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ACCESS TO THE LEGAL PROFESSION FOR MINORITIES: INTRODUCTORY REMARKS

*The Honorable Denny Chin**

I have been asked, as moderator, to introduce the general topic of this afternoon's first session: "Access to the Legal Profession for Minorities." Professor Wilkins will be focusing on the law firms and, in particular, the experiences of Black partners in the elite corporate law firms. I will spend a few minutes giving you my perspective on the broader subject of minorities in the legal profession in general.

When I started preparing for this panel, my first thought was, "Why is the issue of access to the profession for minorities a subject at a conference on Legal Ethics?" I wondered whether this was a question more suited for a career development or professional development panel or a project for a bar association committee on minorities and the profession. What does the issue of minorities in the profession have to do, if anything, with our ethical obligations as lawyers?

Upon reflection, I concluded that the issue is a perfectly appropriate one, indeed an important one, to consider in the context of legal ethics, for essentially two reasons.

First, we've heard a lot now about the lawyer as public citizen, the lawyer statesman.¹ The ethical lawyer is no longer merely someone who takes care not to violate the Code of Professional Responsibility or the Canons of Ethics. To the contrary, the concept of the ethical lawyer has been expanding. The ethical lawyer is a moral lawyer, a lawyer who not only complies with Disciplinary Rules, but who also exercises good judgment, is publicly spirited, and aspires to improve society. Hence, we have Dean Kronman speaking later today on "Professionalism," and we have Professor Gillers speaking tomorrow on whether "a good lawyer can be a bad person."

Under this broader concept of the ethical lawyer, lawyers do have a moral obligation, a duty, to improve access to justice and the administra-

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1. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); DAVID LUBAN, *THE GOOD LAWYER* (1983); see also Tanina Rostain, *The Company We Keep: Kronman's The Lost Lawyer and the Development of Moral Imagination in the Practice of Law*, 21 *LAW & SOC. INQUIRY* 1017 (1996).

tion of justice. This duty would include an obligation to improve the access of minorities to the profession.

Second, the issue is an appropriate one even if one takes a narrow view of legal ethics and looks just at the Canons. Canon 1, for example, provides that a lawyer should assist in maintaining the integrity and competence of the legal profession. The integrity and competence of the profession must be called into question if groups of people face barriers as they seek to enter and advance in the profession.

Ethical Consideration 1-1 states that “[a] basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.” Canon 2 likewise provides that “a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.” These provisions impose a duty on lawyers to strive to increase the number of minority lawyers to help achieve the goal that legal counsel be available to “every person in our society.”

And finally, Canon 8 provides that “a lawyer should assist in improving the legal system.” Well, some of you may ask, is it necessarily the case that the legal system will be improved if access to the profession for minorities is improved?

Let me respond by quoting from the Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts:

In a pluralistic society, highly qualified people from all backgrounds should have an equal opportunity to participate in the governing process. Of course, diversity along gender, racial, and ethnic lines does not equate to a divergency of viewpoints on particular issues; nor may one conclude that because a person belongs to a particular group, he or she will decide or act in a particular way. However, diversity in public institutions may offer a measure of assurance to people of differing backgrounds within the society that there are at least some persons in authority who may share their perspectives and who can serve to balance other viewpoints. In addition, to the extent that people bring different life experiences and perspectives to bear on their tasks, the quality of governance benefits. In such ways, diversity has the potential to enhance both the actual fairness of public proceedings and the public’s perception of fairness and confidence in those proceedings.²

Increasing the number of minorities in the profession will improve our legal system and the administration of justice. Thus, the issue of

2. Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, at 4 (Nov. 21, 1997) (“Task Force Report”).

access to the profession for minorities is very much an ethical issue, in both a broad and a narrow sense of legal ethics.

I want to spend a few minutes to give you my personal perspective on the subject. In some respects, my perspective is a pretty good one. I am a federal judge. I have life tenure. I've had more than my share of exciting, important, challenging cases.³ Most lawyers, at least most litigators, would feel fortunate to be in my position.

I am even more fortunate, however, because of my background. I am an immigrant. I was born in Hong Kong. My mother was a seamstress in a Chinatown garment factory. My father was a cook in Chinese restaurants. My grandfather was a waiter in Chinese restaurants, for many, many years. Yet, with this background, I was able to enter the profession. When I was a first year student and an intern for Judge Henry Werker in the Southern District of New York, I dreamed of coming back someday as a judge. I have now been able to fulfill that dream, and it has just been wonderful.

At the same time, however, also from my perspective, access to the profession for minorities is still a critical issue, for several reasons.

First, although we have made progress, we need to diversify the bench further. I am the only Asian-American Article III judge in the country outside the Ninth Circuit. I was the first Asian-American Article III judge appointed outside the Ninth Circuit. Three-and-a-half years later, there have been no others outside the Ninth Circuit. We have had two more Asian-American judges appointed in the Ninth Circuit since then,⁴ so there are now only eight Asian-American Article III judges, including senior judges, in the country.⁵

3. See, e.g., *Rudolf Nureyev Dance Foundation v. Noreeva-Francois*, 7 F. Supp. 2d 402 (S.D.N.Y. 1998) (involving life and death of Rudolf Nureyev); *United States v. Gangi*, 1 F. Supp. 2d 256 (S.D.N.Y. 1998) (RICO case alleging take-over of Wall Street brokerage firm by organized crime); *Cerasani v. Sony Corp.*, 991 F. Supp. 343 (S.D.N.Y. 1998) (libel case based on Donnie Brasco movie); *Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1066 (1998) (involving the constitutionality of New York's Megan's Law, the sex offender registration and public notification statute); see also *United States v. Morales*, 974 F. Supp. 315 (S.D.N.Y. 1997) (trial of two defendants accused of the felony-murder of a New York City police officer); *United States v. Regan*, 897 F. Supp. 748 (S.D.N.Y. 1995) (perjury case against highly decorated New York City police officer).

4. This was the case as of the time of the symposium in April 1998. Judge George H. King was appointed to the United States District Court for the Central District of California in 1995. Judge Anthony W. Ishii appointed to the district court in the Eastern District of California in 1997. Since the symposium, Susan Oki Mollway has been appointed to the District of Hawaii.

5. In addition to the three judges listed in *supra* note 4, and myself, there are: A. Wallace Tashima (9th Cir.), Herbert Y.C. Choy (senior circuit judge, 9th Cir.), Ronald S.W. Lew (C.D. Cal.), and Robert M. Takasugi (C.D. Cal.).

Second, the number of minority lawyers is surprisingly low in comparison to number of minorities in the general population. The Second Circuit Task Force report tells us, by way of background, that of the general population of the states within the Second Circuit (that is, New York, Connecticut, and Vermont), some 27.6% are minority.⁶ Yet, only 6.6% of the lawyers in the Second Circuit are minority.⁷ Both numbers are drawn from the 1990 Census. Interestingly enough, the percentage of minority judges, and I'm now referring to circuit judges, district judges, bankruptcy judges, and magistrate judges in the Second Circuit, is approximately 8%.⁸

Third, there simply is a great need for more minority judges and lawyers. I do not have statistics, but I know, for example, that the vast majority of the defendants who appear before me in criminal cases are minority. Again, although justice is not administered and cannot be administered on the basis of race, diversity in the bar and the bench will enhance both the actual fairness of public proceedings as well as the public's perception of fairness.

This leads into my next thought, which is the *MacDraw*⁹ case that Professor Simon told you about briefly. This is the case in which I was recently affirmed by the Second Circuit for sanctioning two lawyers for questioning my impartiality in part because of my race.¹⁰

On the one hand, we want to diversify the bench because we hope it will enhance the public's perception of fairness. But what is the premise underlying that thought? Is it that a minority litigant may believe he or she will get a fairer shake if the judge is of the same race or ethnic background? Is it that a minority litigant believes that he or she cannot

6. Task Force Report, *supra* note 2, at 15.

7. *Id.*

8. *Id.* at 16.

9. *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, 994 F. Supp. 447 (S.D.N.Y. 1997), *aff'd*, 138 F.3d 33 (2d Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 175 (1998).

10. *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, *supra* note 9, at 33 (2d Cir.). The Second Circuit commented as follows:

A suggestion that a judge cannot administer the law fairly because of the judge's racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge's membership in a particular racial or ethnic group. Such an accusation is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.

Nor should one charge that a judge is not impartial solely because an attorney is embroiled in a controversy with the administration that appointed the judge. . . . [A]ppointment by a particular administration and membership in a particular racial or ethnic group are in combination not grounds for questioning a judge's impartiality. Zero plus zero is zero.

138 F.3d at 37-38.

get a fair shake from a judge of a different race or ethnic background? If that is the case, is it wrong for a litigant or a lawyer who is not minority to believe that he or she cannot get a fair shake from a judge who is?

Before I tackle these questions and talk about the *MacDraw* case, let me first tell you that I consulted my Code of Conduct for United States Judges to determine whether I could comment on the *MacDraw* case. A petition for rehearing has been filed and, thus, the matter is still pending.¹¹

Canon 3(A)(6) provides that “[a] judge should avoid public comment on the merits of a pending . . . action” It also provides, however, that “[t]his proscription does not extend to . . . a scholarly presentation made for purposes of legal education.” I don’t know how scholarly my segment of this presentation is, but as my segment leads right into Professor Wilkins’s segment, I’m sure that all of you will agree that this presentation fits within the exception.

The *MacDraw* case was a relatively straightforward commercial case. The defendant CIT agreed to provide financing to a company to purchase equipment from MacDraw.¹² The purchaser encountered financial problems; CIT therefore refused to provide the financing.¹³ MacDraw had already prepared the equipment and installed it but it had not been paid.¹⁴ It therefore sued CIT, the financing company, directly for the money.¹⁵ The case turned on whether an oral promise had been made by a CIT employee to the president of MacDraw.¹⁶

The case was tried without a jury.¹⁷ I listened to both individuals testify. I believed one and not the other. MacDraw lost.¹⁸ I thought that was the end of the story. A month later, however, I received a letter from the two lawyers who represented MacDraw.¹⁹ I will read you the portions of the relevant paragraph:

11. The petition for rehearing has since been denied, as was a petition for certiorari. 119 S. Ct. 175 (1998).

12. *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, *supra* note 9, at 448 (S.D.N.Y. 1997).

13. *Id.*

14. *Id.*

15. *Id.* at 448-49.

16. *Id.* at 448-50.

17. *Id.* at 450.

18. *Id.* I ruled on the merits from the bench and, thus, my decision was not reported. The Second Circuit eventually affirmed my decision on the merits. *MacDraw, Inc. v. Cit Group Equip. Fin., Inc.*, 157 F.3d 956 (2d Cir. 1998) (*per curiam*). MacDraw argued on the appeal on the merits that I should have recused myself. The Second Circuit rejected the argument, holding:

[I]t is intolerable for a litigant, without any factual basis, to suggest that a judge cannot be impartial because of his or her race and political background.

157 F.3d at 963.

19. *Supra* note 9, at 451 (S.D.N.Y. 1997).

[We] have been involved in a very highly publicized and significant public interest litigation, *Judicial Watch, Inc. v. U.S. Department of Commerce*, [in Washington, D.C.], which involves a Mr. John Huang, Ms. Melinda Yee and other persons in the Asian and Asian-American communities. Recently, we came upon a document in this case which mentions your name in the context of other prominent Asian-American appointees of the Clinton Administration.²⁰

Parenthetically, the document they were referring to was merely a newspaper article that listed Asian-American appointments made by the Clinton administration.²¹ My name was mentioned.²² That was the document.

Returning to the letter:

Accordingly, could you please formally advise us whether you know either of these individuals, as well as what relationship, contacts, and/or business, political or personal dealings, if any, you have had with them, or persons related in any way to the Clinton Administration.²³

I was just flabbergasted to get this letter. I brought the two lawyers in and inquired as to their basis for sending me the letter and asking me these questions.²⁴ They confirmed, on the record, that the questions were asked of me in part because of my race.²⁵ They elaborated on their reasons for asking me the questions in their brief filed in the Second Circuit in support of their appeal from my order. The respondents wrote, referring to John Huang and me:

The probability that the two men knew of each other was very high. The probability that the trial judge was interviewed by Mr. Huang before his appointment was also high, as was the probability that Mr. Huang made an important endorsement of the trial court's nomination. . . . Minority candidates for political appointment who

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. The colloquy included the following:

THE COURT: You are standing there and you are telling me that you did not ask these questions of me because I am Asian-American, is that what you are telling me?

MR. KLAYMAN: I'm saying that is part of it.

THE COURT: You are conceding that that is part of it?

MR. KLAYMAN: Part of it, yes. And I'm also asking the questions—

THE COURT: You are conceding that you asked questions of the court, at least in part, because of my race?

MR. KLAYMAN: In part. . . .

Id. at 447-48 (quoting 12/19/96 Tr. at 8).

are not popular, or supported, within their own groups are unlikely to secure appointment.

The trial court was appointed by President Clinton near the end of the second year of his first term. The court might well have felt personally indebted to Mr. Huang for its selection. It was entirely possible that Mr. Huang personally found and successfully promoted the trial court for his appointment.²⁶

If it's not crystal clear to you yet, their point was that because John Huang was Asian American and I was Asian American, I could not have gotten my appointment without his support and, therefore, I must have felt beholden to him and, thus, I ruled against their client.

I did not answer the questions they put to me. I simply refused to dignify the questions with answers. The fact is I do not know John Huang, I have never met John Huang, nor do I ever want to meet him.²⁷

Eventually, I sanctioned both lawyers. I saw the situation as an ethical one. I concluded that they had violated two disciplinary rules: DR 1-102(A)(5), which provides that a lawyer "shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice"; and DR 7-106(C)(6), which provides that, "[i]n appearing as a lawyer before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal."²⁸

The two lawyers, as you heard from Professor Simon, were not members of the bar of the Southern District nor were they admitted in New York.²⁹ I revoked their admissions *pro hac vice*, and I ruled that

26. See Brief for MacDraw, Inc. (Plaintiff), Klayman and Associates, P.C., Larry Klayman and Paul J. Orfanedes (Appellants) v. The CIT Group Equipment Financing, Inc. And Richard Johnston (Defendant).

27. Nor have I ever met or spoken to Melinda Yee.

28. See *In re Evans*, 801 F.2d 703, 704 (4th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (affirming district court's disbarment of attorney for violating DR 1-102 (A)(5), 7-106(C)(6), and 8-102(B) for accusing a magistrate judge of either being incompetent or having a "Jewish bias"); *Kentucky Bar Ass'n v. Williams*, 682 S.W.2d 784, 786 (Ky. 1984) (suspending attorney for three months for deliberately failing to appear for court appearance and for writing disrespectful letter to judge); *In re Greenfield*, 262 N.Y.S.2d 349, 350 (2d Dep't 1965) (suspending attorney and disbaring another for writing letter to judge falsely accusing the judge of misconduct in office); *People ex rel. Chicago Bar Ass'n v. Metzzen*, 125 N.E. 734, 735 (Ill. 1919) (attorney disbarred for writing letter to judge stating that the attorney "was usually engaged in dealing with men and not irresponsible political manikins or appearances of men").

29. Courts certainly have power to discipline attorneys who are granted the privilege of appearing *pro hac vice*. See *In re Rappaport*, 558 F.2d 87, 89 (2d Cir. 1977) ("Just as with a regularly admitted attorney, one seeking admission *pro hac vice* is subject to the ethical standards and supervision of the court."); see also *Leis v. Flynt*, 439 U.S. 438, 441-42 (1979) (ability of an out-of-state attorney to appear *pro hac vice* is a "privilege" and "not a right granted either by statute or the Constitution").

any future applications to appear before me would be denied.³⁰ I also ordered them to attach a copy of my decision imposing the sanctions to any future applications they might make for permission to appear *pro hac vice* in the Southern District.³¹ I also directed the Clerk of our Court to forward copies of my opinion to the Disciplinary Committees of the bars of the courts where they were admitted.³²

Not surprisingly, I received quite a few comments from judges and lawyers after the Second Circuit's decision affirming the sanctions was reported in the *NEW YORK LAW JOURNAL*.³³ To my surprise, quite a few people commented that they thought the sanctions I had imposed were light. A number of people thought I should have fined the lawyers.

I did not fine the lawyers because I viewed the matter as a disciplinary matter.³⁴ I thought monetary sanctions were not appropriate because ethical considerations were at stake. Fines generally are not imposed when grievance committees find ethical violations, and I felt a finding that the lawyers had engaged in not just boorish or obnoxious or stupid conduct but unethical conduct was more appropriate than a fine. And I held that their conduct had interfered with the administration of justice.

This brings us not only back to where we began but to the conclusion of my remarks.

The issue of access to the profession is an ethical issue, a moral issue, one that goes to the core of the administration of justice.

If there were more minority judges and lawyers in the profession, lawyers might not question a minority judge's fairness because of his or her race. Lawyers might not presume that a minority judge might be biased because of some absurd notion that the judge might feel beholden

30. 994 F. Supp. at 460.

31. *Id.*

32. *Id.*

33. Deborah Pines, *Sturs on Judge Require Penalties*, 219 N.Y.L.J. 1 (1998).

34. Moreover, the Local Rule in effect at the time appeared to limit the available sanctions and did not provide for monetary sanctions. Local Rule 4(g), as it existed then, provided:

Discipline [of attorneys] may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court, it may also consist of striking the name of the attorney from the roll. In the case of an attorney admitted *pro hac vice*, it may also consist of precluding the attorney from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any.

Local Rule 4 was replaced by Local Rule 1.5, effective April 15, 1997.

See *Macdraw, Inc. v. CIT Group Equip. Fin., Inc.*, *supra* note 9, at 34 note 1 (2d Cir.).

to someone of the same racial or ethnic group who might have helped the judge obtain his or her appointment.³⁵

I am not going to rule differently in my cases because of the race or ethnicity of the lawyers and litigants who appear before me. An Asian-American defendant who appears before me should not believe that I will sentence him any more or less harshly because of his race. At the same time, however, he should take some comfort in the fact that our system is one that permits the son of a seamstress and Chinese cook, the grandson of a Chinese waiter, to become a federal judge.

Thank you very much.

35. As Judge Constance Baker Motley wrote some twenty years ago in denying a motion for her recusal in a sex discrimination case brought by a female attorney against a law firm:

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, ipso facto, indicate or even suggest the personal bias or prejudice required [for recusal]. The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of a sex, often with distinguished law firm or public service backgrounds.

Blank v. Sullivan & Cromwell, 418 F.Supp. 1, 4 (S.D.N.Y. 1975); *see also* *United States v. El-Gabrowni*, 844 F.Supp. 955, 961-62 (S.D.N.Y. 1994) (refusing to answer questions posed regarding judge's religious affiliation and connection, if any, to Israel); *Commonwealth of Pennsylvania v. Local Union 542, IUE*, 388 F.Supp. 155, 163 (E.D. Pa.), *aff'd* 478 F.2d 1398 (3d Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (Higgenbotham, J.) (denying motion to disqualify judge from hearing race discrimination claim and holding "that one is black does not mean, ipso facto, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant").

