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feature article

Race and Justice in Nebraska— Why Prosecutors and Criminal Defense Lawyers Should Care

by Mark Young and Dennis Keefe



This article originally appeared in *Habeas Corpus*, the newsletter of The Nebraska Criminal Defense Attorneys Association. Reprinted with permission.

“And now it’s just as bad for young black women or women of color as it is for men . . . to . . . have a public defender who is so unprepared, uncaring, and really, unsuitable, to stand before a judge, and then you have a prosecutor who comes in . . . and they sit at

their table and the snickering, the way the attitude that they go and handle a case (shows) no respect for the individual or for the system.”

The above quote comes from public hearing testimony before the Nebraska Minority and Justice Task Force preceding the issuance of their final report. Similar comments were heard at a number of public hearings around the state.

At first, for those of us who are prosecutors and criminal defense attorneys and members of the Task Force, such comments (as well as some of the task force findings) made us feel uncomfortable at the very least, and sometimes downright defensive. Eventually, we came to realize that, as difficult as it is to talk about race and justice in America, it is vitally important that we do so for a number of reasons. This is especially true for those of us who hold a public trust as prosecutors and those of us who are appointed to act as zealous advocates for individual clients to fulfill the promise of their constitutional right to the effective assistance of counsel. In this article, we will provide you with background on the Minority and Justice Task Force, outline some of their key findings and explain why prosecutors and criminal defense attorneys should not only care about the issues but should become active in addressing solutions to the problems.

Dennis R. Keefe



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Background

The Nebraska Minority and Justice Task Force was created as the joint initiative of the Nebraska State Bar Association and the Nebraska Supreme Court in October of 1999 to examine issues of racial and ethnic fairness within the Nebraska Court and legal systems. The Task Force focused on four priority areas: Access to Justice, Court Personnel, Criminal and Juvenile Justice, and the Legal Profession. ➔

RACE AND JUSTICE IN NEBRASKA

The results of the Task Force investigation were published in January of 2003 and may be found at http://ppc.unledu/reports_publications/mjtf_final_report.pdf or you may order a hard copy by contacting Liz Neeley at the Nebraska State Bar Association. Although we will summarize the key findings and recommendations in all areas, given the audience for this article, we shall focus on the criminal and juvenile justice section of the report.

Findings

ACCESS TO JUSTICE—Minority Nebraskans believe that they receive substantially worse treatment in the courts than the white majority believes minorities receive.

There is a serious lack of qualified interpreters in the Nebraska court system and a lack of adequate interpreting services throughout the legal process including probation and diversion services.

The Task Force examined how the jury selection process, the qualifications established for jurors, the failure to periodically update jury lists, and the payment arrangements for jurors may all contribute to juries that are not representative of the community. In an investigation of the specific jury selection process in Lancaster County, results showed that minorities were underrepresented in the venires and on impaneled juries for both civil and criminal trials in the summer of 2002.

CRIMINAL AND JUVENILE JUSTICE—Black, Hispanic, and Native American Nebraskans are more likely to be arrested and incarcerated than are white Nebraskans. This finding extends across data collected by national entities as well as state and local agencies in this and regional states. Given the data available at the time of the study, it cannot be determined if these differences result from the fair application of neutral policies or the uneven or prejudicial application of the law.

Minority juveniles are disproportionately represented compared to whites among those arrested and incarcerated in Nebraska. Minority youth also have special difficulty fulfilling some of the requirements of diversion programs. When surveyed, Nebraska's minority bar members and minority court employees consistently reported that court actions were more biased and that the environment for the court was less hospitable than did white members of the bar and white employees who were asked the same questions.

A sizeable percentage of minority bar members surveyed believe that prosecutors are more likely to file criminal charges when the defendant is a minority or when the victim is white, that favorable plea bargains are less likely when the defendant is a minority or where the victim is white, and that minorities are less likely to be offered diversion.

COURT PERSONNEL—Across virtually every level of employment, minorities are underrepresented in Nebraska's courts.

Significant differences in perception exist between white and minority court personnel concerning the nature of the hiring process and the likelihood of minorities receiving preferential or discriminatory treatment, both in hiring and while on the job.

When surveyed, both court personnel and bar members report having witnessed or were aware of inappropriate comments or jokes of a racial or ethnic nature, racial or ethnic slurs, and disrespectful and discourteous treatment of minorities.

THE LEGAL PROFESSION—Nebraska's legal profession is not reflective of the state's racial and ethnic diversity. Racial and ethnic minorities are underrepresented in Nebraska's judicial system.

The Nebraska Supreme Court accepted the Minority and Justice Task Force's final report (January 2003) and endorsed the creation of an Implementation Committee to critically review and implement the recommendations made in the final report. The Nebraska State Bar Association House of Delegates also unanimously adopted the final report. The implementation committee has been formed and is active at the current time. Members of the Implementation Committee are seeking assistance from those outside the committee in implementing some of the recommendations. You may be asked to help.

Why Should You Care

As members of the Bar generally, and as prosecutors and criminal defense attorneys, we can respond to the Minority and Justice Task Force work in a number of ways. We can ignore it. We can argue that the report does not clearly establish bias or prejudice in the justice system or that people's perceptions do not equate to reality. We can throw up our hands and say that the whole problem is just too big to take on. Or, we can decide that it is each of our responsibilities to try to correct the problems that do exist and to try to have a positive influence on other's perceptions of the justice system.

At the most fundamental level, we each have a responsibility to fulfill our oaths as attorneys and as public officials to uphold the Federal and State Constitutions. Due process, equal protection of the laws, and impartiality in the justice system are key principles enunciated in those documents. Our system of justice must be blind to issues such as race or ethnicity or the defendant or victim and the community must accept this fact and perceive the system as fair, or there can be no justice. We need to remember that

justice is not just a goal but a process and that process must not only be fair, it must be perceived as being fair.

As attorneys, our code of professional responsibility also addresses our responsibilities in relation to these issues.

Among other things, the code admonishes:

“The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict.”

EC 7-13

“A lawyer should assist in improving the legal system.” *Canon 8*

“Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect.” *EC 8-1*

“A lawyer should avoid even the appearance of professional impropriety.” *Canon 9*

“Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.” *EC 9-1*

Finally, on a very personal level, we all owe it to ourselves to make sure that racism and ethnic prejudice are not tolerated in our society. This type of personal commitment by each of us in our personal lives will surely spill over into our professional lives and will have a positive impact on the larger community by way of our example, implementing the recommendations of the Minority and Justice Task Force will not be easy and it certainly will not end racism in our society. While the road ahead may be difficult, we cannot shirk our responsibilities as attorneys to make sure that “Due process of law,” “Equal protection of the law,” and impartiality in the administration of the criminal and juvenile justice systems are not just empty phrases. 

ABA Prevails in Privacy Ruling

The public interest prevailed when the United States District Court for the District of Columbia agreed with the ABA that “Congress did not intend for the [Gramm-Leach-Bliley Act’s] privacy provisions to apply to attorneys “who provide financially-related legal services. The District Court’s ruling came as the result of a lawsuit filed by the ABA against the Federal Trade Commission, which was decided along with a similar suit filed by the New York State Bar Association. The ABA’s lawsuit arose from its concern that the FTC’s requirement that lawyers send privacy notices to their clients was unnecessary in light of state regulation of the legal profession and would create misunderstanding about the more stringent confidentiality rules that govern the traditional lawyer-client relationship.

Supreme Court Rules Change:

Attorney Admission Rule—May 13, 2004—Amendments to the Nebraska Supreme Court Rules for Admission of Attorneys, 5 and 16: Added the phrase “*active and in good standing*” to classification of applicants criteria and added “*scaled score*” to the passing standards for the MBE and MEE.

Notice to Court Clerks: If you are using the AS400, send an email response “reply with history” and your request will be forwarded to the proper individual. The rule will be mailed to you.

Supreme Court Rule for Comment—Adopt Rules of Professional Conduct and repeal the code of Professional Responsibility Deadline for comment: July 16, 2004.

The NSBA petitioned requesting the Nebraska Supreme Court to adopt proposed Nebraska Rules of Professional Conduct and repeal Nebraska’s Code of Professional Responsibility. Proposed rules are modeled after the ABA Model Rules of Professional Conduct, with deletions or additions proposed by the NSBA Ethics Subcommittee. The proposed rules have been adopted by the NSBA Ethics Committee, Executive Council, and House of Delegates.

Comment in writing to the office of the Clerk of the Supreme Court and Court of Appeals, P.O. Box 98910, Lincoln, NE 68509-8910, or via email to lasussen@nsc.state.ne.us, no later than July 16, 2004.