

Court Review

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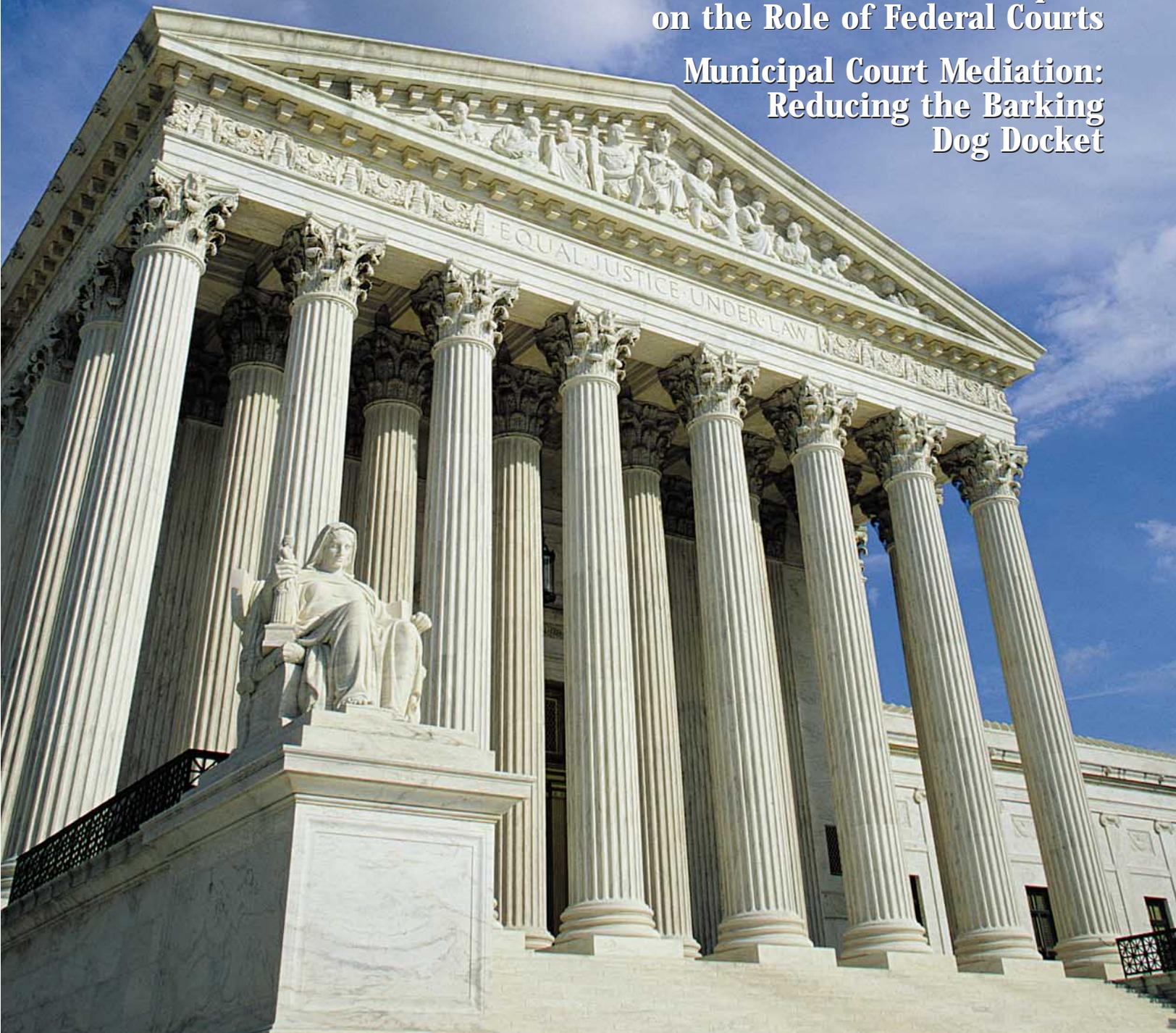
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

**Visitation Violence:
Helping Keep Families Safe**

**Resources: The Key
to Appellate Court Timeliness**

**Chief Justice Rehnquist
on the Role of Federal Courts**

**Municipal Court Mediation:
Reducing the Barking
Dog Docket**



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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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EDITOR'S NOTE

This issue provides insights, information and commentary relevant to judges at all levels of the court system in the United States — trial and appellate, municipal, state and federal.

For state trial court judges who must deal with child visitation issues in the context of domestic violence, Professor Julie Kunce Field provides an overview of the available strategies for keeping families safe, as well as a useful background on domestic violence cases. A sidebar story, reprinted from the *Seattle Times*, illustrates the dangers inherent in these cases, even when precautions have been taken.

For state appellate judges, Roger Hanson provides data demonstrating that the key to shortening the time it takes to decide appeals is the level of resources provided. In a companion article, Judge Stephen J. McEwen, Jr. of Pennsylvania's intermediate appellate court describes how having four law clerks per judge, plus a central legal staff of sixteen, keeps their court current in its work.

For municipal court judges, Judge Karen Arnold-Burger recounts the establishment of a mediation program that can reduce caseload and keep barking dogs and similar problems out of court. For all judges, our Resource Page highlights mediation resources.

We present two essays we believe will be of interest to all judges. First, we reprint major portions of Chief Justice William Rehnquist's year-end report, in which he urged an end to the federalization of local crimes and preservation of the proper balance between the federal judiciary and that of the states. Second, Professor Stephen C. Yeazell brings some reasoned analysis and common sense to the case of California appellate jurist Anthony Kline, who faces a disciplinary proceeding for issuing a dissenting opinion in a case in which he recognized that a recent opinion of the highest court in his state required a contrary result.

Our interview is with Professor Roy Schotland, the reporter for an ABA task force that studied campaign contributions from lawyers to judges. The task force has several recommendations it hopes to get approved by the ABA House of Delegates in 1999. We think you will find this overview of current issues in judicial campaign reform of interest.

We invite your participation in *Court Review*. This journal provides a means of sharing ideas with judges at all levels of the judicial system throughout the country and, indeed, throughout North America. Letters to the Editor are welcome, as are article, essay and book review submissions. Author submittal guidelines are found on page 44.

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Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth at page 44 of this issue. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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President's Column

Paul Beighle

In the history of the American Judges Association, an ongoing issue has been obtaining a responsible, professional agency to provide services for the organization. I have heard stories from members about \$15,000 debts left behind by a planner at a meeting in Colorado and of home improvement projects undertaken with AJA monies. Judge Ira Raab tells of a major battle to finally go professional and contract for the services of the National Center for State Courts in 1982.

Many of our members may not be aware of what NCSC is, who their employees are and what they do for us by way of help in the operation of the AJA on a day-to-day basis. This column is intended to be an introduction.

The NCSC was established in 1971 by the chief justices of several states, acting in response to a call by Chief Justice Warren Burger for a national organization that would be concerned with improving the management and administration of state judicial systems. The NCSC is a non-profit organization, governed by a Board of Directors whose members are appointed by the Conference of Chief Justices and the Conference of State Court Administrators and includes judges and administrators drawn from state trial and appellate courts and from the private sector. From the beginning the NCSC has carried out a vigorous program of technical assistance to state courts, research on basic judicial management and administration issues, and education and training for state judicial officials. In 1984 the educational function was strengthened by the merger with the Institute for Court Management. During the 1980's the role of the Center was broadened to include support for associations of state judicial officials. At present this program provides support for seven organizations in addition to the support for CCJ and COSCA.

The goal of the NCSC is to improve the administration of justice and to provide leadership and service to the state courts. In 1997, a strategic planning process identified support for the development and operations of associations of state judicial officials that have goals consistent with those of the NCSC as a primary means for realizing that goal.

In keeping with those goals, the NCSC invited the AJA Executive Committee to visit Williamsburg, Virginia, in 1997, during Judge Shirley Strickland-Saffold's presidency. Roger Warren, NCSC President, wanted to show us the facilities, introduce us to their staff, and to work through some issues that had to be addressed and resolved for the mutual benefit of both organizations. In the course of the meeting, we toured the Williamsburg facilities and learned of the many services offered by NCSC for court personnel, including (1) the Court Technology Laboratory, which is a project of NCSC's Technology Information Exchange Service and includes Courtroom 21, which was demonstrated at our annual meeting in Orlando, thanks to Judge Jeffrey Rosinek's planning and preparation; (2) the NCSC Library, housing about 35,000 volumes, 4,000 micro-

forms, audiotapes, videotapes and computerized research services; (3) the Court Services division, which provides information on local, state and national resources for the improvement of state court systems; (4) the Information Service, which offers information research services for little or no cost; and (5) the Institute for Court Management, which offers educational programs in judicial information.

The agreement between NCSC and AJA makes the following services available to the Association or to individual members at no cost: use of meeting rooms and conference space at the NCSC headquarters in Williamsburg; access to the extensive and unique library collection of material pertaining to all aspects of judicial systems; use of the Information Service to respond to requests for information on court-related subjects; and reports from the Office of Government Relations on federal legislation and administrative agency actions that affect the state court systems.

Some NCSC employees whom we see at our meetings bear special mention, since they work directly with AJA in the planning and conduct of our meetings and activities during the year.

- Dr. Thomas A. Henderson is the Executive Director of the Association Services Division and Director of Government Relations for NCSC. He directs activities in support of several court organizations, including AJA. His B.A. is from Haverford and his Ph.D. is from Columbia University.

- Shelley Rockwell is the Association Management Specialist for AJA. She has been with us and NCSC for fifteen years. She is from Fairfax, Virginia, and received her B.A. in history and English from the College of William & Mary. Shelley is the principal contact person for the ongoing AJA activities handled through NCSC.

- Anne Kelly is the manager of the Center's publications program. She works with our Publications Committee in producing *Benchmark* and *Court Review*. Anne got her B.A. in history from Loretto Heights College.

- Montrice Smith is new to NCSC. She is from upstate New York. We will probably meet her for the first time in Fort Worth, Texas, at our mid-year meeting.

- Dr. Frank Gavin, Director of the Institute for Court Management, has provided valuable assistance to AJA at the meetings of our Long-Range Planning Committee and at the Executive Committee Retreat, where implementation of the plan was studied, a course of action decided, and tasks assigned to members of the Committee.

Of course, our association with NCSC is always open to contractual negotiation and modification of the terms of our agreement. Our experiences with NCSC as a service provider have been highly beneficial, but not without some disagreements and contention. Happily, they have not left us with a \$15,000 unpaid debt. Nor have they remodeled their homes at our expense.



Soluble Problems for the Federal Judiciary: Curtailing the Expansion of Federal Jurisdiction and Other Matters

William H. Rehnquist

Editor's Note: In his annual report on the federal judiciary, released January 1, 1999, Chief Justice Rehnquist criticized a trend of federalizing crimes that have traditionally been handled in the state courts. Because his comments on the appropriate roles of the federal and state judiciaries are of broad interest, we are reprinting portions of his report, in which he addresses problems he perceives in the federal judiciary and needed solutions. The title placed on his essay is ours; all of the text is taken verbatim from his report. The full report of the Chief Justice can be found at the Internet site of the Administrative Office of the United States Courts, <http://www.uscourts.gov/whatsnew.html>.

I. OVERVIEW

The federal Judiciary enters the last year of the 20th century immersed in many of the same struggles that have defined our federal system of government for 210 years. The administration of justice is affected not only by the relationships among the Judiciary and the other two branches of the federal government, but also by the balance of power between the federal and state governments. In this, my 13th Year-End Report, I will address several of the problems affecting the Judiciary in 1998.

I am pleased to report on the progress made in 1998 by the Senate and the President in the appointment and confirmation of judges to the federal bench — a need that I raised in my 1997 Report as one for which both the Executive and Legislative Branches bore responsibility. The Senate confirmed 65 judicial nominees in 1998, a figure that is above the average number of judges nominated and confirmed in recent years. These appointments will help address the disparity between the courts' workload and their resources. I also note

my gratitude to senior federal judges who, despite their semi-retired status, continue to help ease backlogs in courts around the country.

I also extend my thanks to Congress for continuing to provide adequate financial support to the Judiciary as we work together to maintain a balanced budget. The Judiciary remains committed to fiscal responsibility, and for its part, requested the smallest percentage funding increase in 20 years for fiscal year 1999, even as it faces a growing caseload. The Third Branch is particularly appreciative of the appropriation for the construction of 13 new or expanded courthouse facilities for fiscal year 1999. The new courthouses will replace aging and obsolete facilities and are much needed to alleviate overcrowded conditions and reduce security risks.

Appointments, Jurisdiction, and Salaries

Although the Judiciary is strengthened by the progress made on important issues in 1998, serious problems continue to confront us. The most pressing of those problems are not new, but they have grown in importance either from the neglect or ambivalence of the other branches of government. They are: (1) the failure to appoint any Commissioners to the United States Sentencing Commission — all seven Commissioner positions are vacant; (2) the growing caseload in the federal Judiciary resulting from continued expansion of federal jurisdiction; and (3) the continuing relative decline in judicial salaries. There are, of course, many challenges facing the Judiciary. I focus primarily on these three problems, however, because they need immediate attention. All three are soluble.

Appointments to the United States Sentencing Commission

The political impasse on the appointments to the United States Sentencing Commission, which has been problematic for the past few years, has now reached stunning proportions. There currently are *no* Commissioners at the Sentencing Commission and *no* nominations are pending. The failure to fill these vacancies is all the more egregious when one considers the fact that the seven Commissioners authorized by statute have staggered six-year terms, and that there are additional statutory constraints to insure a bipartisan Commission. For example, at least three of the Commissioners must be federal judges, and no more than four can be members of the same political party. The fact that no appointments have been made to fill any one of these seven vacancies is paralyzing a critical component of the federal criminal justice system.

The Sentencing Commission was created under the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. Its principal purposes are to reduce disparity in sentencing in the federal courts; to establish sentencing policies and practices for the federal courts, including guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes; to advise and assist Congress and the Executive Branch in the development of effective and efficient crime policy; and to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the Executive Branch, the courts, criminal justice practitioners, the academic community, and the public.

Although the staff of the Commission

has been able to carry on the Commission's routine functions, in its present state the Commission is unable to perform some of its core and crucial responsibilities. For example, there are no Commissioners to propose guideline amendments or to take action on Congressional directives or implement legislation. There are no Commissioners to resolve or address circuit conflicts in Sentencing Guidelines interpretations. Every commission needs to make adjustments or respond to changing circumstances or new information. The Sentencing Commission is unable to do so until Commissioners are appointed. With criminal cases in federal courts reaching historic levels, the Judiciary needs a fully functioning Sentencing Commission. If we are going to have Sentencing Guidelines, the Sentencing Commission must be empowered to do its work. The President and the Senate should give this situation their immediate attention.

Caseload and Expanding Jurisdiction

The number of cases brought to the federal courts is one of the most serious problems facing them today. Criminal case filings in federal courts rose 15% in 1998 — nearly tripling the 5.2% increase in 1997. (The details of the federal courts' caseload appear at pp. 6-7, *infra*.) Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state laws. A series of such laws have been enacted in the past few years, including, to name a few, the Anti-Car Theft Act of 1992, the Child Support Recovery Act of 1992, the Animal Enterprise Protection Act of 1992, and the recent arson provisions added to Title 18 in 1994.¹

The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The

pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level. Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, can, and should handle such problems. While there certainly are areas in criminal law in which the federal government must act, the vast majority of localized criminal cases should be decided in the state courts which are equipped for such matters. This principle was enunciated by Abraham Lincoln in the 19th century, and Dwight Eisenhower in the 20th century — matters that can be handled adequately by the states should be left to them; matters that cannot be so handled should be undertaken by the federal government.

Recently, the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Retired Justice Byron R. White, noted that the structure and alignment of the appellate courts is affected by the volume of appeals, which is in turn driven by the jurisdiction of the federal courts. The Commission said in its *Final Report* that "significant changes need to be made in the jurisdiction of the federal courts," and emphasized the importance of "restraint in conferring new jurisdiction on the federal courts, particularly in areas traditionally covered by state law and served by state courts...."

In 1995, the Judicial Conference of the United States, after much study, adopted the *Proposed Long-Range Plan for the Federal Courts* for the next century. Recommendation 1 of the *Long-Range Plan* reads as follows: "Congress should commit itself to conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our sys-

tem of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters." In accordance with this principle, the *Long-Range Plan* recommends that federal courts should only have criminal jurisdiction in five types of cases:

- (1) offenses against the federal government or its inherent interests;
- (2) criminal activity with substantial multi-state or international aspects;
- (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise;
- (4) serious high level or widespread state or local government corruption; and
- (5) criminal cases raising highly sensitive local issues.

Although Congress need not follow the recommendations of the Judicial Conference, this *Long-Range Plan* is based not simply on the preference of federal judges, but on the traditional principle of federalism that has guided the country throughout its existence.

Similarly, Justice White and Judge Gilbert Merritt included a separate statement in the *Final Report* of the Commission on Structural Alternatives for the Federal Courts of Appeals that describes the core functions of federal courts, the role federal courts should appropriately have in criminal matters, and the factors that should be considered before assigning new responsibilities to the federal courts. Those factors include determining whether the proposed legislation would assign work to the federal system that is within its core functions; whether states are inadequately addressing the perceived need; whether the federal courts have the capacity to take on new business without additional resources or restructuring; and the extent to which proposed legislation is likely to affect the caseload,

Footnotes

1. In contrast, the effect that the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act are having on habeas corpus proceedings and prisoners' actions continues to appear positive. See note 5, *infra*.

and in turn whether the federal courts have the capacity to perform their core functions and fulfill their mandate for "just, speedy, and inexpensive determination" of actions. Other factors include the cost of delay to litigants and whether the perceived needs are, or could be, served as well by alternatives such as alternative dispute resolution or administrative proceedings.

Many others have written on how Congress might appropriately balance jurisdiction between state and federal courts. A common element of the recommended threshold standards for federal criminal legislation is remedying demonstrated state failure. Such an approach would reduce the likelihood that a particularly high profile or egregious event would be enough on its own to justify new federal laws. Such an approach also is more consistent with judicial federalism and with Alexander Hamilton's observation in the *Federalist No. 82* that "the national and State systems are to be regarded as ONE WHOLE."

A re-examination of diversity jurisdiction is also warranted. Diversity jurisdiction was originally enacted as part of the Judiciary Act of 1789 when there was reason to fear that out-of-state litigants might suffer prejudice at the hands of local state court judges and juries, and there was legitimate concern about the quality of state courts. Conditions have changed drastically in two centuries. At the very least, there simply is no need to allow in-state plaintiffs to avail themselves of diversity jurisdiction to remove matters to federal court. These lawsuits account for a substantial percentage of the federal caseload, and as state law is applied in such cases in any event, there is no good reason to keep them in federal court.

I have requested Chairman Howard Coble of the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee to conduct hear-

ings in the next session of Congress on the issue of the general expansion of federal jurisdiction caused by federalizing state crimes, and on curtailing federal diversity jurisdiction. Chairman Coble has demonstrated an interest in the federal courts' caseload and, in the most recently concluded session of Congress, sponsored the Alternative Dispute Resolution Act, which directs federal courts to provide alternatives to litigation in court and gives them flexibility in how to do so.

Judicial Salaries

For the fifth time in the past six years, Congress has denied federal judges, top officials in the Executive Branch, and its own members cost-of-living salary adjustments. Since January 1993, the value of the salaries for these positions has declined 16% when measured against the Consumer Price Index. The relative cumulative loss of purchasing power during this period for a federal district judge exceeds \$77,000.

Federal judges, who have made a lifetime commitment to federal service, should not be required to bear these continuing financial penalties. The vast majority of career government employees and retirees receive inflation adjustments annually. Career employees may also receive added locality pay adjustments. Denying cost-of-living adjustments to top officials is a regressive approach to compensation and is counter-productive to the common sense goal of encouraging capable individuals to enter the Judiciary. The 1989 law providing for annual cost-of-living salary increases for these positions should be allowed to operate as intended.

Panel Attorney Compensation

Another issue of concern is the rate of pay that court-appointed attorneys receive to defend individuals in criminal cases. By statute, the Judiciary bears the

responsibility for ensuring that defendants in federal criminal cases receive legal representation. If the defendant is unable to pay, the Judiciary must provide a lawyer to vindicate the defendant's rights. This responsibility is met through Federal Defender Offices, Community Defender Offices, and attorneys in private practice who are appointed by the court, generally referred to as "panel attorneys."

Congress established maximum hourly rates of compensation for panel attorneys in 1964 with the passage of the Criminal Justice Act. Since the first adjustments to those rates in 1970, the maximums have fallen far behind inflationary effects. In 1986, Congress authorized the Judicial Conference to set higher maximum hourly rates of up to \$75. Since then, the Judicial Conference has approved the higher rate in 93 of 94 judicial districts upon a finding of demonstrated need. However, Congress has appropriated funds only sufficient to pay up to the \$75 rate in part or all of 16 districts. In other districts, because of a one-time authorized increase, panel attorneys may only be paid \$65 for in-court work and \$45 for out-of-court work.

The Judiciary's budget request for fiscal year 2000 will include funds sufficient to pay all panel attorneys at the \$75 rate. I respectfully urge Congress to give very serious consideration to this request. Inadequate compensation for panel attorneys is seriously hampering the ability of judges to recruit attorneys to provide effective representation. The Judiciary, in turn, is taking steps to insure that defender services' costs are reasonable....

II. THE YEAR IN REVIEW

The Federal Courts' Caseload

For the first time in 26 years, criminal filings experienced a double-digit increase, growing by 15%.² Filings in

2. In 1998, filings of criminal cases grew 15% to 57,691 cases. This means that, on average, each authorized federal judge handles 89 criminal filings per year. Not since 1972 have the criminal filings risen by double digits. That year, filings rose 14%, and the courts received more immigration cases than fraud cases. Twenty-six years later, immigration filings have once again exceeded the number of fraud filings, making immigration-related offenses the sec-

ond most significant offense category after drug law violations. The increase in filings related to drugs and immigration occurred primarily along the southwestern border districts, although drug-related filings rose or remained stable in more than 57 districts across the nation. Nationwide, immigration filings rose 40% to 9,339 cases, and drug filings rose 19% to 16,281 cases.

U.S. courts of appeals and U.S. bankruptcy courts also rose, by 3%³ and 5%,⁴ respectively. In contrast, civil filings declined 6%.⁵

The Supreme Court of the United States — Caseload Statistics

The total number of case filings in the Supreme Court increased from 6,634 in the previous term to 6,781 in the 1997 Term — an increase of slightly more than 2.2%. Filings in the Court's *in forma pauperis* docket increased from 4,578 to 4,694 — a 2.5% rise. The increase in the Court's paid docket was by only 30 cases, from 2,055 to 2,085 — a 1.46% increase. During the 1997 Term, 96 cases were argued and 91 signed opinions were issued, compared to 90 cases argued and 80 opinions issued in the 1996 Term. No cases from the 1997 Term were scheduled for re-argument in the 1998 Term.

....

VII. CONCLUSION

As we prepare to complete the work of this millennium and embark upon the next, the Judiciary may take a fair measure of satisfaction in that, despite the challenges we face, the United States court system continues to serve as a global standard of excellence. We must dedicate ourselves to maintaining the

splendid tradition of our Judiciary, and to preserving a proper balance with the other branches of government and the states as we continue to work together.

Chief Justice William H. Rehnquist was appointed to the United States Supreme Court by President Nixon in 1971, taking his oath of office, following confirmation, on January 7, 1972. He became the nation's 16th Chief Justice in



1986 on appointment by President Reagan. A Stanford law graduate, he clerked for Justice Robert H. Jackson in 1952-53. Rehnquist practiced law in Phoenix and served as an Assistant U.S. Attorney General prior to his appointment to the Court.

3. Appeals filed in the 12 regional courts of appeals rose 3% in 1998 to a record level of more than 53,800. The overall increase resulted from civil and bankruptcy appeals, which rose 6% and 4%, respectively. Criminal appeals remained stable, while administrative agency appeals and original proceedings dropped 14% and 8%, respectively.
4. Although bankruptcy petitions increased from approximately 1,350,000 to more than 1,400,000, attaining a record high for the 11th consecutive quarter, the 5% increase represented a slowing of the double-digit growth seen in the two previous years. Filings under Chapter 7 accounted for more than 70% of all bankruptcies and, with a 7% growth, were the main cause of the continued climb in the bankruptcy numbers. Chapter 13 filings, which made up 28% of all bankruptcy filings, rose a modest 1%. Chapter 11 filings and Chapter 12 filings, each of which constitutes less than 1% of all bankruptcy filings, dropped 22% and 9%, respectively.
5. The number of civil filings in the U.S. district courts was 256,787. The 6% decline in filings was attributable primarily to decreases in federal question litigation, filings involving the United States as a defendant, and diversity of citizenship filings. Federal question litigation filings dropped 6% from 156,596 to 146,827. The overall decline in these filings was largely a result of a 22% decline in personal injury cases, of which the 4,300-case decline in product lia-

bility filings (mostly breast implant cases) had the greatest effect. In addition, a significant decline in federal question litigation involved state prisoner petitions, which dropped by more than 3,200. The overall reduction in state prisoner petitions likely results from the continuing effects of the Prison Litigation Reform Act, which, among other provisions, places limitations on how prisoner petitions may be filed. Filings with the United States as defendant fell by 12% from 39,038 to 34,463. This decline stemmed chiefly from a 34% decrease in prisoner petitions filed by federal prisoners. Motions to vacate sentence decreased 46% (nearly 5,400 filings), mostly as a result of the subsiding effects of the *Bailey v. United States* Supreme Court ruling, which restricted the imposition of enhanced penalties for using firearms in violent crimes or drug trafficking offenses, and the 1996 Antiterrorism and Effective Death Penalty Act, which provided a one-year limitation period for filing state habeas corpus petitions and federal motions to vacate sentence. Diversity of citizenship filings declined 6% (more than 3,200 cases) largely because of the drop in personal injury/product liability filings related to breast implants.

Good Judging and Good Judgment

Stephen C. Yeazell

Judges should be independent, but judges should also be accountable. When does independence become lawlessness?

For most of our history, we have conducted a sporadic national debate about good judging — what it means to be a judge and when judges act lawlessly. Occasionally, those debates have been cast in dramatic terms, with real or threatened impeachments.

More recently and more characteristically, states have turned to disciplinary bodies that, like judges, exercise a broad range of powers — from private admonition to removal from office. Given such graded powers, judicial disciplinary bodies must use the gradations thoughtfully. Equally, however, judges must not confuse independence with irresponsibility.

In our most populous state, a drama is unfolding that illustrates the damage possible when both the judiciary and its watchdogs lose a sense of proportion. In this sad tale we see the terrible straits into which good principles, misapplied, can drive our legal system. The judiciary, the legislature, an independent commission, and the American Bar Association have all leaped into the fray, each making bad matters even worse.

The first act opened when Justice Anthony Kline, a respected and senior judge on California's intermediate appellate court, wrote a 1991 opinion holding that a court may not vacate a trial court judgment to implement a settlement agreement between parties to a civil suit.¹ There is much to be said for this position. It commended itself as dictum to the U.S. Supreme Court, when it faced a related issue a few years later.² Some, but not all, academic opinion has agreed with Justice Kline.³

As it happened, in *Neary v. Regents of the University of California*,⁴ the California Supreme Court disagreed with Justice Kline, ordering the trial court to vacate judgment entered on a jury verdict in order to effectuate the parties' agreement. Justice Kline was not convinced. Over the next several years, Justice Kline tried to persuade his high court that he was right, in majority opinions refusing to extend *Neary*⁵ and in concurring opinions applying it while denouncing its rationale.⁶ His Supreme Court didn't budge.

In December 1997, Justice Kline apparently decided he couldn't stand it any more and, in a case presenting the same issue, dissented, writing that he could “not as a matter of conscience

apply the rule announced in *Neary*.”⁷

That's wrong. Even if there are circumstances in which a judge may knowingly refuse to follow governing law, this isn't one. The law involved was clear and recent, and the higher court had declined earlier invitations to rethink its position. The law in question is neither a threat to the legal system nor the stuff of high morality. Sensible people can and do disagree about how far a court should go in effectuating parties' settlement. Some would argue that an outcome to which both parties to an ordinary civil dispute agree is just. Without going that far, we regularly allow civil parties great procedural leeway: stipulating to facts known to be false; submitting to unconstitutional assertions of territorial jurisdiction; embodying in consent decrees remedies for which the law provides no justification.

Justice Kline is obviously entitled to his views about the right path for this somewhat esoteric doctrine to take. And any rational view of judicial independence suggests several ways for a judge to express his views. A majority opinion written *dubitante* is one course. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit recently took this route in an antitrust

The author expresses his appreciation for comments from Evan Caminker, Judith Resnik, and Eugene Volokh, and for some probing questions from Steven Lubet, whose comments should not be mistaken for endorsement of the views expressed here.

Footnotes

1. *Neary v. Regents of the University of California*, 278 Cal. Rptr. 773 (1991), *rev'd*, 834 P.2d 119 (1992).
2. *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18 (1994). *Bancorp* declined to implement the part of a settlement calling for vacation of an appellate opinion making new law in an important area. The unanimous opinion was broad and in dictum said that the same principle applied to trial court decisions, even those that made no new law.
3. Compare Jill Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (taking Justice Kline's view of the matter) with

Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994) (taking a more complex view of the question).

4. 834 P.2d 119 (1992).
5. See *People v. Barraza*, 35 Cal. Rptr. 2d 377 (1994) (refusing to extend *Neary*, which arose in a civil case, to allow reversal of a criminal conviction and substitution of conviction for an alternate crime that would not require deportation of the convicted defendant).
6. See *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 24 Cal. Rptr. 2d 632, 638-40 (1993) (Kline, J., concurring) (criticizing *Neary* rule in case in which court declined request for stipulated reversal based on “extraordinary circumstances” exception to *Neary* rule).
7. *Morrow v. Hood Communications, Inc.*, 69 Cal. Rptr. 2d 489, 491 (1997) (Kline, J., dissenting).

case, writing a majority opinion that demonstrated why the rule he applied under compulsion of governing precedent was not sensible.⁸ The Supreme Court responded by granting certiorari and adopting Judge Posner's view.⁹ A powerful concurring opinion, in which Justice Kline recognized an obligation to follow the law while saying why he thought the present view not desirable is another possibility. If Justice Kline wanted to argue his case at greater length, a law review article or speech would provide other outlets for his disagreement with his high court. If Justice Kline found the point at issue so significant that he could not conscientiously follow the law announced, recusal is another possibility, perhaps even recusal accompanied by an explanation.

What Justice Kline is not entitled to do is to continue to vote in cases while announcing that he will refuse to follow a recent, authoritative ruling of his state's highest court. A dissent written under these circumstances is not merely a signal of intellectual disagreement with the high court. It is a refusal to adhere to the constraints of judging. A judge possesses legitimate power only by virtue of submitting to the discipline of law. Without the willingness to recognize such boundaries, a judge should not wield the power of the office.

Yes, one can posit dramatic, extreme examples in which, perhaps, a judge may have some limited right or duty to protest a deeply immoral law. Justice Kline, in a published defense of his action, compared himself to Justices Marshall and Brennan of the United States Supreme Court, who toward the end of their careers routinely dissented

from the imposition of the death penalty.¹⁰ There are two things wrong with this analogy. First, intermediate appellate justices occupy a different institutional position than do justices of the highest court. Second, if high court judges have greater leeway anywhere for dissent it has to be in matters of life and death, though one could respectfully argue even there that fidelity to law requires acquiescence.

If the judge was wrong, the next protagonist may have matched him in bad judgment, though, for reasons that will soon appear, one cannot be sure. Like many states, California has a body charged with enforcing judicial discipline, the Commission on Judicial Performance. The sanctions available to the Commission range from the nearly trivial — a private letter of reproof — to the severe — removal from office. It also has available a range of processes, from staff investigation to formal charges and hearing. The Commission invoked the most public and serious of its processes — charging Justice Kline with “conduct prejudicial to the administration of justice” and “willful misconduct.” It is difficult to imagine anyone's thinking that Justice Kline should be removed from office for a single uncharacteristic act that did not affect the outcome of a case (if only because two other judges followed controlling precedent). Because the Commission's deliberations are appropriately confidential, we cannot know its motivation for taking the route it did.

The most charitable view of the Commission's action would see it as a public response to Justice Kline's equally public declination to follow governing

law. If so, its public charges were a calculated counterweight to the public dissent of Justice Kline. An appellate justice's announcement that he no longer considers himself bound by the law sends ripples through the legal system and arguably demands an equally public announcement that such behavior is not part of a judge's tool kit. But if the Commission took such a view, one might have hoped that it would have accompanied its charges with a statement that it was not contemplating removal from office. Not to say so at the outset risked just the sort of almost hysterical reaction that in fact ensued. As matters now stand, the surest sign that the Commission is taking such a path would be a rather quick resolution of the case — a quick settlement in which Justice Kline accepted his responsibility to follow the law and the Commission moved on to the far more serious matters on its docket.

There are less charitable constructions of the Commission's actions. If one views the question solely as a question of how to bring Justice Kline back to his characteristically judicial ways, one would think of a private letter, reminding the judge of his duty to follow the law.¹¹

Such a letter requires informal written notice to the judge but can be issued without any public announcement, charges, or hearing. On this view of things, more elaborate, and potentially serious, action would follow only if this ordinarily sensible judge demonstrated that he had not gotten the message.

Another possibility, of course, is that the Commission was displaying the same poor judgment as Justice Kline. A

8. See *Khan v. State Oil Co.*, 93 F.3d 1358, 1362-64 (7th Cir. 1996) (criticizing but following Supreme Court precedent), *rev'd sub nom. State Oil Co. v. Khan*, 522 U.S. 3 (1997). Judge Posner concluded his analysis and criticism of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), by stating: “But all this is an aside. We have been told by our judicial superiors not to read the sibylline leaves of the U.S. Reports for prophetic clues to overruling. It is not our place to overrule *Albrecht*; and *Albrecht* cannot fairly be distinguished from this case.” 93 F.3d at 1364.

9. See *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275 (1997). The Court noted: “Despite what Judge Posner aptly described as *Albrecht's* ‘infirmities, [and] its increasingly wobbly, moth-eaten foundations,’ there remains the question whether *Albrecht*

deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.” *Id.* at ___, 118 S. Ct. at 284 (citation omitted).

10. *J. Anthony Kline, Justice Kline Defends His Dissent*, CAL. LAW., Sept. 1998, at 25, 26.

11. In the parlance of the California Commission, such letters are “advisory” and constitute “corrective action” rather than “discipline.” See CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, 1997 ANNUAL REPORT, at 36 (Rule 110 (c)), 21 (“An advisory letter may be issued when the impropriety is isolated or relatively minor....”).

relatively young agency, it may be still finding its way. But if that is the explanation, the Commission needs to hear from critics that this is the wrong path. Any judiciary the size of California's — with fifteen hundred judges — has some genuinely bad actors — intemperate, incompetent, or corrupt persons now sitting as judges who dishonor their offices and distort justice. In recent months, California's Commission has disciplined one judge for tricking a convicted felon into waiving his right to prompt sentencing, so the judge could consider depriving him of medical care while in prison,¹² another judge for extorting sexual favors from a criminal defendant in return for reduced sentences for her and her accomplices,¹³ and a third for altering judicial records to conceal his acts of bias towards friends who were parties or lawyers.¹⁴

A good prosecutor does not devote attention to litterbugs when faced with roaming murderers. Similarly, no body with disciplinary authority over the judiciary should squander public funds and reputation in prosecuting an isolated act of uncharacteristic bad judgment when faced with such an array of far worse behavior.

If bad judgment lay behind the Commission's charges, things promptly got worse. In response to the Commission's charges, the California Judges Association and the American Bar Association weighed in, ABA President Jerome Shestack writing that the Commission "should not be 'second-guessing' a judicial opinion."¹⁵ "Second-guessing" hardly captures the behavior in question, in which a judge announced that he was declining to follow what he recognized as governing law.¹⁶ The ABA does neither the judiciary nor itself credit when it defends such behavior.

Matters could have become even worse. The state legislature joined the chorus passing a bill that would strip the

Commission of the power to punish a judge for any dissenting opinion or judicial decision. That was wrong for two reasons. Like the judge's dissent and the Commission's charges, it lacked proportion. Faulty exercise of prosecutorial discretion calls for replacing or reprimanding the prosecutor, not repeal of the substantive law. Worse, the legislation was substantively wrong. We *should* have the power to discipline a judge who decides a case as a result of a bribe or confessed racial bias. Yet the bill would have prevented discipline in such a case.

Many of the opening acts of this drama have not been pretty. But they are not beyond rescue. The Governor has saved the legislature from its fit of ill-judgment by vetoing the bill. The charges remain pending against Justice Kline. Common sense, which has been in short supply in this matter, suggests a quick resolution via an agreement, in which Justice Kline promises to abide by governing law — even when he doesn't like it — and the Commission dismisses charges or issues a private letter of reproof. At that point, perhaps all concerned can exhale and get to the really difficult problems confronting the legal system — of which this is not one.

For those of us who are bystanders, the lessons are equally important. First, believers in judicial independence must recognize that this icon of justice comes linked to its siblings — fidelity to law and accountability. Judges are powerful, but their power comes at the cost of a constraint; without that constraint power ceases to be legitimate. Judicial independence should not mean independence of law. Second, bodies that discipline judges need to see behavior in context and to exercise appropriate prosecutorial discretion. Without that discretion, such bodies will themselves become part of the problem. Finally, the broader public — academics, bar and

jurist's associations — must recognize that a defense of judicial independence does not mean defense of every act by every judge. Instead, any discerning defense of judicial independence will mean disapproval of some judicial behavior. For us, just as much as for judges, wisdom must include a sense of proportion.



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From Medieval Group Litigation to the Modern Class Action (Yale Univ. Press 1987), and a casebook on modern procedure, *Civil Procedure* (4th ed., Little Brown & Co. 1996). A graduate of Harvard Law School, Professor Yeazell has a master's degree from Columbia University, where he studied medieval English literature, and his undergraduate degree from Swarthmore College.

12. *In Sharp Rebuke State High Court Censures Jurist*, L.A. TIMES, August 11, 1998, at A3.

13. *Ex-Judge Censured for Sexual Relationship with Defendant*, L.A. TIMES, January 6, 1999, at B1.

14. *Madera Justice Kicked Off Bench*, THE [S.F.] RECORDER, January 4, 1999, at 1.

15. *Judge Faces Discipline: Commission Charge over Justice's Opinion*

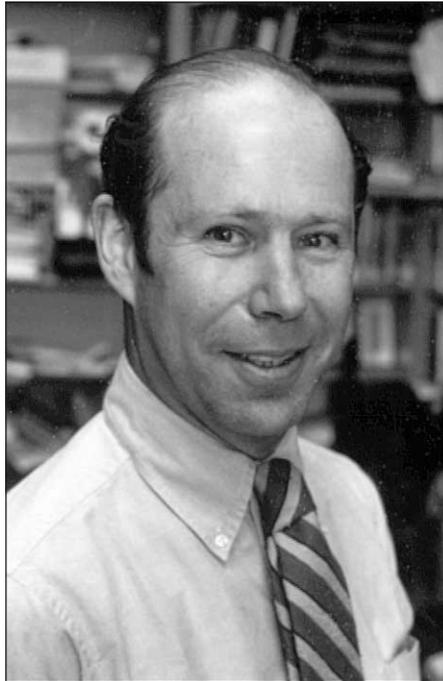
Unleashes Firestorm of Protest, CALIF. ST. B.J., Aug. 1998, at 1-3 (quoting ABA President's letter).

16. "I acknowledge that the opinion of the California Supreme Court in *Neary* ... requires that the motion before us be granted. I would deny the motion, however, because I cannot as a matter of conscience apply the rule announced in *Neary*." *Morrow*, 69 Cal. Rptr. 2d at 491 (Kline, J., dissenting).

An Interview with Roy Schotland

Georgetown law professor Roy Schotland was the reporter for the ABA's Task Force on Lawyers' Political Contributions for its recommendations of changes in the financing and handling of judicial elections. While the ABA task force's *other* recommendations – known under the label “pay-to-play” based on their attempts to limit the ability of lawyers to get work from government in exchange for campaign contributions to government officials' campaigns – have received wide notice, the judicial election reform measures have received less discussion. The recommendations, now under active review within the ABA and by the Conference of Chief Justices, are expected to appear on the agenda of the ABA House of Delegates in August.

Professor Schotland has for many years studied campaign finance and election law issues, and he was a law clerk for U.S. Supreme Court Justice William J. Brennan, Jr. in 1961-62, when Brennan wrote the majority opinion in *Baker v. Carr*, 369 U.S. 186 (1962), which authorized judicial review of state legislative districting and ultimately led to the one-man, one-vote rulings that reshaped the country's political landscape. In this interview, we discussed the judicial election reform proposals, as well as some of the problems they were designed to address. We also briefly discussed the *Baker* case and the duty of a clerk to keep confidential the work of the Court.



Court Review: Let me start with this: You first got into writing about judicial elections at least by 1985. What originally got you into studying judicial elections?

Schotland: That's simple, and in a way wonderful, and in a way embarrassing. It was the first time that I taught election law. I haven't done it continuously since — in fact there was about a ten-year break — but that first time it was a seminar, which meant papers, and a student came in and suggested that he would like to do a paper on judicial campaign finance.

And I sat there completely silent, and

after a few moments he said, “What's wrong?” And I said, “The only thing wrong is that I didn't think of it. It's superb.” So this was genuinely a student-initiated area, and I kept digging. There was almost zero out there. There would be a little bit on trial court elections in L.A. in a two-year cycle, and then that sort of thing about county elections in some other state and some other cycle, totally isolated, and really no effort, at least that I can recall, ... to get generalizations and no effort to say what can be done about this, if anything.

CR: Obviously there's been quite a bit in the meantime since your first article back in 1985.¹ You recently have been the reporter for the ABA's Task Force on Lawyers' Political Contributions. How and why was that group formed?

Schotland: The driving force there was the Association of the New York City Bar and the chairman of the S.E.C., who were very concerned — not at all about judicial elections — but about what is called pay to play; that is, just as in the municipal bonds finance area, there has been regulation of contributions by municipal bond underwriters to, let's say, state or county treasurers. There was a concern about municipal bond lawyers.

Now, put wholly aside whether those lawyers should be distinguished from all kinds of other lawyers who do all kinds of other work with state and local governments. The driving point was that

Footnotes

1. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. LAW & POLITICS 57 (1985). For Professor Schotland's views regarding campaign finance reform in non-judicial settings, see Roy A. Schotland, *Proposals for Campaign Finance Reform: An Article Dedicated to Being Less Dull than its Title*, 21 CAP. U. L. REV. 429

(1992); and Roy A. Schotland, *Proposals for Campaign Finance Reform - A Postscript*, 21 CAP. U. L. REV. 489 (1992). In the last-cited article, Schotland used an apparently novel device, which he called a “bogometer,” “a new scientific instrument [that] locates and measures bogus,” to locate minor errors in his earlier arguments.

the muni-bond lawyers should be regulated. The ABA, if I may put it in simple language, put that aside. It came back. The ABA said, well, we'll appoint a task force, and as they were appointing that, a key member of the ABA said, you know, if we're looking at campaign contributions at all, we really ought to include judicial elections. So it piggy-backed.

CR: The report of the task force was issued in two parts: a part one, dealing with the pay-to-play issues with state and local candidates, and a part two dealing with judicial candidates. Were you the reporter for both parts?

Schotland: Happily, no, not at all. I say that because the pay-to-play issues are, I think, much more hard to answer than the judicial campaign issues. Specifically, the task force was sharply divided on the pay to play and throughout was completely unanimous on the judicial [issues].

CR: Were there different task forces

Schotland: No.

CR: — or were they the same group?

Schotland: Exactly the same people. Of course, there were slightly different, shall I say, leading participants on the different issues. The key person on judicial is the Chief Justice of Texas, Thomas Phillips.

CR: How did the group get selected? Do you know?

Schotland: I really don't. I only came into it — they were created by [ABA] House of Delegates action in the Summer of '97. I was first contacted in February '98. And the first time there was actual discussion of judicial issues was ... at a task force meeting at the beginning of March.

So their earlier work had all been on the pay to play, and there were several bond lawyers in that group. There were some of the people who were pressing for regulation of bond lawyers. And I believe that Chief Justice Phillips was there ... at least primarily because of the judicial issues.

Senator Howard Baker was one of the group. William Webster was one of the group. I just don't know how the particular people got brought in. There's an outstanding Los Angeles lawyer Ron Olson, of Munger, Tolles & Olson, who, as far as I know, has no particular

SELECTION AND RETENTION SYSTEMS FOR STATE COURT JUDGES	
APPELLATE COURTS	
Total appellate judges: 1,243	
Total that stand for some form of election: 1,084 (87%)	
Total that stand for contestable election: 659 (53%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 582 (47%)	Appointment: 133 (11%)
Partisan Election: 495 (40%)	Partisan Election: 400 (32%)
Nonpartisan Election: 166 (13%)	Nonpartisan Election: 166 (13%)
	Retention Election: 518 (43%)
GENERAL JURISDICTION TRIAL COURTS	
Total trial judges: 8,489	
Total that stand for some form of election: 7,378 (87%)	
Total that stand for contestable election: 6,650 (77%)	
INITIAL TERM	SUBSEQUENT TERMS
Appointment: 2,061 (24%)	Appointment: 1,013 (12%)
Partisan Election: 3,669 (43%)	Partisan Election: 2,360 (28%)
Nonpartisan Election: 2,759 (33%)	Nonpartisan Election: 2,891 (35%)
	Retention Election: 2,127 (25%)

Source: Report and Recommendations of the [ABA] Task Force on Lawyers' Political Contributions, Part Two, July 1998, at 69, 73.

involvement in the muni-bond area and certainly has continued to be extremely valuable in the judicial area.

CR: Let's talk about the report of the group. What would you characterize as the theme of the recommendations, or can you point to a theme?

Schotland: I would say the theme would be that you cannot sit still. You also cannot stop with saying let's get rid of judicial elections, because when you have thirty-nine states with significant numbers of judges up for some form of election — three other states [also have elections], making a total of forty-two, but those three others only have probate judges up — so let's [call it] mainly about thirty-nine states.

If you've had generations of effort to get rid of judicial elections and you still have 87 percent of state judges up for some form of election, then you've got to pay attention to the problems — and there are problems, obviously, in judicial elections. And you've got to go to work on that, and I would say the theme is not to say that we should have judicial elections, not to say we shouldn't have judicial elections, but [that] we have them, they're becoming nastier, noisier, and costlier, and we've got to do something

about it.

CR: Before we talk about the solutions, let's talk for a minute about the problems. What did your group feel were the most important problems that need to be addressed now?

Schotland: Concentrated large contributors, that is, either individuals or one or two firms or a particular type of firm or particular types of litigants who funded heavily and also were a heavy proportion of a judge's [total funding]. If a judge got a hundred thousand dollars from one firm and another judge got a million dollars in \$20 contributions from lots and lots of people, I think those are two quite different situations, one more problematic than the other. So it isn't just the matter of the amount of money, it's the matter of the size of the contributions and the concentration.

CR: You present quite a bit of data in the report about the rising cost of campaigns. What do you feel is a cause for that?

Schotland: Well, there are several causes. Campaigns generally are costing more, partly because they're becoming more sophisticated, partly because of media expenses. Judicial races by and large don't use much broadcast, but in

THE RISING COST OF JUDICIAL ELECTIONS

Los Angeles Superior Court (non-partisan election)

median cost - 1974:	\$3,177
median cost - 1994:	\$70,000

Alabama Supreme Court (partisan election)

two candidates, total expense - 1986:	\$237,281
two candidates, total expense - 1996:	\$2.1 million

Pennsylvania Supreme Court (initial partisan election; later retention elections)

largest amounts raised - 1987:	\$407,711 and \$115,457
largest amounts raised - 1989:	\$1.4 million and \$555,824
largest amounts raised - 1993:	\$1.3 million and \$250,000
largest amounts raised - 1995:	\$1.8 million and \$926,019

Wisconsin Supreme Court (non-partisan election)

two candidates, total expense - 1979:	\$102,564
two candidates, total expense - 1997:	\$899,074

Source: Report and Recommendations of the [ABA] Task Force on Lawyers' Political Contributions, Part Two, July 1998, at 15-16, 69-71, 73.

some of the less expensive markets they do. And, of course, if you're adding TV on top of other ordinary campaign expenses, you've got a lot more [cost].

There's been a spreading recognition of the states' judicial races. The Chamber of Commerce in September of '98 explicitly targeted eight states in which they said that business had an interest in turning around the approach of those courts or preserving the approach of those courts to issues in which business is particularly interested, and that's very heavily product liability and tort reform. Tort reform generally. Things like punitive damages.

You [get a] statute through the legislature, the court knocks it out. Business has been in the habit of giving money to members of legislatures and executive officials, but they really had never paid as much attention as recently to the courts.

You just had significant Chamber of Commerce involvement in the Michigan race. The Michigan court, and I hate to speak this way, but [it] went from a Democratic court to a Republican court.... I don't know if it's the first time, but [for the] first time in a long time, the majority of that court are Republicans.

And you're going to see more of that, I have no doubt, in 2000.

CR: Other than the involvement of chambers of commerce directly in 1998 campaigns, were there any other surprises or changes?

Schotland: Some judges in Oklahoma who were up for retention were targeted by business [for defeat], and the tactic didn't work. Those justices and judges came through. I don't know if I'd call that a surprise.

Let me make explicit, [though]. As long as the rules are as they are, anybody who faults plaintiffs' lawyers on the one hand or the defense side, Chamber of Commerce, on the other hand, is either being silly or hypocritical.... I don't mean for one second to say that these people are doing anything wrong when they participate. The only thing [that] would be wrong is if they give sums that are illegal or they launder money and so forth, and I'm not aware of any such problems in judicial races.

CR: The Sixth Circuit ruled last year that overall expenditure limits on judicial campaigns, at least in the circumstances argued by the State of Ohio, were unconstitutional.² Your task force didn't suggest any expenditure limits because

that case was still pending and the constitutionality was in doubt. If expenditure limits aren't available, what can be done to improve the situation?

Schotland: Let me say first that the Ohio expenditure limits had been set by the court itself, and I would think any neutral observer [would] be a little concerned about seeing the people whose races are in question setting the regulation of those races.

Now, that's a reason why many of the people, academics, that is, who attend to campaign finance are very, very skeptical of expenditure ceilings, even if they were held constitutional. There is a very decent case that the general unconstitutionality of expenditure ceilings should be distinguished from the rather special situation of judicial elections.

But there's another problem with expenditure ceilings. If you have a ceiling, you just push the money outside of the candidate campaign and into independent spending or spending by parties. So the expenditure ceilings, even if constitutional, won't work. They just cause a different flow of the funds.

And by and large, while that different flow, many of us would say, is clearly constitutional and has to be protected and allowed, most of us would say we'd rather see the candidates in charge of the campaigns than any independent or more amorphous group, because the voters can hold the candidates responsible for a campaign. Voters can't hold responsible some independent group that runs a Willy Horton ad.

CR: How would the contribution limits proposed by your task force be handled?

Schotland: In the first place, they should be set in light of the actual experience in the jurisdiction. What is an appropriate contribution in, let's say, Alabama and what's appropriate in Wyoming or Texas or California would obviously differ.

And you also have to set the contribution limits in a way that is fair as among different size firms. For example, if you say the limit is only on indi-

2. *Suster v. Marshall*, 149 F3d 523 (6th Cir. 1998), cert. denied sub nom. *Marshall v. Suster*, 67 U.S.L.W. 3452 (Jan. 19, 1999).

viduals and you don't do anything about law firms, then the plaintiffs' bar, which tends to be in small firms, could give, let's say, five times or ten times the limit; whereas, a firm with a few hundred people could give a few hundred times the limit.

So there has to be not only a cap on individual contributions, but also some related cap on at least law firm contributions, speaking of law firm not just as the firm's own pocket, but [including all] the members of the firm, employees of the firm.

The task force also said that once the limits are set, if they are violated, the judge should not be able to sit in the case in which a lawyer or a party has given excessively. Or, if the jurisdiction doesn't decide to have general campaign finance limits, then the task force thought it of the highest importance that there be a special limit for purposes of disqualification; that is, if somebody gives more than X, they shouldn't be able to have a case before that judge.

CR: Was any consideration given to a blanket disqualification any time a lawyer contributor is before a judge?

Schotland: No. I would say that's the extreme of symbol-driven, impossible purity. Lawyers, I would think, and the task force said, have an obligation to support good judges for one thing. For another thing, where are the judges going to get money from if they don't include, among the contributors, the lawyers?

For a last thing, the task force thought and said that lawyers' contributions are less problematic than contributions from likely litigants, because the lawyers know that they're going to win some, they're going to lose some, and the best thing they can get is a judge that's going to do a decent job. Litigants are only going to be concerned about which way that judge is going to go on some single issue.

So to single out lawyer contributions, or single out anybody's contributions, and say, if there's any contribution at all, then the judge can't sit, would mean that either judges can't raise funds or they can't sit. It's utterly unworkable.

CR: How would indirect contributions be handled?

Schotland: The task force says they should be aggregated. If Steve

Leben is running and Roy Schotland gives him up to the limit — let's assume the limit is a thousand dollars — Roy Schotland should not be able to give another thousand dollars to a political action committee and another thousand dollars to a party, having an agreement with the party and the political action committee that they will do things to help the Steve Leben campaign. All of that should be put together and should be under the \$1,000 cap, whether it's direct to the candidate or indirect.

Now, that doesn't mean that absolutely any contribution to a PAC or party would be included. Let's say, for example, the party doesn't do anything special for Leben's campaign, they just include him on the list of all the candidates whom they're supporting. That would not make the contribution "earmarked" for Leben's benefit.

Without the aggregation, you've just got a sham limit; that is, I can give [the maximum] dollars to the candidates and then more dollars elsewhere to help the candidate. And the parties and PAC's are happy to take the money for the candidates, if they're for them, anyway.

CR: Another of your recommendations may be considered part of the pay-to-play proposals themselves —

Schotland: Yes.

CR: — in prohibiting the appointment by judges of lawyer contributors who have given over specified amounts.

Schotland: Yes.

CR: Is that proposal running into the same opposition that other pay-to-play proposals are?

Schotland: First of all, I don't know, because the other pay to play is under review now in the ABA ethics committee, and I don't know where they're coming out. This one, the limit on appointing excessive contributors, has been supported by a report by an ad hoc review committee that is looking over the task force report ..., and they are supporting the limit on pay to play in judicial appointments.

The problem has been that in some jurisdictions, at least in specialized courts, there has been a strong pattern of large contributors or at least significant contributors getting appointments to a disproportionate extent.

You can't simply say that you bar the person completely, because you'd want

to be able to appoint people to pro bono work, and there might be very special cases where somebody has very special expertise and [that] would be highly relevant. In those situations, the judges would be able to make the appointment so long as they make explicit findings, formal findings, about why they're doing it.

Also, the review committee has said if there's a rotation system, then it's okay if there have been large contributors because they're just getting appointed by rotation and not simply because of the contributions.

CR: The first recommendation made by the task force was to provide for full disclosure, particularly of lawyer contributions, and to make sure that those disclosures are filed with the local court clerk so they're easily accessible to the public. If nothing else got adopted, would adoption of that disclosure provision itself be a substantial improvement?

Schotland: Well, people would differ about "substantial." The one area of campaign finance regulation that has been the most widely supported is disclosure. I think the way the task force wrote it is not quite as happy as the way the Conference of Chief Justices and the review committee are writing it.

The whole idea of having the local filing was simply to make it more available, and if, in fact, the jurisdiction has central filing which is electronic, so that people anywhere in the state can get the data by coming on line, then you don't need local filing.

So the real point is either go electronic, which ... I think almost as many as twenty states now have and probably another ten will have very soon, either have the electronic so everybody can get in easily, or if you don't have the electronic, then have it filed not only centrally but also locally.

CR: Your task force also made some miscellaneous recommendations, such as shortening the time period for raising money, forbidding carry-over of campaign funds from one election cycle to the next, promoting more voter's guides by bar and citizens groups, and getting better data collection on expenses of campaigns.

Let me ask you about the shortened period for raising money. Back in 1987 after the Rose Bird election, you partici-

pated in a panel discussion where you said, "Judges facing campaigns have to move early. They have to get a committee early, they have to get fund raising early."³ Have you changed your view?

Schotland: First of all, the task force recommendation was simply that states that have not already adopted the fairly longstanding Model Code provision, which gives a limit on the [fundraising] period, should adopt it.

I forget at this moment ... just how many states have it. I think it's around half still don't have it.⁴ What you're speaking to, I think, really goes to what the time period should be as distinct from whether there should be any limit.

If there is no limit at all, that means that, as did happen in some situations, the day after, let's say, the 1998 elections occur, the next day, judges who may not be up for not only two years but four or six years are on the phone raising money. They can raise money literally all the time.

And it's one thing to say it ought to be early, whatever you decide early is. It's another thing to say they should never be limited. A Florida court did hold that the Constitution knocks out any time limit. The task force thought that is an impossible answer as well as wrong. The idea that judges could raise money all the time is about as problematic as anything we can think of.

CR: At this point, what's the status of the ABA consideration of your task force report, and where will it go from here?

Schotland: There is an ad hoc review committee that has been working. It includes [Texas] Chief Justice Phillips and the California lawyer I mentioned earlier, Ronald Olson. They will have a report out ... which aims at a discussion ... in February where the ABA will be meeting in Los Angeles.

Then the review committee presumably will make this or that change in their report and bring that before the [ABA] House of Delegates in August, when either the ABA committee report

or original task force report recommendations will be up for action.

CR: By the way, how unique is the process of electing judges in this country?

Schotland: Well, I understand that Switzerland has some of it, and the Soviet Union used to, I don't know if they still do. I think you can stop there. So it is all but completely unique.

CR: The task force indicated that it continues to support merit selection rather than election.

Schotland: Yes. But note that most merit systems include retention elections. So you still, even with merit, don't get away from elections of some type, and if you have elections of some type, you have trouble.

Two justices, Nebraska and Tennessee, were defeated in ... '96, ... in Nebraska because the justice had written the opinion in which that court unanimously struck term limits. And the term limits people came after him and spent supposedly around \$200,000. They haven't filed any disclosure documents, they say they can't be required to. And although the justice raised about \$80,000, he was not retained.

In Tennessee, it was a group aimed at making courts much more conservative and supported, lamentably, by the Republican leadership in the state, including the governor, if I remember correctly, and one or two United States senators, saying Justice Penny White should be defeated. And she was.

So even if you have retention, you're going to have campaign finance problems at least as a potential, and I think, in fact, that potential is being seen much more frequently.

Let me just note, earlier you spoke of the voter's guides.

CR: Right.

Schotland: The hope is that they would be official, not just by bar or other citizen groups. Several western states have for generations had official [ones], and the Washington Supreme Court in '96 and '98 by court order got out over a

million voter guides on the judicial elections, which were inserts in Sunday newspapers: 1.2 million in '96, 1.3 million in '98.

CR: Let me ask you a couple of questions based on your service as a clerk at the U.S. Supreme Court. You clerked during the October 1961 term of the Court. From your experience, how do you view the duty of a clerk to keep secret what went on there?

Schotland: Total. At least, at very least, until all the justices who were there during that clerk's time have left the court.

CR: Have you ever been asked to talk to a biographer —

Schotland: Yes.

CR: — or writer or other author?

Schotland: Oh, yes.

CR: How have you responded?

Schotland: There is a man who's been working over ten years on Justice Brennan's biography. He is the so-called official biographer, and I think most of the clerks did speak with him pursuant to the justice [having] selected him to do this. And we trust his sense of the large picture and sense of discretion. We aren't yet at the point where all the justices who sat with Brennan are gone, but the biography is taking long enough that that may happen.

CR: Have you read the Lazarus book, *Closed Chambers*?

Schotland: I've been in it, yes.

CR: Do you have any thoughts about the —

Schotland: Not printable.

CR: Okay. Let me ask you —

Schotland: That was not meant to be a no comment. That was meant to be a, "I think it's outrageous."

CR: You were there for *Baker v. Carr*, which was written by Justice Brennan while you were serving there. In looking in one of the biographies — that is apparently an unauthorized one — I noticed that most of the press reports immediately after the opinion praised the minority opinion more than Justice Brennan's. *The Washington Post* said:

3. *After California, What's Next for Judicial Elections?*, 70 JUDICATURE 356, 360 (1987).

4. Professor Schotland's recollection was accurate. According to the task force report, "at least" twenty-four states limit the time period

in which a judge can raise funds. ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PART TWO 48 (1998).

“On the basis of legal scholarship and forensic ability a jury would award victory to the minority. In contrast to Mr. Frankfurter’s tour de force, the opinion of the Court, written by Mr. Brennan, was pallid and technical.”

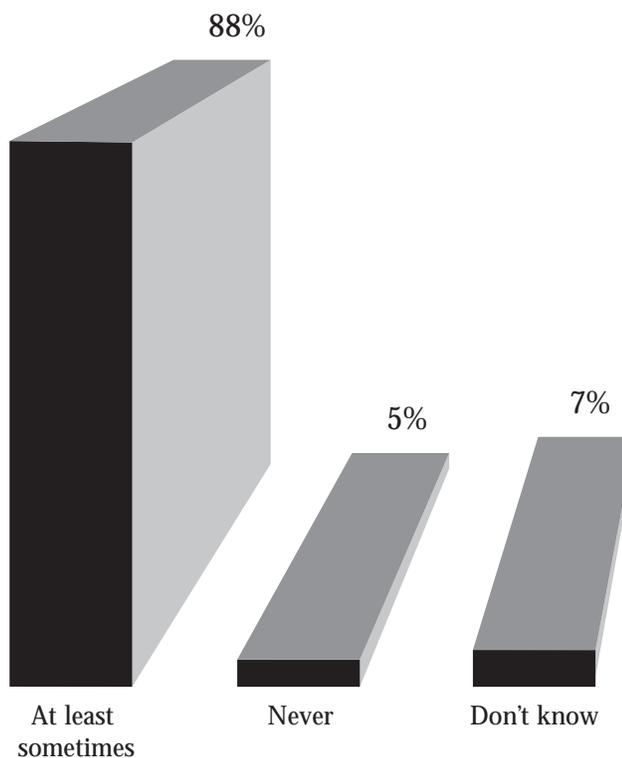
I’m not sure that the forces of history would stand with *The Washington Post* this many years later, but I wonder whether such reviews ever bother a justice who’s written an opinion.

Schotland: If they do, I’ve never heard of it. I think anybody who had participated in that one would say, if you want to call it pallid and technical, that might be totally accurate, but perhaps it was that way in some measure in order to have a majority. There might have been members of the Court who would not have been happy with some elegant rhetoric.

CR: What was it like to be at the Court in that year with such a strong split between Justice Frankfurter and the conservatives, and Black and Douglas, among others, on the liberal side?

Schotland: It was Frankfurter’s last year. It was a swan song time. He had almost had a majority in the prior term on that case, and Justice Stewart thought it ought to be reargued. If you look in the November 1997 *Harvard Law Review*, Anthony Lewis, the *New York Times* correspondent who had written a book about reapportionment back before *Baker v. Carr*; had a piece on *Baker* behind the scenes, which includes some of the documentation showing how the case worked out.⁵ Frankfurter ended up with nobody but Justice Harlan with him. He had had Justice Whittaker, who by the time the case came down had retired, after a very short period on the court. And he had had Justice Clark, who switched to join Justice Brennan. And Stewart, who originally wasn’t sure which way he would go, was part of the Brennan majority.

PENNSYLVANIA SURVEY: ARE JUDGES INFLUENCED BY BIG DONORS?



Source: Pennsylvania telephone survey of 500 respondents, January 1998. Question asked: “In Pennsylvania, how frequently do you think the decisions made by judges in their courtrooms are influenced by large contributions made to their election campaigns – always, most of the time, some of the time, or never?” Full responses: always – 7%; most of the time – 30%; some of the time – 51%; never – 5%; don’t know – 7%; reported margin of error – 4.4%. Survey done for the Pennsylvania Special Commission to Limit Campaign Expenditures, appointed by the Pennsylvania Supreme Court.

And much of the quality of the Brennan opinion was precisely because it was trying to be as narrow as possible to make a step which was obviously a large one, and Justice Brennan, once he had a larger than five-justice majority, was not about to change the opinion and disregard the loyalty of Justice Stewart, who had said he would go along with something, to use *The Washington Post*’s language, not his, that

was pallid and technical.

CR: How did having the chance to work for Justice Brennan affect your career?

Schotland: Well, as one of my professors said of most Supreme Court law clerkships, from there it’s all downhill.

CR: Thank you.

5. See Anthony Lewis, Jr., *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29 (1997). In this memorial tribute to Justice Brennan, Lewis relies upon working documents from Justice Brennan’s chambers, made accessible to Lewis by Justice Brennan, including a detailed memorandum written at the time by Schotland and his fellow clerk, Frank I. Michelman, who later became a law professor at Harvard. In Lewis’ account, Justice Clark ultimately changed his position after he determined that the citizens of Tennessee had no effective remedies other than recourse

to the federal courts. When Justice Clark wished to discuss his changing views with Justice Brennan, a snowstorm prevented Clark from going to the Supreme Court building. Schotland drove Justice Brennan to meet with Clark, and waited an hour and a half in the car before Brennan returned to announce Clark’s change of position. 111 HARV. L. REV.34-35. The Lewis piece provides a fascinating inside view, apparently from authorized sources, of the shaping of the Court’s opinion in *Baker v. Carr*.

**SUMMARY OF RECOMMENDATIONS FOR JUDICIAL CAMPAIGNS
ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS**

Amend Canon 5 (Model Code of Judicial Conduct) to require judges' campaign committees to file disclosure reports with clerk of court (unless otherwise readily available to the public, as with electronic access) and to provide full disclosure of lawyer contributions.

Amend Canon 5 to provide for specific contribution limits for each individual, PAC, firm or political party. The limits would be set by each jurisdiction in light of its own experience and practice.

Amend Canon 5 to provide for recusal, on motion, when a lawyer who has contributed more than the limit on contributions (or, if no contribution limit has been adopted, a separate limit for recusal purposes) is before the judge.

Amend both Model Code of Judicial Conduct for judges and Model Code of Professional Conduct for lawyers to prohibit appointment by judge of lawyer-contributors who give more than a specified amount, except for *pro bono* appointments or in extraordinary circumstances accompanied by specific findings.

Take related steps to reduce the need to raise funds and encourage compliance with campaign regulations, including:

- Limiting the period during which judicial campaigns may solicit contributions (through adoption of Model Code Canon 5C(2) in states that have not yet adopted it);
- Prohibiting carryover of campaign funds;
- Encouraging bar associations and other citizen organizations to produce more voter's guides to promote informed voting; to have judicial campaign oversight committees, to assist candidates in meeting appropriate standards and to assure that campaigns promote public confidence in the judiciary; and to have better data collection on judicial campaign finance practices; and
- In those state with public funding of some campaigns, considering whether such funding should be extended to judicial campaigns.

Dangerous Visitations...



AP/Wide World Photos, Elaine Thompson

A taxicab passes the parking spot in Seattle where Melanie Edwards and her two-year-old daughter, Carli, were murdered in December by Carli's father. The car was parked across from Common Ground, a social service agency through which court-ordered visitations between Carli and her father were arranged.

It's a judge's worst nightmare - a mother and child killed in the process of making a court-ordered visitation exchange. But it can happen, as a Seattle case in December made clear, and even when at least some precautions are taken. In an accompanying article, Professor Julie Kunce Field outlines the steps judges can take to maximize the safety of children and victims of domestic violence.

Killer 'Lived and Breathed' His Estranged Wife's Terror

BY KIM BARKER

SEATTLE TIMES STAFF REPORTER

He built her a jail before he shot her.

Carlton Edwards told his wife so many times that he would kill her, the threat is now a numb soundtrack for people she knew. He wouldn't let her shop alone or write her teenage daughter in England. She covered black eyes with theatrical makeup.

So when Melanie Edwards took her daughter and left, burrowed down so far that her husband couldn't find her, she started to see possibility. She planned to move into her own apartment, with her daughter, next month.

"It's a waste," said Michele Tokarski, one of Melanie Edwards' closest friends from Illinois. "She was trying to get out of this, doing all the right things. And then this happened."

Carlton Edwards shot and killed his wife and 2-year-old daughter two weeks ago, outside the one place that he knew they would be, Common Ground, a neutral spot where he picked up his daughter for visits.

The murder charges against Carlton Edwards were upgraded last week to first-degree-aggravated murder.

Two days after the shooting, he called a friend and said he shot his wife and daughter because his wife "tripped out" and tried to spray him with pepper gas.

"Obviously what I did was completely wrong," Carlton Edwards told the friend.

Last weekend he shot and killed

himself in the San Francisco Bay Area after a police officer approached him.

Since the killings, people involved with the Edwards family have looked to plug the holes in the system. Common Ground has already decided to change its drop-off procedure to protect custodial parents from accused batterers.

Small fixes have been suggested. If authorities order a batterer's assessment, to evaluate whether a parent seeking visitation is dangerous, it should be done before the parent gets to visit the child, said Gene Oliver, Melanie Edwards' lawyer.

On Nov. 10, King County Superior Court Commissioner Leonid Ponomarchuk said Carlton Edwards could have overnight visits with his daughter. He also ordered a batterer's assessment, which wasn't done.

Some domestic-violence advocates are calling for changes. The group Survivors in Service was planning a demonstration from noon to 3 p.m. today at the King County Courthouse to protest "court decisions that kill women and children."

It's not easy to make these decisions. A court commissioner hears as many as 15 cases on family-court motions and protection orders in one morning, Superior Court Commissioner Kim Prochnau said. She makes decisions based on slim reading, slimmer testimony and gut instinct, and she's been lucky.

"It is an art rather than a science, determining what the risk is," she said.

On paper, Carlton Edwards had no domestic-violence history.

He met Melanie Cunningham in

February 1992 while on vacation in England. At the time, Edwards was still married to his second wife. Four days after divorcing his wife and six months after meeting Cunningham, Carlton Edwards married her. They lived outside Chicago.

Carlton Edwards wanted a son, but Carli was born in August 1996.

"This man wouldn't buy her a stroller for her baby," said Sharyn Romano, who threw the baby shower. "He was just a tyrant. He lived and breathed her fear."

Carlton Edwards, an airline mechanic, moved the family to the Seattle area in June 1997. A year later, they moved to a home in Gig Harbor.

Melanie Edwards decided to leave after a fight in late July. A friend snapped photos of her bruised leg and swollen eye. Melanie Edwards said that her husband had slammed her head in the door and had punched her repeatedly in the back of the head. She planned her escape and left Oct. 19, three days early, because she was afraid.

"I need to be able to stay where he cannot get to us," she wrote when she filed for divorce. "If that means leaving this area I will need to do that. I cannot stress too much how much danger I believe I have put myself in by leaving him. The only thing worse would have been to stay."

She went to a shelter for a few days. Kim Frinell, who had worked with Melanie Edwards, and his wife offered to let her move into a tiny studio apartment beneath their garage in Magnolia.

See 'Killer,' page 22

Killer

Continued from page 21

Melanie Edwards moved in with her daughter, her clothes and a couple of decorative prints of Harlequin masks. She started a job at the Museum of Flight. Her old boss paid Risk Management Services for a bodyguard to protect her from her husband.

Her lawyer hid her file, concerned that her husband might break into his office to find it. On Nov. 2, Melanie Edwards won a protection order. On Nov. 10, Carlton Edwards was granted overnight visits with his daughter.

Melanie Edwards left the courtroom that day and drove straight for a car lot, where she traded in her 1996 Ford Taurus for a car that her husband wouldn't recognize.

Although scared of him, she started to feel that she would survive, co-workers said.

"She reminded me of someone who had been in prison and suddenly tasted freedom," said Michael Friedline, her boss at the Museum of Flight.

She asked everyone to call her

Melanie Cunningham. She had a date on the Friday after Thanksgiving, and she wore Sandra Frinell's crystal necklace and fox jacket.

She ran up her credit cards, bought new silverware, dishes and quilts, all still in their wrappers in her hide-away apartment, waiting to be opened when she moved. The new furniture from Ikea was supposed to be delivered last Thursday.

Early this month, she sat down with Risk Management President Michael Carlucci and said she no longer needed his help. At the time, Carlucci thought Carlton Edwards still posed a significant risk to her, and he told her so.

Carli got sick the next weekend. Melanie Edwards still brought her to see her father for their fifth visit. When he brought her back three days later, 13 minutes early Dec. 9, Carlton Edwards said Carli was better.

Carli ran inside Common Ground to play. She asked the program supervisor to comb and fix her hair. For the first time, Carlton Edwards was friendly toward Common Ground staff members before he left.

Melanie Edwards showed up at 6:22 p.m., picked up her daughter

and walked back to her car, parked 50 yards away on the street.

Carlton Edwards approached and shot them both in Melanie Edwards' new car, at 6:30 p.m.

Co-workers held a memorial service for Melanie and her daughter a week ago at the Museum of Flight. About 100 people grasped for meaning. They looked at pictures of Melanie and Carli throughout the service - mother smiling in the borrowed fox jacket, daughter in a matching yellow-orange hat and outfit, holding a stuffed bunny.

Melanie Edwards used to say that she didn't have many friends because her husband wouldn't let her see people socially, unless he was there.

At the service, several people walked to the microphone, said they'd miss her, said she'd be surprised at the turnout.

Carlton Edwards was only mentioned once by name during the service, in a prayer. Otherwise, he was called "someone who promised to love them."

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Visits in Cases Marked by Violence:

Judicial Actions That Can Help Keep Children and Victims Safe

by Julie Kunce Field

Melanie Edwards' story is disturbing. It ought to be disturbing. Ms. Edwards tried to do everything right, but the system failed her and her daughter, and now both are dead. Ms. Edwards' case illustrates one of the most troublesome situations facing courts with jurisdiction over family law matters: cases in which there is domestic abuse.

Unfortunately, domestic abuse by one parent on another is common. Domestic abuse can include emotional and psychological abuse as well as physical assaults. Children are harmed by domestic abuse, even if they are not the direct victims of the physical violence.

How to make sure that children's best interests are met, and that the children and the victim stay safe, are paramount concerns. But, in any given case, a judge must determine whether and how a child should have a continuing relationship with the offending parent. Visitation, or parenting time, between the offending parent and the children becomes problematic, and can cause judicial headaches, and participant heartaches.

This article will discuss some of the methods available to courts to fashion visitation orders that can ensure safety for the children and the victim parent, and identify recent developments in the area of supervised visitation in family law cases.¹ This article will also discuss some things that might have been done differently for Ms. Edwards, which may have avoided the tragic result in her situation.

I. DOMESTIC ABUSE IS COMMON, AND WOMEN AND CHILDREN ARE THE USUAL VICTIMS.

Statistics on domestic abuse indicate that many family law cases will involve domestic abuse at some level, and that women and children are the most common victims:

- There are five million reported incidents of domestic abuse every year.²
- Women are about ten times more likely than men to experience violence committed by an intimate.³
- Approximately 3.3 million children witness their parents' interpersonal violence each year.⁴
- More than fifty percent of abusers will be abusive of their partners in a subsequent relationship.⁵
- In thirty-two to fifty-three percent of all families in which women are being beaten, their children are also the victims of abuse by the same perpetrator.⁶
- Up to seventy-five percent of battered victims have left or are trying to leave men who will not let them go.⁷
- In 1992, 1,414 women were known to have been killed by their husband, ex-husband or boyfriend.⁸

II. DOMESTIC ABUSE IS ABOUT POWER AND CONTROL.

The key factor characterizing domestic abuse is one partner's need to control the other. Abuse and violence generally occur after the man has wooed and charmed the woman.

The author expresses her appreciation to Kansas Attorney General Carla Stovall and to her assistant, Carolyn Ward, for their help in providing information for this article.

Footnotes

1. For a similar discussion of these issues directed to legal aid attorneys and indigent clients' concerns, see Julie Kunce Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, CLEARINGHOUSE REV., Special Issue 1996, at 295.
2. BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (Aug. 1995).
3. BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (Jan. 1994).
4. B. E. Carlson, *Children's Observations of Interpersonal Violence in Battered Women and Their Families: Intervention Strategies and Treatment Programs* (1984).
5. Daniel Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 53 (Jan. 1994).

6. J. Edleson, *Mothers and Children: Understanding The Links Between Woman Battering and Child Abuse*, paper presented at the Strategic Planning Workshop on Violence Against Women, National Institute of Justice, Washington, D.C., March 31, 1995. The paper can be found online at <http://www.mincava.umn.edu/papers/nij.htm>.
7. This is often the most dangerous time for a woman and explains why most women stay in a battering relationship. She stays because she is in fear for her life if she leaves. See Martha R. Mahoney, *Legal Images of Battered Women*, 90 MICH. L. REV. 1 (1991).
8. BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (Aug. 1995) (based on the Uniform Crime Reports collected by the FBI, which reported the victim-offender relationship for 61 percent of the reported homicide incidents).

It has been demonstrated that when a woman tries to leave her abuser, the violence escalates....

Many survivors of domestic abuse describe their partner in the initial stages as loving, attentive, protective, and charming. It is only later, after the woman is more invested in the relationship, that abuse starts. Abuse can start subtly, with degrading and isolating behavior, insults, and "put downs." The man begins to convince the woman that she is causing unhappiness to him and in their relationship and

that she needs to change. He will control her by isolating her from her friends and family, and will blame her for his problems. He will often accuse her of infidelity and blame her for his jealousy, whether there is a realistic basis for his claims of jealousy or not. He will control her finances and her comings and goings. He will often use children, pets, and other people and things important to her as a means of controlling her. He will lash out with violence, then claim remorse and a willingness to change. Until the next time, when it happens again. These characteristics of controlling and manipulative behavior are seen again in the offending parent as custody and visitation cases play out in court.

Women are often asked why they don't leave a violent relationship. The answers are complex. The level of control by the batterer often includes financial control, making it difficult for the victim to have any means of escape. One of the main areas of control that a batterer maintains over his partner is the threat to take the children from her.⁹ It also has been demonstrated that when a woman tries to leave her abuser, the violence escalates, and is more likely to become lethal.¹⁰ Given that, staying in the abusive relationship is often a means of survival.

The batterer has often convinced the victim that he can do what he wants to her without risk of punishment, a claim the victim will believe if, as is often the case, she has called the police and the batterer had insignificant (if any) consequences because of his abuse. In public, the abuser often is seen as someone who is caring and kind, even while committing extreme acts of violence or torture in private. Batterers almost universally deny or minimize the abuse and blame the woman rather than themselves. This reversal, where the batterer claims to be the victim, is often seen in courtrooms. The victim, who may have been subjected to years of abuse and mental conditioning by the batterer, may appear in court as emotional, hysterical, and frustrated with the fear that her batterer may be able to convince the court that she (not he) is the prob-

lem. The batterer, on the other hand, may seem to be in complete control of the situation, while he denies or minimizes the abuse, or claims to be the victim himself.¹¹

Courts must understand domestic violence, and the complexity of the situation, when fashioning a visitation order. A lack of understanding of domestic violence and the use of power by the batterer in that relationship could lead to harmful results for the victim and her children. Visitation, in the context of a domestic violence case, becomes one more means of the batterer controlling the victim, and maintaining power over her. It gives the batterer opportunities to interact with her, directly or through the use of the children, and can endanger her at the critical time of separation.¹²

III. DOMESTIC ABUSE HAS PROFOUND, HARMFUL EFFECTS ON CHILDREN.

Children in violent homes are victims of abuse whether or not they are the direct targets of the violence:

Another way to look at the situation is this:

Where there is physical and sexual violence in the home, the children are witnesses to a series of crimes in their own homes, and they are at risk themselves for being direct victims of a crime. The constant psychological and emotional abuse directed by a parent at the family also conveys a powerful and lasting lesson about the roles of men and women in relationships.¹³

Nearly all children in violent homes hear or see the abuse:

Hiding in their bedrooms out of fear, the children may hear repeated threats of injury, verbal assaults on their mother's character, objects hurled across the room, suicide attempts, beatings, and threats to kill. Such exposure will arouse a mixture of intense feelings in the children. These feelings include fear that the mother will be killed, guilt that they could not stop the violence, divided loyalties, and anger at the mother for not leaving.¹⁴

Even a single episode can produce post-traumatic stress disorder. The immediate effects are withdrawn, anxious, or aggressive behaviors by the child exposed to parent-on-parent violence. Teenagers are more likely to turn to alcohol or drug abuse. The long-term effects include the risk of being a victim or an abuser in adulthood.¹⁵ Children from homes where there is parent-on-parent violence are more likely to be physically abused themselves by the battering parent. Surveys show that between forty-seven and fifty-four percent of men who had battered a partner had also abused a child more than twice a year,

9. See Joan Zorza, *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113-15 (1996).

10. See Mahoney, *supra* note 7, at 5-6, 64-65, 82; Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 593 n.44 (1996).

11. See Marilyn McDonald, *The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases*, COURT REVIEW, Spring 1998, at 12.

12. See sources cited in note 10 *supra*.

13. N. Masliansky, *Child Custody and Visitation Determinations When Domestic Violence Has Occurred*, CLEARINGHOUSE REV., Special Issue 1996, at 273.

14. Saunders, *supra* note 5, at 52 (citations omitted).

15. *Id.* at 52-53.

whereas only seven percent of men who had not battered their partner had severely abused a child more than twice a year.¹⁶ More than half of abusers will be abusive of their partners in a subsequent relationship,¹⁷ a fact which means that children may be exposed to domestic violence on visits at the abuser's home with his new partner. Children are often used as tools by the abuser to continue to have power and control over the victim. Custody and visitation battles that are brought to court often become the forum for continuing abuse and control.¹⁸

Given the profound effects of domestic violence on children, courts that are presented with domestic violence cases involving children should be particularly concerned about keeping the children safe, which often means keeping the victimized spouse safe, and not blaming the victim for the abuse, or allowing the abuser to continue his abuse through court processes.

IV. WHAT JUDGES CAN DO TO AID IN SAFETY DURING VISITATION.

When setting a visitation schedule in any case, the court has the goal of trying to balance the children's relationships with both the custodial parent and the noncustodial parent. Where there is violence, issues such as where and when pickup and drop-off of the children occur, and who will be present during those transfer times, are critical. Issues that may not be problematic in a nonviolent relationship, such as when the children may call the noncustodial parent, or adjusting visitation times because of schedule changes, can be harrowing in a relationship marked by violence.¹⁹ The court's understandable desire may be to insist that the parties work out these apparently minor matters themselves, and the court may not be able to understand why the parties don't seem to be able to do that. But asking the parties to work out their own visitation details would be comparable to asking a former hostage to return to his captors alone, without any weapons or back-up support, to negotiate the surrender of weapons, and the release of other hostages or goods. The hostage-takers have all the guns, and the power, and the ability to control the outcome to their design. Similarly, the battered woman has no relative power without legislative and court assistance to design a visitation plan that can help her and the children stay safe.

To help ensure safety, the court that is faced with a case like Melanie Edwards' can do certain things. First and foremost, the court must have a clear understanding of domestic violence. Had the court had a better understanding of domestic violence

in Melanie Edwards' case, perhaps the outcome would have been different. From the news reports, it indicates that the court allowed overnight visits, even though an ordered batterer's assessment had not been done. Had the assessment been done, perhaps there would not have been any visitation allowed. The cost of waiting a few days, or even a few weeks, for a determination of whether a parent is dangerous to the child or to the victim is small compared to the cost of underestimating the danger.

The news report also said that "on paper, Carlton Edwards had no domestic violence history." By that, it likely means that Ms. Edwards did not rely on calling the police as a safety measure. Many battered women don't call the police for help, knowing that they will be hurt worse if they do call, and that it is likely that the police response will not help them.²⁰ But there was easily accessible evidence that Melanie Edwards was battered – photographs, and many friends and acquaintances who knew – the abuse was apparently common knowledge. Ms. Edwards' former employer was so concerned about her safety that he had hired a security guard to protect her. Even without police records, there was ample evidence that Carlton Edwards was dangerous to Ms. Edwards, and, therefore, harmful to their daughter as well.²¹

The safety of the victim and her children should always be the primary consideration. The victim's own assessment of the danger must be believed, and considered. In her court filings, Melanie Edwards tried to stress the danger she was in. Had her concerns been taken more seriously, she may not have been put into the situation she was.

Courts that have pending cases before them, in which there is an allegation of domestic violence, can and should do the following in order to make safe decisions:

1. Understand domestic violence.²² Recognize that women and children are most often victims, and that men rarely are victims, though they may try to portray themselves as victims.²³
2. Have the primary concern be the safety of the victim and her children. All orders should be drafted with that concern foremost in mind. "Fathers' rights" or "parents' rights" should always be secondary to safety.

The safety of the victim and her children should always be the primary consideration.

16. Surveys are cited in Saunders, *supra* note 5, at 51-52.

17. Saunders, *supra* note 5, at 53.

18. Joan Zorza, *supra* note 9, at 1117 n. 2. "Five percent of abusive fathers threaten during visitation to kill the mother, 34 percent threaten to kidnap their children (and 11 percent actually do abduct them), and 25 percent threaten to hurt their children." *Id.*

19. See Julie K. Field, *Visiting Danger: Keeping Battered Women and Their Children Safe*, CLEARINGHOUSE REV., Special Issue 1996, at 295.

20. Kathleen Waits, *Battered Women and Their Children: Lessons from One Woman's Story*, 35 HOUSTON L. REV. 30, 36 n.17 (1998) ("Battered women's decisions not to call the police may be quite reasonable. Given how poorly many police respond to

domestic violence, ... a woman may legitimately fear that her situation will be worsened, not improved, by calling the police.")

21. See text *supra* at notes 13-18.

22. An excellent, easy to read introduction to domestic violence is found in Kathleen Waits' latest article. See Waits, *supra* note 20.

23. Even after the murders, Carlton Edwards tried to portray himself as a victim of wife who "tripped out" and tried to attack him with pepper gas. See generally Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality of Battered Women*, 29 FAM. L. Q. 273, 304 (1995) (explaining that abusers "frequently deny, minimize, lie ... and manipulate others, including the courts, to further control and punish their victims").

If assessment tools are available, use them before ordering any exchange or visitation....

3. Believe the victim.²⁴ The cost of erring on the side of not believing her could be enormous.
4. If assessment tools are available, use them before ordering any exchange or visitation of the children.
5. When fashioning visitation schedules, consider some of the suggestions included in this article, and know how any

local, supervised visitation center operates to ensure client safety.

Safety provisions can include consideration of some or all of the following: (1) supervised visitation, (2) supervised or otherwise safe pick-up and drop-off, and (3) other restrictions or requirements, such as limiting the use of alcohol or controlled substances, or successful completion by the perpetrator of a batterer's intervention or counseling program as a condition of visitation.²⁵ In thinking through the visitation arrangement, judges should consider what will happen when schedules need to be changed, and how the telephone will be used, either for visitation or as a means of contact. The primary consideration in setting visitation should always be safety of the victim and her children.

A. SUPERVISED VISITATION

Supervised visitation arrangements are common in child abuse and neglect proceedings, but are not as routine in custody, divorce and paternity actions. Because there usually is not the same kind of agency involvement in a family law case as in an abuse or neglect matter, there is no built-in mechanism for supervision. The hard questions to answer, then, are: (1) who will do the supervision; (2) where will the supervision take place; and (3) how will the costs of supervision be paid?

Federal funding is available for the development of supervised visitation centers.²⁶ Because of this increase in funding availability, and the recognized need for the services, many

communities now have supervised visitation centers available as an option for domestic relations cases. Where there is a supervised visitation center available, the questions of who will supervise the visits, and where they will take place, can be answered within the program, after the program considers the court's orders, the particular needs of the children and the parents, and the safety concerns of the children, parties, and center staff. Supervised visitation centers generally can accommodate a range of requirements, from constant, one-on-one supervision on- or off-site, to supervision only during the exchange of the child. The supervisors may be licensed mental health professionals or paraprofessionals (preferably with specialized training).²⁷ Judges should contact their local domestic violence shelter to find out whether a supervised visitation center is operating in their area.

Before making any referral, the court should understand what services the center can and cannot provide. It is critical that a judge who is considering sending a case to a center know what that center's capabilities are, and whether the center can provide services for a particular case. By keeping open communication between the court and the center, the parties and the children will be better served. Courts should also evaluate whether a center meets minimum requirements that will help protect children and parties.

The Attorney General of the State of Kansas has developed an excellent guide of what supervised visitation centers should offer.²⁸ Kansas is one of the first states to develop statewide guidelines and to provide grant funding²⁹ to establish and expand centers. The Kansas guidelines set out the purpose and goals of visitation centers, define terms, describe a preferred administrative structure and record-keeping requirements, and create guides for referrals, service provision, confidentiality, staffing and training, and safety recommendations. A review of the Kansas guidelines can help courts determine whether the service provider that serves their community has met the basic standards of service and safety necessary in the implementation of supervised visitation and exchange of children.

The State Justice Institute recently funded a study that examined 1,049 cases referred to five supervised visitation pro-

24. See Waits, *supra* note 20, at n.55 and 99-100.

25. The American Bar Association's Center on Children and the Law recommended these visitation conditions in its book, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* (1994), as did the National Council of Juvenile and Family Court Judges in its Model State Code on Domestic and Family Violence (1994) [hereafter "Model Code"]. In addition, the Model Code also suggests that the visitation conditions include a requirement that the abuser pay a fee to defray the costs of supervised visitation, that overnight visits be prohibited, that the abuser post a bond guaranteeing the safe return of the children, and that any other condition necessary for the safety of the children, the parent or other family or household members be set.

26. This legislation was part of the Local Crime Prevention Block Grant Program, Pub. L. No. 103-322, 108 Stat. 1838 (1994), and

is codified at 42 U.S.C. § 13751 (1998). Other funds are available through a provision of what was officially labeled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, more commonly called the Welfare Reform Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, for services related to needy families, which in pertinent part are codified at 42 U.S.C. § 669b (1998).

27. R. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229 (1995).

28. OFFICE OF KAN. ATTY. GEN. CARLA STOVALL, CHILD EXCHANGE AND VISITATION CENTER GUIDELINES (1998).

29. State funds were collected through a \$10 increase in the marriage license fee. Kan. Stat. Ann. § 23-108a (1997). The enabling legislation passed by the Kansas Legislature appears at Kan. Stat. Ann. § 74-7334 (1997) and Kan. Stat. Ann. § 75-720 (1997). Federal matching funds were made available through 42 U.S.C. § 13751 (1998). See also 42 U.S.C. § 669b (1998).

grams around the country.³⁰ The SJI survey looked at empirical information on the cases, and surveyed programs, families, courts and professionals affiliated with the cases. The SJI report has some findings of interest to judges. For instance, the researchers found that the average case receives supervised visitation services for between nine and ten months, during which time there are about four visits per month, each lasting about two hours. Of particular interest to courts using supervised visitation services are the limitations on what supervisors can offer the court in terms of making assessments of the families and the need for additional services for most of the families who use the facilities.

Standards of the Supervised Visitation Network³¹ and the Kansas standards³² both specify that, except for therapeutic supervised visitations, which are conducted by mental health professionals, supervisors should not be performing evaluations or making recommendations to the court about what should happen with the parties or the children. The supervisors can, and should, give factual information to the court about what occurs during visitation or exchanges, so that the court can make a decision about what is the best next step for the family members. Once again, communication between the court and the service provider is critical if the court is to get the type of factual reporting that will be most helpful to it. For example, one judge complained about his local program's reports:

Case managers summarize the reports visitation specialists prepare. A lot of the detail is lost. They just say, "Visitation is going well." It is extremely generic when they distill it. They don't understand that we are looking for detail to support their recommendations. They seem shocked that we ask for evidence. There should be a middle ground between the weekly, detailed reports and the generic summaries that case managers prepare.³³

A discussion between the judge and the program staff about what kind of information the judge needs in reports could prevent this kind of problem.

The SJI report emphasizes that "...supervised visitation programs...work best when they compliment [sic] other therapeutic interventions."³⁴ The report recommends:

[T]he court must play an aggressive oversight role. It must order families into the supervised visitation program, refer the families elsewhere for the evaluations the court needs to make decisions about custody and visitation, and schedule timely review hearings to ensure that case progress is being monitored and that the families are receiving needed services.... In many respects the family court should emulate the juvenile court in supervised visitation cases and assume a similar oversight role.³⁵

[T]he court must play an aggressive oversight role.

Among the good news in the SJI report is that the great majority of visiting parents (71%) said they could relax and enjoy the visit, and that the great majority of those surveyed (73%) indicated that the same was true of the children. But with the remaining families who had difficulty relaxing during visits, the researchers conclude that these families are in greater need of therapeutic remedies to address their underlying psychopathologies, personality disorders, and substance abuse problems.³⁶ Essentially, the SJI report concludes that "supervised visitation is an extremely valuable service, but [it] is not a substitute for therapeutic interventions and judicial oversight."³⁷

In making orders referring cases to supervised visitation centers, the order must provide sufficient information so that the center can do its job, the parents can know what to expect, and the court can be informed of problems that may arise. Most essentially, the order must contain the referral, the services to be provided (e.g., supervised visitation or supervised exchange), identify the duration and frequency of contact, who may have contact with the children, who will pay for the services, and the type and frequency of reporting back to the court the progress of the visitation. In order for the center to do its job effectively, it needs to know what other orders may be in effect that might impact on the supervision. For example, in some states, the court is required by statute to maintain the effectiveness of the protection order.³⁸ In other states, protec-

30. J. PEARSON & N. THOENNES, SUPERVISED VISITATION: A PORTRAIT OF PROGRAMS AND CLIENTS, (1997). The report is available from the Center for Policy Research (303-837-1555).

31. The Supervised Visitation Network defines itself in a mission statement as "a community of individuals who are committed to the delivery of supervised visitation services to children and families." The Network is finalizing guidelines for its members to follow in developing supervised visitation programs. Current drafts of the standards and guidelines developed by the Supervised Visitation Network are available from their office, 1213 S.E. Second Avenue, Grand Rapids, Minnesota 55744 (218-327-6737).

32. See *supra* note 28.

33. Pearson & Thoennes, *supra* note 30, at 64.

34. *Id.* at 144.

35. *Id.* at 144.

36. *Id.* at 143.

37. *Id.* at 144.

38. See, e.g., Cal. Fam. Code § 3031 (1998), which provides that "the court is encouraged to make a reasonable effort to ascertain whether or not any ... protective order ... is in effect that concerns the parties or the minor. The court is encouraged not to make a custody or visitation order that is inconsistent with the ... protective order ... unless the court makes both of the following findings[:] (1) the custody or visitation order cannot be made consistent with the ... protective order...[and] (2) the custody or visitation order is in the best interest of the minor." See also, e.g., N.J. Stat. Ann. § 2C:25-29 (1998), which requires that "parenting time arrangements shall not compromise any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant."

Family members themselves can often be bullied and intimidated by the abuser.

tion orders will provide that visitation is an exception to the order. The visitation center staff needs to know whether there is a protective order in effect, and what the parameters of the order are in regard to the visits. Therefore, a court order referring the case to a center may require the parties or the clerk's office to provide copies

of relevant orders, and to identify specifically what those orders are. A model order referring a case to a supervised visitation center is found at the conclusion of this article.

How the costs of supervised visitation will be covered can be difficult. Few states have taken the steps that Kansas has, and provided state funding to supplement the federal funds available. Without subsidies, costs can be prohibitive at some centers for all but wealthy and upper-middle class parties. Many centers, though, provide their services at no, low or reduced cost, based on a sliding scale. The Model Code suggests that the abuser be required to pay the fees associated with supervised visitation.³⁹ That suggestion makes sense, because the abuser's conduct is the reason that supervised visitation or exchange is required. Judges should become familiar with the rates of services at the centers which serve their communities, in order to be able to evaluate the availability of such services for any given case.

The court should also consider what sanctions would be appropriate for violation of a court's order regarding visitation. A battering parent who does not comply with the court's orders setting supervised visitation should face consequences for his conduct. He may believe that if he does not comply with the requirements imposed that the supervision will be canceled. One thing that the court should not do to deal with non-compliance is to reward the batterer's non-compliance by taking the case out of the program and putting the visitation arrangements back into the hands of the parents. The court should fashion real consequences, such as limiting or eliminating visitation for a period of time. And, upon review in all cases, the Court should be prepared to modify the supervised visitation based on the reports received from the center, and to meet the changing needs of the parties and the children.

B. FAMILY MEMBER SUPERVISION

Where supervised visitation centers are not available, or for indigent clients without funds to pay for a supervisor, many

custodial parents may opt for a family member to do the supervision. Although family members may seem like the only choice for a supervisor, they are often a very poor choice. A common tactic of batterers is to isolate their victims so that they have no ready source of emotional support.⁴⁰ As a result, the victim may not have contact with any of her own family members who may be willing to supervise visitation. Family members from either party's family may, consciously or unconsciously, assist the batterer in his attempt to control and intimidate his former partner. Family members may not recognize the abuse for what it is, or may apply victim-blaming myths about domestic violence that are prevalent in our culture.⁴¹

Family members themselves can often be bullied and intimidated by the abuser. Unlike professionals or paraprofessionals at a visitation center, family members rarely have had any training in safety planning, or in methods for responding to physical or emotional manipulation. It might be difficult for family members to put themselves in the position of reporting violations of court orders during visitation, and the supervisor's partiality might be in question, were the family member to present his or her report to the court.

The Model Code recognizes that family members may, at times, be the only supervision option. The Code therefore suggests that "[i]f a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation."⁴² The rationale of the Code's drafters was that "[w]hen those supervising visitation are furnished clear guidelines related to their responsibility and authority during supervision, they are better able to protect the child should the perpetrator engage in violent or intimidating conduct toward the child or adult victim in the course of visitation."⁴³ Even in jurisdictions where the Model Code provision regarding supervised visitation is not in effect, the court can still order such conditions on the supervised visitation, in the best interests of the children.

C. TRANSFER ISSUES

Visits in domestic violence cases provide the perpetrator with the certain knowledge of when his victim will be at a particular place. If the court is not careful, it could also provide him with her address (if he does not already know it). Given that danger, judges must be cautious about setting out transfer locations. At minimum, if the abuser does not know the victim's address, nothing in the transfer should reveal that information. The Model Code and the statutes of many states make it clear that the address of the victim may be kept confidential.⁴⁴ Even if a given state's legislation does not provide for

39. Model Code, *supra* note 25, § 405, comment, at 35.

40. See DULUTH DOMESTIC ABUSE INTERVENTION PROJECT'S POWER AND CONTROL WHEEL. This graph describing tactics used by abusers is available from most domestic violence programs and shelters, and in many common references on domestic violence. It can be found online at:

<http://www.infoexchange.net.au/wise/DVIM/DAIP.htm>. See also C. Kirkwood, *LEAVING ABUSIVE PARTNERS* 53-54 (1993).

41. See NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT

WORK AND IN THE COMMUNITY (Mary P. Koss, et al., eds. 1994), at 8-9.

42. Model Code, *supra* note 25, Sec. 405(5).

43. *Id.* at § 405(5) Commentary.

44. See, e.g., Model Code, *supra* note 25, § 405; California law, CAL. FAM. CODE § 3100 (1998); Florida law, FLA. STAT. ANN. § 741.30 (1997); Michigan law, MICH. COMP. LAWS ANN. § 600.2950 (1998); New York law, MCKINNEY'S FAM. CT. ACT § 154-b (1997); Pennsylvania law, 23 PA. CONS. STAT. ANN. § 6112 (1998).

confidentiality of addresses, courts need to be aware that non-custodial parent knowledge of the custodial parent's address is not a requirement for visitation.

Many supervised visitation centers will provide for supervised exchanges of children as one of their services. This option is probably the safest, because it can provide documentation of compliance with court orders, trained personnel, and a child-friendly environment. Other locations that have been used for transfer of children in domestic violence cases include police stations and other public locations, such as restaurants or parks. Police stations, while probably viewed as the safest venue, are not typically child-friendly places in which to wait. Restaurants or other public locations may not provide any real safety, since passers-by may not want to get involved in what appears to be a "domestic dispute," even where there may be threats of violence. Having the transfer take place in the home of a third party or relative raises some of the same concerns that supervision by a relative does: lack of training, inability to stop the abuser if he becomes violent or threatening, and reluctance to report violations.

The method and timing of the transfer can influence the location, and help determine safety planning. For example, when visitation centers plan for safe exchange, they generally will time the transfer so that the custodial parent brings the child to the center well before the non-custodial parent is due to arrive, so that both parties are not present with the child at the time of the exchange. That kind of safety planning for the exchange is not possible where the exchange is taking place at a public location or police station. And at the home of a third party or relative, the third party may not be able to enforce the requirement that the parties not be present at the same time. If the non-custodial parent, for example, refuses to leave after dropping off the children so that he can be there when the custodial parent arrives, there may not be much that the relative can do to make him leave, or to warn the custodial parent before she arrives that the other party is still there. Given all of these considerations, courts should be thoughtful about when, where and how the transfer of children should take place in domestic violence cases.

D. OTHER LIMITS THAT A COURT MAY CONSIDER

The Model Code suggests a number of obligations that a court may choose to require of the violent parent before visitation may be had, or during visits. Those restrictions may be combined with a supervised visitation requirement, or may be ordered without supervised visitation. When ordering such restrictions, a court should consider how compliance will be monitored, and fashion provisions that will allow for reporting of violations by agencies or persons other than just the victim herself.

Restrictions can include limitations on drug and alcohol use

generally and, in connection with transportation of the children, a requirement that a batterer attend and complete a batterer's treatment program, limits on the use of the telephone to contact the children, and guidelines for what will be allowed when schedules must be modified.

1. DRUG AND ALCOHOL USE RESTRICTIONS

Certainly it is not in the best interests of children to be transported by a parent who has been using alcohol or other intoxicating substances. Nor is it in their best interests to be under the care of an intoxicated adult. But the restrictions on the use of drugs or alcohol during visits go beyond those two concerns. The National Council of Juvenile and Family Court Judges gathered information that demonstrates the connection between substance abuse and family violence. Drinking or substance abuse during visitation can disinhibit control of behavior, or can be the excuse or trigger for violence.⁴⁵ Estimates of alcohol or drug use by violent men range from fifty-two to eighty-five percent — rates three times those of nonviolent men.⁴⁶

Restrictions on the use of drugs and alcohol during visits seems like a minimal and appropriate order that can do much to protect children in domestic violence cases. The imposition of a requirement that an abuser complete a substance abuse treatment program, or attend such programs or meetings on an on-going basis, are other provisions a court may order.

Most judges are very familiar with methods for measuring compliance with orders not to use drugs or alcohol, including, for example, monitoring AA or other relevant program attendance, conducting random drug testing through court services or probation offices, or through out-patient treatment programs. Many supervised visitation centers may have the capacity to monitor whether a parent is intoxicated at the time of visitation or exchange, and can report that information to the court. In addition to simply ordering a prohibition against drug or alcohol use during visits, the court should plan for what will happen if its order is violated, and the restricted parent tries to pick up the children while intoxicated, or becomes intoxicated while the children are visiting. Because it could be dangerous to put the onus on the victim to decide, at the time of exchange, that the visiting parent is intoxicated and should not have visitation that day, the court should consider who and how that decision will be made at the time of the visitation. For example, if the visitation exchange is made at a supervised visitation center, the trained center staff can and should make

[C]ourts should be thoughtful about when, where and how the transfer of children should take place....

45. R.W. Fagan, et al., *Reasons for Alcohol Use in Maritally Violent Men*, 14 AM. J. OF DRUG & ALCOHOL ABUSE 371-92 (1988).

46. Model Code, *supra* note 25, Appendix IV, Prevention and Treatment (citing G. K. Kantor & M. Straus, "The Drunken Bum"

Theory of Wife Beating, 34 SOC. PROBS. 213-30 (1987); Fagan, *supra* note 45; JJ Fitch & A. Patantonio, *Men Who Batter: Some Pertinent Characteristics*, 171 J. NERVOUS & MENTAL DISEASE 190-92 (1983)).

A poor batterer's program can be more hurtful than helpful.

that determination for the safety of the children. A relative who is supervising the exchange would need to be trained and should be specifically authorized by the court's order to say that visitation will not occur if the visiting parent arrives intoxicated.⁴⁷

2. BATTERER'S TREATMENT OR COUNSELING PROGRAMS

Although attendance at a batterer's treatment program⁴⁸ is not a cure-all, it can "offer offenders a chance at rehabilitation, but cannot be expected to work with many who attend. Courts need to recognize that batterer treatment needs to be used as one option in an array of sanctions used to deter domestic violence."⁴⁹ It can be difficult to evaluate the effectiveness of treatment programs but, according to the National Council of Juvenile and Family Court Judges, good programs are long-term and have goals that include: increasing the offender's responsibility for his battering behavior; developing behavioral alternatives to battering; increasing constructive expression of all emotions; developing listening skills and anger control; decreasing isolation and developing personal support systems; decreasing dependency on and control of the relationship; and increasing the batterers' understanding of the family and social facilitators of battering.⁵⁰ In addition, in order for the treatment to have the greatest chance of being effective, the court should look at the length and intensity of the treatment program, evaluate the program's quality, monitor victim's safety, and hand down sanctions for non-compliance.⁵¹ Any recidivism of the violence since the treatment was ordered should be a basis for the court giving serious consideration to imposing additional sanctions, or requiring more restrictive, or supervised visitation. Attendance at a batterer's treatment program may be ordered not just in regard to a visitation or custody case, but also in connection with a criminal action against the batterer. Judges should be sure that visitation orders are consistent with any criminal sentencing provisions, such as completion of treatment programs.

A poor batterer's treatment program can be more hurtful than helpful. Judges who are concerned that the treatment program in their community does not meet an acceptable standard of effectiveness should work with any local coordinated community response organizations to identify judicial concerns, and should attempt to implement an effective program

that meets the goals identified by the National Council of Juvenile and Family Court Judges.

3. TELEPHONE VISITATION

The telephone can be a means to maintaining a connection between children and their non-custodial parents. But, as with the other provisions discussed in this article, what may work in a non-violent relationship can be dangerous in a relationship where there has been violence. The telephone itself is often used as a means of harassment by the violent party; any court orders that permit or even require telephone contact between the batterer and his children can be a court-sanctioned invitation to terror.

In allowing for telephone visits, the court must consider the arrangements that will ensure safety. Of course, the court must evaluate whether telephone contact is in the best interests of the children at all, and whether they are of an age where that kind of contact is meaningful. The court should avoid giving the batterer access to the victim's phone number for purposes of visits, or emergencies. In the case of a true emergency, the police or medical professionals can contact the victim directly, rather than the abuser.

With current telephone technology, there can be danger even if the victim or the child places the call from home. With the advent of caller-ID, her telephone number may be displayed for the abuser. Bell South Telephone Company reported to the Florida Governor's Task Force on Domestic Violence that it was unrealistic to believe that an abuse victim who uses a telephone is safe, even if she uses current technology to block calls or uses a pay phone, cellular phone or calling card. With the advances in caller-ID and enhanced call return, even blocked numbers may appear on the phone bill of an abuser.⁵²

Given the potential for harassment, and the high cost associated with the victim having to repeatedly change phone numbers or acquire unlisted phone numbers once the batterer has discovered her number, judges should consider carefully any arrangements for telephone visitation before ordering this type of contact.

4. MODIFICATIONS TO VISITATION SCHEDULES

Changes in visitation schedules may seem to be one of those trivial issues that the parties should be able to work out themselves, without court intervention. In non-violence cases, that should be true. In cases where there has been violence, visitation changes can become one more means of control by the batterer. The batterer may not appear on time to pick up or

47. As discussed in text at notes 40-43, *supra*, a supervised visitation center is preferable to a relative as a supervisor, but if a relative is going to be a supervisor, he or she must be trained to handle the offender and must be empowered to respond in appropriate ways to inappropriate conduct during visitations and exchanges.

48. Batterer's treatment, as described here, is not substance abuse treatment, though that may be ordered as well. See A. Ganley, COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS (Center for Women

Policy Studies, Washington, DC, 1981)(treatment of substance abusing batterers is a necessary part of rehabilitation, but that alone will not stop the battering).

49. *Id.*

50. *Id.*, cited in Model Code, *supra* note 25, Appendix IV.

51. *Id.*

52. FLORIDA GOVERNOR'S TASK FORCE ON DOMESTIC VIOLENCE, FIRST REPORT 41 (1993).

return the children, he may change visitation days or times at the last minute, or he may repeatedly petition for increased or altered, visitation times.

The use of a supervised visitation center for exchange of the children, or for supervised visits, can limit the controversy over changing scheduling. The center staff can report to the court the missed or late visits, and their knowledge of the situation can assist the court in evaluating new petitions for visitation. The center itself may impose consequences on the non-complying parent, for instance, charging a fee for every minute the parent is late.

Even without the use of a supervised visitation center, judges can also limit the controversy by fashioning a very specific visitation schedule that builds in consequences for non-compliance. There should be no room for ambiguity or negotiation.⁵³ For example, the order should state the precise days, times and parameters of visits, including any conditions on the non-custodial parent. The Model Code drafters suggest that the posting of a bond for the safe return of the child could be one condition. If the non-custodial parent is late or does not appear, the order should specify the range and type of consequence to be expected. Monetary penalties are appropriate, and could be spelled out. An order could specify that it is the court's intention that a parent violating the time of return, for example, would be penalized \$100 for a first violation, \$200 for a second violation, and so on. The violation penalties would be for contempt of the court's orders, and would be in addition to any fines imposed by the visitation center. Although violation of the order would still have to be found by the court, including the penalties would be consistent with the Model Code and ABA Report's suggestion that the orders be specific and without room for negotiation.

Specific orders that understand the victim's need for safety can also limit the victim feeling as though she must limit or withhold visitation as a means of protection. Orders should not put victims in the untenable position of having to choose between safety for herself or her children, or with violating the court's order. By understanding domestic violence from the victim's perspective, the court can realize that a victim's refusal to allow visitation under certain conditions, or fleeing to prevent visitation under certain conditions, is an effort to stay safe and alive, rather than a tactic to alienate the abusive parent from the children. Where a custodial parent has refused visitation, the court should examine carefully the reasons behind that refusal, and if fear of domestic violence is raised as the reason for the refusal, the court should review its orders to determine how the victim and the children can be assured of safety.

V. CONCLUSION

No doubt one of the most difficult decisions faced by courts that hear family law cases is determining how to balance safety

and access in domestic violence cases. Visitation problems, though annoying in any case, can prove deadly in domestic violence cases if not handled appropriately. Specific orders that spell out consequences, the use of supervised visitation centers, and safety planning can help limit the harm domestic violence victims and their children face during visits or exchanges. Along with these technical tools, however, a better understanding of domestic violence, and its complexities, can assist judges in devising solutions in particular cases. By understanding more deeply the perspective of the victim, and the children who experienced violence in their home, judges will be able to limit any further harm to these sufferers, and give them a setting that can help them to heal.



Julie Kunce Field (B.A., University of Nebraska, 1982; J.D., University of Chicago, 1985) is an associate professor of law at Washburn Law School. She has run law clinics at Washburn and the University of Michigan law schools, supervising students on cases involving domestic violence, employment discrimination, and other issues of concern to indigent clients. Professor Field has written extensively on domestic violence and the law, and has conducted numerous training programs for attorneys, judges, advocates, law enforcement and others on those issues. Currently, she is working on a book on confidentiality and privacy issues as they relate to domestic violence and the law.

53. MODEL CODE, *supra* note 25, §405; THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOC., *supra* note 25.

ANY COURT, U.S.A.

Name of party,)
Plaintiff,)
vs.)
Name of other party,)
Defendant.)

Case No. _____

ORDER FOR SUPERVISED VISITATION OR EXCHANGE

The Court hereby orders:

- 1. The parties shall participate in the [] visitation [] exchange program offered at [name of center] with the following child(ren) [list names and dates of birth of child(ren)]:
2. The type of service between the visiting parent and the child(ren) will be [check only one]:
3. The parties are ordered to contact [name of center] at [center's phone number] within 10 days of service of this order.
4. The parties are directed to comply with the rules of [name of center], and to attend orientation as required by center staff.
5. The cost of supervision or exchange will be divided as follows [check only one]:
6. Only the following people may provide transportation of the visiting child(ren), along with, or in place of, either the visiting non-custodial parent or the custodial parent [list name and relationship]:
7. This order shall continue until [check one]:
8. Reports shall be made to the Court forthwith whenever services have had to be terminated, a party fails to comply with the Court's orders, when there has been a situation in which he has endangered a child or a party, or when requested by the Court.
9. Failure to comply with any of the provisions of the Court's order may result in the Court issuing sanctions against the responsible party.

IT IS SO ORDERED.

Judge

Resources: The Key to Determining Time on Appeal

by Roger A. Hanson

INTRODUCTION

There is only limited agreement among the nation's state appellate court judges, lawyers, and court managers on how long it should take to resolve appeals, although interest in this topic has been expressed for more than fifty years.¹ The American Bar Association (ABA) has tried to formulate numerical time standards in terms of the maximum number of days that should elapse between the date of the filing of the appeal and its resolution. However, this effort was met with resistance because the criteria have been viewed by some as unrealistic.² There has been a call by judges and judicial organizations, including the Council of Chief Judges of Courts of Appeal, for information from a variety of courts on how long they actually take to handle appeals before setting new standards.

In response to the need to know why some courts are more expeditious than others, the National Center for State Courts combined data collected from a previous study of thirty-five state intermediate appellate courts³ with new data on managerial aspects of those same courts. The earlier study focused primarily on resources (e.g., number of case filings per judge) and organizational characteristics (e.g., method of selecting the chief judge, statewide versus regional jurisdiction) as possible explanations of variation in court processing time. The results of that study demonstrated the importance of resources: courts with more cases relative to the number of judges and legal staff took longer to resolve appeals. However, these con-

clusions were drawn without the benefit of data on managerial characteristics, such as the presence of local time standards, the extent of judicial training in case management, whether the judges monitored and discussed the court's degree of timeliness, and so forth. To remedy this gap, a questionnaire was mailed to the original thirty-five courts, asking for their responses to questions about various managerial policies.⁴ The returned questionnaires were then used to develop quantitative and qualitative indicators of management. Data from these management measures were then integrated into the original dataset, although sufficient management data were obtained from only thirty-one of the thirty-five courts.

The key findings from the new analysis, including both resource and management variables, are:

- Resources remained the most potent factors in accounting for why some courts are more expeditious than others. They had substantial effects on case processing time. A statistical analysis indicates that if a court has 100 more case filings per judge than another court, the court will take approximately four months longer to resolve seventy-five percent of its cases. On the other hand, by assigning an additional law clerk to each judge, processing time would be shortened by about three months.
- Many of the organizational variables found previously to be statistically significant were now found to be of negligible consequence in the overall picture. Alternative ways of

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Footnotes

1. See Will Shafroth, *Judicial Statistics of State Courts*, 31 J. AMER. JUD. Soc. 116-19 (1947).
2. The ABA's initial effort set forth criteria aimed primarily at state intermediate appellate courts. The key criterion was that the length of time from the filing of the notice of appeal to the court's resolution should be 280 days or fewer for all mandatory appeals. See APPELLATE DELAY REDUCTION COMMITTEE, A.B.A. APPELLATE JUDGES CONFERENCE, STANDARDS RELATING TO APPELLATE DELAY REDUCTION (1988). However, critics contended that a less stringent standard was needed because most courts could not approximate the 280-day deadline. See Carl West Anderson, *Are the*

American Bar Association's Time Standards Relevant for California's Court of Appeal?, 27 U.S.F.L. REV. 301 (1993). The critics prevailed and the ABA reformulated its criteria in several fundamental ways. First, the idea of a single, national standard was dropped. Courts were encouraged instead to adopt their own time goals. Second, guidelines called Reference Models were proposed as alternatives to uniform standards. Reference Models stipulated specific numerical criteria, but the deadlines were offered as starting points for discussion, not prescriptions. Third, different Reference Models were provided for intermediate appellate courts and courts of last resort. For intermediate appellate courts, the Reference Models suggest that seventy-five percent of mandatory and discretionary appeals should be resolved in 290 days or fewer and that ninety-five percent of appeals should be resolved in 365 days or fewer. A.B.A. JUDICIAL ADMINISTRATION DIVISION, STANDARDS RELATING TO APPELLATE COURTS (1994). Subsequently, the Appellate Court Performance Standards Commission has adopted timeliness as one of the basic standards that all state appellate courts should meet. However, the Commission followed the ABA's thinking and urged courts to set their own numerical timeframes. APPELLATE COURT STANDARDS COMMISSION & NATIONAL CENTER FOR STATE COURTS, APPELLATE COURT PERFORMANCE STANDARDS (1995).

selecting the chief judge, whether an opinion was required in every case, and whether restrictions were placed on oral argument were only of minor influence and have been omitted from the final statistical model used to explain inter-court variation in processing time. Among the organizational variables, only statewide jurisdiction retains some significant role.

- Management was relatively less influential than resources in the updated analysis. Basic principles of modern case management did appear to encourage timeliness. However, they were of such limited statistical significance that their impact could not be translated into specific case processing time savings.

The message for judges, attorneys, policymakers, and taxpayers is that courts need to seek and to receive adequate resources. Management has a positive role to play in the achievement of the efficient use of resources, but resources are essential.⁵

RESOURCES AND MANAGEMENT: COMPETING EXPLANATIONS

No single variable — or even several variables of the same type (e.g., case characteristics) — likely will account for why some appellate courts are able to decide cases within a shorter timeframe than others. The speed of the appellate process likely is a product of different types of factors, including both tangible and intangible ones (e.g., the charisma of a chief judge that spurs every judge to maximum efficiency). Because few efforts have been made to explain, instead of merely describing, court-processing time, a consensus on what to measure, how to measure it, and what the quantitative results really mean has not yet emerged. Conventional agreement on measurement issues will not result, furthermore, unless initial research studies are replicated and refined.⁶

Until widespread agreement arises, a reasonable strategy is to focus on some factors that plausibly shape case processing

time and to see how closely they track with processing times. Future research can then refine those measures and contribute to the development of time standards that are both aspirational and realistic. Hence, the goal of the current research is to describe how long it takes appellate courts to resolve their cases, to determine what combination of measurable factors best explains why some courts are more timely, and to suggest implications for time standards and court improvement.

Results of the previous research⁷ suggested that resources and organizational characteristics were associated with variation in court processing time. The larger the number of cases filed with the court (per judge) each year, the more time it took the court to resolve appeals. Additionally, courts with statewide rather than regional jurisdiction — and those that selected their chief judges by popular election or gubernatorial appointment rather than internally (e.g., seniority, selection by members of court, or by the chief justice) — were more expeditious. Yet, despite the fact that these factors are important to consider, the initial analysis did not include the role of management, which is frequently asserted to be a reason why some trial courts are more expeditious than others.⁸

Do courts that have adopted the ABA's standards or have developed their own standards work more efficiently? Are courts that discuss timeliness at monthly meetings more aware of and responsive to the need for resolving cases quickly? Are courts whose judges and legal staff attend educational programs where case management is discussed more attuned to effective ways of resolving cases? Does the use and configuration of legal staff make a difference?

These questions were part of the written questionnaire sent to the chief judges of the thirty-five courts previously studied.⁹ A visual inspection of the responses reveals no obvious, clear cut connection between management or the use of legal staff and timeliness, as shown in Tables 1 to 6. Courts that are relatively more expeditious do not appear to have adopted case management principles more frequently than other courts. However, eye measurement is not the most reliable method for

3. See ROGER A. HANSON, *TIME ON APPEAL* (1996).

4. For the benefit of future researchers, the questionnaire is reprinted as an appendix to this article.

5. This study — and related research — seeks to determine whether resources and management are of sufficient importance that they can influence timeliness among a wide variety of courts. If so, judges and court managers have powerful tools in choosing how to organize their work and in justifying budget requests. A strong claim for additional resources can be made if variation in resources is shown to be related to longer (or shorter) case processing time across several courts that are different in jurisdiction, organization, and procedure. The focus of this research project does not imply that timeliness is the only goal that courts should pursue. Quality of the review on appeal is a key value. However, this article is limited to exploration of the extent to which resources and management influence timeliness.

6. Most of the literature emphasizes the need to reduce delay and suggests what sorts of delay reduction strategies should be introduced. The number of days it takes courts to resolve appeals is often calculated and bottlenecks in the processing of cases are targeted for

reform. See, e.g., RITA M. NOVAK & DOUGLAS SOMERLOT, *DELAY ON APPEAL: A PROCESS FOR IDENTIFYING CAUSES AND CURES* (1990). Yet, despite the positive value of these efforts, they do not address the question of why some courts are more expeditious than others. Delay reduction is not the same as an explanation for variation in court processing time, even if a common set of tactics is proposed and implemented.

7. See Hanson, *supra* note 3.

8. See BARRY MAHONEY, ET AL., *CHANGING TIMES IN URBAN TRIAL COURTS* (1988).

9. Because many of the original thirty-five courts have improved their performance since the case processing times were measured in 1993, those specific times might be misleading when read in 1999. As a result, the courts are presented in this article in terms of their relative positions. For readers who want to know what the numbers look like, the specific processing times can be found in prior reports. See Hanson, *supra* note 3; Dorothy Toth Beasley, et al., *Time on Appeal in State Intermediate Appellate Courts*, *JUDGES' J.*, Summer 1998, at 12, 14. However, the specific numbers are used in the statistical analyses below.

inferring patterns among a large number of courts. For this reason, a statistical tool was used to examine the simultaneous effects of multiple measures of resources and management practices on case processing time. When a variety of factors are examined together, do courts that have a particular combination of resources and/or management have longer (or

shorter) processing times than other courts? The statistical results presented below indicate that management lacks substantial explanatory power in accounting for why some courts take longer than others to resolve appeals, but resources have statistically significant consequences.¹⁰

TABLE 1
Did the Court Have a Time Standard Governing Steps in the Appellate Process That Was Set by Statute, Rule, or Informal Policy?

Name of Court*	Notice of Appeal to Submission of the Record	Completion of the Record to Filing of the Last Brief	Filing of the Last Brief to Oral/Argument/ Submission Without Oral Argument	Argument/ Submission to Decision	Notice of Appeal to Decision
Tennessee, Middle Civil	✓	✓	✓	✓	✓
Tennessee, East Civil	✓	✓	✓	✓	✓
Minnesota	✓	✓	✓	✓	
Tennessee, West Civil	✓	✓		✓	
Alabama, Criminal					✓
Georgia		✓			
Tennessee, Criminal	✓	✓		✓	
Maryland	✓			✓	
Texas, 11th District	✓	✓			
Pennsylvania	✓	✓	✓	✓	✓
Arkansas	✓			✓	
Missouri, South District	✓	✓	✓	✓	✓
California, 3rd District	✓	✓	✓	✓	✓
Missouri, West District				✓	
New Mexico				✓	✓
Missouri, East District	✓	✓	✓	✓	
California, 6th District	✓	✓	✓	✓	✓
Iowa					
California, 1st District	✓	✓		✓	
Colorado	✓	✓	✓	✓	
Texas, 13th District	✓	✓		✓	
Massachusetts	✓	✓	✓	✓	
New York, 4th Dept.	✓	✓	✓	✓	
Kentucky	✓	✓		✓	
New York, 1st Dept.	✓	✓	✓	✓	
Washington, 3rd Div.	✓	✓		✓	
Arizona, 1st Div.	✓	✓		✓	✓
Idaho	✓	✓	✓	✓	✓
Texas, 5th Dist.	✓	✓	✓	✓	✓
California, 2nd Dist.	✓	✓		✓	✓
Michigan	✓	✓	✓	✓	✓
Washington, 2nd Div.	✓	✓	✓	✓	

* Courts are ranked according to their degree of timeliness from most expeditious to the least. Timeliness is measured by the number of days taken to resolve seventy-five percent of mandatory appeals.

10. Regression analysis is the statistical technique that has been applied to the combination of resources, organizational, and management variables under study. This technique helps to sort out which variables make a difference in explaining variation in the

processing times of the thirty-one courts and which ones do not. Moreover, this technique produces a number, called a coefficient, which can be interpreted as the number of days that a factor contributes (e.g., the number of cases filed per judge) to processing time.

**TABLE 2
Management Training**

Name of Court*	Had Members of the Bench Attended Seminars, Conferences, or Workshops Where Appellate Caseload Management Was on the Agenda?				Had the Court's Legal Staff Attended Seminars, Conferences, or Workshops Where Appellate Caseload Management Was on the Agenda?		
	No, None of the Judges	Yes, But Only a Minority of the Judges	Yes, Over Half of the Judges	Yes, All or Almost All of the Judges	No, None of the Staff	Yes, But Only Those in Top Managerial Positions	Yes, Including Managerial and Nonmanagerial Positions
Tennessee, East Civil			✓		✓		
Minnesota				✓			✓
Tennessee, West Civil	✓				✓		
Alabama, Criminal	✓						✓
Georgia				✓		✓	
Tennessee, Criminal				✓	✓		
Maryland		✓				✓	
Texas, 11 th District			✓			✓	
Pennsylvania		✓				✓	
Arkansas		✓				✓	
Missouri, South District		✓			✓		
California, 3 rd District		✓				✓	
Missouri, West District		✓				✓	
New Mexico		✓				✓	
Missouri, East District		✓				✓	
California, 6 th District			✓			✓	
Iowa			✓				
California, 1 st District		✓				✓	
Colorado				✓		✓	
Texas, 13 th District				✓			
Massachusetts			✓		✓		
New York, 4 th Dept.		✓				✓	
Kentucky		✓				✓	
New York, 1 st Dept.		✓				✓	
Washington, 3 rd Div.				✓	✓		
Arizona, 1 st Div.		✓				✓	
Idaho		✓			✓		
Texas, 5 th Dist.		✓				✓	
California, 2 nd Dist.		✓			✓		
Michigan		✓				✓	
Washington, 2 nd Div.			✓				✓

* Courts are ranked according to their degree of timeliness from most expeditious to the least. Timeliness is measured by the number of days taken to resolve seventy-five percent of mandatory appeals.

The American Judges Association

The American Judges Association is the largest independent organization of judges in the United States. It has about 3,500 members, including members from Canada, Mexico, Puerto Rico, Guam, American Samoa and the Virgin Islands. About forty percent of AJA's members are state general jurisdiction judges, while another forty percent are municipal court or other limited jurisdiction judges. The remainder include state and federal appellate judges, federal trial judges and administrative law judges.

TABLE 3
Court Meetings and Timeliness

Name of Court*	How Frequently Was Timeliness Discussed at the Monthly Meetings of the Bench?			How Frequently Was Information on Case Processing Time Shared Among all of the Judges?		
	Never	Seldom	Regularly	Never	Seldom	Regularly
Tennessee, East Civil	✓					
Minnesota			✓			✓
Tennessee, West Civil		✓			✓	
Alabama, Criminal			✓			✓
Georgia			✓			✓
Tennessee, Criminal			✓			✓
Maryland		✓			✓	
Texas, 11th District						
Arkansas			✓			✓
Missouri, South District		✓			✓	
California, 3rd District			✓			✓
Missouri, West District			✓		✓	
New Mexico			✓			✓
Missouri, East District		✓			✓	
California, 6th District	✓				✓	
Iowa			✓			✓
California, 1st District			✓			✓
Colorado			✓			✓
Texas, 13th District			✓			✓
Massachusetts			✓			✓
New York, 4th Dept.			✓			✓
Kentucky			✓			✓
New York, 1st Dept.			✓			✓
Washington, 3rd Div.		✓			✓	
Arizona, 1st Div.			✓			✓
Idaho		✓		✓		
Texas, 5th Dist.			✓			✓
California, 2nd Dist.			✓			✓
Michigan		✓			✓	
Washington, 2nd Div.			✓			✓

* Courts are ranked according to their degree of timeliness from most expeditious to the least. Timeliness is measured by the number of days taken to resolve seventy-five percent of mandatory appeals.

American Judges Association - Midyear Meeting April 15-17, 1999 Fort Worth, Texas

This year's AJA midyear meeting will be April 15-17 in Fort Worth. The meeting consists of working sessions for the AJA Executive Committee and Board of Governors, as well as several other AJA committee's. This year's program also includes a half-day education program and working conference with a group of physicians, addressing aspects of drug and alcohol abuse and the judicial system's response to those problems. For registration information, contact the Association Services office at the National Center for State Courts, 300 Newport Ave., P. O. Box 8798, Williamsburg, Virginia 23187-8798; (757) 259-1841.

**TABLE 4
Special Procedures**

Name of Court*	Did Your Court Use a Special Expedited Calendar?		Did Your Court Use a Civil Settlement Conference?	
	Percentage of Civil Cases on Calendar	Percentage of Criminal Cases on Calendar	Yes	No
Tennessee, Middle Civil		1%		
Tennessee, East Civil				✓
Minnesota				✓
Tennessee, West Civil				✓
Alabama, Criminal				
Georgia				✓
Tennessee, Criminal			✓	
Maryland			✓	
Texas, 11th District				✓
Pennsylvania				✓
Arkansas				✓
Missouri, South District				✓
California, 3rd District				✓
Missouri, West District			✓	
New Mexico	60%	70%	✓	
Missouri, East District	20%	80%	✓	
California, 6th District				✓
Iowa				✓
California, 1st District			✓	
Colorado	5%	5%	✓	
Texas, 13th District	10%	20%	✓	
Massachusetts		30%	✓	
New York, 4th Dept.				✓
Kentucky			✓	
New York, 1st Dept.			✓	
Washington, 3rd Div.				✓
Arizona, 1st Div.		10%		✓
Idaho			✓	
Texas, 5th Dist.		17%	✓	
California, 2nd Dist.			✓	
Michigan	15%	15%	✓	
Washington, 2nd Div.				✓

* Courts are ranked according to their degree of timeliness from most expeditious to the least. Timeliness is measured by the number of days taken to resolve seventy-five percent of mandatory appeals.

American Judges Association - Annual Meeting and Educational Conference October 10-15, 1999 Cleveland, Ohio

This year's AJA annual meeting will be October 10-15 in Cleveland. The meeting consists of an educational conference plus AJA business meetings, which include a general assembly of all AJA members and meetings of the Executive Committee, Board of Governors and most other AJA committees. Expect the educational programming to span three days from October 11 to 13. More information on the annual meeting will be coming in later issues of *Benchmark* and *Court Review*.

TABLE 5
Use of Law Clerks
(Legal Staff Assigned to Individual Judges)

Name of Court*	Almost All Law Clerks Work for 1-2 Years	Some Law Clerks Work for 1-2 Years But Others Work Longer	Almost All Law Clerks Work as Professional, Long Term Employees
Tennessee, East Civil	✓		
Minnesota	✓		
Tennessee, West Civil	✓		
Alabama, Criminal		✓	
Georgia			✓
Tennessee, Criminal	✓		
Maryland	✓		
Texas, 11th District	✓		
Pennsylvania		✓	
Arkansas		✓	
Missouri, South District	✓		
California, 3rd District			✓
Missouri, West District	✓		
New Mexico	✓		
Missouri, East District	✓		
California, 6th District			✓
Iowa	✓		
California, 1st District			✓
Colorado	✓	✓	
Texas, 13th District		✓	
Massachusetts			✓
New York, 4th Dept.			✓
Kentucky			✓
New York, 1st Dept.			✓
Washington, 3rd Div.			✓
Arizona, 1st Div.	✓		
Idaho		✓	
Texas, 5th Dist.	✓		
California, 2nd Dist.			✓
Michigan	✓		
Washington, 2nd Div.	✓		

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Court Review The Resource Page

Each issue of *Court Review* features The Resource Page (see pages 55-56), which seeks to help judges find solutions to problems that may be facing them, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.

TABLE 6
Roles of Central Staff (Legal Staff Not Assigned to Individual Judges):
Percent of Central Staff Time Devoted to Various Efforts

Name of Court*	Number of Staff	Routine Appeals	Complex Appeals	Writs and Motions	Settlement Conference	Other (e.g., setting up dockets, proofing mandates)
Tennessee, East Civil	1	0%		50%		50%
Minnesota	6	40%	10%	20%		30%
Tennessee, West Civil	1	20%		60%		20%
Georgia	8	10%	10%			80%
Tennessee, Criminal	3	0%	40%	60%		
Maryland	8	80%		20%		
Texas, 11 th District	3	50%	25%	15%		10%
Pennsylvania	14	5%	5%	30%		60%
Arkansas	4	0%	25%			75%
Missouri, South District	2	10%	10%	50%		30%
California, 3 rd District	11	64%		29%		7%
Missouri, West District	3	90%		10%		
New Mexico	14	40%	45%	10%	2%	3%
Missouri, East District	2	0%		35%		65%
Colorado	16	89%		10%		1%
Massachusetts	16	50%	10%			40%
New York, 4 th Dept.	25	10%	50%	20%		30%
Kentucky	10	38%		38%	20%	5%
New York, 1 st Dept.	25	25%	60%	10%		5%
Washington, 3 rd Div.	12	0%	30%	60%		10%
Arizona, 1 st Div.	15	50%	50%			
Idaho	1	0%		1%		
Texas, 5 th Dist.	5	10%	5%	50%		35%
California, 2 nd Dist.	2	0%		100%		
Michigan	76	50%	35%	5%		10%
Washington, 2 nd Div.	3	50%		40%		10%

* Courts are ranked according to their degree of timeliness from most expeditious to the least. Timeliness is measured by the number of days taken to resolve seventy-five percent of mandatory appeals.

Court Review Author Submissions Welcome

Court Review invites the submission of original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to America's working judges. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of articles, essays or book reviews for *Court Review* are set forth in detail on page 44.

THE RESULTS

The best statistical explanation of variation in court processing time includes five characteristics, as shown in Table 7. They are: (1) the number of appeals filed per judge; (2) the number of legal staff assigned to individual judges; (3) whether the court has statewide or regional jurisdiction; (4) the presence or absence of time standards; and (5) the attendance or nonattendance by judges at case management workshops. Courts that had the following three attributes took longer than others to resolve appeals:

- (1) more appeals filed per judge;¹¹
- (2) fewer legal staff assigned to individual judges; and
- (3) regional rather than statewide jurisdiction.¹²

In addition, the last two of the five factors contributed to shorter processing times, although their effects were statistically weak and must, therefore, be considered more suggestive than definitive:

- (4) courts with time standards tended to be more expeditious; and

TABLE 7
Effects of Court Characteristics on
How Long It Took to Resolve
75 Percent of Mandatory Appeals in 1993

Court Characteristics	Unstandardized Coefficient	Standard Error	t-value	Significance level
Number of Mandatory Appeals Filed Per Judge	1.23	.387	3.166	.001
Number of Legal Staff Assigned to Each Individual Judges	-100.19	43.410	-2.308	.030
Court Has Statewide Rather than Regional Jurisdiction	-89.99	50.923	-1.767	.089
The Court Has Time Standards for the Stage Between NOA and Resolution	-51.74	57.106	-.906	.374
A Majority or More of the Judges Have Attended Programs Involving Case Management Issues	-34.44	55.659	-.619	.542
Constant R ² = .337	512.23	79.857	6.414	.001

The coefficients indicate the direction and the extent of the change in court processing time for a given change in each of the court characteristics under study. The coefficient of 1.23 associated with the filings per judge suggests that for every additional filing slightly more than one (1.23) day is added to processing time. For example, if two courts differ by one hundred cases per judge, the court with greater number of cases would be expected to take 123 (100 times 1.23) days longer to process seventy-five percent of its appeals than the other court. Now consider the coefficient of -100.19 associated with the ratio of law clerks to judges. This negative number indicates that every additional law clerk assigned to each judge reduces processing time by approximately 100 days (1 times -100.19). As a result, the addition of law clerks can be a countervailing force to the effects of increases in the number of cases filed per judge. Courts with statewide jurisdiction are likely to take 90 fewer days to resolve their appeals than those with regional jurisdiction. The negative coefficients of the two management variables (-51.74) and (-34.44) are in the predicted direction. Time standards and management training are associated with shorter case processing times. However, using the significance level of .10 as a criterion, these effects are not statistically significant. As a result, the values of these individual coefficients cannot be validly translated into specific case processing time savings. Finally, the R² of .337 indicates that the five factors, taken together, explain one-third of the variation in processing times.

(5) courts in which a majority of the judges had attended case management programs tended to be more expeditious.¹³

DISCUSSION

What do these results mean? Simply stated, they suggest that resources are relatively more important than management in court processing time. As the number of case filings increase, when measured against the number of judges, courts take longer to resolve their cases. Courts that have more law clerks assigned to each judge take a shorter time to process cases. Hence, as caseloads increase, the numbers of judges and law clerk needs to be reviewed, assessed, and placed on the agenda for possible expansion.¹⁴ The effect of resources, moreover, is felt after taking into account the role of management and statewide versus regional jurisdiction. Regression analysis spells out the independent effect of each factor — what each factor contributes above and beyond the influence of all the other factors. The measurable independent effects can be illustrated by considering the following situation.

Take two courts that are similar in several respects, such as one law clerk per judge, regional jurisdiction, the absence of time standards, and the participation of only a minority of judges at past case management seminars. Suppose that one court has 150 cases filed per judge and one has 250 cases filed per judge. The regression results suggest that the court with 250 filings will take approximately 123 days longer than the other court to resolve seventy-five percent of its mandatory

appeals. In a parallel manner, suppose that one court has two law clerks per judge and one has three. If the courts are similar in all other respects, including the number of case filings per judge, the court that assigns three clerks to each judge will take 100 days fewer than the other court to resolve seventy-five percent of its mandatory caseload.¹⁵

These differences are not inconsequential. They point to the central importance of courts seeking and receiving adequate resources. However, the specific coefficients should not be over-interpreted. For example, the estimated increase in case processing time associated with an increase of 100 filings per judge should not be taken literally or universally. The results pertain to the particular courts under study and to the range of factors taken into account. A broader set of courts and measures — or measurements in other years — might yield somewhat different statistical estimates. However, the results are sufficiently strong to expect that resources will remain a durable determinant, even with a more extensive database studied over a period of years.

The jury is still out on the impact of management. It contributes to delay reduction. On the other hand, the limited statistical power of the two management variables found to have a correlation cautions against their immediate adoption, at least to the extent that they are seen as key ingredients to a significant decrease in delay.¹⁶ Management techniques should be encouraged as a method of delay reduction, but with an understanding that their specific, positive effects remain to established.

11. Court resources are measured by the ratio of cases to resources to ensure comparability across courts. Appeals per unit of resources (e.g., judges) achieve a desired level of standardization among different courts to permit a fair and valid test of the effects of resources. Judges are measured by the number of permanent, authorized positions and the number of full-time equivalent positions obtained through the use of senior judges, visiting judges, or pro tem judges.
12. The effects of statewide jurisdiction in reducing case processing time are not intuitively obvious. Why should statewide versus regional jurisdiction make a difference? One answer is that statewide jurisdiction may be capturing the effects of several unmeasured variables, such as the length of the chief judge's tenure, the location of the judges' chambers in a single versus multiple locations, the degree of each judge's autonomy. Judges in courts with statewide jurisdiction might be more likely to comply with court-wide policies (e.g., tight timeframes) because the chief judge might be able to act as a more effective enforcer due to greater span of control, authoritative status, and ability to detect noncompliance. Obviously, there are possible counterexamples, but this variable has proven to be of significance in both the original and the reanalysis. Hence, it seems worthwhile for future researchers to uncover what lies behind this formal category in terms of what managerial disadvantages might lie in regional jurisdiction arrangements.
13. Organizational variables found to be statistically significant in the previous research, see Hanson, *supra* note 2, proved to be of virtually no significance in the reanalysis. For example, the effects of the method of selecting the chief judge, the requirement that the court write an opinion in every decided case, and the imposition of restrictions on oral argument were of virtually no impact in the updated analysis. Finally, some items on ques-

tionnaires proved to be constants. Virtually every court had time limits on record preparation and briefing — thus, these are not variables. Most organizational variables had response patterns with no tendency in the expected direction.

14. An alternative strategy to reducing the number of cases filed per judge might be to review, and in some instances, amend the court's jurisdiction. Because the scope and nature of court jurisdiction affect caseload volume and composition, courts should inform state legislatures of the consequences of legislative decisions to broaden or to narrow jurisdiction. The most obvious examples concern appeals arising from guilty pleas and appeals involving sentencing issues. If a legislature narrows the conditions under which appeals from guilty pleas are possible and the types of sentencing issues that are appealable, they can substantially affect the number of criminal appeals filed annually.
15. Of course, these expectations are based on the range of one to four law clerks found among the courts under study. It would be hazardous to estimate the consequences of five, six, seven or more law clerks per judge when no courts have had experienced that situation and moreover, there likely would be diminishing returns with such numbers. *But see* Stephen J. McEwen, Jr., *On the Effective Use of Resources in Pennsylvania*, COURT REVIEW, Fall 1998, at 48 (noting lack of management problems with four law clerks per judge and a central research staff of 16 other attorneys).
16. Before chief judges work to adopt time goals and send every judge to a training seminar, they should check the adequacy of their resources. The numbers of judges and law clerks are of vital importance and can be linked directly to timeliness. On the other hand, while time standards and education plausibly are related to timeliness, their connection remains more of a working hypothesis rather than a proven relationship.

IMPLICATIONS

At rock bottom, the results imply that courts, attorneys, policy makers, and taxpayers should understand that timely performance is tied to resources. You cannot have one without the other. When caseloads rise, timeliness and resources should be examined. Is an increase of 25, 50, or 100 cases per judge associated with an increase in processing time? What exactly is the increase? Is the increase in time acceptable? If not, what is the preferred response? More judges? More legal staff? Will one judge be sufficient? Or is a panel warranted? Finally, should the court's jurisdiction be modified to reduce the number of appeals?

A second implication concerns the idea of national time standards. How realistic is it to set the same standard for courts with different numbers of cases per judge and different numbers of law clerks per judge when we know that these differences affect case processing time? We also know from other research that not all cases are equivalent. In criminal appeals, there is ample evidence that the more severe the offense at conviction, the longer it takes virtually every court to resolve the appeal.¹⁷ These findings indicate that the composition of the caseload, e.g., the percentage of homicide appeals, needs to be factored in when setting time goals. To take both case complexity and the number of cases filed per judge into account, future research is needed to establish a weighted case measurement scheme applicable to all courts. Each court can then

more precisely call for a specific amount of resources to meet national time goals.

A third implication revolves around the question of the degree to which management efforts provide expected benefits. Are the true effects of management of secondary or tertiary significance compared to resources? Or is the lack of an association between management and timeliness in the current study merely evidence that effective management policies are very difficult to measure? A challenge for the future is to develop new and improved measures.

Finally, the utility of court research lies in its comparative nature. With data on a wide range of courts, the influence of competing explanations can be sorted out. We now have firmer knowledge than before that resources are a meaningful and substantial source of variation in processing time among a broad range of state intermediate courts. Every court – and every corresponding state legislature — needs to know that more, rather than less, resources makes a real and measurable difference in timeliness.



Court consultant Roger A. Hanson has worked with courts and other justice agencies for the past thirty years. Most recently, he was on the staff of the National Center for State Courts. Currently, he is writing a book on court reform and directing several projects on the effective use of resources.

17. See Joy A. Chapper & Roger A. Hanson, *Intermediate Appellate Courts: Improving Case Processing* (1990); Hanson, *supra* note 2, at 53-72.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 3,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 16th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 15 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 15 pages of double-spaced text (including any footnotes).

Pre-commitment: We will consider making a tentative publication commitment based upon an article outline or proposal. In addition to the outline or proposal, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay or book review has been received and reviewed by the *Court Review* editor or editorial board.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 764-8484 ext. 5582. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

APPENDIX*

Reexamining Time on Appeal
 National Center for State Courts
 Roger Hanson, FAX (757) 220-0449

_____ Name of Court

General Instruction: To incorporate the new data into our existing database, when responding to the questions below, **please try to recall what policies you had in place in 1993.** Thank you.

1. Did your court have time standards for completion of appellate review? If so, what steps in the process were covered?

Please check appropriate category:

	Court Rule	Statute	Informal Policy	Other (please specify)
A. Notice of appeal to submission of the record	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> _____
B. Completion of the record to filing of the last brief	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> _____
C. From the filing of the last brief to oral argument/ submission without oral argument	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> _____
D. Argument/submission to decision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> _____
E. Notice of appeal to decision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> _____

2. Did your standards for steps C, D, and E cover both argued and nonargued cases?
 Check the appropriate category.

	Yes, both	No, only argued cases
C	_____	_____
D	_____	_____
E	_____	_____

3. If you had a time standard between NOA and final disposition, what was the elapsed time in days? And what percentage of cases were covered by the standard?
 _____% of cases were expected to be resolved within _____ days.

4. Was timeliness discussed at the monthly meetings of the bench? If so, was information on case processing time shared among all of the judges?

Please circle the most applicable category:

Timeliness was **never, seldom, regularly** discussed at judicial meetings.

Information was shared **rarely, only if serious delays existed, regularly** at judicial meetings.

*Note: As an aid to future researchers, we reprint here the questionnaire from which the data used in this article were obtained.

5. Did your court use a special expedited calendar (cases on a special expedited calendar may be required to submit briefs that are shorter than the normal length, may be decided by a hearing officer, commissioner or pro tem judge, and result in a short, unpublished or summary order) to handle routine (single issue, settled issues of law, relatively uncomplicated facts) cases?

**Please Indicate the Approximate Percentage
of Cases on an Expedited Calendar**

	Civil	Criminal
No, in neither civil or criminal appeals	_____ %	_____ %
Yes, in criminal appeals only	_____ %	_____ %
Yes, in civil appeals only	_____ %	_____ %
Yes, in both civil and criminal appeals	_____ %	_____ %

6. Were the legal staff assigned to individual judges in your court generally recent law school graduates and short-term employees of your court?

Please check the response that most closely approximates your situation:

- Yes, almost all of the legal staff assigned to individual judges generally work as "elbow clerks" for approximately _____ years.
- No, some legal staff assigned to individual judges work for up to _____ years with those judges.
- No, almost all legal staff assigned to individual judges work as professional, long-term employees of the court.

7. Did your court employ legal staff who are not assigned to individual judges? If so, what were their responsibilities? Total number of legal staff not assigned to individual judges = _____

Please indicate the approximate time that all central staff, not assigned to individual judges, including supervisors, devote to the following responsibilities:

- _____ % preparing memoranda decisions on routine appeals
- _____ % conducting research on routine appeals
- _____ % conducting research on complex appeals
- _____ % handling writs
- _____ % handling motions
- _____ % hosting settlement conferences
- _____ % other responsibilities (please specify, _____)
- 100%

8. Had members of the bench attended seminars, conferences, or workshops where appellate caseflow management was on the agenda?

Please check most appropriate response:

- No, none of the judges
- Yes, but only a minority of the judges
- Yes, over half of the judges
- Yes, all or almost all of the judges.

9. Had the court's legal staff attended seminars, conferences or workshops where appellate caseflow management was on the agenda?

- No, none of the staff
- Yes, but only those in top managerial position
- Yes, including managerial and nonmanagerial positions

10. Finally, did your court have a formal settlement conference? Was it mandatory? Please check the appropriate box.

- No, we had no program
- Yes, there was a voluntary program
- Yes, there was a mandatory program

Approximately _____ % of civil cases were referred to the program.

On the Effective Use of Resources in Pennsylvania

by Stephen J. McEwen, Jr.

The Pennsylvania Superior Court is a statewide intermediate appellate forum comprised of fifteen commissioned judges and, during 1998, eight senior judges (judges who had reached the mandatory retirement age of seventy years). It was one of thirty-five state intermediate appellate courts recently reviewed and found to be the fifth most expeditious court based on cases resolved in 1993.¹ Seventy-five percent of the cases were resolved within 370 days after the filing of the notice of appeal. In 1997, the record of the court would have been considerably better, as the appeal time was reduced from 370 days to 281 days, a time frame surpassing the guidelines of the American Bar Association's (ABA) Judicial Division, which recommends that seventy-five percent of the cases be resolved within 290 days.

It is somewhat difficult to be modest about such performance, because the taming of a roaring inventory in timely fashion is an accomplishment that engenders considerable pride. While it is difficult to identify the factors and procedures that have enabled the court to attain this enviable record, one reason is certain, undisputed, and obvious, namely, the firm dedication and intense effort of the judges of this court to excel.

Yet the drive to excel is surely a shared characteristic to be found in appellate courts everywhere. Thus, one must search for more tangible features of our operations to account for our timeliness. Three features of our court that come to mind are: (1) the assignment of four "elbow clerks" to each judge, two of whom may pursue the career of a government attorney, (2) a central legal staff, and (3) the yeoman service of senior judges.

Legal staff assigned to individual judges. The assistance of four "elbow clerks" assigned to each judge is, in the view of the members of this court, instrumental in enabling the judges to provide an average of 250 written decisions per year. It was in 1980 that the volume of appeals prompted the Legislature and Governor of Pennsylvania to expand the membership of this court from seven to fifteen commissioned judges. The three elbow clerks who served those fifteen judges and a few senior judges stemmed the tide for a bit, but the number of appeals continued to soar, as did the annual production of written decisions of each judge: 121 in 1982, 190 in 1987, 209 in 1992, and 248 in 1997. As a result, during this period, the

allotment of three clerks was increased to four.

The effort to compress the maximum productivity from resources is continuous, as is demonstrated by a personnel measure adopted in 1983 that authorized each judge to designate one clerk, after three years' service, a Judicial Clerk III. That personnel change removed a relatively low earning cap and permitted that clerk to pursue the path and higher compensation of a state government attorney. That permanent clerk can serve as supervisor of the staff of clerks, as well as a mentor for the new clerks who periodically arrive, and affords a certain continuity in the operations of each chamber's staff. The benefits to the court of a career elbow clerk have been such that each judge was authorized in 1996 to designate a second of the four clerks as a career clerk, so that each chambers now has two career clerks and two other clerks who, for the most part, serve but a year or two.

The observation is sometimes made that the administrative responsibility posed by the presence of four clerks significantly reduces the time a judge is able to devote to decision making. A further occasional observation is that the scrutiny and revision of the work of four clerks render the judge an editor and not an author. Those observations are most often the suggestions of a judge in another state court in which fewer than 200 cases per year are assigned to him or her for written decision, not to mention the scrutiny of an additional 500 cases to determine whether to join or to write in concurrence or dissent.

Surely there is immeasurable fulfillment to be found in a chambers where a judge, with the aid of but a single clerk, or two, carves a niche in jurisprudential halls by crafting all of his or her own opinions. So idyllic a chambers triggers recollection of the America of Norman Rockwell - and the observation that even if the America of Rockwell ever was, it now isn't. The fact is that only those appellate courts able to control their volume and inventory, namely, allocatur courts or courts that exercise discretion and accept appeals upon petition, are able to control their jurisprudential destiny.

Those appellate courts to which appeals are taken as a matter of right are challenged by an unrelenting increase in the number of those appeals and the need to provide written decisions in resolving them. Thus, personnel is a critical factor. If the legislature does not enlarge the membership of those

Footnotes

1. See Dorothy Toth Beasley, et al., *Time on Appeal in State Intermediate Appellate Courts*, JUDGES' J., Summer 1998, at 12, 14 (ranking Pennsylvania's intermediate appellate

court fifth among thirty intermediate appellate courts studied with both civil and criminal jurisdiction).

appellate courts (and it would require a separate article to address the sound jurisprudential reasons for refraining from such expansion, not to mention taxpayer concerns), then the current complement of judges inevitably requires more parajudicial assistance, specifically, a larger staff of elbow clerks and a larger central legal staff.

Pooled legal staff. The Central Legal Staff (CLS) is comprised of sixteen attorneys with responsibilities in two broad categories: individual appeals and educational projects. An adequate summary of the duties of CLS would require an extended article, but a certain reflection may be gleaned from this overview:

- Individual appeal work: docketing statement review, motions, conflict clearance, CLS writing program, and case management.
- Educational projects: new clerk seminars, continuing legal education classes, and legal research/position papers.

Because the Central Legal Staff processes essentially all of the miscellaneous matters requiring resolution by the court, the four elbow clerks are free to devote essentially all of their time to assisting their judge with the preparation of opinions and memoranda of decision.

Though wary that it is too obvious to merit mention, may I suggest that the selection of the CLS Director is a critical determination. The duties of the position require an exceptional research ability, as well as a skill at supervision of lawyers. Requirements also include the need to display assurance, as well as deference, in the required frequent contact with judges, and, as well, ideally, an instinct for searching in other jurisdictions, and even beyond, for methods to enhance the work product and process. Thus, while a fine intellect is a basic prerequisite, so is a need for particular personal skills.

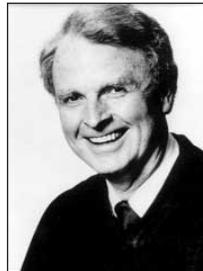
Roles of Senior Judges. Observers of the Pennsylvania Superior Court, including judges from other states, instantly focus upon the figure of almost 250 written decisions per judge, complemented, of course, by a further 500 studied decisions for joinder or concurrence or dissent. So fixed is the focus on the individual performance that the observers tend to overlook the total number of appeals decided by this court, most recently 4,981 in 1996 and 4,968 in 1997. Basic arithmetic demonstrates that our complement of fifteen commissioned judges could not have produced so many written decisions, because 250 cases per commissioned judge equates only to 3,750 written decisions. It is, therefore, evident that only

the continuing service of full-time senior judges has enabled this court to rise to the requirement of written decisions in almost 5,000 cases.

Mandatory retirement age for a judge in Pennsylvania is seventy years. A judge who has been elected to the Superior Court and completed at least ten years' service is eligible to become a senior judge. All eligible Superior Court judges since 1980 have continued to serve, and have done so on a full-time basis, maintaining a full chambers staff. The compensation of senior judges is a fixed per diem amount, but the per diem payments cease when the total payments in a year, added to the pension that year, reach the compensation level of a commissioned judge. Hence, senior judges sometimes serve without compensation for varying periods of time.

The efficacy of the senior judges' efforts is demonstrated by the fact that, during a recent year, senior judges constituted twenty-five percent of the membership of the court, but they were responsible for twenty-eight percent of its decisions. And, of course, the commissioned judges welcome and are grateful for both the efforts of and opportunity for continuing association with such venerable jurists.

And so the Pennsylvania Superior Court opines.



Judge Stephen J. McEwen, Jr. is the President Judge of the Pennsylvania Superior Court, the intermediate appellate court in Pennsylvania. He has served on that court since 1981 and has been its presiding judge since 1996. A graduate of St. Joseph's College (A.B.), the University of Pennsylvania Law School (LL.B.), and the University of Virginia Law School Graduate Program for Judges (LL.M.), Judge McEwen was a trial lawyer, professor of trial advocacy at Villanova University Law School, twice elected District Attorney of Delaware County, and General Counsel for the Pennsylvania District Attorneys Association.

Municipal Court Mediation: Reducing the Barking Dog Docket

by Karen Arnold-Burger

“Judge, I work nights and sleep days. So, I am home all day and that dog barks all day long! It is driving me crazy. This has been going on ever since she and her smart-mouthed son moved into the neighborhood 7 months ago. There are other people in the neighborhood that have dogs, but they don’t bark like that. You know, they just rent. They don’t even own that place. And another thing, when she’s gone, which seems like a lot, he has kids coming in and out of that house at all hours, smoking cigarettes and throwing the butts in my yard. And, the way they speed up and down the street, it’s a wonder someone hasn’t been killed.”

“Your honor, I am a single mother trying the best I can to raise my teenage son since my husband died. I work two jobs and the dog does stay outside during the day. We have had a lot of change and turmoil in our family in the last year. The dog is in new surroundings and is trying to protect our home. He was my husband’s dog and we could never part with him. My son and his father were best friends and it has been tough, but he doesn’t have anything to do with this ticket so I think Mr. Jones should keep him out of it. And judge, I know this may not be relevant, but Mr. Jones’ cat is always over in my flowerbed digging up the flowers, but I haven’t said anything. In fact, if my dog is barking, it is probably at his cat that has one of those doors that she can come in and out of the house at will. I just want to fit in and get along with my neighbors. But, you know judge, dogs bark and I think it is curious that the dog never barks when we are there. I’ve heard lots of other dogs bark in the neighborhood. In fact the neighbors on all sides of Mr. Jones and me have pets. I have an affidavit here from one of the neighbors that says she has never heard my dog bark. For some reason, I think Mr. Jones just doesn’t like us. He peeks out his curtains at us all the time when we are out in the yard, I feel like I’m always being watched. Last week, when my son was mowing our yard, he stood on his front porch yelling obscenities at him because my son was not bagging the grass and the clippings were getting on his ‘perfect’ lawn. He stands outside late at night and waters his lawn in the summer and shovels snow in the winter. There are several times the noise has startled me in the middle of the night and I get scared when I see a man standing under my bedroom window. I am scared of him, judge.”

Does this sound familiar? Often this testimony is followed by a parade of neighbors, half of whom are home twenty-four hours a day and have never heard the dog bark, and the other half who can show you clumps of hair they have lost because the dog barks incessantly and they haven’t slept in seven months. At the end of the trial (which is the first one on a docket that has twelve other cases that must be heard before lunch), they are all sitting in the courtroom (on their respective sides of the aisle), expecting some words of wisdom that will solve this problem.

Half of the room is going to leave upset. Tomorrow, when Mr. Jones’ cat appears in Ms. Smith’s flowers, she is going to turn the hose on it (or worse). Timmy Smith is going to get a little “mouthier” and you can be sure he will lay skid marks as he leaves his driveway. Mr. Jones is going to take up his guard post

on the front porch, waiting for the chance to tell that boy and his mother what kind of trailer park trash he thinks they are.

You will get to know these parties and all their relatives by first names over the next two years, because they will be back again and again for a wide range of disputes. It is cases like these that often have other judges referring to municipal courts as “judges’ hell.” Well, I am here to tell you that there is hope and that hope is in community mediation.¹

Mediation has been said to have its beginnings in ancient Sumerian society. In that culture, before a dispute could be submitted to a judicial council, it had to be presented to the “*mashkim*,” who would attempt to negotiate a settlement.² Even today, mediation is widely looked upon as the preferable method to resolve disputes in Asian, European, African, and Native American cultures. In fact, in parts of the Orient, liti-

1. For the uninitiated, mediation is a process of dispute resolution in which one or more impartial third parties assists disputants in an attempt to negotiate a consensual agreement between them. “Community mediation” has been defined as “[a] constructive process for resolving differences and conflicts between individuals, groups, and organizations. It is an alternative to avoidance, destructive confrontation, prolonged litigation or violence. It gives people in conflict an opportunity to take responsibility for the res-

olution of their dispute and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups, and create processes that make communities work for all of us.” NATL. ASSOC. FOR COMMUNITY MEDIATION, COMMUNITY MEDIATOR, Summer 1998, at 12.

2. Stephen G. Bullock & Linda Rose Gallagher, *Surviving the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 890 (1997).

gation is viewed as “a shameful last resort” used only when all else has failed.³

In the early 1960's and 1970's, neighborhood justice centers began popping up around the country, predominantly in low-income areas, as a method of promoting reconciliation during a socially turbulent decade. By the late 1970's and early 1980's, interest in alternative dispute resolution techniques rose and several private programs, most notable of which is the San Francisco Community Boards Program, were inaugurated by foundations and civic organizations.⁴ Under the direction of United States Attorney General Griffin Bell and the U.S. Department of Justice's Law Enforcement Assistance Administration (“LEAA”), federal funding was made available for several pilot programs around the country.⁵ Clearly, the philosophy behind this widespread support was the belief that such programs would not only relieve exploding court dockets around the country, but that they also would make justice more accessible to the public.

Today, the majority of states have institutionalized mediation by statutory enactment. Many courts order or encourage mediation in divorce actions involving child custody disputes, and mediation and arbitration are often looked on as favorable alternatives in complex civil actions. But mediation can be beneficial in dealing with any dispute in which the parties are likely to have an ongoing relationship after the conclusion of the case, such as neighbors or the relations of landlord and tenant, government and citizen, customer and client or employer and employee, to name just a few.

Several years ago, we started gathering information about how we could make mediation work in a municipal court setting. Overland Park, Kansas, is an affluent suburb of Kansas City. It has a population of about 135,000 residents and is part of a larger metropolitan area of 1.5 million people. The municipal court handles traffic and criminal misdemeanors, including animal control, property maintenance, and building code violations. It has historically had the second largest caseload of any municipal court in Kansas, second only to Wichita.

Our fact-finding group consisted of the municipal judge, a local attorney with extensive mediation training and experience, and the director of the paralegal program at the local community college, who was interested in offering some mediation courses in her program. We met with several community

leaders, including a city prosecutor, a victim assistance coordinator, a city council member, a state appellate judge who had been active nationally in promoting mediation, the president of the community college, the director of continuing education for the college, and a retired mediator who had coordinated the local small claims court mediation program on a volunteer basis for several years.

We began by examining existing programs in our state and around the country. There are literally hundreds of community mediation centers nationwide. Coincidentally, we found hundreds of different approaches. Some municipalities had their own mediators on staff to help resolve community disputes. These city employees reviewed police reports daily and initiated mediation discussions in appropriate cases. Other cities had programs staffed entirely by volunteers, some with little or no formal training, but a wealth of field experience.

In Wichita, Kansas, the program is operated as a private, non-profit enterprise, with a large portion of its funding and facility needs coming from

“Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.”

– Abraham Lincoln

the local bar association. Victim assistance personnel in various district attorneys' offices around the country often take on the role of community mediator.

Community leaders seemed to recognize the cost-effectiveness of mediation over litigation. It was believed that the community was much better served when the prosecutor's office spent its limited resources prosecuting violent and repeat offenders, not feuding neighbors. In addition, many cited the reduction in police officer time spent on repeat calls for assistance.

The informality of mediation was seen as a real plus to the process. The open exchange of thoughts and ideas, unconstrained by the rules of evidence and legal procedure, seemed to be a more effective method in these types of situations than the typical, “scorched earth” adversarial process. In addition, mediation offered lower emotional costs than those associated with more traditional forms of dispute resolution. “Where there is little room for a simple, sincere apology in litigation — other than [as] an admission to be used to tactical advantage — such empathy can be the turning point of a mediation. In this way, the promise of mediation is to transform conflict into resolution at its very core, rather than merely providing an answer to the superficial dispute.”⁶ Professor Frank E.A. Sander of the Harvard Law School calls mediation the “sleep-

3. *Id.*

4. Peter S. Adler, *State Offices of Mediation: Thoughts on the Evolution of a National Network*, 81 Ky. L.J. 1013, 1015 (1993).

5. *Id.*

6. Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55. For a detailed examination of the situations in which apology may be a useful part of dispute resolution in mediation, see Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165 (1997).

How could we make this happen with no money?

ing giant of ADR.”⁷

We also looked at research findings from around the country. We found that the majority of existing programs reported that seventy to ninety percent of the mediated cases resulted in a lasting settlement.

They routinely reported reductions in court caseloads, and a majority of program participants reported high levels of satisfaction with the process.⁸

Finally, we met with our local police department, which was just embarking on community policing and was focusing more and more on solving community problems and less and less on writing tickets. They were enthusiastic. All the feedback we received was positive. We were ready to set sail.

But then we reached our first roadblock. How could we make this happen with no money? Although lots of entities were interested, no one wanted to invest money in the project and, in all honesty, we did not have the time or resources to go searching for dollars. We were all well-meaning, but we also were all over-committed and no one had the time to develop the program and put together grant requests. And, in reality, we didn't know enough about how it would “look” or how many cases would be referred to put together a coherent grant request. Would it be a private, non-profit entity? How would we get money to hire an executive director? Would there be a charge for mediations? Would mediators be paid or would we only use volunteers? If we used volunteers, realistically was there a big enough volunteer base in the community? How would we train volunteers without a director? Where would these mediations take place? How would we pay for a facility? How many cases could we refer from the municipal court in a year? How would the cases be screened?

We decided to work from our strengths and take small steps, hoping to build on each small success. Based on our research of successful programs at the community level, three

underlying criteria seemed essential for success. It had to be voluntary, free and confidential.⁹ We kept quoting the famous line from the Kevin Costner movie, *Field of Dreams*, “If we build it, they will come.”

The Kansas Supreme Court first adopted rules concerning the use of mediators in 1987.¹⁰ The rules were expanded in 1996 to include minimum standards that must be met before a mediator could handle a case referred by a state court. In Kansas, in order to qualify as a mediator in court-referred cases, the mediator must first complete an approved training course. All mediators must complete a core mediation course, which consists of a minimum of sixteen hours and must include training in the areas of conflict resolution techniques, neutrality, agreement writing, ethics, role playing, communication skills, evaluation of cases and laws governing mediation. In addition, mediators wishing to mediate certain types of cases must have additional training.¹¹ As a final requirement, mediators must co-mediate three cases with an approved mediator within the first year following training. To maintain their “qualified” status, mediators must participate in six hours of continuing mediator education each year.

As already mentioned, the local community college was a strong partner in the investigative and planning effort. It had already expressed a desire to provide mediation coursework in its paralegal program. However, as a nationally certified program, any changes or additions to curriculum would take quite some time.

The curriculum review process was not as stringent for the college's continuing education program. This branch of the college offered a wide variety of coursework for professionals in various fields who needed to meet minimum requirements and also had continuing education requirements (e.g., real estate appraisers, nurses, insurance agents and early childhood development professionals).

By utilizing the continuing education division, coursework could be developed and put in place quickly. This was viewed as important by the group. Mediation was a growing field. At

7. *Id.* Mediation can be contrasted with other alternative dispute resolution methods. “Mediation is unique among dispute resolution alternatives. Other approaches, such as early neutral evaluation (ENE) and nonbinding arbitration, as well as summary jury trials, minitrials, and court-settlement conferences, emphasize predicting the outcome of later adjudicatory proceedings. Mediation, however, focuses on addressing the full range of issues the parties bring to the table.” Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 650 (1997).

8. Bullock & Gallagher, *supra* note 2, at 919.

9. Although the issue of confidentiality of mediation agreements will not be examined in depth in this article, it is a criterion that many point to as essential to ensure an unrestricted exchange of information between the parties. In most states, statutes provide confidentiality in at least some circumstances. However, these statutes may not apply to all types of mediation, and they may not be applicable in federal court proceedings. A review of the caselaw suggests a

growing trend, at least in federal courts, toward recognition of a common law “mediator privilege,” much like an attorney-client privilege. See *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (adopting mediator privilege under federal common law of privileges in civil case and reviewing existing caselaw); *In re March 1994 Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995) (adopting federal common law mediator privilege to protect mediation of state civil lawsuit from disclosure in grand jury proceeding); *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987) (adopting federal common law mediator privilege to protect mediation in community dispute resolution center from disclosure in grand jury proceeding).

10. Kan. S. Ct. R. 901 *et. seq.*

11. For example, domestic mediation and civil litigation mediation each require 24 additional hours of training; parent/adolescent mediation requires 14 additional hours. See Kan. S. Ct. R. 902.

the time, the only training being offered in mediation around the state was at the state bar association's continuing legal education programs. However, it was not required that one be a licensed attorney to be a mediator. It was felt by the group that it would be unrealistic to think that a neighborhood mediation program would be able to afford to have attorneys mediate the disputes. Studies we read indicated that the success of mediation was largely dependent on the skill, training and experience of the mediators.¹² A bank of non-law-trained mediators needed to be developed and no other college was offering any training targeted to this group. So, the first step was to develop a training program and get it up and running as soon as possible. The group, led by community college personnel, spent the next few months developing the curriculum, devising a marketing plan and selling the training component. In September 1997, the first twenty-hour training session was offered.

This still didn't solve the problem of having a method to refer and mediate municipal court disputes. In talking to mediators, the group realized that mediators were having a difficult time meeting the second prong of the Supreme Court's mediator qualification criteria. It was difficult to find an "approved" mediator with whom to co-mediate three cases. Many people were actually trying to make a living at mediation and they were not likely to give their services away to help their new competition. Modeling the program after legal aid clinics that operate out of law schools around the country, it was decided that the college would offer, in conjunction with the training course, a practicum. The practicum would consist of co-mediating three cases with an approved mediator. This practicum would only be available to those students who took the training course through the community college.

As it has been set up here, the students pay \$150 for the practicum. The college then uses the money to pay approved mediators to co-mediate cases with the students. The practicum is completely self-funded. And where would they get the cases to co-mediate? From municipal court referrals. The circle was complete. Students would get the training and experience necessary to apply to the Kansas Supreme Court for the designation as an "approved mediator," the college would get income from providing the training course, the citizens of Overland Park would get free mediation services, and, finally, the municipal court would experience a proportional decrease in its caseload.

The first practicum included twenty students. So we had an immediate need for sixty cases to mediate. We also had a list of "approved" mediators who were willing to offer their services. We had conducted training classes for the police department and the neighborhood services and building code enforcement divisions three months earlier. We started targeting cases for mediation on July 1, with hopes of having them mediated in September. Our goal was to have all sixty cases mediated within ninety days, when the class and practicum would be

offered for a second time.

When the first practicum class took place, we had had only three cases referred for mediation, obviously a major hurdle for success of the program. We asked ourselves where we went wrong. Was there simply not a demand in our community for mediation? We tried not to panic. We contacted the local legal services office, which was providing mediation for small claims court cases. They were providing this service with volunteer mediators, all of whom were already approved by the Supreme Court. We arranged with them to allow our students to co-mediate small claims court cases. We also rolled out the program to several neighboring cities. They began to refer cases from their municipal courts.

Although we were not able to reach our ninety-day goal, we were able to get all practicum students their promised mediations. Clearly, important questions remained about the long-term viability of the program. Why weren't we getting the referrals from the police department and the neighborhood services division we had hoped to get? We had been confident that at least thirty cases a month could be referred from the court. What happened?

As is true with most community mediation programs, we were committed to making the program voluntary. In other words, both parties had to agree to mediation before one would be scheduled. We discovered that we were getting a significant number of referrals (although still not as many as we had hoped for reasons that will be addressed later), but we could not get both parties to agree to come to the table. These mediations are generally referred to as "victim/offender" mediations. The offenders were always willing to cooperate and looked forward to the opportunity to discuss the matter short of trial. However, the victims were extremely reluctant. "I am the victim here and a taxpayer and I expect the City to prosecute the offender," was an all-too-common refrain.

In the small claims court setting, a civil proceeding, the judge was more comfortable ordering that mediation take place on the day of trial. Only if mediation failed, which it rarely did, would a trial take place. The criminal proceeding was not as clear-cut. The police were generally not called out and in a position to make a referral unless there was at least an apparent violation of the law. Once a violation was noted, the city attorney had a statutory duty to prosecute and many victims were not satisfied until a prosecution took place and a clear penalty had been imposed.

In addition, the police department was also being schooled in community policing techniques and was getting pretty good at "shuttle diplomacy" between disputing parties, avoiding a criminal complaint being filed altogether. Finally, the mere

[T]he first step was to develop a training program....

12. William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH. L. REV. 261, 317 (1994).

process of calling the parties and requesting that they participate in mediation sometimes had the same “shuttle diplomacy” effect of working the matter out without further intervention.

But the fact remained that, as judges, we found it somewhat distasteful in a criminal case that was already on file to order the “victim” to participate in mediation. Only the situations in which there were cross-complaints tended to lend themselves to such a referral.

Faced with a limitation of the use of mediation in victim/offender cases due to a reluctance of both judges and victims, we did more research. We found that when victims finally did come to the table, they received many benefits from this face-to-face confrontation. In a report on a restorative justice program in Polk County, Iowa, victims routinely reported that their victim-offender meeting allowed them to have previously unanswered questions about the crime answered.¹³ They also reported that the meeting allowed them to obtain closure in a way not provided by the traditional prosecution approach. Polk County officials found this even worked in what are sometimes called “victimless crimes,” such as prostitution, drug offenses, drunk driving and weapons charges. In such cases, representatives of neighborhood associations where the crime occurred served as the “victim” for purposes of the mediation session.¹⁴

We decided we were not targeting some disputes early enough. In some cases, once criminal charges had been filed, it might be too late for mediation. The parties became too quickly entrenched in their adversarial roles once the term “victim” and “defendant” had been applied to them. We again met with the police department and neighborhood services division and asked them to consider referring cases on their first contact with the parties. So, for example, anytime a neighbor called and complained of a barking dog or an abandoned car, the case would be referred for mediation – before a ticket was issued. This immediately increased referrals. Although the use of this approach means that we cannot measure our success solely on the basis of the number of court-referrals that result in successful mediations, we hope to be able to measure an appreciable decrease in the initial filing of certain types of cases.

We also increased our public relations campaign. All the local newspapers, and many local television news programs, ran stories on the program. We knew that when we were able to get the parties to the table, mediation was almost invariably successful. We measured this by whether or not the police were called back to the residence. We started to trumpet our success stories. The word started to spread and our referrals have increased each month since inception.

The program has now been in operation for one year. All five core-training classes have been full. There often has been a waiting list. The college has expanded its course offerings to include courses in the more specialized areas of domestic

mediation, parent/adolescent mediation, and civil litigation mediation. It also offers several courses for continuing mediation credit. We have been able to successfully arrange mediation opportunities for the practicum students in a timely manner. The word is getting out in the community.

We are now moving into the next phase of our development. We are refining the forms we use, developing evaluation instruments for both the mediators and the participants and analyzing each stage of the process. For example, we learned that many mediations end in a written settlement agreement. Participants seem to appreciate the ability to memorialize their discussions. We were concerned about how we would handle failures to comply with this confidential agreement. The mediators now encourage the parties to agree to return to mediation if there is a perceived or actual failure to comply with the agreement. This avoids further police involvement and lets the parties take responsibility for bringing the matter back to the table.

After just one short year, it has become essential that we hire an executive director. We desperately need someone who can market the program to homes associations, community groups, and other courts. Our hope is to ask the four participating municipalities to make a one-time contribution to hire a part-time director; it would then be the director’s responsibility to find money to continue the position and to expand it into a full-time job. Our vision is to one day have a freestanding Community Mediation Center, located at the community college, that will be a resource for court-referred and community-referred mediations of all types. The appearance to the public of neutrality is important, and locating the program at the college fulfills that requirement. We are excited about the opportunity this holds for our community. We still believe that “if we build it, they will come.”

And the best news? I haven’t heard a barking dog case in months.



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13. Fred Gay & Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, PROSECUTOR, Sept./Oct. 1996, at 16, 18. See also Melissa Baria, *Victim-*

Offender Mediation, COURT REVIEW, Spring 1996, at 14.
14. See Gay & Quinn, *supra* note 13, at 18.

The Resource Page: Focus on Mediation and ADR



SOME USEFUL BOOKS

Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*. Penguin USA. 2d ed. 1991. 200 pp. \$12.95.

Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*. Jossey-Bass Publishers. 2d ed. 1996. 450 pp. \$34.95.

Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*. Westview Press. 2d ed. 1994. 212 pp. \$25.00.

Jay Forberg, et al., *Divorce Mediation: Theory and Practice*. Guilford Press. 1998. 508 pp. \$55.00.

John M. Haynes, et al., *Mediating Divorce: Casebook of Strategies for Successful Family Negotiations*. Jossey-Bass Publishers. 1989. 331 pp. \$38.95.

Donald T. Saposnek & Donald Saposnek, *Mediating Child Custody Disputes: A Strategic Approach*. Jossey-Bass. Rev. ed. 1998. 352 pp. \$32.95.



ADR JOURNALS

Ohio State Journal on Dispute Resolution
Drinko Hall, 55 West 12th Ave.
Columbus, Ohio 43210-1391
(614) 292-7170
4 issues/yr. \$40
<http://www.acs.ohio-state.edu/units/law/jdr/>

Mediation Quarterly
Jossey-Bass, Inc.
5th Floor, 350 Sansome Street
San Francisco, California 94104-1342
(800) 956-7739
4 issues/yr. \$58 (individuals)
<http://www.josseybass.com/JBJournals/mq.html>

Journal of Dispute Resolution
School of Law
University of Missouri, Columbia
206 Huston Hall
Columbia, Missouri 65211
(573) 882-2052
2 issues/yr. \$21 (US) \$26 (Canada)
<http://www.law.missouri.edu/csdr/jdr.html>

Dispute Resolution Journal
American Arbitration Assoc.
140 W. 51st Street
New York, New York 10020-1203
4 issues/yr. \$100 (\$90 first year)
<http://www.adr.org/subscription.html>

Dispute Resolution Magazine
ABA Dispute Resolution Section
ABA Order Fulfillment
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000
3 issues/yr. \$25 (non-section members)
<http://www.abanet.org/dispute/magazine/home.html>



OTHER MEDIATION/ ADR RESOURCES

National Association for Community Mediation
<http://www.nafcm.org>

The NACM is a clearinghouse for community mediation programs around the country. Under "news" on its directory, you are linked to background information and its available publications. For links to web sites of community mediation programs or other dispute resolution groups, click "links" from the home page.

Court Review thanks Judge Karen Arnold-Burger, Judge Robert Fairchild, and Gary Kretchmer for their contributions of information for this page.

CPR Institute for Dispute Resolution
<http://www.cpradr.org>

This web site includes bibliographies of books and articles of interest, as well as this group's own publications, including ones about developing ADR programs in state and federal courts.

The Federal Judicial Center
<http://www.fjc.gov>

Several ADR publications can be downloaded from the web site, including ones describing all ADR programs in use in the federal courts and ones evaluating specific pilot programs tried there.

American Arbitration Association
<http://www.adr.org>

You can read current articles from the AAA's *Dispute Resolution Journal*, find bibliographies of recent ADR literature, and find links to other ADR sites.

American Bar Association: Section of Dispute Resolution
<http://www.abanet.org/dispute>

This ABA section has a number of useful publications, listed here, as well as links and updates on current activities.

SUGGESTIONS FOR THE RESOURCE PAGE

Each issue of *Court Review* features The Resource Page, which seeks to help judges find solutions to problems they may be facing, alert them to new publications, and generally try to provide some practical information judges can use. Please let us know of resources you have found useful in your work as a judge so that we can tell others. Write to the editor, Judge Steve Leben, 100 N. Kansas Ave., Olathe, Kansas 66061, e-mail: sleben@ix.netcom.com.



The Resource Page



NEW PUBLICATIONS OF INTEREST

G. Alan Tarr, *Understanding State Constitutions*. Princeton Univ. Press, 1998. 271 pp. \$35.

Rutgers University political science professor G. Alan Tarr examines the state constitutions of the United States, discussing their distinctiveness in American governmental structure. Tarr provides a historical discussion of the interpretation of state constitutions throughout U.S. history, concluding with an examination of modern trends in state constitutional interpretation. He concludes that, while many state courts continue to rely automatically on federal case law when confronting what should be a state law issue, more independent state interpretations are being made. Over time, Tarr suggests, this will have a positive effect in giving alternative possibilities from which a state court may choose the one that best captures the meaning of the provision of its constitution that is at issue.

Richard Fruin, *Judicial Outreach on a Shoestring: A Working Manual*. ABA Judicial Division, 1999. 246 pp. \$19.95.

In this book, Judge Richard Fruin provides descriptions of seventeen judicial outreach programs in place around the country, ranging from town hall meetings to teen courts to judge-hosted educational radio programs. Central to the book are working papers, publicity and associated materials from the individual programs, which are included. In addition, other program ideas for judicial outreach are also described. The price is discounted to \$9.95 for ABA Judicial Division members; add \$3.95 to either price for S&H. Order from ABA Publication Orders, P. O. Box 10892, Chicago, Illinois

60610-0892 - (800) 285-2221 - Product Code 5230048. Add sales tax if from DC (5.75%), Illinois (8.75%) or Maryland (5.0%).

David Rottman, et al., *A Guide to Court and Community Collaboration*. NCSC, 1998. 107 pp. \$5.00 (S&H).

This NCSC-produced guide includes a description of six exemplar projects of court-community collaboration, in addition to a detailed, general discussion of how to develop such programs. To order, send \$5.00 for shipping and handling to NCSC, Att.: Lynn R. Grimes, P. O. Box 8798, Williamsburg, VA 23187-8798 - or call (757) 259-1841 - or e-mail: lgrimes@ncsc.dni.us.



INTERNET SITES OF INTEREST

National Center for State Courts
<http://www.ncsc.dni.us>

The National Center's web site provides links to local court web sites throughout the country, as well as to sites of organizations affiliated with the National Center, including the Conference of Chief Justices, the National Association for Court Management, and the American Judges Association.

CTC6 - National Court Technology Conference
<http://www.ncsc.dni.us/ctc6.htm>

Hosted by the National Center for State Courts, the September 14-16, 1999 CTC6 will be the sixth national court technology conference. More than 125 vendors are anticipated, along with an international faculty covering best practices in justice information systems, electronic filing, data security, courtroom technologies and other areas. Full details and registration information are available at this web site.

State Justice Institute (SJI)
<http://www.clark.net/pub/sji/>

SJI, established by Congress to foster innovations in judicial administration in state courts, has awarded more than \$100 million in grants to court systems, local courts and other entities, as well as educational scholarships to judges and court management personnel. Information about grants available from the State Justice Institute is available at this web site, as well as SJI's newsletter and lists of prior grant recipients (with contact information). For an overview of SJI, you can look at their ten-year report, *Improving the Quality of American Justice, 1987-1997*. More on SJI in the next issue of *Court Review*.

Federal Judicial Center
<http://www.fjc.gov>

The Federal Judicial Center has a great many publications available on line, including the Manual for Complex Litigation; several publications on alternative dispute resolution; educational materials for training court staff on issues such as supervising other employees and diversity in the courts; and back issues of the *State-Federal Judicial Observer*; a FJC publication.

The Federal Judiciary Homepage
<http://www.uscourts.gov>

The Administrative Office of the U.S. Courts hosts this site, which includes the federal judiciary newsletter, *The Third Branch*, issued monthly; listings of federal judicial vacancies, along with federal caseload statistics; news releases regarding the federal judiciary; and other general information about the federal courts.



MEDIATION/ADR RESOURCES

Resources on mediation and ADR are found on page 55.