

1.5 Overcoming Concerns About Raising Race

Addressing issues of race in the criminal justice system is no easy task.

The one thing that is absolutely certain about the American experience is that never in our history as a people have any of us, black or white, been “neutral” on the matter of race. It has been, and remains, the great overriding issue throughout all our history, in all our law, in all our institutions.¹²¹

Criminal defense attorneys face considerable obstacles when raising claims of racial bias. One writer notes that “enormous systemic, financial, and other pressures . . . make it extremely difficult . . . to raise and vindicate” such claims.¹²² Large caseloads and limited resources magnify these challenges. However, public defenders and appointed counsel must remain alert to the issues discussed in this manual, since racial and ethnic minorities are more likely to live in poverty and therefore more likely to be represented by assigned counsel. African Americans are nearly five times as likely as Whites to rely on appointed counsel.¹²³

Criminal defense attorneys have an obligation to advocate for their clients, including raising issues of race in appropriate cases. The North Carolina State Bar Rules of Professional Conduct (RPC) provide that attorneys must “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”¹²⁴ The RPC state that a lawyer is “an officer of the legal system, and a public citizen having special responsibility for the quality of justice,” who “should be mindful of deficiencies in the administration of justice.”¹²⁵

Why might some attorneys not raise issues of race when race may be adversely affecting a client’s case? Some factors that might cause a lawyer to refrain from raising racial issues include:

- lack of awareness that race is an issue in the case,
- concern that a judge may reject the argument,
- unfamiliarity with supporting law, required factual showing, and strategies,
- reluctance to step outside of one’s comfort zone,
- concern that this strategy may affect the case in unpredictable ways, and
- the existence of contrary legal precedent or the fear of creating bad precedent

This manual is intended to equip attorneys and other court actors with the information and tools they need to address issues of race effectively and overcome concerns such as those above. The chapters that follow identify ways in which racial considerations may unlawfully affect criminal cases and provide legal support and practical strategies for addressing those issues. Some concerns, such as the potential of weakening relationships with other court actors or creating bad precedent, are outweighed by the obligation an attorney owes to an individual client. In appropriate cases, the attorney has an ethical

obligation to advance all arguments that would assist the client. Failing to do so may leave constitutional and other violations unaddressed, result in an incomplete record for appellate review, constitute ineffective assistance of counsel, and deprive the client of a fair trial.

Raising issues of race where appropriate in individual cases may have an aggregate positive effect even if the claims do not always succeed. Doing so may create an environment in which “race discrimination and bias issues are openly joined on the record instead of relegated to the background.”¹²⁶ Everyone involved in the criminal justice system has a role in helping to stem racial discrimination, but defense attorneys have a particularly important voice. As recognized by the Equal Justice Initiative’s report on racial discrimination in jury selection, “[t]he entire community—including prosecutors, judges, court administrators, civil rights and community groups, and elected officials—has a role to play in addressing this issue, but racial bias in the courtroom cannot be confronted effectively without vigilance and advocacy by defense lawyers.”¹²⁷ We hope this manual helps North Carolina criminal defense attorneys recognize and raise issues of race in an informed and effective manner.

¹²¹ Norman C. Amaker, *The Haunting Presence of the Opinion in Brown v. Board of Education*, 20 S. ILL. U. L.J. 3, 6–7 (1995).

¹²² Robin Walker Sterling, *Raising Race*, THE CHAMPION, April 2011, at 24, 26.

¹²³ See CHRISTOPHER HARTNEY & LINH VUONG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* 14 (2009).

¹²⁴ NORTH CAROLINA RULES OF PROF’L CONDUCT R. 1.3.1 (Diligence), *available at* www.ncbar.com/rules/rpcsearch.asp.

¹²⁵ NORTH CAROLINA RULES OF PROF’L CONDUCT R. 0.1.1, 0.1.6 (Preamble).

¹²⁶ Sterling, *supra* note 122, at 26.

¹²⁷ EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010), *available at* www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.