

**The Florida Bar  
 President’s Special Task Force to Study Enhancement of Diversity  
 in the Judiciary and on the JNCs**

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**The Florida Bar  
President's Special Task Force to Study Enhancement of Diversity  
in the Judiciary and on the JNCs**

**Introduction: Florida Bar President Eugene Pettis Reaches Out Both to Governor Rick Scott and Members of The Florida Bar.**

In 2004, The Florida Bar convened a Diversity Symposium that resulted in the issuance of a "Diversity in the Legal Profession Report," which identified, among other goals, the imperative of diversifying Florida's judiciary by the year 2014. In the ensuing decade, The Florida Bar focused upon Diversity as an important commitment of the legal profession. In 2010 The Florida Bar articulated that commitment as follows:

Commitment to Promoting Diversity

The Florida Bar is fully committed to the enhancement of Diversity within the Bar, the legal profession, legal education, and in the justice system, and affirms its commitment to a Diverse and inclusive environment with equal access and equal opportunity for all.

--The Florida Bar, May 27, 2010

Even before 2004, The Florida Bar had manifested its commitment to Diversity through official action. In 1991, at the request of The Florida Bar along with 50 of its members, the Florida Supreme Court amended the Rules Regulating The Florida Bar to add subsection (d) to Rule 4-8.4, which provides that, "A lawyer shall not...disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers...on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic."

That disciplinary rule amendment arose from the recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, the 1990 and 1991 Reports of which led to momentous actions in all three branches of Florida government. For instance, "the proportion of county and circuit court judges of color almost doubled between 1990 (6%) and 2000 (11%). At the court of appeals level, the proportion quadrupled, from 4% in 1990 to 15% in 2000." See, *The Integrity of our Judiciary Depends on Diversity*, Professor Aaron Taylor, April 2014 (Appendix 1) and Appendix 2, Demographics of Florida's State Judiciary.

The Florida Bar and Florida's Governors

In the 24 years since 1990, The Florida Bar has variously aligned with and against Florida's Governors regarding issues of interest to the Bar's sections and members. Throughout

that entire period, however, Florida's Governors and The Florida Bar have tended to remain closely aligned on at least two matters of common concern.

The first is the importance of a fair, impartial and independent judiciary that is selected based upon merit through a hybrid system that involves assessment and nomination of applicants by Judicial Nominating Commissions, Gubernatorial appointment, and elections, either in the first instance or upon the expiration of an initial term or portion thereof of a County Court Judge or Circuit Judge following an appointment. The second is the importance of pursuing, achieving and sustaining a Diverse and inclusive judiciary that reflects the state's demographic composition and exhibits fairness, impartiality and independence.

When frictions between The Florida Bar and Governor Rick Scott arising from matters broader in scope than diversity *per se* seemed to imperil the traditionally steady alliance between the Office of the Governor and The Florida Bar related to judicial independence and diversity, Florida Bar President Eugene Pettis, in collaboration with the Board of Governors of The Florida Bar, reached out to Governor Scott and his General Counsel, Peter Antonacci. Mr. Pettis recommended use of the occasion that the Governor will have in June 2014 to fill 78 vacancies on the JNC's to reverse the downward trend in the representation of Diverse lawyers on JNC's and to fill many of the judicial vacancies during the balance of 2014 with Diverse lawyers.

#### Florida Bar President Pettis Appoints Special Task Force

One tangible result of the outreach by President Pettis to Governor Scott and Florida lawyers was the formation of this President's Special Task Force to Study Enhancement of Diversity in the Judiciary and on the JNC's (the "Task Force"). The Task Force, which is comprised of several distinguished practitioners, includes: lawyers designated by Mr. Antonacci on behalf of Gov. Scott; lawyers who have served as legal counsel to previous Governors; members of Judicial Nominating Commissions; leaders of voluntary bar associations; a former Florida Attorney General; former judges; and holders of other public offices. The members of the Special Task Force are:

- Frank Scruggs of Fort Lauderdale, Chairman
- Cynthia G. Angelos of Port Saint Lucie
- Robert A. Butterworth Jr. of Fort Lauderdale
- Cassandra Larkin Denmark of Bartow
- Linda Bond Edwards of Tallahassee
- Judge Hubert L. Grimes of Deland
- Paul C. Huck Jr. of Miami
- Corali Lopez-Castro of Miami
- William R. Scherer of Fort Lauderdale
- William J. Schifino of Tampa
- Robert C.L. Vaughan of Fort Lauderdale

## Meritocracy, Diversity, and Legitimacy are Inter-related

The processes for merit selection and merit retention of Florida's judges are firmly cemented into the foundation of modern Florida Government, along with other bedrock principles such as transparent access to public records and meetings; financial disclosure by public officials; enumerated individual rights; balanced budgeting; and legislative curtailment of executive rule-making authority.

Florida lawyers have historically led efforts to inform the public about the importance of merit selection and merit retention of our state court judges. The continuing support of Florida lawyers for these processes shall remain critically important in protecting judicial merit selection/retention process as an integral component of the bedrock of government in this state.

In response to recently commissioned surveys of Florida lawyers conducted for the Task Force, among lawyers who indicated having an opinion, over three quarters (77%) of the general sample of Florida Bar members and nearly two-thirds (64%) of JNC Applicants report that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment. By contrast, over three-quarters (78%) of JNC members who indicated having an opinion, responded that they disagree with the statement that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment. 67% of the JNC Members who responded to the Task Force survey have been JNC members for three or fewer years, i.e., were appointed by Governor Scott. While the term "partisan politics" was not defined in the survey, nor was there a distinction drawn between the selection processes used by The Florida Bar and Office of the Governor, the survey demonstrated a dramatic difference of opinion between those who succeeded in obtaining an appointment to a JNC and those who did not.

When considering only those respondents in the general sample of Florida lawyers who indicated having an opinion and examining the question by race/ethnicity, 82% of African-Americans, 69% of Asian-Pacific Islanders and 55% of Hispanics report that lawyers from Diverse racial or ethnic groups do not have the same chance as other candidates to be chosen for appointment to a JNC. Comparatively, 35% of Caucasians report having the same opinion.

Anyone who cares deeply either about merit selection of judges or about diversifying Florida's judiciary, and everyone who cares about both, should consider these data, and the difference of opinion about them, alarming. The data from the Task Force surveys suggest that, at a minimum, further analysis is warranted in the ensuing months and years. In keeping with the charge that it received from Florida Bar President Eugene Pettis, the Task Force urgently focuses now upon the opportunities at hand for Governor Scott to appoint larger numbers of Diverse lawyers to JNC's and, ultimately, increasing the number of Diverse judges appointed from the slates presented as nominees for Gubernatorial appointment to judgeships.

In keeping with the spirit of collaboration and candor exemplified by President Eugene Pettis, the Task Force recommends ten action steps to help sustain if not reinvigorate the momentum created by The Florida Bar throughout its nearly twenty-five years of earnest attention to Diversity in the profession and in the judiciary.

The Task Force commenced and ended its work within the ninety day timeframe allotted for it to report its findings and recommendations. It has done so with confidence that President Pettis, ensuing Presidents of The Florida Bar, and the Board of Governors will remain strongly committed to realizing the benefits of achieving and sustaining Diversity in Florida's judiciary.

## THE TEN RECOMMENDATIONS

**1. Encourage The Florida Bar to nominate and Governor Rick Scott to appoint Diverse lawyers to fill significant numbers of vacancies on the Judicial Nominating Commissions (“JNC’s”) (including the 78 upcoming vacancies - 26 by direct Gubernatorial appointment and 52 from slates proposed by The Florida Bar), and encourage Governor Scott to appoint Diverse lawyers to fill vacancies in Florida’s judiciary that become available to him for appointment**

**2. Work with Governor Rick Scott educate the members of The Florida Bar and the public about the public policy rationale or, in corporate terms the “business case,” for increased Diversity in Florida’s Judiciary; Encourage Governor Scott to reiterate his commitment to Diversity by informing JNC appointees that he regards Diversity as important, and to take other specific steps recommended by this Report.**

The Task Force commends the Florida lawyers who responded to its surveys.<sup>1</sup> The survey reflects divergent views among survey respondents with some strong support for diversity initiatives and some respondents questioning the propriety or continued need for intervention in furtherance of increased diversity. For example, in narrative response, some JNC members questioned whether outreach to achieve Diversity should be a JNC objective:

Question 9 to JNC Members: Please offer any comments, suggestions or feedback you may have about how Judicial Nomination Commissions can help in maintaining a fair and impartial court system that is reflective of the rich diversity or our state.

Responses of JNC Members<sup>2</sup>

The system works. Do NOT attempt to fine tune it with false diversity activities. When qualified minorities apply their names are usually forwarded to the Governor for consideration.

It is my belief that the most qualified candidates be nominated for appointment by the Governor for a judicial opening. An applicant's race, gender, national origin, sexual orientation, etc. should have no impact in determining whether or not he or she is qualified for nomination to a judicial position. A question is asked on the judicial applications regarding gender and ethnicity, which I believe, if legally permissible, should be removed.

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<sup>1</sup> The biographical sketches of the scholars who conducted the surveys and assisted the Task Force with interpretation of survey results appear in the Appendix at 3(a) and 3(b).

<sup>2</sup> The full sets of written Responses of JNC members, JNC applicants, and The Florida Bar general sample appear in the Appendix at 4.

Question 22 to JNC Members: Please explain how you would like to see such greater outreach occur.

Don't try to fix what ain't broke

I am not sure it is job of JNC to "recruit" applicants. I want applicants who are informed enough and have the desire/drive to apply. JNC's job is to nominate the best qualified, not to fill a politically correct "quota". I do not vote for a class of applicant, I vote for those who I believe can do a good job as a judge. You had Q's above re politicizing the JNC, this has elements of that very thing.

A JNC is a neutral body and should not conduct outreach efforts.

I think the outreach process is appropriate the way it is.

I don't think the process should be laid out at the applicants' feet. If they want it bad enough, the process is not hard. All they have to do is educate themselves a little bit. We don't want judges who can't even figure out how to apply on their own.

It is occurring already and working fine and should not be tinkered with.

WHY is a JNC doing outreach?

Outreach should not occur from a JNC.

In the recently decided U.S. Supreme Court case involving a challenge to the constitutionality of a voter-approved amendment banning race-conscious university admissions of the kind that the Supreme Court permitted a decade earlier, the Justices' opinions expressed strong differences regarding the philosophical underpinnings of the constitutional issue before the Court. Thus, even the nation's most incisive legal minds earnestly differ regarding Diversity. Justice Scalia wrote:

As Justice Harlan observed over a century ago, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.

*Schuetz v. Coalition to Defend Affirmative Action*, 133 S.Ct. 1633, 1648, 2013 WL 1187585 (March 25, 2014) (Scalia, J., concurring in the judgment).

By contrast, Justice Sotomayor wrote:



Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process.

\*\*\*

Race also matters because of persistent racial inequality in society – inequality that cannot be ignored and that has produced stark socioeconomic disparities.

\*\*\*

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you really from?", regardless of how many generations her family has been in the country.

\*\*\*

As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.

*Id.*, at 1675 (Sotomayer, J., dissenting) (internal citations omitted)

The Task Force recommends that the Board of Governors of The Florida Bar revisit and again set forth its rationale for seeking to diversify Florida's judiciary and the JNC's. In doing so, The Florida Bar might, for instance, invoke the language of the American Bar Association, which stated the importance of Diversity as follows:

Members of racial and ethnic minorities bring to the bench and bar the unique perspectives that are necessary for effective representation of minority interests. As Justice O'Connor said of former Justice Thurgood Marshall: Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth. *Citing* Hon. Sandra Day O'Connor, Thurgood Marshall: The Influence of a Raconteur, 44 *Stan. L. Rev.* 1217 (1992).

Brief of the American Bar Association as Amicus Curiae in Support of Defendants-Appellants, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 01—1447) 2001 WL 34624916, at \*7-8

Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled. Our nation’s founders recognized that a legitimate government depends upon the participation of all the people. “It is essential to [a republican] government that it be derived from the great body of society, not from . . . a favored class of it . . . .” 29 *citing*, 29 The Federalist No. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961) (1788).

In particular, the ability of the judiciary to discharge its constitutional responsibilities “ultimately rests” on “public confidence in it.” *United States v. Johnson*, 323 U.S. 273, 276 (1944); see also *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”). Courts must guard against perceptions that “destroy[] the appearance of justice and thereby cast[] doubt on the integrity of the judicial process.” *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979).

Brief of the American Bar Association as Amicus Curiae in Support of Defendants-Appellants, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 01—1447) 2001 WL 34624916, at \*12-13

The “business case” for Diversity has been long accepted and well documented. These examples from two iconic Florida companies present the rationale for Diversity from a business perspective and typify ‘values statements’ that commonly appear on corporate websites:

Publix – Diversity Statement:

COMMITTED TO DIVERSITY

Variety makes everything better.

Imagine a store full of nothing but oranges.

Diversity is a very good thing. Not just for the physical differences, but because of the fresh ideas and unique perspectives a diverse group of people provides. So Publix hires lots of different kinds of people. We make it a priority to employ and work with people from many backgrounds, cultures, abilities, and ethnicities.

It’s no surprise that being diverse ourselves enables us to better serve a wider variety of customers and support our diverse communities with the right product in the right stores. We thrive as a business because of workforce diversity, including our suppliers. We purchase products from both mainstream and diverse vendors.

Walt Disney World – Diversity Statement:

## DIVERSITY

Having a Diverse workforce is critical to our business. When our employees reflect the diversity of the communities we serve, it enhances the quality of our entertainment and experiences. Encouraging a broad range of opinions, ideas and perspectives helps us drive creativity and innovation across the company.

We're building a workforce representative of the global marketplace in which we operate, while fostering an inclusive environment for our employees and their families. Although we still have plenty of progress to make, we are proud that our Company continues to focus on this area.

Similarly, HCA, a leading provider of healthcare services that Governor Rick Scott headed, identifies Diversity among its core corporate values and includes this Diversity Statement on its website:

Diversity and Inclusion at HCA is significant to our core business of delivering healthcare excellence. It involves the hearts and lives of our employees, our patients, and our communities. The following HCA Diversity and Inclusion Vision Statement is a strong reminder that our strategy touches all facets of our company:

At HCA, we will provide culturally competent care to every patient we serve. We will foster a culture of diversity and inclusion across all areas of our company that embraces and enriches our workforce, physicians, patients, partners and communities.

HCA is an Equal Opportunity Employer

We strive to create and maintain a setting in which we celebrate cultural and other differences and consider them the strengths of the organization. No one shall discriminate against any individual with regard to race, color, religion, sex, national origin, age, disability, sexual orientation, gender identity or veteran status.

The national and state sentiments in favor of outreach to achieve Diversity in the judiciary seem so widely held as to obviate the need to re-present the rationale or “business case” for Diversity. But the need still exists, as reflected by the statements of JNC members who questioned whether JNC’s should reach out to potential candidates to create Diverse applicant

pools. Leadership can clearly articulate the Bar's Diversity objectives and broaden public understanding of the reasons why Diversity in the judiciary matters.

**3. Educate members of The Florida Bar and the public on the rigorous process by which the Board of Governors of The Florida Bar chooses slates of nominees for presentation to the Governor for appointment to Judicial Nominating Commissions, and ask Governor Scott not to reject The Florida Bar's JNC slates.**

On eighteen occasions, Governor Rick Scott has rejected entire slates of nominees from the Board of Governors of The Florida Bar for appointment to the JNC's.<sup>3</sup> The lawyers on these rejected slates have outstanding records of professional service. They were selected through a vigorous, multi-step process that culminated in formal nomination by the Bar Board of Governors, in fulfillment of statutory duties assigned to it by Section 43.291(1), Florida Statutes in pursuit of the objective established by law.<sup>4</sup>

No prior Governor of Florida has rejected a slate of JNC nominees presented by The Florida Bar. Governor Scott need not by law explain his reasons for rejecting slates of The Florida Bar's JNC nominees.<sup>5</sup> The current opportunity to appoint 78 JNC members (26 by direct Gubernatorial appointment and 52 from slates proposed by The Florida Bar) affords Governor Scott an opportunity to realize a significant milestone in Florida's longstanding commitment to achieving Diversity in the Judiciary and to rebuild bridges with The Florida Bar regarding this area of shared commitment.

Every Florida Governor is entitled to consider whether prospective judicial appointees share his or her judicial philosophy. The Task Force does not suggest otherwise.

Nonetheless, the written comments of survey respondents who are JNC Applicants and Florida Bar members, plus the quantitative results of their surveys, suggest a disconnect regarding perceptions of the nomination and appointment processes, not only between members

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<sup>3</sup> Appendix 5 shows the composition of slates of candidates for JNC appointments and the resolution of their candidacies by Gubernatorial action.

<sup>4</sup> Section 43.291 (1) and (4), Florida Statutes provide:

(1) Each judicial nominating commission shall be composed of the following members:

(a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.

(b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law.

\* \* \*

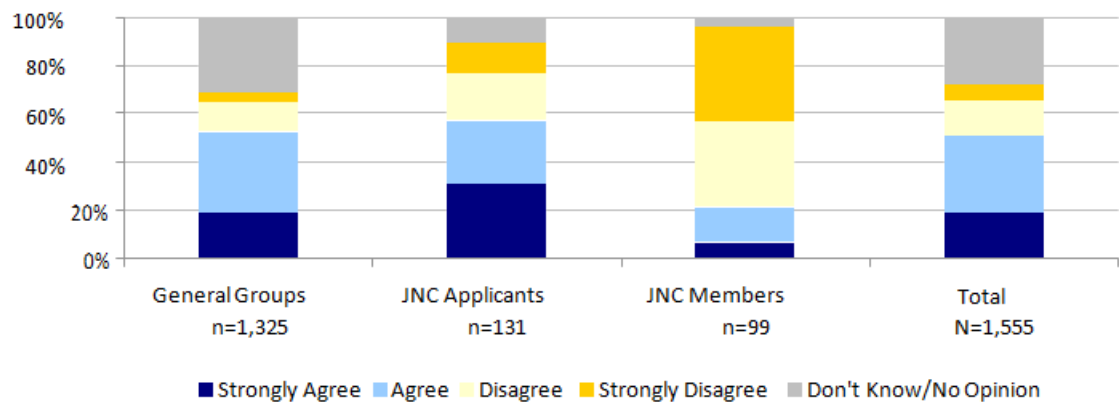
(4) In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit.

<sup>5</sup> Id.

and nonmembers of JNC’s, but also between respondents who self-identified as Diverse and respondents who self-identified as not so.

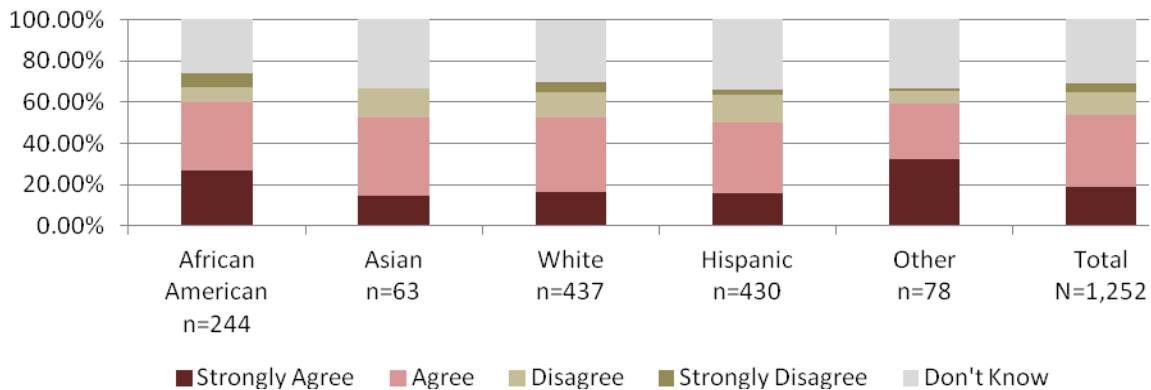
- \* When considering only those respondents who indicated having an opinion, over three-quarters (77%) of the general sample and nearly two-thirds (64%) of the applicants report that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment. Comparatively, over three-quarters (78%) of the JNC members with an opinion disagree with the conclusion that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment.
- \* When considering only those respondents who indicated having an opinion and examining the responses by race/ethnicity, 81% of African-Americans, 79% of Asian-Pacific Islanders, 75% of Caucasians, and 74% of Hispanics report that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment.
- \* When considering only those respondents who indicated having an opinion and examining the responses by gender, there are no significant differences between male and female respondents as 78% of females and 77% of males report that, too often, partisan politics are more important than merit in determining who is selected for a JNC appointment.<sup>6</sup>

**Chart 3. Too often, partisan politics are more important than merit in determining who is selected for a JNC appointment**



<sup>6</sup> The numbers of the charts in this Report coincide with the numbers in the full set of such charts in Appendix 3(c).

**Chart 3.1 Too often, partisan politics are more important than merit in determining who is selected for a Judicial Nominating Committee appointment; General Groups**



These quantitative survey data are corroborated by the written (narrative) responses of JNC applicants and the general sample of Florida Bar members:

**Question 9 to JNC Applicants:** Finally, please offer any comments, suggestions or feedback you may / have about the Judicial Nomination Commission process.

It seems political and selections are not based on merit.

I think from my experience it's too politically charged and not enough emphasis on merit

Selection of JNC members is incredibly political, which is disheartening to those who are trying to maintain a nonpartisan bench.

Was not selected to serve on the JNC by the Governor because of my political party affiliation.

Too much cronyism -- does not select the best applicants

The process is too politicized.

Different Governors have different “agendas” in selecting JNC members. All, to some extent, are looking to place individuals who share the Governor's judicial philosophy, which will inevitably lead to GOP governors appointing GOP lawyers and Democratic governors appointing Democratic lawyers. GOP governors are generally nondiscriminatory with respect to race, sex, etc. in their appointments, looking for merit based on philosophical/political (to the victors go the spoils); Democratic governors are a bit more discriminatory, as they are bean counters when it comes to diversity, though it's easier for them to do so because of the disproportion of “minorities” who are Democrats.

The current governor cleared the 2d DCA JNC of members with backgrounds suggesting they might oppose his agenda. In my case, I am an appellate lawyer who specializes in representing plaintiffs in personal injury actions.

I think it is too politically motivated

I do not believe the governor should be able to determine who is on JNCs. He should determine who is on the bench after the JNC process takes place. He stacks the deck by appointing people that agree with his politics, then pick the judges from the people those people pick. The bar should choose all the JNC members.

While partisan politics may not dominate the selection of Judicial Nominating Commission members, make no mistake, it remains an intra-Florida Bar political process. Unfortunately in recent years, Executive branch appointments increasingly reflect a political agenda. As to the nomination process and the Executive's appointments, I am a lot less concerned with diversity than excellence.

It has become too political. Partisanship political views are more important than qualifications.

**4. Recommend that the Office of the Governor and the Judicial Nominating Procedures Committee of The Florida Bar appoint a Diversity Officer and otherwise work together to: review the processes used by JNC's in identifying, recruiting, and evaluating nominees for appointment to Florida's judiciary; determine whether JNC processes and procedures impede the recruitment, evaluation, and nomination of candidates that are Diverse in terms of race, ethnicity, gender, color, national origin, sexual orientation, physical disabilities, or status as a protected veteran under federal law; redirect processes through reforming JNC outreach, interview, and evaluation methods; and provide guidance regarding advertising or starting nomination processes.**

The Florida Bar Judicial Nominating Commission Procedures Committee is a valuable resource to the JNC's. Historically, its training and orientation sessions have provided information and training to the JNC's.

There is a compelling need to institutionalize oversight of JNC operations to assure accountability for fulfilling the statutory obligations established by Section 43.291, Florida Statutes. Statewide facilitation and guidance would help to achieve (a) consistency in JNC processes and procedures, including uniformity between circuits and consistency with best practices for sourcing and evaluating candidates, and (b) focused commitment to achieving Diversity and fulfilling the statutory objectives set forth in §43.291, Florida Statutes. These needs were highlighted over twenty years ago by the Florida Supreme Court Racial and Ethnic Commission:

Each judicial nominating commission should, by rule, establish a model plan for recruiting qualified minority candidates for judicial appointment, updating the plan as appropriate to account for

experience gained in the recruitment process. Particular attention should be paid to the recruitment of minority females for judicial appointment. Judicial nominating commissions should be required to provide to the governor a statement certifying compliance with the commission's minority recruitment plan when submitting recommendations for judicial appointments. In addition, the Florida Supreme Court should require the Judicial Nominating Procedures Committee of The Florida Bar and each judicial nominating commission to submit an annual report detailing each commission's record of increasing the number of minorities recommended for appointment to Florida's bench.

*Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, 1990.*

When he appointed the Task Force, Florida Bar President Eugene Pettis encouraged it not to devote extensive time restudying issues that have been previously explored. The foregoing recommendations are among a few recommendations of that Supreme Court's Commission that were not implemented. They still warrant consideration and implementation by the JNC's today.

Responsibility for the oversight of the JNCs is spread throughout the branches of Florida's government. Because the JNC's have express authority to enact rules of procedure, the Governor has the authority to appoint and remove JNC members, and the Florida Supreme Court has the authority to repeal JNC rules of procedure, leadership toward uniform statewide JNC rules of procedure pertaining to Diversity could come from a number of sources. Of all such sources, statewide leadership seems most likely to emerge from the Office of the Governor. In other words, judicial Diversity becomes very important when a Governor makes it so. Collaboration between the Governor and The Florida Bar, particularly if it is reinforced by training and orientation initiatives by the JNCs themselves, could sharpen the State's focus upon achieving greater Diversity in its judiciary.

##### **5. Educate members of The Florida Bar and the public about the importance of providing opportunities for Diverse lawyers to gain access to membership in JNC's and to judicial appointments.**

The Task Force survey asked whether respondents agree that strong "political overtones" compromise the current JNC process. This term is the one used by Diverse local bar associations' representatives in addressing the Task Force at its March 11, 2014 meeting. As noted earlier, the term "political overtones" is undefined and imprecise. It is, however, directionally indicative of sentiments extensively reflected in Task Force Survey results suggesting that a significant and concerning gap in opinion regarding whether such "overtones" are seen as limiting opportunities for Diverse lawyers to become members of JNC's.

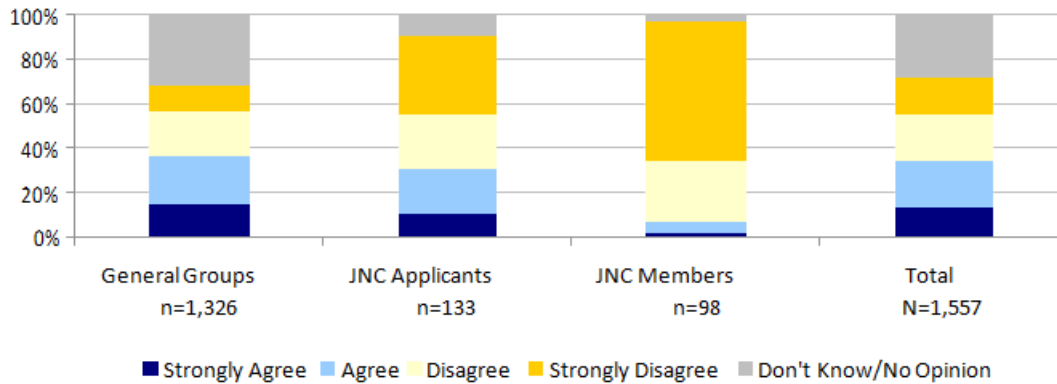
- \* When considering only those respondents who indicated having an opinion, there are significant differences in opinion across the three separate surveys. While just over half (54%) of the respondents in the general survey agree that lawyers from Diverse racial or ethnic groups do



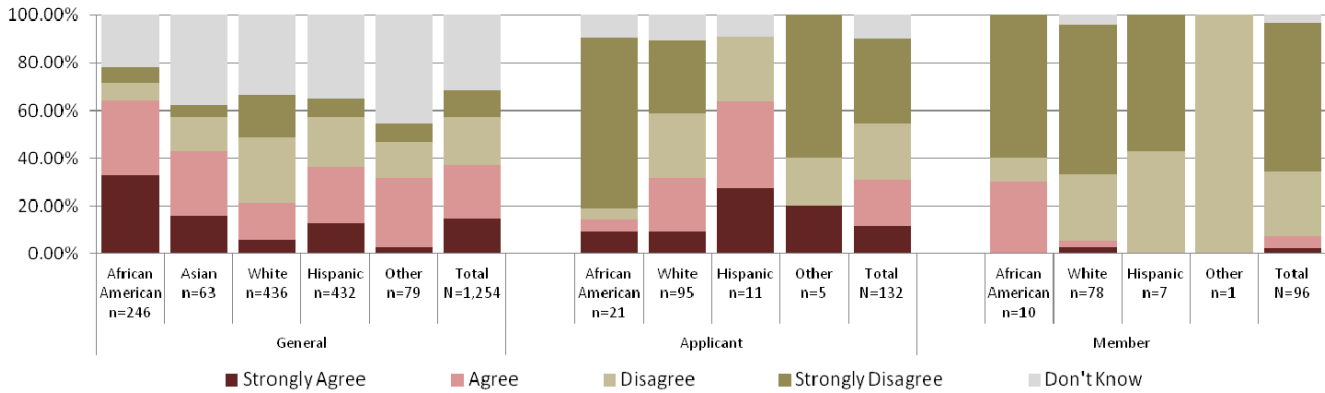
not have the same chance as other candidates to be chosen for JNC membership, about two-thirds (66%) of the applicants and almost all (93%) of the JNC members disagree.

- \* When considering only those respondents who indicated having an opinion and examining the question by race/ethnicity, 82% of African-Americans, 69% of Asian-Pacific Islanders and 55% of Hispanics report that lawyers from Diverse racial or ethnic groups do not have the same chance as other candidates to be chosen for JNC membership. Comparatively, 35% of Caucasians report the same.
- \* When considering only those respondents who indicated having an opinion and examining the question by gender, there are significant differences between male and female respondents as 64% of females and 46% of males report that lawyers from Diverse racial or ethnic groups do not have the same chance as other candidates to be chosen for JNC membership.

**Chart 7. Lawyers from diverse racial or ethnic groups do not have the same chance as other candidates to be chosen for JNC membership**



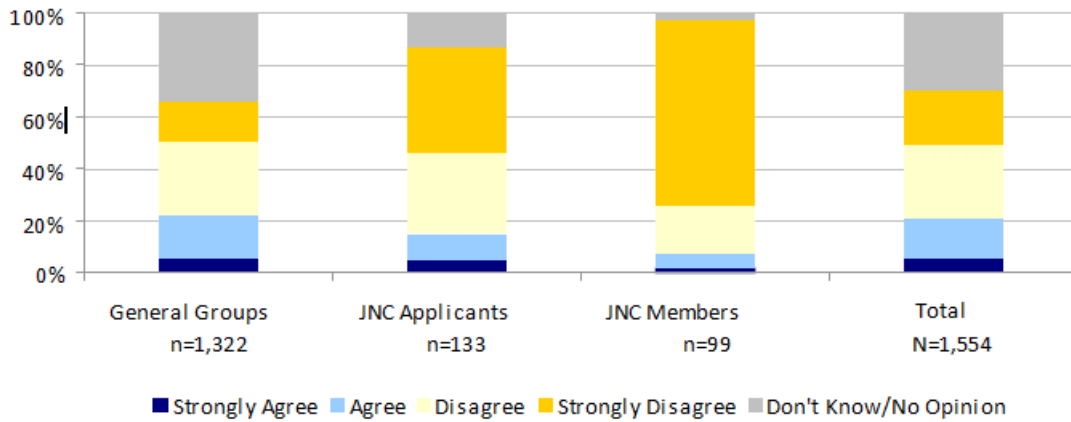
**Chart 7.1 Lawyers from diverse racial or ethnic groups do not have the same chance as other candidates to be chosen for JNC membership.**



The Task Force inquired whether the general sample of Florida lawyers, JNC Applicants, and JNC members regard women as having the same chance as men to be chosen for JNC membership. The results were as follows:

- \* When considering only those respondents who indicated having an opinion, a majority of JNC members (93%), applicants (83%), and respondents from the general survey (67%) disagree that lawyers who are women do not have the same chance as men to be chosen for JNC membership.
- \* When considering only those respondents who indicated having an opinion and examining the question by race/ethnicity, 76% of Caucasians, 70% of Hispanics, 58% of Asian-Pacific Islanders, and 53% of African-Americans disagree that lawyers who are women do not have the same chance as men to be chosen for JNC membership.
- \* When considering only those respondents who indicated having an opinion and examining the question by gender, there are significant differences between male and female respondents as 79% of males and 53% of females disagree that lawyers who are women do not have the same chance as men to be chosen for JNC membership.

**Lawyers who are women do not have the same chance as men to be chosen for JNC membership**



The Task Force also inquired whether the general sample of Florida lawyers, JNC applicants, and JNC members regard Lesbian Gay Bisexual and Transexual (LGBT) lawyers, lawyers with physical disabilities, and lawyers who are protected veterans as having the same chance of becoming JNC members or judges as lawyers who are not in any such groups. As reflected by the charts in Appendix 3(c), none of the groups surveyed view any of these groups as not having an equal chance to become JNC members or judges.

The Task Force inquiry regarding the opportunities for LGBT lawyers is the first formal survey by The Florida Bar regarding treatment and professional opportunities for LGBT lawyers.<sup>7</sup> In ensuing studies, more comprehensive inquiries should be made regarding the opportunities for appointments for members of the LGBT legal community, as well as for other Diverse groups, including, lawyers who have disabilities or who are veterans with certain employment rights that are protected by federal law.

**6. Inquire further regarding the dramatic disparity between the views of JNC members, as expressed in their multiple-choice survey responses and in their written responses to open ended survey questions, and the views of JNC applicants and the general sample of Florida Bar members.**

On several questions, the responses of currently serving JNC members differ strikingly from the responses of JNC applicants and the general sample of Florida Bar members. Charts in the Task Force’s materials from the April 30, 2014 meeting reflect those stark differences. Additionally, JNC members answered “don’t know” or “no opinion” on some questions at significantly higher rates than the two other groups of respondents. This pattern warrants further inquiry and analysis.

<sup>7</sup> The Task Force Surveys are historically significant as the first instances in which The Florida Bar surveyed its members regarding their views regarding Diversity and because they led to a more robust census of African-American, Asian-Pacific Islander and Hispanic lawyers in Florida.

**7. Implement the recommendations of the Task Force subcommittee regarding outreach to Diverse JNC members.**

A subcommittee of the Task Force prepared and delivered a series of recommendations regarding recruiting and mentoring JNC applicants, which the Task Force as a whole adopted and agreed to incorporate as presented. The Subcommittee's report appears in its entirety in Appendix 6.

Even though they could have receded in discouragement, given sentiments reflected by survey results, Diverse lawyers exhibited optimism and interest by applying to The Florida Bar in record numbers for the opportunity to become listed on one of its slates for presentation to Governor Scott for appointment to a JNC. The surge in such applications seems to have resulted from the extensive outreach by Florida Bar President Eugene Pettis and members of the Board of Governors of The Florida Bar leading up to the JNC application deadline. The effectiveness of their combined recruitment efforts suggests that outreach can – in relatively short order – effectively deepen and diversify JNC applicant pools.

The subcommittee's recommendations, if adopted and implemented, would help sustain the high levels of interest realized as a result of the Bar's outreach related to the 78 current JNC vacancies. To become impactful, however, the Bar's recent outreach must be followed by Gubernatorial appointments that signal a decisive reversal of the recent downward trend in the representation of Diverse lawyers on the JNC's and on the bench.

**8. Implement the recommendations of The Florida Bar's 2004 Diversity in the Legal Profession Report regarding the initiatives of the individual members of The Florida Bar to discourage opportunistic targeting of Diverse judges when they stand for initial election subsequent to gubernatorial appointment, as augmented by a subcommittee of the Task Force.**

Task Force members Paul Huck and William Scherer led deliberations regarding the importance of Local Bar Leaders in the recruitment and retention of Diverse judges. The Task Force supports their recommendations, which appear in the Subcommittee Report in Appendix 7.

**9. Implement the recommendations of the Brennan Report advocated by the Task Force.**

In 2010, the Brennan Center For Justice at New York University School of Law authored a study on Improving Judicial Diversity. In the face of data suggesting, for example, that white males were in some instances statistically overrepresented on certain courts by a margin of two-to-one, while every other demographic group (including women) remained statistically and historically underrepresented, the study sought to examine diversity in 10 state courts across the country, including Florida, and to provide a roadmap on how to improve diversity on state court benches.

To this end, the Brennan Center offered a list of ten best practices to nominating Commissions across the country to attract the brightest female and minority candidates to the judiciary. The Task Force endorses and adapts the following recommendations of the Brennan

Center for Justice's Executive Summary and notes that the Task Force's several preceding recommendations encompass all of the following of its recommendations:

- **Grapple fully with implicit bias.** Cognitive scientists have focused attention on the widespread tendency to unwittingly harbor implicit bias against disadvantaged groups. Fortunately, these biases are mutable. Thus, by acknowledging that this tendency exists, Commissions can take steps to counteract their biases.
- **Increase strategic recruitment.** The first step in ensuring a Diverse applicant pool is making sure that an open judicial seat is widely advertised and that all candidates are encouraged and welcomed to apply.
- **Be clear about the role of diversity in the nominating process in state statutes.** Commissions should have clear parameters of when and how diversity can come into play.
- **Keep the application and interviewing process transparent.** Educate potential candidates about what to expect when they submit their applications, and keep interviews consistent among candidates. Outlining the nominating process for all candidates will ensure that each applicant is treated in a similar way.
- **Train Commissioners to be effective recruiters and nominators.** Commissioners need clear standards and appropriate, recurrent training.
- **Appoint a diversity compliance officer or ombudsman.** Florida should appoint a Diversity Officer to be primarily responsible for realizing its statutorily recognized goal of achieving meaningful diversity in the JNC's. This position would help improve and guide outreach efforts, and would strategize on how to maintain or improve diversity levels on the JNC's and in the judiciary. A Diversity Officer would help improve and guide outreach efforts.
- **Create Diverse Commissions by statute.** A Diverse Commission, for various reasons, is more likely to facilitate a more Diverse applicant pool. States should adopt statutes that clearly encourage a Diverse Commission.
- **Maintain high standards and quality.** Creating a Diverse bench can be done without sacrificing quality. All local law schools have female and minority graduates and these can be the source of many judicial applicants. Recruitment should also expand to candidates who graduated from top national schools, as these schools often have far more Diverse alumni than local law schools.
- **Improve record keeping.** Keeping a record of the racial and gender makeup of the applicant pool and how candidates advanced through the nomination process will make it much easier for JNC's to track their own progress on issues of diversity.

**10. Persist in efforts to educate Floridians regarding the importance of a fair, impartial, and independent judiciary that reflects the diversity of the State's population and that is selected through processes that are transparent, and insulated from political considerations that exceed legitimate gubernatorial consideration of the judicial philosophies and temperaments of prospective judicial appointees.**

## **Conclusion**

Diversity and meritocracy are twins. Together, they help achieve public confidence and preserve the legitimacy of the judicial system.

The occasion to fill 78 vacancies on Judicial Nominating Commissions creates a golden opportunity to reaffirm the importance of a fair, impartial, and independent judiciary that reflects the rich diversity of Florida's population.

Delivery of a clear statement of commitment to achieving Diversity in Florida's judiciary combined with concrete steps to institutionalize focused monitoring and accountability of JNC operations and processes will sustain a new direction for Florida through decisive action to appoint Diverse JNC members in June 2014 and in the months and years thereafter to appoint Diverse judges.

The remarks of Eugene Pettis upon becoming President of The Florida Bar, succinctly stated the objective:

This year we are going to broaden the scope of our work as bar leaders. And we are going to reach further, lift higher and embrace those who we come into contact with, so the words of diversity and inclusion will have substantive meaning. That spirit is essential for us to truly stand as one bar with one mission - equality and justice for all.