extent to which these data can be generalized to law firms across the state. On the other hand, the answers given to most of these survey questions by the respondents were highly consistent, demonstrating a clear trend and allowing reasonable inferences and conclusions to be made from this data.

According to data from the survey of law firms, if there are no minorities currently in the firm, one-third (1/3) of these firms have formerly employed, or attempted to employ minority attorneys in the past. Almost all responding firms (93%) have referred matters to minority lawyers outside of their firm and similarly, the vast majority of firms (97%) have referred matters to female lawyers outside of their firm. Just over two-thirds of firms (70%) have utilized minority lawyers as co-counsel, and 77% have utilized female lawyers as co-counsel. The high percentage of responding firms that have referred cases to, or associated minority and women attorneys as co-counsel, suggests that at least some minorities and women are networking well with New Mexico law firms. The number of firms that have employed or attempted to employ minorities is not as encouraging.

In 1988, the percentage of firms who had employed or made formal offers of employment to ethnic minority attorneys within the past two years was 41%. Ten years later in 1998, that percentage is down to 35%. This is not a good sign for minority lawyers, who continue to be underrepresented in private law firm practice. The Task Force, however, did not have any data on the number of applications received from minorities by law firms.

Comparative data from the State Bar indicates that the percentage of minority attorneys in private law firms has increased only 3% (from 13% to 16%) in the last ten years, while the percentage of minority attorneys in solo practice has increased by 5% (from 21% to 26%), and in government practice by 5% (from 27% to 32%). Current data shows that minority attorneys are significantly underrepresented among private law firm practitioners. For example, Hispanics represent 17% of the membership of the State Bar, but only 11% of attorneys working in law firms, 20% of attorneys working in solo practice and 22% of attorneys in government practice.

As the original Task Force concluded in 1990, the State Bar and the minority bar associations must recognize this continuing disparity in employment statistics and must commit the energy and resources to promoting greater employment opportunities for minority attorneys in private firms. Only through such joint efforts and programs will minority attorneys achieve true integration into the mainstream of the legal profession in New Mexico.

The importance of effectively addressing this employment issue is clearly demonstrated in the following section on disciplinary proceedings and minority attorneys.

## **DISCIPLINARY SANCTIONS AND MINORITY ATTORNEYS**

The original Task Force observed that 53% of all attorneys sanctioned by the New Mexico Disciplinary Board in the late 1980s were solo practitioners, while 40% were employed in firms having two to five attorneys, a combined total of 93%. On the other hand, less than 2% of the attorneys sanctioned were employed in firms with 10 or more lawyers.

At the time the 1990 Task Force Report was published, only 30% of all active-instate attorneys in New Mexico were solo practitioners, while 27% of active-instate attorneys were employed in firms having two to five members. Thus, solo and small firm practitioners were disproportionately represented among the group of attorneys sanctioned, while attorneys in the larger firms were seldom involved in disciplinary proceedings. Because guidance and mentoring by experienced attorneys is typically unavailable to solo and small firm practitioners, this group of attorneys is characteristically subject to a greater risk of disciplinary action than attorneys in larger firms where such guidance and mentoring are usually available.

When ethnicity was factored into the disciplinary action equation in the late 1980s, Hispanics were shown to be disproportionately represented among the active instate attorneys receiving sanctions.

In 1988, Hispanic attorneys were being disciplined at a highly disproportionate rate (more than 2 to 1) when compared with the percentage of Hispanic attorneys who were active instate members of the State Bar of New Mexico.

The most apparent reason for this disparity was that of the 256 Hispanic attorneys in private practice in 1988, 125 or 49% were solo practitioners, and 78 or 30% were employed in firms with two to five attorneys. (See Task Force Report, January 20, 1990, at 21). In other words, 79% of Hispanic attorneys in private practice were engaged in the type of practice with the greatest risk of receiving sanctions, while only 53 Hispanic attorneys (21%) were employed in firms with six (6) or more attorneys with the lowest risk of receiving sanctions. *Id.*, at 21 and 67-68.

The 1990 Task Force Report made the following observations, most of which, as seen below, are appropriate observations in 1999 as well:

A large percentage of minority attorneys are in sole practice or in small firms. These attorneys are offered very little guidance

or training and have no mentors or role models to pattern their behavior. Attorneys are not usually taught in law school how to handle trust accounts or their daily business affairs. They are left to learn their trade by trial and error.

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Second, attorneys in sole practice or with small firms feel compelled, primarily for financial reasons, to accept almost every conceivable case that comes their way without giving sufficient thought to the fact that he or she may not be prepared (by experience or training) to properly handle the case. Accepting a case when an attorney has little or no experience in the area increases the risk of that attorney being the subject of disciplinary action when the case turns sour and the client becomes disgruntled.

In updating the incidence of disciplinary sanctions imposed on minority attorneys since 1988, the Task Force on Minorities in the Profession II asked the Disciplinary Board to provide annual statistical reports from 1989 to 1997. These comprehensive reports list the type of sanction imposed, the number of attorneys receiving each sanction, the ethnicity, age, gender and years of practice of the attorney being sanctioned, the size of firm the sanctioned attorney practices in, and the generic reason for the sanction. This data was analyzed by the Task Force to determine the impact of the disciplinary process on minority attorneys over the last ten years. The following findings are supported by the data: Hispanic attorneys receive about 26% of all disciplinary sanctions, and yet, they comprise only 17% of the active instate membership of the state bar; Information reported in 1990 about minority attorneys and incidence of disciplinary sanctions remains true in 1999; There has been little change over the past ten years in the disproportionate incidence of disciplinary sanctions for solo and small firm practitioners, and therefore, in the disproportionate incidence of disciplinary sanctions for minority attorneys.

The original Task Force recommended a "joint effort of the law schools, the State Bar, law firms and the individual attorney," to provide the training, support and guidance necessary to effectively address the practice and management problems chronically encountered by solo and small firm practitioners. While some progress has been made in this effort, the Task Force believe much more needs to be done and soon.

## **INVOLVEMENT OF MINORITY ATTORNEYS IN THE ACTIVITIES AND LEADERSHIP OF THE STATE BAR OF NEW MEXICO**

Members of the State Bar were asked about their participation in New Mexico State Bar activities and barriers to involvement in State Bar programs/activities in the "Survey of Members of the State Bar."

A significant number of respondents are members of professional associations in addition to the State Bar of New Mexico. Forty-eight percent (48%) are members of the New Mexico Trial Lawyers Association, 33% are members of the New Mexico Hispanic Bar Association, and 23% are members of the New Mexico Women's Bar Association. About the same amount of White non-Hispanics and Hispanics participate in national and local bar activities of any kind (approximately two-thirds (2/3) of each group do not participate). Participation in the activities of these professional associations will have some impact upon the time availability or interest of respondents in participating in the activities of the State Bar of New Mexico.

With respect to participation in the activities of the State Bar, White non-Hispanic respondents had slightly greater participation in Bar activities within the past three years, with 77% of White non-Hispanic respondents participating in Bar activities as compared to 71% of Hispanics. In 1988, 71% of minority attorneys said they had participated in a State Bar activity within the past three years. The average amount of participation in State Bar activities for both Hispanics and White non-Hispanics is about once per year.

Most members of both groups would participate if they were not so busy and about one-third (1/3) of Hispanic respondents would participate more if they were asked. About one-quarter (1/4) of Hispanic respondents also reported that they would participate more if they thought it would make a difference to their career. About one in five Hispanic respondents said they would participate more if it were less expensive compared to 14% of White non-Hispanics. Survey responses also indicate that the principal reason for lack of participation is lack of time. When asked specifically about cultural, gender, social, or racial considerations which affect participation in activities, only 15% of respondents say these kinds of considerations affect their participation.

Data collected by the State Bar staff on participation by minorities in State Bar Committees, Sections, Divisions, and pro bono and referral programs indicates a respectable increase in participation by minorities in these programs and activities over the decade. Since 1990, minority participation in State Bar Section Boards has increased

37.5%; Committee service by minorities increased 37.5%; and participation by minority members on State Bar Division (Young Lawyers Division and Senior Lawyers Division) Boards increased 25%. Total minority participation in Sections, Committees and Divisions increased 38.5% from 1990 to 1998.

While cumulative data for volunteer minority participation in the State Bar's pro bono and referral programs are not available, 1999 data reflect that 33.1% of the total minority membership volunteer for the Lawyers Care Pro Bono Program and Lawyer Referral for the Elderly Program. It is, therefore, encouraging that a significant number of minority members are actively and increasingly involved in State Bar activities and programs.

## **THE IMPACT OF THE JUDICIAL REFORM ACT – AN UPDATE**

The 1990 Task Force Report described the historical diversity of the judiciary in New Mexico and considered the potential impact of the 1988 Judicial Reform Amendment upon minorities seeking appointment to judicial positions. (Task Force Report, January 20, 1990, at 84-96). A brief summary of that discussion provides an appropriate context for updating the impact of the Judicial Reform Amendment on the diversity of the Judiciary in New Mexico over the last ten years.

For many decades prior to the 1988 Judicial Reform Amendment, minority attorneys had been highly successful in obtaining appointments to judicial positions or in being elected to judicial office in partisan elections. By 1988, of the 81 justices and judges then comprising the New Mexico Supreme Court, Court of Appeals, District Court and Bernalillo County Metropolitan Court, 22 or 27% were of minority descent. (Task Force Report, January 20, 1990, at 84, note 14). At that time, minorities represented only about 17% of the State Bar of New Mexico. Under the electoral system, minority attorneys were very well represented in the State's judiciary.

At the time the 1990 Task Force Report was written, the Judicial Reform Amendment had only been in effect for about a year and only ten vacancies had been filled. Minorities, at that point, had not fared well under the new system. Of the ten vacancies, three had been vacated by minority judges. No minority had been appointed, even though at least one minority attorney had been nominated and recommended to the governor for each position in which a minority applied.

A number of observations and concerns were expressed by the original Task Force about the Judicial Reform Amendment. Included in that discussion were the following concerns:

1. Whether minority representation on nominating commissions would fairly reflect a cross-section of the New Mexico population.

2. Whether minority attorneys would be benefited by the one-time partisan election feature of the Judicial Reform Amendment in light of the success experienced by minorities in partisan elections prior to the adoption of the Amendment.
3. Whether minority attorneys would be disadvantaged by the Amendment in light of their demographics, which at the time showed lower experience levels when compared with non-minorities. In this regard, 70% of all New Mexico's minority attorneys had been admitted to the Bar since 1980 and 66% were then under age 40.
4. Whether the total lack of success by minorities in securing appointment to judicial positions under the new Amendment would continue. This concern principally addressed the level of commitment by the governor to appoint qualified minorities to judicial office.

The "Fiscal Year 1996-1997 Report on Judicial Nomination," prepared by Leo M. Romero, Chair of the Judicial Nominating Commissions, provides a recent and representative picture of the participation and success of minorities in the judicial selection process under the 1988 Amendment. This Report summarizes the decisions of various Judicial Nominating Commissions with respect to the 18 judicial vacancies occurring between July 1, 1996 and June 30, 1997.

Of those 18 vacancies, one was on the Court of Appeals, 13 were on the District Courts and four were on the Bernalillo County Metropolitan Court. A total of 189 candidates applied for the 18 vacancies and 63 were nominated. Nominations were made by 17 Judicial Nominating Commissions for 17 of the 18 vacancies (no nomination was made for a temporary vacancy in the Third Judicial District). Information regarding the ethnicity of the commissioners, applicants, nominees and appointees for this period is as follows:

1. 68% of the Commissioners were White/Non-Hispanic and 32% were Hispanic; there were no Asian American, African American or Native American commissioners.
2. 28% of the applicants were Hispanic, African American or Native American.
3. 33% of those nominated were Hispanic, African American or Native American.
4. 19% of those appointed were Hispanic, African American or Native American.

In terms of appointees, it must be noted that actual numbers are relatively small and interpretation is limited. It is interesting to observe, however, that nearly 40% of the Hispanic applicants were nominated (17 of the 43

who applied), compared to 31% of the White non-Hispanic applicants (42 of the 135 who applied). Numbers for other racial groups are too small to allow much interpretation. The statistics compiled for the entire period from 1989 to 1997 present a similar picture.

## **PERSPECTIVES OF NEW MEXICO ATTORNEYS ON RACIAL AND ETHNIC FAIRNESS IN THE LEGAL SYSTEM**

How do New Mexico attorneys perceive the racial and ethnic fairness of the legal system in New Mexico? The answers vary significantly depending upon the race, ethnicity and gender of the survey respondents. This is new information not addressed in the 1990 Task Force Report, but significant in light of the widely diverse perspectives held by minority and non-minority attorneys.

The Task Force's "Survey of Members of the State Bar" included questions related to opinions about differential treatment of minorities and women in the legal system. This section highlights responses related to perceptions of differential treatment from these 152 survey respondents who are members of the State Bar, comparing Hispanic and White non-Hispanic respondents where relevant and female to male respondents where relevant. The numbers of respondents from other racial or ethnic groups (15 total) are too small to include in the comparison.

Members of the State Bar were asked about experiences in which settlement positions or factual assertions were devalued based on ethnicity or gender. In the case of discrimination based on ethnicity, about one-third (1/3) of respondents have experienced opposing counsel devaluing a position because of ethnicity. A higher percentage of Hispanic respondents (41%), compared to White non-Hispanic respondents (27%), reported experiencing opposing counsel devaluing a position based on ethnicity. Also, just over one-third (1/3) of respondents have experienced opposing counsel devaluing a position because of gender. Just over one quarter (28%) of male respondents had experienced opposing counsel devaluing a position because of gender (compared to 57% of female respondents).

Several questions on the Survey of Members of the State Bar asked respondents about their own experience with discrimination based on ethnicity and gender. When respondents were asked if they had ever left a position

because of perceived discrimination, 16% of respondents said they had left a position because of perceived discrimination. When asked a similar question about professional opportunities in the workplace, 43% of respondents feel that professional opportunities as an attorney were limited because of discrimination. More than half (1/2) of Hispanic respondents felt that professional opportunities were limited because of discrimination, and only 32% of White non-Hispanic respondents felt that opportunities were limited. The bases for discrimination in these cases were primarily related to gender and ethnicity.

One-third (1/3) of all respondents said they had personally experienced an uncomfortable/hostile work environment. Just over one-quarter (1/4) of respondents said they had salary not comparable with those of similar experience, abilities, and qualifications. About one-third (1/3) of Hispanic respondents reported that they had personally experienced an “uncomfortable/hostile environment,” “inequitable work assignments,” “restricted opportunities for advancement,” and “salaries not comparable with those of similar experience, abilities, and qualifications” and other unspecified differential treatment. In comparison, White non-Hispanic respondents did not report these experiences as frequently as Hispanic respondents.

Survey respondents were also asked if they believed male attorneys have more opportunities to participate in office management than female attorneys. About one-third (1/3) of respondents said there were more opportunities for male attorneys to participate in office management. Also, when respondents were asked if there were more opportunities for non-minority attorneys to participate in office management than ethnic minority attorneys, 20% of respondents affirmatively agreed, there were more opportunities for non-ethnic minorities. About one-third (1/3) of Hispanic respondents believed that there were more opportunities for non-ethnic minority attorneys in office management compared to only 5% of White non-Hispanic respondents who believed there were more opportunities for non-ethnic minority attorneys.

The minority and non-minority attorneys, and male and female attorneys who responded to the Task Force survey expressed widely divergent perspectives on issues relating to racial, ethnic and gender fairness in the legal profession. In 1990, the fairness issue prompted the original Task Force on Minorities in the Profession to recommend the adoption of a rule of professional conduct prohibiting the expression or manifestation of bias or prejudice by a

lawyer on the basis of race, gender, religion or national origin. (1990 Task Force Report, at 98, Recommendation No. 20). As noted above, the New Mexico Supreme Court on January 1, 1994, adopted Rule 16-300, NMRA 1999, prohibiting an attorney from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others.

While the survey responses addressing differential treatment of attorneys, witnesses, clients and others on the basis of race, ethnicity and gender may suggest cause for concern, the good news is that only two (2) disciplinary complaints have ever been brought under Rule 16-300. Counsel for the Disciplinary Board reported that one resulted in sanctions and the other was dismissed for lack of substance. Nevertheless, the divergent views of the responding attorneys should remind us all of the value of tolerance and civility in the practice of our profession.

Similarly, 93% of male respondents and 89% of female respondents have not rejected retaining a female expert because of credibility concerns. Overall, the vast majority of responding members of the State Bar have not rejected ethnic minority or female experts because of their credibility.

## **RECOMMENDATIONS OF THE TASK FORCE ON MINORITIES IN THE PROFESSION II**

The Task Force recommends that the following matters be considered by the Board of Bar Commissioners of the State Bar of New Mexico in addressing the issues described in this Report, and particularly, in improving the involvement of minority attorneys in the activities and leadership of the State Bar of New Mexico and promoting equal opportunities in the profession for minorities and women.

1. The Board of Bar Commissioners should create a standing committee of the Board for leadership development, charged with designing and implementing strategies for improving the quality, quantity and diversity of leadership for bar-related activities. The Committee should have, as part of its mission, cultivating closer ties among the State Bar, voluntary and student bar associations, and other law-related organizations and outreach to those members

who typically do not actively participate in the activities and leadership of the State Bar, with the goal of increasing interest and participation in, commitment to, and greater strength of, the State Bar and all bar-related organizations.

2. The Board of Bar Commissioners should reorganize the Standing Committee on Minorities in the Profession to include active participation by Commissioners, officers of each voluntary bar association and other law-related organizations with the goal of developing a community of interest and developing the resources necessary to address the many issues and concerns impacting minority members of the State Bar, as detailed in this Report.
3. The New Mexico Board of Bar Examiners should be commended for the innovative action it has taken over the years to study and implement changes designed to assure fairness in the administration of the New Mexico Bar Examination. Essential to its continuing mission, however, is adequate statistical and demographic information about its applicants and passage rates. Only if this information is properly compiled and regularly evaluated can the Board be confident that it is administering a fair and unbiased examination. Accordingly, the Board of Bar Commissioners should consider recommending to the New Mexico Supreme Court and the Board of Bar Examiners the continued compilation and reporting of accurate records on applicants' race, ethnicity and passage rates to assist this effort.
4. The Task Force believes that bar examination preparation courses and mentoring can have a significant impact on bar passage rates. Not all bar review courses are affordable to applicants with limited means. Accordingly, the Board of Bar Commissioners, as well as all minority bar associations, should investigate the potential of developing a bar review program on a cost affordable basis, including, providing mentoring by experienced attorneys on a volunteer basis on strategies for taking the Bar Examination. The project proposed by the Young Lawyers Division should be assessed in this regard.
5. Training in law office management, accounting and the handling of client trust funds is absolutely essential if the profession is to effectively reduce the incidence of disciplinary problems for solo and small firm practitioners. The Board of Bar Commissioners should consider:
  - (1) recommending to the Law School that it supplement the legal education it provides its students with basic training in the administration and economic operation of a small law office and the management of client funds;
  - (2) recommending to the New Mexico Supreme Court that courses in law office management, trust fund accounting, and ethics be mandatory CLE courses for newly admitted lawyers and solo and small firm practitioners;
  - (3) recommending that the new Law Office Management Committee, in cooperation with the Solo Section and CLE of the State Bar establish a formal curriculum for solo and small firm practitioners addressing the common and unexpected facets of practicing law and managing a law business as a solo or small firm practitioner. The proposed Solo Conference for debut in 2000 may well meet this need.
  - (4) recommending to the Board of Bar Examiners that issues on law office management and ethics be included as part of the Bar Exam.
6. The Board of Bar Commissioners should assess the effectiveness of the Bill Kitts Mentor Program and make such modifications to the administration of the program as will substantially increase the number of participants and enhance the learning and networking experience intended by the program.
7. The Task Force continues to believe that the State Bar of New Mexico can and should play a role in promoting and increasing equal employment opportunities for minority attorneys in the private sector. The Board of Bar Commissioners should consider strategies and programs designed to increase and diversify the pool of applicants for these positions by, among other things, continuing the Summer Law Clerk Program and promoting job fairs and other projects designed to interest minorities and other members in private firm practice.
8. The State Bar, sections of the State Bar, the law school, and voluntary and minority bar associations must undertake responsibility for encouraging minority and women lawyers and law students to seek employment opportunities in those areas of the profession where minorities and women have historically been under-represented.
9. The Task Force recommends that the Board of Bar Commissioners consider amending Article 1 of the State Bar's bylaws to add the following as an expressed purpose of the State Bar: "It is in the enlightened self-interest of the State Bar to promote full and equal participation in the legal profession by minorities and women." In addition, the Task Force recommends that the New Mexico Supreme Court consider including this language as an amendment to the Rules Governing the State Bar (Rule 24-101).

10. To assist minority attorneys in maintaining and increasing their traditional role in the State's judiciary, the Task Force recommends that the Board of Bar Commissioners direct the Standing Committee on Minorities in the Profession to develop and organize programs that will encourage diversity in the judiciary.
11. The Task Force recommends that the Board of Bar Commissioners consider recommending to the Disciplinary Board and the Judicial Standards Commission the development of a procedure for receiving and addressing complaints of discriminatory conduct by lawyers and judges.

## **THE TASK FORCE ON MINORITIES IN THE PROFESSION II – MEMBERS**

Like the original Task Force, the members of Task Force II comprise a highly diverse group of lawyers and judges. The forty members of the Task Force II are:

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