

JUSTICE FOR ALL:
AN OVERVIEW OF THE SUPREME COURT OF MISSOURI'S
COMMISSION ON RACIAL AND ETHNIC FAIRNESS

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ABSTRACT

Systematic racial and ethnic inequality can only be reversed by systematic action. After the killing of Michael Brown by the Ferguson police in August 2014, Missouri's need for judicial and legal reform could no longer be ignored. The following year, the Supreme Court of Missouri Commission on Racial and Ethnic Fairness ("Commission") was established to examine and review current practices and recommend measures to ensure fairness, impartiality, equal access, and participation for racial and ethnic minorities in the judicial process and in the practice of law. This Article, authored by the Commission's Co-chair, Missouri Court of Appeals Judge Lisa Hardwick, discusses the Commission and provides an overview of its background and purpose. Judge Hardwick details some of the steps the Commission has taken towards fulfilling equitable justice in the courts, using her position as co-chair to shed light on its inner workings. Judge Hardwick shows how the Commission is well-equipped and well-positioned to meet its goals of ensuring equal access and full participation for racial and ethnic minorities in Missouri courts. The Article explains that with a successful five-year history of data collection and procedural reforms, the Commission has built a strong foundation to carry the work of racial justice into the future.

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JUSTICE FOR ALL

“Missouri is committed to ensuring racial and ethnic fairness now and into the future.”¹ Since its inception in October 2015, I have had the privilege of co-chairing the Supreme Court of Missouri Commission on Racial and Ethnic Fairness (“Commission”), which endeavors to fulfill our state’s commitment to equitable justice for all in Missouri courts. While the Commission’s structure and operational processes are still evolving, the dedicated members have moved forward with action steps to eliminate disparities and inequities based on race or ethnicity. This Article will provide an overview of the Commission, its background, its purpose, and some of the steps it has taken towards fulfilling its purpose.

I. FINDING THE PATH THROUGH FERGUSON

In December 1988, the New York Commission on Minorities organized the first meeting of the four then existing state court task forces and commissions on racial and ethnic bias.² Representatives from the task forces and commissions in Michigan, New Jersey, New York, and Washington State met to discuss the status of their research and program activities.³ The discussion laid the groundwork for a formal agreement in 1989 to establish the National Consortium on Racial and Ethnic Fairness in the Courts, created to enhance collaboration among the existing and future state commissions.⁴ Since that time, the Consortium’s membership has grown from four state task forces and commissions to more than thirty-seven.⁵ In 2015, Missouri became the thirty-seventh state to join the Consortium when the Supreme Court of Missouri established its Commission on Racial and Ethnic Fairness in the Courts.⁶

1. JULIE LAWSON, REP. TO THE NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE CTS. 2 (2017).

2. *About the National Consortium*, NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE CTS, <https://www.national-consortium.org/about> [<https://perma.cc/DAE3-UAMK>].

3. *Id.*

4. *Id.* The name originally adopted by the organizers was The National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts. The group adopted the current name in 2002. *Id.*

5. *Id.*

6. COMM’N ON RACIAL AND ETHNIC FAIRNESS, DEC. 2017 REP. TO THE SUPREME COURT OF MO. FOR THE PERIOD 2016-2017 6 (2017) [hereinafter CREF 2017 ANNUAL REP.].

Missouri's need for such a commission did not reveal itself quietly. In August 2014, the Ferguson police killing of Michael Brown threw our state and judicial system into the national spotlight.⁷ Protests and public outcry amassed against the now bare inequalities this attention exposed in the processing of cases in the local Ferguson municipal court and those in the surrounding jurisdictions of St. Louis County.⁸ Indeed, "[i]n a scathing report issued in March [of 2015], the Justice Department called on Ferguson to overhaul its municipal justice system."⁹ The report, issued in response to the turmoil in Ferguson's wake, left little room for interpretation: "Th[e] disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans."¹⁰ A second Department of Justice report focusing on the St. Louis County Family Court arrived at equally condemnatory conclusions.¹¹ Specifically, "[i]n short, Black children [in the St. Louis County Family Court system] are subjected to harsher treatment because of their race."¹² Per the recommendations of both reports, the systems had to change for the sake of fairness for all.¹³

Systemic racial and ethnic inequality can only be reversed by systemic action. Accordingly, and in response to the developments in Ferguson and disparate treatment identified in the Department of Justice reports, the Supreme Court of Missouri ordered the creation of the Commission on Racial and Ethnic Fairness on October 6, 2015.¹⁴ The spirit of the moment

7. Emily Brown, *Timeline: Michael Brown Shooting in Ferguson, Mo.*, USA TODAY (Aug. 14, 2014), <https://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/> [<https://perma.cc/Z3MP-C4FU>].

8. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> [<https://perma.cc/MR8B-SE4L>].

9. *Id.*

10. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 5 (2015). For example, "[d]espite making up 67% of the [Ferguson] population, African Americans accounted for 85% of [the Ferguson Police Department's] traffic stops, 90% of [the Ferguson Police Department's] citations, and 93% of [the Ferguson Police Department's] arrests from 2012 to 2014." *Id.* at 62.

11. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAM. CT. (2015).

12. *Id.* at 3.

13. *Id.* at 53; INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 10, at 90–102.

14. See Order Establishing the Commission on Racial and Ethnic Fairness, Sup. Ct. of Mo. 1 (Oct. 6, 2015); Rosemary Siefert, *Commission on Racial and Ethnic Fairness to Hold Forum at MU on Thursday*, COLUMBIA MISSOURIAN (Feb. 14, 2017), <https://www.columbiainmissourian.com/news/local>

was best captured by Julie Lawson, the Commission's former executive director: "The Ferguson report came out calling for the establishment of (a commission), and the Supreme Court said 'absolutely.'"¹⁵ Although the Department of Justice reports were limited to St. Louis County, then-Supreme Court Chief Justice Patricia Breckenridge recognized the right to a fair and impartial adjudication "in 100 percent of our courts" and that "[e]ven a perception of justice denied anywhere should concern us *all*, no matter who or where we are."¹⁶ In that vein, the Supreme Court of Missouri chartered the Commission, also known as CREF, to address inequality not just in the St. Louis area, but in all courts across the state of Missouri.¹⁷

II. THE BLUEPRINT FOR ACTION

The Commission's foundational goal "is to examine and review current practices and recommend measures to ensure fairness, impartiality, equal access and full participation for racial and ethnic minorities in the judicial process and in the practice of law."¹⁸ The Supreme Court charged the Commission to identify "barriers to access and fairness" in our judicial system, to review relevant materials to aid in development of recommendations, and perhaps most importantly, to seek out public engagement so Missourians have their voices heard on these critical issues.¹⁹ In furtherance of its goals, the Commission's focuses include:

[1] The existence and impact of any racial and ethnic bias and/or disparities within the judicial system and the practice of law;

[2] Changes to court rules, regulations, laws and/or practices to improve meaningful access to or participation in the judicial system and the practice of law by racial and ethnic minorities;

[/commission-on-racial-and-ethnic-fairness-to-hold-forum-at-mu-on-thursday/article_a3a34314-f2d6-11e6-9eae-7302fd895338.html](https://www.wustl.edu/law/journal/article_a3a34314-f2d6-11e6-9eae-7302fd895338.html) [https://perma.cc/MDP9-3CBM].

15. Siefert, *supra* note 14.

16. *Chief Justice Announces New Supreme Court Commission on Racial and Ethnic Fairness*, MO. CTS. (Oct. 13, 2015) <https://www.courts.mo.gov/page.jsp?id=93102> (emphasis in original).

17. *Id.*

18. Order Establishing the Commission, *supra* note 14, at 1.

19. *Id.*

[3] Measures to ensure that all persons within the judicial system and practice of law refrain from manifesting bias or prejudice, by words or conduct, based on race or ethnicity;

[4] Measures to address any implicit or other bias within the judicial system and legal profession;

[5] The availability of effective legal representation for racial and ethnic minorities within the judicial system;

[6] Measures to enhance racial and ethnic diversity in the selection, retention and promotion of judicial officers, court staff and professionals in the legal community; and

[7] Measures to enhance understanding of the practices, procedures and proper role of the state's courts.²⁰

Annual reports from the Commission are required to keep the Supreme Court apprised of its work and are published to maintain a public record.²¹ The reports generally include recommendations for new policies or changes in judicial procedures, and the Commission is authorized to implement such initiatives as approved by the Supreme Court.²²

The Commission was originally comprised of fifty-six members (“Commissioners”), appointed by the Supreme Court from across the entire state and from various roles within our judicial system and the legal profession.²³ This composition ensures that “[a]ttorneys, judges, law enforcement, court personnel and representatives from academia have a voice in the process of creating systematic changes within the courts to ensure racial and ethnic fairness for all Missourians.”²⁴

The Supreme Court authorized the Commission to be “led by three co-chairs along with a steering committee” made up of subcommittee co-

20. *Id.* at 2–3.

21. *Id.* at 1–6. The Commission’s Annual Reports for 2016-2017, 2018, 2019, and 2020 are available on its website: <https://www.courts.mo.gov/page.jsp?id=129996>.

22. *Id.* at 1–3.

23. See CREF 2017 ANNUAL REP., *supra* note 6, at 4. The Supreme Court’s order requires the appointment of “at least 40 members” to the Commission. Order Establishing the Commission, *supra* note 14, at 3.

24. COMM’N ON RACIAL AND ETHNIC FAIRNESS, 2020 ANNUAL REP. TO THE SUPREME COURT OF MO. 12 (2020) [hereinafter CREF 2020 ANNUAL REP.].

chairs.²⁵ Its order identifies six subcommittees, each given a different focus within the broad range of barriers to equal access and full participation experienced by racial and ethnic minorities in the judicial process and practice of law.²⁶ The Civil Justice and Criminal Justice Subcommittees address the practices, procedures, rules, and statutes that result in unfair treatment of diverse litigants and defendants in our trial and appellate courts.²⁷ The Juvenile Justice Subcommittee focuses on measures to address the “preschool-to-prison pipeline” by working with school systems, law enforcement, and the public to improve training and recommend greater protection for juveniles who make un-Mirandized statements to law enforcement officers.²⁸ The Municipal Justice Subcommittee provides recommendations on improved data collection and processes to eliminate racial disparities in municipal court matters, such as traffic tickets and driver’s license suspension practices across the state.²⁹ The Practice of Law Subcommittee focuses on attorneys’ interaction with our judicial system and training to eradicate biases that adversely affect people of color and case outcomes.³⁰ Finally, the Judicial Justice Subcommittee focuses on the improvement of internal court practices, including training judges and court personnel, developing diverse jury pools, and revising rules and procedures that result in disparate treatment.³¹

Soon after the Commission set out to work, it had to adapt to the growing needs for informational support and public outreach which would

25. Order Establishing the Commission, *supra* note 14, at 3. I was honored to serve as one of the Commission’s original “tri-chairs” alongside Mr. William Bay, partner with Thompson Coburn LLP in St. Louis, and Mr. Michael Middleton, Deputy Chancellor Emeritus and Professor Emeritus of Law at the University of Missouri in Columbia. In 2019, Mr. Middleton became an Emeritus Chair of the Commission and was succeeded by Ms. Mikah K. Thompson, Associate Professor at the University of Missouri-Kansas City School of Law, as a Commission tri-chair.

26. *Id.* at 2.

27. CREF 2017 ANNUAL REP., *supra* note 6, at 23.

28. *Id.* at 23–24; CREF 2020 ANNUAL REP., *supra* note 24, at 12. “The preschool-to-prison pipeline is the process in which students are pushed out of school through out-of-school suspensions, expulsions and overly-harsh discipline and into the prison system.” Hayley Thompson, *Explaining the Preschool-to-Prison Pipeline and Suggesting Solutions*, LOQUITUR (Nov. 4, 2020), <https://www.theloquitur.com/explaining-the-preschool-to-prison-pipeline-and-suggesting-solutions/> [https://perma.cc/KWD8-2TNW].

29. CREF 2020 ANNUAL REP., *supra* note 24, at 13.

30. *Id.*

31. *Id.*

be required to meet its goals.³² To “realign it[self] more closely with the work,” the Commission created two additional subcommittees at the end of 2017: the Data Subcommittee and the Public Engagement Subcommittee.³³ The Commission charged the Data Subcommittee with “[r]eviewing and assessing other CREF subcommittees’ requests for information and data, including assessments of feasibility[, and] [i]dentifying proposed changes to case management or other data collection methods used by the judiciary.”³⁴ Consistent with its name, the Public Engagement Subcommittee is charged with “[r]esponding to public inquiries[,] [s]upporting CREF subcommittee public sessions[,] [s]erving as a conduit for the exchange of information[, and] [c]ommunicating the mission, priorities and work of the CREF.”³⁵

Most recently in 2020, the Commission established its Systemic Racism Workgroup.³⁶ With representatives from each subcommittee, the Workgroup plans projects and programs to address structural racism and the overarching issues of racial and ethnic bias that impede fairness throughout our judicial system, which no single subcommittee could fully address.³⁷ The Workgroup actively partners with “educators, diversity experts, law firms and legal organizations to collect data and recommend institutional changes that will combat systemic racism.”³⁸ Though still in its infancy, there is great hope that the Workgroup’s collective efforts will expedite progress in eliminating the implicit and explicit biases that create structural barriers to justice.

32. See COMM’N ON RACIAL AND ETHNIC FAIRNESS, DEC. 2018 REP. TO THE SUPREME COURT OF MO. FOR THE PERIOD 2017-2018 3 (2018) [hereinafter CREF 2018 ANNUAL REP.].

33. *Id.*

34. *Id.* at 7.

35. *Id.*

36. CREF 2020 ANNUAL REP., *supra* note 24, at 6, 10. I am currently chair of the Systemic Racism Workgroup.

37. See *id.* at 3.

38. LISA WHITE HARDWICK, MISSOURI CREF - 2021 STATE REPORT 2 (2021).

III. DATA-DRIVEN CONTEXT AND COLLABORATION

In the Commission's view, a core requisite to fully addressing issues of racial equity is gathering information about the nature, scope, and effect of current processes. Information in hand, the Commission will then be in a position to address each instance of racial and ethnic unfairness in the most effectual ways. To that end, the various subcommittees, in cooperation with the Data Subcommittee, actively seek information not only about repeatable occurrences of racial and ethnic unfairness, but also about the adverse consequences, intended or otherwise, of established practices and procedures.³⁹

The Commission's information gathering is an ongoing effort that often necessitates changes in standard reporting procedures and the types of data collected. For instance, in order to learn more about the racial demographics of licensed attorneys in Missouri, the Commission recommended changing the state's annual attorney enrollment forms to include a voluntary option to self-identify racial and ethnic background.⁴⁰ This recommendation was adopted by the Supreme Court and implemented with great success, as coordinated by the Missouri Bar.⁴¹ The data will help determine whether Missouri lawyers reflect the diverse constituencies in our state and whether there are prejudicial barriers to entry, retention, and advancement in the profession.⁴²

The Commission also supported a now published demographic report from Missouri's Office of the State Courts Administration, which provides both data and analysis regarding gender, race and ethnicity, and age of all state judicial employees—not just judges.⁴³ Much of this information had not been previously available to the public. With annual updates of the "Report on Diversity and Inclusion in the Missouri Judiciary," the Commission can use this data to "assess disparities, make recommendations, and gauge future efforts to increase diversity in the workforce."⁴⁴

39. See CREF 2020 ANNUAL REP., *supra* note 24, at 11–13.

40. *Id.* at 8.

41. *Id.*; CREF 2018 ANNUAL REP., *supra* note 32, at 11.

42. COMM'N ON RACIAL AND ETHNIC FAIRNESS, 2019 ANNUAL REP. TO THE SUPREME COURT OF MO. 8 (2019) [hereinafter CREF 2019 ANNUAL REP.].

43. HARDWICK, *supra* note 38, at 3.

44. *Id.*

In January 2021, our Supreme Court granted approval for the Commission, in conjunction with the law firm Shook, Hardy & Bacon and Missouri State University, to “conduct a statewide study of racial bias in the courts.”⁴⁵ The Commission’s Systemic Racism Workgroup proposed the study to evaluate the role of bias as a cause of the significant racial disparities in the processing of traffic, juvenile, and criminal cases in Missouri. The approved team of attorneys and academic researchers is reviewing available case records and court procedures, conducting surveys and interviews with judicial personnel, and soliciting comments from court users and the general public on incidents involving disparate treatment.⁴⁶ By the Spring of 2022, this investigative review will “result in a report with recommendations to address disparities resulting from implicit and explicit bias.”⁴⁷ While this work is long overdue, the Commission recognizes that such a report is only the first step in its ongoing assessment of racial equity “with the goal of eliminating systemic racism in Missouri courts.”⁴⁸

Another source of information-gathering is spearheaded by the Public Engagement Subcommittee, which conducts public listening and feedback sessions that allow Missourians to have their voices heard in furtherance of the Commission’s work.⁴⁹ These public outreach sessions often bring a thematic focus on the needs of particular communities.⁵⁰ For example, the Commission has hosted public engagement sessions in St. Louis on juvenile justice, with the goals of (1) “[l]istening to ideas, experiences or recommendations from the public;” (2) “[e]xamining strategies from community members about the juvenile justice system and ways Missouri

45. *Id.* at 4. This study was approved under the leadership of then-Chief Justice George Draper, who raised concerns about systemic racism as a central point of his keynote address at the 2020 joint annual meeting of The Missouri Bar and The Judicial Conference of Missouri. George W. Draper III, Chief Just., Sup. Ct. of Mo., first joint annual meeting of the Missouri Bar and the Judicial Conference of Missouri (Sept. 16, 2020) (available at <https://news.mobar.org/missouri-chief-justice-george-w-draper-iii-addresses-judges-lawyers-virtual-joint-annual-meeting/>).

46. See the upcoming COMM’N ON RACIAL AND ETHNIC FAIRNESS, 2021 ANNUAL REP. TO THE SUPREME COURT OF MO. (2021).

47. *Id.*

48. *Id.*; see also *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 714 (1993) (Karen Tokarz and Ed Roth, eds.) (which, along with several bar associations, recommended that: “the Missouri Supreme Court establish a Task Force on Race and Justice to conduct a study of whether racial bias exists in the administration of justice in Missouri and, if so, what steps should be taken to remedy it.”).

49. See Siefert, *supra* note 14.

50. See CREF 2019 ANNUAL REP., *supra* note 42, at 27 (inviting Missourians to attend a public listening session in Ferguson, Missouri with an emphasis on municipal and civil court experiences).

courts can best meet the needs of our youth;” and (3) sharing progress of ongoing work towards already identified issues and sharing plans for the future.⁵¹ The Commission has also hosted events focused on the public’s interactions with civil and criminal courts.⁵² These forums help raise awareness about unfair practices and provide an outlet to de-escalate community tensions. As aptly stated by Commissioner Willis Toney, an attorney who participated in a Kansas City session, “[t]he heart of it is to not have situations like what happened in Ferguson. To not have people feel disenfranchised. To have everyone believe that when they go to court they will have equal justice.”⁵³

The Commission values its relationship with the National Consortium on Racial and Ethnic Fairness in the Courts as a key opportunity for engagement beyond Missouri.⁵⁴ As mandated by the Supreme Court, members of the Commission “collaborate and participate” with other state task forces and commissions by attending the National Consortium conferences and exchanging information about challenges and achievements.⁵⁵ In only its second year of existence, the Commission maximized the benefits of this collaboration by hosting the National Consortium’s twenty-ninth Annual Conference in St. Louis, bringing fresh ideas and new perspectives to our state during the well-attended three-day gathering.⁵⁶

51. *Supreme Court of Missouri’s Commission on Racial and Ethnic Fairness Invites Community Feedback About Juvenile Justice at Upcoming St. Louis Forum*, MO. CTS. (Aug. 16, 2017) <https://www.courts.mo.gov/page.jsp?id=116093>.

52. CREF 2019 ANNUAL REP., *supra* note 42, at 7.

53. Terra Hall, *Missouri Supreme Court Examines How Race Could Impact the Right to a Fair Trial*, KSHB 41 KANSAS CITY (Feb. 28, 2017, 3:32 PM) <https://www.kshb.com/thenow/missouri-supreme-court-examines-how-race-could-impact-the-right-to-a-fair-trial>.

54. See NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE COURTS, GATEWAY TO JUSTICE: OUT OF THE FIRE AND INTO THE FUTURE 5 (2017).

55. Order Establishing the Commission, *supra* note 14, at 1; CREF 2018 ANNUAL REP., *supra* note 32, at 11.

56. See NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE COURTS, *supra* note 54, at 5; CREF 2018 ANNUAL REP., *supra* note 32, at 11.

IV. CATALYSTS FOR ACTION-ORIENTED CHANGE

The Commission recognizes that data collection and collaboration serve largely to identify opportunities for and to support corrective action, which is the true catalyst for change. Based on information gathered during the past five years, the Commission has taken affirmative steps to promote racial and ethnic fairness by recommending new or revised procedural rules and practices for Missouri courts.⁵⁷ The Supreme Court of Missouri has approved many of the recommendations, thereby authorizing the Commission to move forward with reforms in several key aspects of the judicial system.⁵⁸

Fair treatment involves ethical considerations that strike at the heart of these reforms. With attorney-client relationships in mind, the Commission recommended now enacted revisions to Rule 4-8.4(g) of the Missouri Rules of Professional Conduct, which addresses bias and prejudice in the practice of law.⁵⁹ Specifically, the revision “identifies the special importance of a lawyer’s words or conduct, in representing a client, that manifest bias or prejudice or constitute harassment against others based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status.”⁶⁰ More importantly, the new provision makes attorney bias or prejudice a direct violation of the Rules of Professional Conduct, creating accountability for unfair representation based on race or ethnicity.⁶¹

57. See CREF 2018 ANNUAL REP., *supra* note 32, at 11–12 (listing some of the Commission’s accomplishments for the 2017-2018 calendar year).

58. See *id.*

59. See CREF 2020 ANNUAL REP., *supra* note 24, at 9.

60. MO. RULES OF PROFESSIONAL CONDUCT, R. 4-8.4 cmt. 4. The rule now reads:

It is professional misconduct for a lawyer to . . . manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

Id.

61. See MO. RULES OF PROFESSIONAL CONDUCT, R. 4-8.4 cmt. 4.

Consistent with the revised conduct rules for attorneys, the Commission also recommended changes to the Rules of Judicial Conduct.⁶² As approved by the Supreme Court, Rule 2-2.3, which generally requires a judge to “perform the duties of judicial office without bias or prejudice,” now provides more clarity in defining bias, prejudice, harassment, and improper conduct in general.⁶³ The revisions include examples of bias for judges to be aware of and avoid, such as:

epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.⁶⁴

By specifying improper conduct, the revised rule holds judges accountable for their actions and reactions, intentional or otherwise, that demonstrate bias or prejudice.

As a further measure to keep attorneys and judges apprised of these ethical responsibilities, the Commission recommended the recently enacted changes to Missouri Supreme Court Rules 18.05 and 15.05 on continuing legal education (“CLE”).⁶⁵ Attorneys licensed in Missouri and non-attorney judges must now annually complete a minimum of one credit hour of professional training “devoted exclusively to explicit or implicit bias, diversity, inclusion, or cultural competency.”⁶⁶ The Commission proposed this change to better enable practitioners to identify, avoid, prevent, or even remedy instances of racial and ethnic unfairness as they arise. The next step, to fulfill the new CLE requirement in a meaningful way, involves the development and promotion of interactive programs, webinars, and

62. MO. CODE OF JUDICIAL CONDUCT, R. 2-2.3 cmt. 1; CREF 2020 ANNUAL REP., *supra* note 24, at 9.

63. MO. CODE OF JUDICIAL CONDUCT, R. 2-2.3(a); MO. CODE OF JUDICIAL CONDUCT, R. 2-2.3 cmt. 1–3.

64. MO. CODE OF JUDICIAL CONDUCT, R. 2-2.3 cmt. 2.

65. CREF 2020 ANNUAL REP., *supra* note 24, at 9.

66. MO. SUP. CT. R. 15.05(A)(2) and 18.05(A)(2).

trainings geared towards the elimination of bias.⁶⁷ To that end, the Systemic Racism Workgroup has created and presented an accredited training program for Commissioners and attorneys, and the Commission is still seeking other avenues to provide continuing legal education on matters of diversity and inclusion.⁶⁸

The Commission's reform efforts to end inequality in the courts reach into the jury pool as well.⁶⁹ As recommended by the Commission, the Missouri Supreme Court has adopted anti-bias jury instructions for use in civil and criminal cases.⁷⁰ In civil matters, the revisions to the Missouri Approved Jury Instructions ("MAI") 2.00 and 2.03(A) require that the instructions be given once before jury selection and then reread prior to the jury retiring for deliberation.⁷¹ Likewise in criminal matters, the revised instruction in MAI 4th 400.02 and 402.01 must be given before jury selection and also included in the final instructions that the jurors take into deliberations.⁷² Additionally, the Civil Justice Subcommittee has professionally produced a jury instruction video on implicit bias.⁷³ The video will be available to all Missouri trial courts for the juror orientation

67. HARDWICK, *supra* note 38, at 2.

68. See CREF 2020 ANNUAL REP., *supra* note 24, at 3; HARDWICK, *supra* note 38, at 2. In October 2020, the Commission "conducted a virtual training session for Commission members on *Confronting Systemic Racism in Missouri Courts*. The session was recorded and made available to attorneys statewide for continuing legal education (CLE) and elimination of bias credit. Three moderated CLE sessions have been held with good attendance and post-session evaluations." *Id.*

69. See CREF 2020 ANNUAL REP., *supra* note 24, at 10 (referencing the Commission's recommendations to change criminal and civil jury instructions).

70. *Id.* at 9.

71. *Id.* The civil instruction reads:

Justice depends on careful and fair decisions based on a conscious and unbiased analysis of the evidence in this case. It is the duty of every juror to determine the facts based upon the evidence presented at trial. Automatic or reflexive responses influenced by conscious or unconscious preconceptions or stereotypes should not enter into that determination. Bias based upon factors such as race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status has no role in the pursuit of justice. Your conclusions in this case should be based on a fair and unbiased consideration of the evidence and respect for the views of other jurors whose backgrounds and perspectives may be different from yours.

MO. APPROVED JURY INSTRUCTIONS 2.03(A).

72. CREF 2020 ANNUAL REP., *supra* note 24, at 9.

73. HARDWICK, *supra* note 38, at 2. At the time of this Article's publication, the video is still in production and is expected to be available in early 2022.

process and will feature a diverse group of judges explaining the prejudicial dangers of unconscious bias in jury deliberations and decision-making.⁷⁴

Along with jury instructions, the Commission is considering statutory changes that will improve fairness in the juror selection process.⁷⁵ For example, to improve juror diversity, the Commission supported draft legislation that would lower the minimum age for jurors from twenty-one to eighteen.⁷⁶ Members of the Judicial and Criminal Subcommittees are researching the impact of laws that adversely affect juror eligibility, such as the collateral consequences of felony convictions, and are considering ways to expand opportunities for expungement of criminal records.⁷⁷ In 2020, Missouri was awarded a State Justice Institute Grant for a master jury list project that will aid the subcommittees in identifying best practices and sources of records to ensure diverse jury pools.⁷⁸

Finally, the Municipal Justice Subcommittee has promoted uniformity, consolidation of services, and more equitable access to justice in our state's municipal court system.⁷⁹ Implemented changes include the development of operating standards for the municipal divisions,⁸⁰ regularly scheduled meetings between the presiding circuit judges and the municipal divisions in their circuits to ensure compliance with standardized procedures, and the provision of bench cards to all judges sitting in municipal divisions outlining relevant state law and court rules.⁸¹ At the Commission's urging, "[m]unicipal divisions are also being brought onto the statewide case management system to facilitate the tracking of case filings and related data."⁸² The consolidated record-keeping has increased efficiency and improved the accountability of municipal divisions of the circuit courts that have traditionally operated under localized rules. With more uniform municipal court practices, the Commission hopes to promote fairness and

74. *Id.*

75. *See id.* at 3.

76. *Id.* Missouri and Mississippi are the only states in which the minimum age for jury service is twenty-one.

77. CREF 2017 ANNUAL REP., *supra* note 23, at 23; CREF 2020 ANNUAL REP., *supra* note 24, at 12.

78. CREF 2020 ANNUAL REP., *supra* note 24, at 10.

79. *Id.* at 10.

80. CREF 2017 ANNUAL REP., *supra* note 6.

81. *Id.* at 12, 19, 25.

82. HARDWICK, *supra* note 38, at 2.

consistency in case outcomes, regardless of the varying racial and ethnic demographics of the communities in which the municipal divisions preside.

V. POSITIONED FOR PROGRESS

With a successful five-year history of data collection and procedural reforms, the Commission has built a strong foundation to carry the work of racial justice into the future. It has evolved into a robust structure of eight subcommittees, one workgroup, and seventy-six Commissioners, many of whom bring specific subject matter expertise to the issues under consideration. The Commission's leadership has developed a tiered schedule of meetings to ensure that the work is on-going and responsive to changing dynamics. The full commission gathers twice annually to discuss policy recommendations and emerging issues, while the Steering Committee convenes quarterly to share subcommittee updates. And the executive team of tri-chairs meets monthly to handle administrative matters and strategic planning. The Supreme Court has also retained an Executive Director to coordinate the day-to-day activities of the Commission and serve as a liaison with judicial departments.⁸³

Despite the unprecedented challenges of operating in a global pandemic during the past year, the Commission is moving forward to tackle the issues that erode confidence in the fairness of our courts. Among the topics currently under review, the Judicial Subcommittee is evaluating the use of preemptory strikes and the effectiveness of *Batson* challenges in guarding against race discrimination during jury selection.⁸⁴ The Systemic Racism Workgroup is reviewing concerns about offensive displays of slavery, confederacy, and Native American history in murals and markers at Missouri courthouses. The Municipal Justice Subcommittee is collecting data to examine the impact that driving while suspended or revoked charges have on minority communities. The Civil Justice Committee is considering a proposed jury instruction on eyewitness identifications in civil cases, similar to a recently approved instruction for criminal cases.⁸⁵ The Criminal Justice Subcommittee is exploring options for automatic expungement of

83. See, e.g., Siefert, *supra* note 14.

84. A *Batson* challenge, detailed in *Batson v. Kentucky*, 476 U.S. 79, 96–100 (1986), allows a party to challenge the use of preemptory strikes in jury selection in a racial discriminatory manner.

85. MO. APPROVED JURY INSTRUCTIONS, CRIMINAL 310.02.

certain low-level offenses after a defined period of time. The Data Subcommittee is working to expand the scope of criminal and civil records that are required to include information about the race or ethnicity of persons involved in particular cases. The Practice of Law Subcommittee will be analyzing data from a survey sent to all members of the Missouri Bar regarding the hiring, retention, and job satisfaction of racially diverse attorneys. The Juvenile Justice Subcommittee is seeking the Supreme Court's approval of new rules to provide legal counsel for juveniles at the interrogation stage and to establish time standards for delinquency cases, much like those in existence for child abuse and neglect cases. All of these initiatives will be supported by the Public Engagement Subcommittee's sponsorship of continuing legal education programs and public forums to promote awareness and dialogue regarding proposed changes. With the sustained pursuit of this collective work, the best is yet to come. The Commission is well-equipped and well-positioned to meet its goals of ensuring equal access, justice, and participation for racial and ethnic minorities in Missouri courts.