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Chief Justice Ronald M. George presents a Kleps Award to the Court of Appeal, Second Appellate District, for its judicial externship program. From left: Administrative Director of the Courts William C. Vickrey, Kleps Award Committee Chair Justice Ronald B. Robie, Judicial Assistant Shelly Perez, Justice Laurence D. Rubin, Chief Justice George, and Administrative Presiding Justice Roger W. Boren.



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STATE JUDICIAL BRANCH

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Views expressed in *California Courts Review* are those of the authors and not necessarily those of the Judicial Council or the Administrative Office of the Courts.

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“Accountability.” What is it?

This is a problem that California’s Commission for Impartial Courts has been struggling with since the commission and its four task forces were created in 2007. More specifically, how do judges and courts account for themselves and their decisions to voters?

Ironically, the first written statement of accountability seems to be rooted in the law, the Code of Hammurabi. In that code, which dates from 1760 B.C., the Babylonian king Hammurabi was pretty harsh on judges’ accountability:

If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge’s bench, and never again shall he sit there to render judgment.

While some citizens may think that is the appropriate punishment for judges, the commission is searching for a definition that protects the need for judges to exercise their judgment in accordance with the law and free of improper influences while still being accountable to the people. As part of our continuing coverage, retired judge Roger K. Warren, the AOC scholar-in-residence, provides his insights on judicial accountability.

We also honor the work of local courts that are bringing mediation techniques to self-represented litigants so they have a way of settling their disputes without going to trial. And a judge argues for reducing the number of peremptory challenges in misdemeanor cases.

Finally, we publish the views of two Los Angeles judges who firmly disagree with the views of a retired Riverside County judge on the use of direct calendaring systems. We welcome such an exchange of views and urge our readers to write whenever they agree or disagree with anything in this publication.

—Philip Carrizosa
Managing Editor

ON PROVIDING JUSTICE IN TOUGH ECONOMIC TIMES

The following are excerpts of remarks delivered by Chief Justice Ronald M. George in March 2008 to a joint session of the Legislature in his 13th annual State of the Judiciary address.

We in the judicial branch are keenly aware that this is a difficult year for you and the Governor. The fiscal challenges facing California are set against a backdrop of troubling financial developments on the national level. These often seem magnified in our large, complex, and diverse state—and complicate your task of achieving a budget that reasonably meets the public’s needs.

I am not here to request funding for sweeping new initiatives. I am here to tell you that the judicial system understands its obligation to contribute to the solution. Accordingly, we have carefully examined the judiciary’s budget to determine how we can assume our share of the burden in an equitable manner. I will stress those needs that are essential to the very integrity of the justice system and the vital interests of Californians, and explain the impact on the state’s people and institutions of any failure to provide the courts with the resources essential to allow them to function effectively.

California’s judicial system is said to have the largest law-trained judiciary in the world, far surpassing the federal system. That is not surprising when one considers that 95 percent of the legal proceedings in the United States are filed in state courts, and California is the leader in filings by virtue of its size and the diversity of its institutions that have made us one of the largest economies in the world.

Statistics from the National Center for State Courts, however, indicate that California is at the bottom of the lists of comparable states in the number of judges it provides in proportion to the state’s population. We also for that reason are near or at the bottom of the list when it comes to the time it takes to bring every type of case, including criminal, to final judgment.

Beyond its careful attention to the substance of the law, the judicial branch for more than a decade has engaged in self-examination intended to make us more responsive to the needs of the California public we serve, and more effective and accountable in using the resources made available to us. With your help, we have transformed our court system into an increasingly fair and effective branch of government better able



to serve the public. And because of the structural reforms we have undertaken at our own initiative, our branch is in a better position to cope with the present fiscal crisis than it otherwise would be. Nevertheless, given the proposed reductions, it will remain difficult to perform our core function of providing accessible justice to all Californians.

The last major piece of the structural transformation of our judicial branch, following the transition from county to state funding and the unification of the state's 220 trial courts into a single level of 58 courts, one in each county, is the transfer of court facilities from the counties to state ownership under judicial branch management. The Trial Court Facilities Act of 2002 began the transfer process, but it immediately encountered delay because so many courthouses were in worse shape than anticipated and could not be transferred without the expenditure of substantial sums by the counties.

In 2006, an agreement was reached among the counties, the courts, and the state: Counties could transfer facilities, and the state would accept them, with the understanding that the counties would retain liability for any damages caused by the condition of the buildings—for 35 years or until the buildings were replaced, refurbished, or no longer used for court purposes.

This new measure jump-started the process, and of the 451 courthouse fa-

cilities, approximately 120 were transferred by the end of the last fiscal year. The authorizing statute, however, had a sunset date. During the closing hours of last year's legislative session, a bipartisan proposal to extend this deadline was unexpectedly sidetracked. A replacement urgency bill, AB 1491 authored by Dave Jones, Chair of the Assembly Judiciary Committee, is before you. The judicial branch and the counties are poised to move on the transfers once this measure is adopted.

Our focus now is how to rehabilitate and replace those court facilities that, because of earthquake, fire safety, and security deficiencies, pose substantial dangers not only to those who work in them, but also to persons who appear as witnesses, parties, or jurors, or enter these structures to pay traffic tickets or obtain documents or various services. Senator Perata is carrying legislation, SB 1407, authorizing a revenue bond that would help us meet many of the most urgent needs. We are exploring using performance-based infrastructure processes to the greatest extent possible for new construction, which should allow us to maximize the state's contribution.

Many courthouses also have major security problems. For example, last year in Los Angeles, two separate attempted escapes resulted in one deputy sheriff being pepper-sprayed by a prisoner, and another deputy being

repeatedly struck in the face and cut by a jail-made razor shank. An attack by a prisoner who had to be escorted in a public elevator in the Monterey courthouse put both a deputy and the public in danger. These and similar incidents might have been avoided if resources had allowed for a second deputy to accompany the prisoner.

Disputes that lead to court proceedings can be volatile. Criminal cases sometimes involve gang rivalries and angry victims and families, bent on retaliation. But family law matters in civil courts often are the most dangerous. When I arrived at the main Los Angeles courthouse a few years ago to meet with court leaders, I observed personnel mopping up blood in a hallway after a physician involved in a marital dissolution proceeding had fatally shot his wife.

Security costs have been the fastest growing and the most expensive component of the trial court budget, comprising almost \$500 million of our budget. We have worked closely with the sheriffs of our state to set proper and consistent security standards statewide to bring some predictability to the cost of these services. Expected and essential funding from the Legislature to accomplish these goals also failed to materialize at the end of last year's session.

Meanwhile, those who come to the courts increasingly arrive without

legal representation. Access to justice has been a primary goal of the Judicial Council, which, as Chief Justice, I chair. Seeking ways to improve access to the courts, the Judicial Council created a Task Force on Self-Represented Litigants, and has worked with local courts, the State Bar, legal services, and local community organizations to offer a broad range of services to assist self-represented litigants.

People must have *meaningful* access to the courts, or the phrase “justice for all” becomes no more than an empty promise. That requires making necessary tools available, including court information in several languages, user-friendly forms, guidance on how to file and respond to pleadings, and at least limited assistance from legal counsel and interpreters when needed. The judicial branch has expanded its efforts to improve the availability of interpreters without additional funding from the Legislature, and will continue to attempt to augment those services.

The courts also have actively participated in improving services to families and children in the foster care system. Timing here is critical. During the brief period of a child’s development and learning, delay in providing services or a proper placement too often amounts to a denial of those vital needs to the developing child.

Two years ago, I appointed a Blue Ribbon Commission on Children in Foster Care, chaired by my colleague Justice Carlos Moreno, and including Senator Darrell Steinberg and Assembly Members Karen Bass and Bill Maze as members. Recently, our commission issued draft recommendations and solicited public comment before preparing its final report to the Judicial Council. Those recommendations are expected to respond to the urgent needs of California’s nearly 80,000 children in foster care, who include a disproportionate number who may drop out of school, end up homeless or unemployed, or become involved with the mental health or criminal justice systems. I anticipate that the Judicial Council will be bringing recommendations to

you later this year to improve the treatment of foster children in California.

The steps we have taken to improve access, procedures, and services for the public we serve will, however, be meaningless if we lack the judges needed to implement them. A study by the National Center for State Courts recommended the addition of more than 350 judges to meet current needs after years of no increase in judgeships. We have focused on the 150 highest priority positions, and asked that they be created in groups of 50 over the next three years. You responded, creating 100 new judgeships in the last two legislative sessions.

It is vital that the last complement of 50 judgeships be authorized this year. Senator Ellen Corbett is carrying this bill, SB 1150, and I urge you to support it and to provide, as soon as it is feasible, the funding needed for an adequate number of judgeships.

Many of the new judicial positions are designated for areas of the state that have seen an enormous growth in population over the last few decades without a corresponding increase in the bench, such as the Inland Empire and the Central Valley.

For example, the case backlog is so acute that recently, for two years in a row, Riverside’s court was forced to close down all of its civil courtrooms for months at a time to handle criminal cases, which have priority under the Constitution. At the request of court leadership and the Bar, I created a special task force of experienced judges from all over the state to go to Riverside County to help reduce its staggering backlog. Progress has been made, and discussions of possible changes in practices by both the courts and their justice system partners are producing important results. Nevertheless, a substantial backlog of cases remains. We sent this task force to Riverside using our existing budget resources, without seeking any additional allocation from the Legislature.

Court delays have real, human consequences. In one Riverside civil case, the surviving husband and very young children of a mother who stayed at home to care for the children and who was killed in an automobile accident, ended up in homeless shelters during the years they spent waiting for a trial date to be scheduled. No judge was available to hear their case. Once a trial date was set, the case was settled within two weeks.

The failure to provide sufficient resources and personnel for the court

People must have *meaningful* access to the courts, or the phrase “justice for all” becomes no more than an empty promise.

system risks depriving California of an effective public civil justice system. The absence of an operational civil justice system will affect every aspect of California life: business and financial institutions, dissolutions of marriage, probate distributions, child custody and support, civil rights, governmental functions—all will have no place to go. The legislation you enact into law may not be subject to judicial enforcement if that occurs. I believe we all agree that a functioning court system is not a luxury—it is an essential component of state government.

There are severe limits to how much we can reduce the services that we are required to provide. For example, providing legal counsel to criminal defendants is not simply a program that can be eliminated as part of budget reductions—it is a constitutional responsibility, and one that would be enforced by federal courts at state expense if we ignore it. Cutting back on the processing of vehicle offenses would make no sense—such matters are a source of revenue to state and local government. Reducing services in dependency matters is not an option—such action would jeopardize federal funding.

These circumstances illustrate the need not to limit the use of the resources that are provided to the judicial branch, but instead to authorize

the judicial branch to apply them in the most effective manner. We, in turn, will continue to remain accountable for how we have used the funds you allocate to our branch.

Flexibility is especially important in developing much needed technology. At a recent meeting of the Judicial Council with the leaders of the Departments of Corrections, Social Services, Child Support, Justice, and the California Highway Patrol, we discussed the urgent common need for a system that allows us to share updated information. Without that, domestic violence restraining orders, warrants, and dispositions too often are not circulated promptly to law enforcement. We are working to create a consistent case management system that makes information more transparent to the public, more accessible to other parts of government, and more effectively shared among the courts.

Having spoken about the need for flexibility in managing our resources, I want to mention a proposal intended to help the California Supreme Court do just that. Each year, our seven-justice court reviews more than 9,000 petitions for review and original relief and typically issues opinions in 110 to 115 cases. The nine-justice United States Supreme Court has issued about 70 opinions each of the past few terms. Only appeals from judgments of death come directly to the California Supreme Court. Twenty to 25 of the opinions issued by our court each year are in these very lengthy and time-consuming capital cases. We also dispose of another 30 or so related habeas corpus petitions in death penalty cases each year, involving the preparation of lengthy internal memoranda addressing the multiple issues presented.

The court has improved and expanded the selection of counsel and shortened the time for filing briefs in our court. Our efforts have met with some success—at present, we have approximately 80 fully briefed appeals from judgments of death pending in our court, and another 100 fully briefed capital habeas corpus matters.



The records in these cases are routinely 10,000 pages long, and sometimes several times longer, and involve numerous issues. Considerable staff and judicial time must be expended on each case.

Earlier this year, the Supreme Court proposed a constitutional amendment, endorsed by all the justices of the court and backed by the administrative presiding justices of the Courts of Appeal, that would allow the Supreme Court to transfer certain fully briefed cases to the intermediate appellate court for argument and preparation of an opinion. After the Court of Appeal's decision, the Supreme Court would review all cases, and proceed with oral argument and a written opinion if there is an important question of law or a conflict between Courts of Appeal on a matter of law, or if the Supreme Court finds that the lower court may have committed an error in reaching its decision.

This proposal does not concern the merits of the death penalty; it is strictly about process. The proposal arose out of a grave concern that the death penalty caseload is consuming too large a portion of the resources needed by the court to perform its basic constitutional role of deciding significant issues of law in civil and noncapital criminal cases in order to provide guidance to the lower courts, government, business, and individuals.

To effectively handle these difficult matters, adequate resources must be allocated to every part of the justice system—prosecution, defense, and the Courts of Appeal. In view of the budget

situation, I have asked that our proposal not be advanced at this time. I shall, however, at a more propitious time, seek your consideration of this constitutional amendment, and in the meantime we are interested in hearing the Legislature's ideas about how to best address the difficult issues of delay and workload presented by the Supreme Court's backlog of death penalty cases.

Before I close, I mention one additional subject. As many of you know, it has become increasingly difficult to attract well qualified candidates from diverse backgrounds to the bench from both private and public practice, because the judicial retirement system in effect for judges appointed since 1994 is grossly inadequate. This urgent situation should be corrected if we are to ensure the continued excellence of our judicial system, and I ask that you deal with this problem in the near future.

California's court system has a nationwide reputation for excellence and innovation in providing service to the public, for the high quality of its bench, and for the creativity and innovation of judges and court administrators and court staff. In my view, an impartial judiciary—and its corollary, adherence to the rule of law—are the cornerstones of our democracy. Support for our judicial branch is essential to our democratic form of government in good times and in bad.

We in the judiciary look forward to working with our co-equal branches of government to further enhance the administration of justice in our state.

Court Briefs

Marin County Pilots Family Violence Court

The Superior Court of Marin County has launched a family violence court to address domestic violence problems in the community. By joining its resources with those of the probation department, the district attorney, the public defender, and private counsel, the court anticipates that the collaboration will lead to an overall reduction of domestic violence in the county.

The court, overseen by Presiding Judge Verna Alana Adams, plans to meet weekly. Defendants referred to the program will be required to enroll in a 52-week program for batterers, participate in drug and alcohol programs, pay fines, and complete court-ordered community service. The family violence court will be similar to the county's substance abuse and mental health courts, already in operation.

Domestic violence is the primary type of violent crime in Marin, accounting for 30 percent of violent crimes prosecuted in the county. Marin plans to pilot the project for six months and then evaluate its effect.

Contact

Kim Turner, Executive Officer, Superior Court of Marin County, 415-473-6237

Courts Put Restaurant Pagers in the Hands of Jurors

As Judge Gary S. Paer, Superior Court of Orange County, held a pager waiting for a table at a busy restaurant last summer, an innovative idea came to him: What if jurors could be summoned with the same efficiency as a waiting patron at a restaurant? With long "stand and wait" times the biggest complaint of jurors in his court, Judge Paer felt he might be onto something. The idea took just six months to become a reality, and in January, a tray of restaurant-style pagers were delivered to the court. Today, rather than being restricted to an area just outside the courtroom for indefinite periods of time, jurors may walk freely about the courthouse until they are paged.

The pager vendor, Long Range Systems (LRS), reports that similar pager systems have been purchased by other

counties in the state. In Sacramento, Santa Clara, and Ventura Counties, for example, judges use the pagers to send alerts to attorneys when their cases are being called. LRS estimates the pager system for Judge Paer's court cost approximately \$1,400.

Retired Judge Follows His Calling

When Broadcom co-founder Dr. Henry T. Nicholas III was looking for someone to run an academic center he hoped to open in Santa Ana, he looked no further than retired Judge Jack K. Mandel. Judge Mandel, who retired from the Superior Court of Orange County in 2000, accepted the calling and now serves as a volunteer at the Nicholas Academic Center.

For years, Judge Mandel dedicated himself outside the courtroom to helping area teens, serving as a tutor and an education advocate and launching successful school retention and college prep programs. His outreach and commitment helped keep teens focused on academics. His efforts persuaded dozens of Santa Ana

youth to pursue a college education.

Today, Judge Mandel coordinates the programs of the center, which has both paid staff and volunteers. Center directors are all former students, mentored as young teens by Judge Mandel while he was a sitting judge. The three directors also attended his alma mater, Allegheny College in Meadville, Pennsylvania. The learning center opened in January 2008 and serves about 60 students daily.

Insurance Coverage for Superior Courts

In November 2007, the Administrative Office of the Courts (AOC), Office of Court Construction and Management (OCCM), launched two programs to provide insurance protection and risk management services for the superior courts.

The Insurance and Risk Management Program develops insurance programs needed by the AOC to cover facility transfer and the construction of court buildings and facilities. The Health and Safety Program helps ensure that court buildings and facilities are safe



for employees and visitors. Program staff work closely with state and other regulatory agencies, court personnel, county facility managers, and contractors performing work on existing and new court buildings.

While the programs are elective, there are significant advantages to selecting coverage through the AOC:

- The program is administered by the AOC.
- Coverage is designed specifically for superior court entities.
- The program is flexible to meet the courts' changing needs.
- Loss restoration and adjustments are coordinated directly with the AOC Facilities Management unit.
- Health and safety reviews are coordinated with the judicial branch workers' compensation program, also administered by the AOC.

A copy of the insurance program brochure can be obtained from OCCM.

Contact

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Santa Clara Girl Scouts Have Their Day in Court

In recognition of Women's History Month, 21 female bench officers of the Superior Court of Santa Clara County hosted the Santa Clara County Council of the Girl Scouts at a luncheon on March 25. Guests included women representing leadership positions from the State Bar Board of Governors, the local bar association, and a diverse group of area law associations who spoke to the Girl Scouts about their careers. During lunch, guests answered questions and shared life experiences with the scouts in small groups. After lunch, the girls gathered to observe court proceedings.

Girls attending the event were selected through an application process. Applicants had

expressed an interest in learning more about the legal process and potentially a career in law. The event ended with a badge ceremony in the court's conference center.

Superior Courts Recognized for Mental Health Programs

The Council on Mentally Ill Offenders (COMIO) Best Practices Award for 2008 has been presented to four California superior courts. The award is presented annually to recognize cost-effective approaches to meeting the needs of adults and juveniles with mental disorders who have been or who may become offenders.

This year, COMIO presented its Best Practices Award in the adult category to the Superior Court of San Francisco County's behavioral health court and the Superior Court of Orange County's co-occurring disorders court. The Superior Court of Santa Clara County received awards for its mental health treatment court adult program and its juvenile delinquency division's court for the individualized treatment of adolescents.

COMIO has 11 members representing the California Department of Corrections and Rehabilitation, the California Department of Mental Health, law enforcement agencies, the Legislature, and the courts. Since 2001, its charge has been to "investigate and promote cost-effective approaches to meeting the long-term needs of adults and juveniles with mental disorders who are likely to become offenders or who have a history of offending."

Information About COMIO

www.cdcr.ca.gov/COMIO

Chico Attorney Awarded for Self-Help Work

Nancy McGie, family law facilitator for the Superior Courts of Butte and Glenn Counties, was presented with the 2008 Family Law Award by the Legal Aid Association of California. Each year, the award recognizes three family law advocates for their outstanding dedication and commitment to legal services for low-income Californians. The other two recipients were Laura Fry of the Legal Aid Foundation of Los Angeles for

direct representation, and Benjamin Kuhm, a family law practitioner in San Francisco, for his pro bono work. The Family Law Award was presented at the association's statewide Family Law Conference in Los Angeles on February 20.

Ms. McGie is the managing attorney at the Self-Help Assistance and Referral Program (SHARP), a tricity court collaboration between Butte, Glenn, and Tehama Counties. She distributes her time among offices in Willows, Chico, Oroville, Red Bluff, and Orland. In 2007, her office had contact with 25,820 self-help clients.

San Jose Interpreter Publishes Memoir

Rattana Pok spends his days in the courtrooms of the Superior Court of San Joaquin County as a court interpreter. In his spare time he's a writer.

When Slaves Became Masters: A True-Life Story of a Little Boy Before, During, and After the Unfathomable Evil of Pol Pot's Regime is Mr. Pok's memoir, written to educate people about Cambodia's fall to Communism. Approximately 2 million Cambodians died as the result of starvation, disease, and murder. Many survivors and their



descendants now reside in California.

Mr. Pok, who works as a Cambodian-English interpreter, expresses his reasons for publishing his story: "I want people to understand our people and the horrible things we went through."

When Slaves Became Masters

www.amazon.com and www.authorhouse.com. For an audio slide show of an interview with Mr. Pok and excerpts of the book: www.recordnet.com (search for Pok)

San Joaquin Expands Night Court

The Superior Court of San Joaquin County has extended its night court to five nights a week to compensate for the shortage of courtrooms at the downtown Stockton courthouse. The court is awaiting the completion of three new courtrooms scheduled to open this

summer. In the meantime, court leaders say the night sessions are a good way to serve the community, and residents report being in favor of the convenient hours to take care of traffic violations, small claims cases, and civil weddings.

Planning for the expanded night court required a lot of coordination but was necessary to meet the needs of the community. Staff anticipate that the Friday-night civil wedding program will make that a busy night for the court. Night sessions will be available as long as the public continues to use court services during the extended hours.

Santa Clara Opens Family Wellness Court

The Superior Court of Santa Clara County has launched a second juvenile dependency drug court, thanks to a multi-agency effort designed to help children up to three years of age who are living in families affected by substance abuse. The primary goal of the new dependency drug court, known as Family Wellness Court, is to improve the lives of children who are already in out-of-home placement or are at risk of being removed from their homes. The

ultimate objective of the effort is to keep more families together.

Family Wellness Court is funded through a \$3.7 million grant awarded by the U.S. Department of Health and Human Services to the Santa Clara County Social Services Agency. First 5 of Santa Clara County will provide matching funds of \$2.6 million. The five-year grant will help expand the existing dependency drug treatment court program, which has a history of success in reuniting at-risk families through counseling, treatment, and other support services.

Judge Higa Receives Criminal Court Bar Association Award

Judge Robert J. Higa, Superior Court of Los Angeles County, has been honored with the President's Award from the Criminal Court Bar Association. Judge Higa was sworn in as a member of the bench in 1978 and has served at the court's Norwalk branch for the past 26 years. Association President Andrew Stein reported that nearly every judge in the Norwalk courthouse attended the award presentation.

2008 Aranda Access to Justice Award

The California Commission on Access to Justice is seeking nominations for the 2008 Benjamin Aranda III Access to Justice Award. The award is cosponsored by the Judicial Council, California Judges Association, and State Bar. It honors a California trial court judge, appellate court justice, or commissioner who has demonstrated a long-term commitment to equal access, and who has personally completed significant work in improving court access for low- and moderate-income Californians. Nominations must be received by May 15.

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Incoming and Outgoing Court Executive Officers

Presiding Judge Terence L. Bruiniers, Superior Court of Contra Costa County, has announced that, with the retirement of Ken Torre, the court has

Staff Honored During Mediation Week

During Mediation Week, the California courts recognized Sheila Purcell, Superior Court of San Mateo County, for her contributions to promoting the availability, use, and quality of court-connected mediation programs. Ms. Purcell received a certificate from the California Judicial Branch Staff Recognition Program, presented by AOC Regional Administrative Director Christine Patton, Bay Area/Northern Coastal Regional Office, on March 21.



Ms. Purcell is director of the San Mateo court's Multi-Option Appropriate Dispute Resolution Project.

AOC Senior Attorney Heather Anderson (left) and Presiding Judge Robert D. Foiles of the Superior Court of San Mateo County (right) congratulate Sheila Purcell (center) on receiving a California Judicial Branch Staff Recognition Program certificate.

named Kiri S. Torre as its next executive officer, effective September 1, 2008. Ms. Torre will leave her current position as the executive officer for the Superior Court of Santa Clara County.

Presiding Judge Stephen H. Baker, Superior Court of Shasta County, announced the pending retirement of Executive Officer Susan Null and the appointment of Melissa Fowler-Bradley as the new executive officer, effective July 12, 2008. Ms. Null has been with the Shasta court since 1991 and its executive officer since 1995. She previously worked for the Superior Court of Contra Costa County for approximately eight years.

Ms. Fowler-Bradley, who has more than 30 years of judicial branch experience, has been with the Shasta court since 1995. Before that, she worked in the Superior Court of Alameda County.

Milestones

The following judges have left the bench.

Judge Charles W. Campbell, Jr., Superior Court of Ventura County

Judge Larry L. Dier, Superior Court of Modoc County

Judge Charles D. Field, Superior Court of Riverside County

Judge Dzintra I. Janavs, Superior Court of Los Angeles County

Judge Kenneth R. Kingsbury, Superior Court of Alameda County

Judge Michael S. Luross, Superior Court of Los Angeles County

Judge Glenn A. Mahler, Superior Court of Orange County

Judge Richard J. Oberholzer, Superior Court of Kern County

Judge John W. Parker, Superior Court of San Joaquin County

Judge Daniel S. Pratt, Superior Court of Los Angeles County

Judge Randolph J. Rice, Superior Court of Santa Clara County

What Does It Mean to Be "Accountable"?

By
Roger K. Warren

The Commission for Impartial Courts and its four task forces have been meeting since last September to consider actions that might be taken to safeguard the quality, impartiality, and accountability of the California judiciary in light of challenges that have emerged across the country. One of the fundamental questions that each task force has faced is, What does it truly mean for judges to be accountable for the satisfactory performance of their judicial duties?

An important objective of any judicial selection and retention system is that judges be held properly accountable for satisfactory performance of their judicial duties. A principal objective of mechanisms designed to promote

ethical and professional conduct by candidates for judicial office is that candidates be held accountable for any improper conduct. An objective of judicial campaign finance regulations is that judicial candidates, campaigns, campaign contributors, and independent political groups be publicly accountable for their respective campaign finance activities. Finally, one of the objectives of activities to improve the public's knowledge and understanding of the judiciary is to enable the public to make more informed decisions on issues affecting these various aspects of accountability in the context of judicial elections.

Accountability is an important democratic value, and an especially important value for American courts. Under the rule of law all governmental power and authority, including judicial power, is derived from the will of the

people as expressed in the laws and constitutions of our nation. The courts hold others accountable to the laws and constitutions and are themselves accountable to the laws and constitutions. Judges and courts are held accountable for the proper performance of their duties through appropriate mechanisms established by the laws and constitutions.

But the mechanisms through which courts and judges are held accountable differ somewhat from the mechanisms through which other elected officials are held accountable because the roles of judges differ from the roles of other elected officials. Judges' decisions are subject to review by higher courts, and their conduct is subject to review by a specially created constitutional body. In addition, judges have limited discretion in deciding cases, generally hear their cases in open court, and publicly explain their decisions.

In deciding cases judges are accountable to the law and constitutions, not to political or special interests or public sentiment of the moment. Attempts to use judicial elections to hold judges accountable to political or special interests, rather than to the law and constitutions, threaten the fairness and impartiality of our courts.

Two Dimensions of Judicial Accountability

The public perception is often that judges and courts are unaccountable. A 2005 public opinion survey by the Justice at Stake Campaign found that 81 percent believed that "judges should be more accountable."¹ The growing public interest in the topic of "judicial accountability" is reflected in greater news coverage of the topic in recent years. According to the National Center for State Courts, in 2001 there were 32 references to "judicial accountability" in the major media; in 2006 there were 157.

The public perception that judges and courts are not sufficiently accountable may be attributed in part to the tendency of judges and courts to emphasize their "independence" without also explaining the ways in which they are accountable. The public perception also reflects lack of public understanding of the proper role of American courts and of the ways in which the role of the judiciary differs fundamentally from the roles of the other two branches of govern-

ment. The failure of judges and courts to adequately explain the ways in which they are and should be held accountable creates a communication vacuum all too often filled by messages from partisan and special interests demanding creation of other, less appropriate measures of accountability.

Like the concept of judicial independence, the concept of judicial accountability has two dimensions: decisional accountability and administrative (or institutional) accountability. Just as the rule of law and the proper performance of the judicial function require that judges be independent—i.e., free from improper influence—in deciding cases, so too the rule of law requires appropriate measures of accountability regarding judicial decisionmaking. Likewise, the manner in which courts exercise their administrative (or institutional) independence over matters such as judicial rule making and governance, judicial administration, and court management is also subject to appropriate measures of accountability.

The issue of administrative accountability is addressed here only briefly because the charge of the Commission for Impartial Courts focuses on challenges to the California judiciary arising from disagreement with judicial decisions, rather than from dissatisfaction with the judiciary's performance of its administrative responsibilities.

Like officials in the political branches, judges and courts are and ought to be publicly and politically accountable for the ways in which they discharge their administrative responsibilities. In addition to complying with all applicable rules of administration and other provisions of law, judges and courts are expected to comply with all applicable court performance standards established by the judicial branch itself. These rules and standards may cover such things as court governance, leadership, and management; a court's relationships with other justice system partners and other branches of government; case management; resource acquisition and management; personnel policies; accessibility; facility safety and convenience; treating court users with courtesy and respect; records management; and timely and expeditious handling of cases, disbursement of funds, and provision of information and services.

The principal means of ensuring administrative accountability are through the openness and transparency of court activities, regular

public and statistical reporting on the work of the courts, and administrative review of court operations by state and local legislative bodies and executive branch officials. Holding incumbent judges accountable for their satisfactory performance of such administrative duties when they may appear on the ballot as judicial candidates also is appropriate.

Accountability for Decisionmaking

Decisional accountability, on the other hand, requires accountability mechanisms more closely tailored to the unique role of the courts. Public accountability of governmental officials is a critical objective of democratic government not only because accountability tends to motivate better performance on the part of government officials but also because it often promotes decisionmaking consistent with the public interest. But accountability is not always a good thing. The measure of accountability must align with the ends desired: to whom or what is one accountable? This is certainly true, for example, when it comes to professional performance, which is properly measured against prescribed professional or legal standards, not by majority vote. For the proper performance of a surgery we hold the surgeon accountable to appropriate medical standards, not a public opinion survey. It is especially true of judges, whose constitutional duties often require them to make countermajoritarian decisions. Who among us, believing that the law is on our side, would want to go before a judge disposed to rule against us because a decision in our favor would be unpopular with the voters?

Under the rule of law it is critical that judges be guided by the law alone in their judicial decisionmaking. The Founding Fathers of the U.S. Constitution believed that “inflexible and uniform adherence” to the law was “indispensable in the courts of justice.”² In Federalist Paper No. 78, Alexander Hamilton wrote that judges

must be free “from the effects of those ill humors [in society], which the arts of designing men . . . sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”³

To ensure that judges are guided in their decisions solely by the law, free from improper political interference or the undue influence of special interests or public clamor, judges are held accountable for proper performance of their decisional responsibilities in ways that differ from the accountability mechanisms applicable to elected officials in the other two branches of government. If for their judicial decisions judges were accountable directly to the other branches or to political parties, special interests, or the voting public, judges would inevitably tend to be influenced in their decisionmaking by the popular will of the moment or the powerful, rather than solely by the laws and constitutions.

The Founding Fathers also recognized that allowing a judge to be removed from office on account of an unpopular decision would substitute rule by the powerful or popular for the rule of law. The U.S. Constitution therefore provided federal judges with life tenure subject to good behavior. The impeachment acquittal of U.S. Supreme Court Justice Samuel Chase, a Federalist, upon the Jeffersonians’ attempt in 1805 to remove him from office because of a number of his controversial rulings and to appoint a Jeffersonian to the bench, established “the basic principle” described by Chief Justice Roberts that “you don’t impeach judges if you disagree with their decisions.”⁴

Initially, state court judges were also appointed for life or extended terms of office. But states later turned to the election of judges for limited terms. Most state judges are now elected—as in California. But it is important to recall that states did not turn to the election of judges because they believed that voters should decide whether the

decisions of sitting judges were right or wrong. Judicial elections were not established in the states to hold sitting judges accountable to the electorate for the way in which they decided cases. Judicial elections were established by state constitutions in the belief that voters would do a better job than politicians had done through overly politicized appointment processes in *selecting* competent, fair, and impartial judges.

How Judicial Accountability Is Different

One of the most important ways in which judicial accountability mechanisms differ from those applicable to other elected officials is that for the legal correctness of a judicial decision, a judge is accountable not to the political branches of government or to the popular sentiment of the day nor, indeed, to any person, but only to the law and constitutions.

The California Constitution therefore establishes a hierarchical structure for the California courts so that the legal soundness of decisions of lower courts can be reviewed by appeal to other judges sitting on higher and more authoritative courts. The entire appellate review process is open and transparent. There is no comparable constitutional structure by which legislative or executive decisions are subject to appeal to higher legislative or executive authority.

Second, the conduct of judges in California is governed by a unique Code of Judicial Ethics and special constitutional body established to hear and rule on complaints of judicial misconduct. To ensure an honorable, fair, and impartial judiciary of the utmost integrity, the conduct of judges is regulated by perhaps the toughest ethical rules in the world. The rules cover judges’ conduct both on and off the bench. The Code of Judicial Ethics is enforced by the Commission on Judicial Performance, a majority of whose 11 members are neither judges nor even lawyers but lay members of the

public. Any person can file a complaint for judicial misconduct with the commission. Upon a finding of misconduct the commission has the authority and responsibility to impose discipline up to and including removal from office. There is no such code or constitutional body to discipline members of the legislative or executive branches for misconduct in office.

The commission is not a court, however, and does not rule on the legal correctness of a judicial ruling or decision. Absent other improper conduct, an erroneous ruling or decision by a judge does not itself constitute misconduct. Judges can therefore appropriately be held accountable through the ballot for any such misconduct if they subsequently stand for election.

A third way in which judges are held accountable and other elected officials are not is through requirements of openness and transparency in judicial decisionmaking. The arguments presented to judges, written and oral, are presented openly and on the public record. Appellate courts are required to provide written opinions explaining the reasons for their decisions. Lower court judges also usually spell out the reasons for their decisions, either orally in open court or in a written decision. Judges cannot be lobbied off the record or hide from their decisions or the reasons for their decisions. In this way, they are publicly accountable for their decisions in ways that other elected officials are not.

Fourth, the discretion of judges in deciding cases is severely limited by legal procedures and precedents in ways that the authority of other elected officials is not. Whereas a governor or legislator is essentially free to introduce a bill to change or create a new law at will, judges only decide disputes about what the existing law is, and only when a case raising the issue is brought before them by others—and even then only when it is necessary to decide the legal issue in order to resolve the underlying case. Unlike the other branches, there are also strict rules governing the presentation of evidence and arguments

to a court, and the court must follow the law as established by higher courts in previous cases.

Finally, it is important that judges be the first to point out that this does not mean that judicial decisions should not be criticized. To the contrary, judicial decisions are as subject to legal, scholarly, and public criticism as the decisions of other branches. Robust, even strident, criticism of governmental actions is as healthy for the judiciary as for the other branches. But personal attacks on judges and courts in response to unpopular judicial decisions are wrong—as wrongful as personal attacks on legislators or executives on account of their decisions. As Chief Justice John Roberts has said, “Judges can stand the criticism of their opinions, but personal attacks I think are beyond the pale.”⁵

Our Lady of the Law

Some years ago former New York Governor Mario Cuomo spoke eloquently of the need to improve public understanding of the role of the courts in upholding the rule of law despite significant challenges. “For two hundred years,” he said, “our lady of the law has proven stronger than the sins of her acolytes and has made us better than we could have been . . . Now she must be lifted above the political melee and confusion before her bright, guiding light is doomed. . . [¶] . . . The burden of persuasion rests with us . . . We—the judges, the lawyers, the citizen supporters of the justice system—we must lead the charge . . .”⁶ “We must explain to the public in language they all understand that the judicial system is different from the political branches of our government and that difference makes all the difference to our strength and glory as a democracy.”⁷

To maintain its independence and impartiality, the California judiciary must respond to the overwhelming public perception that judges should be more accountable. The judiciary must reaffirm the importance of judicial accountability but explain that judges are

accountable in ways that other elected officials are not. We need to explain that in deciding cases judges are accountable to the law and constitutions and to strict codes of ethical conduct, not to political or special interests or to the prevailing public sentiment of the moment. We need to explain how attempts to hold judges accountable to political or special interests, rather than to the law and constitutions, undermine the fairness and impartiality of the court system—and how it is in every American’s interest that judges have the integrity and courage to follow the law even if they personally disagree with it or know that some of their decisions may be unpopular. ■

Roger K. Warren, a 20-year veteran of California’s trial courts and past president of the National Center for State Courts, is scholar-in-residence at the Administrative Office of the Courts in San Francisco.

Notes

1. Belden Russonello & Stewart, *Access to Justice and Constitutional Rights Versus Political Pressure: Defining the Battles for the Court*, report of national survey (Justice at Stake, Sept. 2005), p. 44.
2. Jacob E. Cooke, ed., *The Federalist* (Wesleyan Univ. Press 1961), p. 529.
3. *Id.* at p. 527.
4. “But it’s a free country. They’re free to say what they wish. [¶] But the issue of impeachment was resolved in the Salmon Chase hearing. The basic principle was established: You don’t impeach judges if you disagree with their decisions.” (Judge John G. Roberts, Senate Confirmation Hearing (Sept. 13, 2005), as transcribed by CQ Transcriptions), www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=all.
5. *Ibid.*
6. Mario Cuomo, “We Must Lead the Charge” (Fall 1999) 36(3) *Court Review* 19, <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20Cuomo.pdf>.
7. *Id.* at p. 18.

Animis Opibusque Parati

The Special ADR Needs of Self-Represented Litigants

By
Helen I. Bendix

If you are bewildered by the title of this article, you are in good company. Self-represented litigants feel the same way when they confront the civil justice system. California superior courts have begun to focus on the special needs of self-represented litigants in connection with court-sponsored alternative dispute resolution (ADR) programs such as mediation. Through grants provided by the Administrative Office of the Courts in 2006 to improve access to civil justice, the Superior Courts of Los Angeles, San Mateo, San Francisco, and Stanislaus Counties surveyed the experiences of self-represented litigants and neutrals in court-sponsored ADR. The concerns identified in the surveys and the initiatives these courts have implemented to address those concerns are recounted in the accompanying articles.

Imagine the plight of a self-represented litigant when a judge asks, “What kind of ADR do you want?” Sometimes a judge will simply order the case to mediation. Many times the self-

represented litigant will not even know what the terms *ADR* and *mediation* mean. Indeed, it is quite common that the self-represented litigant does not speak English and no interpreter is in the courtroom.

Once ordered or referred to an ADR process, the self-represented litigant is expected to be

prepared without any explanation of what goes on at the ADR hearing. At the hearing itself, the self-represented litigant may be squared off against a party with counsel in a forum that the self-represented litigant does not understand. It is not difficult to imagine that self-represented litigants could conclude from these experiences that they are powerless and that the justice system is


not open to all. Similarly, they may perceive settlements produced in this context to be unfair. This is a shame, given that court-sponsored ADR proceedings may be the forum in which self-represented litigants are the least disadvantaged by not having lawyers.

The Judicial Council has awarded special funding to implement mediation and settlement programs in civil cases and to help self-represented litigants effectively participate in the programs. ♡ These articles describe four court projects to address the needs of such litigants.

Neutrals presiding over proceedings with self-represented litigants also face special problems. Self-represented litigants may not understand that neutrals are ethically constrained from giving legal advice. Some neutrals are therefore concerned about professional liability when only one side is represented. Some are concerned about their personal safety if the ADR hearing is not held at the courthouse, given how emotionally entrenched some self-represented litigants can be in their views about their cases.

Because self-represented litigants generally do not understand the legal process, neutrals may have to spend extra time just explaining basic legal concepts and procedures without advancing discussion toward a settlement. This adds to the frustration of opposing counsel and his or her client. As a result, neutrals may find it difficult to maintain neutrality or face challenges regarding the appearance of impropriety.

As shown in the following articles, the information gathered by four different superior courts reveals a common need to provide links to outside resources and for improved informational materials that address the special needs of self-represented litigants in court-sponsored ADR. Just how those courts have responded to this need is also detailed.

By the way, the Latin phrase *animis opibusque parati* means “prepared in minds and resources.” How fitting. 

Helen I. Bendix is a judge of the Superior Court of Los Angeles County and presides over a general civil jurisdiction court. She is chair of the court's Alternative Dispute Resolution Committee, which oversees the largest ADR program in the United States.

Solving Problems for Litigants and Mediators



Julie L. Bronson

By
Julie L. Bronson

The challenges faced by the Superior Court of Los Angeles County's ADR program were similar to those identified in 2004 by the Judicial Council's Task Force on Self-Represented Litigants.

Facing increased numbers of self-represented litigants participating in the court-sponsored ADR program, the court had to confront the basic need by such litigants for an explanation of out-of-court settlement options such as mediation, their procedures, and their potential benefits. In addition, numerous attorney mediators had expressed concerns regarding the provision of ADR services to self-represented litigants. These concerns included professional liability and malpractice insurance coverage, the desire of self-represented litigants to receive legal advice from mediators, and self-represented litigants' lack of preparation for the ADR process.

In fiscal year 2004–2005, the Judicial Council approved a grant for the Superior Court of Los Angeles County's ADR

program to assess the needs of self-represented litigants in alternative dispute resolution and to determine how assistance could be provided to meet the identified needs.

Surveying ADR Participants

To implement the assessment, surveys were designed to solicit information from self-represented litigants, ADR neutrals, and ADR staff about their respective experiences and their suggestions for providing assistance to self-represented litigants participating in court-annexed mediation and arbitration.

Surveys were administered to self-represented litigants by telephone in English and Spanish. Self-represented litigants were contacted upon filing a complaint, upon being referred to the court's ADR program, and after participating in an ADR process. Although 74 percent of the respondents had never participated in the court's ADR program, 66 percent thought ADR would be beneficial. Those surveyed identified areas of needed assistance, including receiving an explanation of the process, receiving suggestions for and having an opportunity to practice case presentation, and learning negotiation skills.

The court's ADR panel members also completed surveys on their experiences in mediating or arbitrating court cases in which at least one party was self-represented. Their surveys identified concerns regarding professional liability and malpractice insurance coverage, self-represented litigants' requests to receive legal advice from the mediators, and the difficulty in sometimes witnessing a less-than-fair settlement simply because a litigant was not knowledgeable about the law.

Court ADR staff assigned to all civil courthouses were requested to complete a brief survey on their experiences with self-represented litigants. Approximately 76 percent of the staff indicated that self-represented litigants were unknowledgeable about the ADR process.

All survey participants were asked to rate the perceived usefulness of a series of statements describing possible remedies for the difficulties encountered by self-represented litigants participating in the court's alternative dispute resolution program. The most popular option was to post a video on the court's Web site on the ADR process, including a mock mediation and arbitration. In general, all survey respondents expressed the need for more educational materials about the ADR process and procedures.

Improving Information About ADR

In an effort to improve educational and informational materials for self-represented litigants, the court's ADR program applied for and received an implementation grant from the Judicial Council. The grant provided funding to revise ADR brochures to reduce the complexity of information and present materials in a clear, concise manner. The goal was to make available educational materials about ADR in plain language that could be understood easily and produced in a variety of media and languages. The major focus of the grant was to develop audiovisual materials explaining how the ADR process works and how to prepare for it.


Video vignettes providing an overview of alternative dispute resolution were created. Using a homeowner-contractor dispute as an example, actors demonstrated four different types of ADR—mediation, arbitration, settlement conference, and neutral evaluation—offered by the court. For each ADR process litigants were provided suggestions for case presentation. The videos can be accessed on the Internet by going to www.lasuperiorcourt.org/adr and clicking on the ADR information link.

The print program brochures were revised to explain the four types of ADR offered by the court to reinforce the video vignettes. The brochures were translated into Spanish, Armenian, Korean, and Tagalog; distributed to all courthouses; and made available to legal service centers. On request, the

video and print materials were made available to the Dispute Resolution Programs Act providers in Los Angeles County.

The issues raised by the court's ADR neutrals and ADR staff in the assessment were addressed by developing and presenting training modules on working with self-represented litigants. The focus of the trainings was to provide a clear understanding of legal information as opposed to legal advice and to develop techniques to minimize common obstacles to working with self-represented litigants.

Although the project goal and objectives were met, the court's ADR department has pursued additional efforts to implement educational materials about alternative dispute resolution. The video script has been translated into Spanish, and a Spanish voice-over will soon be added to the video. Closed-captioning has been identified as an additional feature for the ADR video.

Detailed reports on the assessment and implementation projects are available on the password-protected Serranus Web site at <http://serranus.courtinfo.ca.gov/programs/adr/grants.htm>. 

Julie L. Bronson is the ADR administrator for the Superior Court of Los Angeles County. She has more than 20 years of experience in developing, implementing, and administering comprehensive court-based ADR programs. She has lectured and served as a consultant on ADR programs to other state courts, numerous foreign delegations, and others.

Photos of mediation training sessions, pages 19 and 22, provided by the Superior Courts of San Francisco and Stanislaus Counties.

Bringing Mediation to the Minority Community

By
**Karen Camper and
Julie Dodge**



Karen Camper Julie Dodge

The mediation pilot project of the Superior Court of Stanislaus County is designed to educate self-represented litigants about the court's mediation program, from the simple basics of what

it is to how it can help them. The program's primary focus is on the Hispanic community. In addition to making the public aware of all services available to litigants proceeding without lawyers in our self-help center, our mediation project is working to develop support services for self-represented litigants in small claims and limited jurisdiction civil cases. We have focused our efforts on the Hispanic community in particular because surveys determined that Hispanics make up nearly 40 percent of the county's population yet only about 16 percent of the mediated cases and thus were an underserved minority in Stanislaus County. The mediation center and the self-help center are centrally located in downtown Modesto.

Building Public Awareness

In general, we know that people aren't accustomed to calling someone and receiving help with their disputes—they either do nothing or seek help through the court system. Building public awareness is one of the challenges any mediation program will face. People can be afraid of the unknown or unfamiliar. To overcome this initial obstacle, we have made every effort to develop a solid network among the various Hispanic social service and community support groups. The presentations to these various groups have been effective: the information about the mediation process is well received by the attendees, who, in turn, become an excellent source of referrals to the program. We were very fortunate in hiring a grant coordinator, Carolina Bernal, who is president and chief executive officer of the Hispanic Chamber of Commerce of Stanislaus County and who, in addition, has strong ties within the Hispanic community and is a familiar local television and talk show host, adding an extra benefit for marketing purposes. Through Bernal's talents and contacts, an advisory committee developed a widespread media marketing plan to help get the word out to the community.

Film clips are being produced in both English and Spanish, explaining what mediation is, along with a walk-through of a typical mediation process. This video will be aired on local cable shows and played on video monitors posted in high-volume areas of the courthouse. DVDs will be available for distribution to the public. A mock mediation was conducted at California State University, Stanislaus during Mediation Week in March. Posters in both English and Spanish, ordered from Maryland's Mediation and Conflict Resolution Office, promote mediation as an out-of-court solution to disputes. We have also created public service announcements for airing on the local Hispanic radio station.

One of the hurdles we had to overcome in the public broadcasting arena was that many Hispanic radio or cable shows are broadcast beyond Stanislaus



County lines, which we anticipated would result in more calls to our mediation center. The mediation center staff is bilingual but limited in number, so it was decided to reduce the use of broader-based radio stations. Some people are still drawn in from outside the county, but we direct their calls to our self-help center because it is more adequately staffed with bilingual clerks.

Building Volunteer Staff

A final piece of our mediation project is to seek additional mediation staffing—currently, we have only two full-time mediators—and better access to services in outlying cities throughout Stanislaus County. The Stanislaus County Mediation Center soon will be holding a mediation training workshop conducted by an attorney-mediator. Recruitment for such training is directed at members of the local community who are willing to volunteer for community-based mediation and “day-of-court” mediation. The anticipated increase in staff resources will make more mediators available for local mediation services and services to outlying areas in places such as libraries or service centers.

The Community Responds

The feedback from our mediation center staff is that the concept of mediation is not necessarily well embedded in the community despite the success mediation has had in Stanislaus County. (In 2007, when we started our program, 34

percent of the contested matters set for hearing were referred to mediation; of those, 63 percent reached agreement.) Looking to a strong authority figure to make decisions is a more typical dynamic, meaning that more education about the benefits of a collaborative mediation approach is necessary. Our small claims commissioner talks about the benefits of mediation when she takes the bench and encourages people to use the service.

When mediation is explained to members of the community, the response appears to be positive. In fact, during the last quarter of 2007, 27.5 percent of the mediation cases were opened by Hispanic individuals. This figure indicates that Hispanics are positive about using mediation when it has been explained to them by the case manager at the mediation center. ■

Karen Camper is ADR coordinator for the Superior Court of Stanislaus County's civil unlimited, civil limited, and small claims program and its community-based mediation program. She also oversees the court's small claims advisor program.

Julie Dodge is the managing attorney for the court's self-help center and a family law facilitator. Martin Eichner, director of dispute resolution services for Project Sentinel and the Stanislaus County Mediation Center, contributed to this article.

Drawing on Community Partners and Mediation Advisors

By Jeniffer Alcantara,
Judy Louie, and
Jason H. Stein



Jeniffer
Alcantara



Judy Louie



Jason H. Stein

The Superior Court of San Francisco County launched its mediation project for self-represented litigants in November 2007 as part of an effort to make the benefits of mediation available to

litigants without attorneys. Mediation is available to litigants at virtually any time during the life of a civil case, including before a case is filed, any time after the case is filed but before the first hearing, and on site on the day of a court hearing. Since the project's inception its 50 diverse volunteers have mediated more than 220 cases. The project's success is due in large part to the efforts of its community partners, the mediation advisor, the volunteers, and the participants.

Partnering With Others

The project was developed through a partnership between the court's Alternative Dispute Resolution Program, the ACCESS Center, Community Boards of San Francisco, and local law schools. The ADR program manages the development and implementation of the court's civil settlement programs, which include mediation, judicial arbitration, and settlement conferences. The ADR program also provides the oversight and management of the project.

ACCESS, which stands for "Assisting Court Customers With Educational and Self-Help Services," is a court-based program that provides educational and informational legal materials in English, Spanish, and Cantonese. Community Boards is a local program that has been offering conflict resolution services since 1976. As a community-based mediation provider, it helps to effectively manage all of the project's pre-filing mediations and a majority of its prehearing mediations. Law students who have been trained as mediators also help the court provide mediation coverage for every small claims calendar. These partnerships allow mediation services to be offered at multiple locations, including at the courthouse, the ACCESS Center, and Community Boards.

Using a Mediation Advisor

ACCESS staff promote mediation to all interested persons and refer appropriate cases to the mediation advisor, who is located at the ACCESS Center. The mediation advisor provides the assistance that litigants need to understand the legal options in their cases so that they can effectively participate in mediation. The advisor assists litigants in making the arrangements and completing any court forms necessary to continue or dismiss the matter pending a mediation outcome. Since the project's launch, the advisor has made contact with more than 1,200 self-represented litigants, individually or in groups.

Specialized Training for Volunteers

All project volunteers have completed specialized court-sponsored training that was designed to increase mediation participants' level of trust and confidence in the process as well as the court. The training includes a small claims component that addresses, at minimum, how to manage time constraints at day-of mediations, provide information as opposed to giving legal advice, use problem-solving techniques, and write small claims agreements.

The rich diversity of San Francisco presents highly complex issues that must be addressed to ensure meaningful access to the judicial process for all San Franciscans. Court customers speak myriad languages other than English, come from diverse cultural and socioeconomic backgrounds, and span all ages and literacy levels. Thus, project volunteers are also required to complete diversity training to enhance their effectiveness in facilitating communication between self-represented litigants during mediation.


Feedback From Participants

Participants have expressed high levels of satisfaction with the mediators' skills and abilities. One participant commented, "[The mediator] handled all parties with skill and compassion." Another stated, "[The mediator] was very knowledgeable and helped me to understand the court processes." Among other positive comments, one participant noted, "Excellent mediator with ability to root out key issues."

An ADR project assistant aids in project evaluation by coordinating evaluation surveys and compiling the results. The evaluation surveys are an invaluable tool to review the project's progress and assess its success. Thus far the project has received glowing reviews from its participants, including such comments as these:

"I truly believe that the mediation was helpful."

"This deleted the stress I felt from dealing with this issue."

“This was an excellent experience and a speedy resolution to a very complicated case.” 

Jeniffer Alcantara is the ADR administrator for the Superior Court of San Francisco County; Judy Louie has been the director of the court's ACCESS Center since August 2006; and Jason H. Stein is the court's mediation advisor.

Touting Mediation as Part of a Multi-Option Program



By
Lauren Zorfas

Lauren Zorfas

When we contemplated applying for funding to develop and implement settlement support services for self-represented litigants in the Superior Court of San Mateo County, we chose to

focus our efforts broadly in small claims and limited civil cases and more narrowly in the area of unlawful detainer cases. The San Mateo court currently has a robust alternative dispute resolution program that we call our Multi-Option ADR Project, or MAP. MAP has several components, including civil and probate ADR, family law ADR, small claims mediation, judicial

arbitration, and juvenile mediation programs for both dependency and delinquency. In 2007 we released our MAP evaluation report for 2003–2005, which showed that 13 percent of small claims litigants referred themselves to the program; the rest were court referred, generally on the day of trial. Aside from these and other statistics, we studied several aspects of the small claims process, looking at several small claims calendars and the small claims advisor program, which is run one night a week, and interviewing judicial officers, small claims clerks, and the coordinator of the small claims mediation program. We heard a lot of the same feedback: the small claims litigants were not getting enough information about the court process and alternatives to litigation such as mediation. Although the small claims advisor was very helpful, we needed more than the weekly program to reach all of our small claims litigants.

Information and Education

Our plan to address these issues consisted of two basic steps. One was to inform litigants early on that mediation was available. This was done by developing an information sheet that accompanied each small claims filing, advising litigants of the availability and advantages of mediation and what they could expect from the process.

What was most noticeable in our observations of small claims cases was the recurrence of the same basic misunderstandings or questions about the legal process: who can be a party, what is a cause of action, whom do I serve, how do I serve them? So we decided that our second step would be to devise a workshop that introduced the small claims litigant to the court process, answering all these basic questions and, more important, touting the advantages of mediation as well as preparing them for it.

In developing this workshop we enlisted the help of a community-based mediation agency, the Peninsula Conflict Resolution Center (PCRC). Although a special referral is not needed

to use the program, we worked with PCRC to develop a special referral form that litigants can take with them and self-refer to the center. Besides reminding litigants of the workshop's availability, the referral form allows us to track the number of referrals coming directly from the workshop.

The workshop “So You’re Thinking of Filing a Lawsuit?” is offered the first, third, and fifth Monday of every month at 1:30 p.m. It consists of a guided PowerPoint presentation and several handouts. Each participant is given a “pre-evaluation” to test themselves on (and allow us to measure) what they know about the court process and mediation. They are also given an outline of the PowerPoint, a resource packet, and a glossary of legal terms.

In addition to the designated workshop presenter, we often have a judge introduce the session as a “friendly face of the court,” although, of course, the judge does not discuss the specifics of any case. The coordinator of the small claims mediation program often attends and, on occasion, so does a representative from PCRC. At the end of each workshop, the participants are given a “postevaluation” to test what they have learned from the workshop and to obtain their feedback on the workshop.

When we looked at the pool of self-represented litigants filing in limited and unlimited cases, we noted that the large majority were, not surprisingly, defendants. We decided to continue our workshop approach, covering part two of the court process in a workshop titled “I Have a Case in Court—Now What?” This workshop, offered on the second and fourth Mondays of each month, follows the same format as the other, including a PowerPoint presentation, handouts, and a pre- and post-evaluation.

This workshop is a bit lengthier and covers more about what self-represented litigants can expect from the court process now that they are involved in a lawsuit. For example, such topics as filing an answer, case management conferences, and law-and-



motion are discussed. And, as with the first workshop, mediation is suggested as a win-win alternative to the win-lose court process.

Both workshops have been highly successful, starting with an average of 5 participants per session in the first three months and, more recently, jumping to 10 participants per session. The feedback on the evaluations has been highly favorable. Another positive result has been an increase in the number of court-based mediations on both the small claims and civil sides in cases involving self-represented litigants.

Special Focus on Unlawful Detainer

The other area of focus was unlawful detainer. Because of the fast-track nature of these cases, taking the time to set up mediation is often difficult or impossible. In our court we have a weekly pretrial calendar for the unlawful detainer cases that are set for trial. In the past, these cases could involve multiple


“informal” settlement attempts, often direct negotiations between the landlord’s attorney and the self-represented litigant/tenant and, sometimes, a legal aid services attorney. If the parties could not settle, they would meet with a court commissioner in chambers to see if he or she could assist in reaching a settlement. But to self-represented litigants, already distrustful of a system they did not understand, this was not always the best option.

With all these considerations in mind, we instituted a court-based neutral settlement program. On the day of the pretrial calendar, when the calendar is called, the commissioner advises the parties that a neutral settlement officer will meet with them if at least one side in the case is self-represented. The commissioner explains that the settlement officer is in fact a neutral employed by the court but has no decisionmaking power in the case. The parties are also advised that the settlement officer can offer information,

but not legal advice, to either side in the case.

The program started in February 2008, so it is still in its infancy. In the first three weeks there were four qualifying cases, and each settled with all parties expressing that they were very pleased with the program.

Information Available for Other Courts

As we continue these programs, we will gather data and make it available to interested courts. The PowerPoint presentations used in our workshop are available on the court’s Web site at www.sanmateocourt.org/selfhelp and, along with the presenter’s notes, will soon be on the Equal Access page of the California Courts Web site, www.courtinfo.ca.gov. 

Lauren Zorfais is the supervising attorney of the family law facilitator’s office/self-help center at the Superior Court of San Mateo County in Redwood City.

Reducing Peremptory Challenges in Misdemeanor Cases: A Modest Reform

By
Charles B. Burch

The vast majority of state jurisdictions and the federal courts allow 6 or fewer peremptory challenges in misdemeanor trials.¹

It is logical that cases of less significance, particularly as measured by the lesser penalties involved, should not merit the use of the same jury resources allocated to noncapital felonies, including, as is true in California, three-strike cases.

Even though studies of the jury system in California have acknowledged and decried the overburdening of prospective jurors by mandatory, repeated summonses to jury service, the Legislature has not authorized the simple corrective measure of reducing the number of peremptory challenges in misdemeanor cases to a smaller but reasonable number.

In fiscal year 2005-2006, 3,402 misdemeanor jury trials were held in California courts, a sig-

nificant decrease from the previous year's 4,260 trials.² In the past 10 years, the number of misdemeanor jury trials has varied from 3,000 to 5,000 per year. For each of these trials, jury administrators were required to summon and make available a sufficient number of persons to allow a jury to be seated with the assumption that all 10 peremptory challenges would be exercised by each side.

The fact is, in more than 70 percent of all misdemeanor trials in California, 12 or fewer peremptory challenges are actually used. It follows from these numbers that if the number of peremptory challenges were reduced to 6 per side in misdemeanor cases, jury administrators could summon prospective jurors in correspondingly smaller numbers. As a result, at least 25,000 to 40,000 citizens per year would avoid trips to the courthouse for jury service. I say "at least" because this numerical range does not take into

account those many instances where jurors are summoned for service but are excused without being sent to a courtroom for voir dire. It is difficult to provide a precise estimate of the number of saved trips to the courthouse in a system with 6 rather than 10 peremptory challenges because many variables are involved when jury commissioners send out summonses and actually notify prospective jurors that their presence is required. However, there is little doubt that the number of saved trips would be substantially more than 25,000 because the number of summonses would be reduced to reflect the need for fewer jurors in all misdemeanor cases scheduled for trial.

In addition to this obvious benefit, other benefits would flow from a reduction in peremptory challenges. The costs of court administration for jury trials would be reduced. Clerks and administrators would spend less time summoning, processing, and handling jurors in all misdemeanor cases because smaller groups of prospective jurors would be summoned to court. Because the actual selection process at trial would take much less time in many cases, those time savings would free up judges to conduct other trials or attend to other court business.

The CJA Proposes, the Legislature Disposes

Last year, the California Judges Association (CJA) proposed, and state Assembly Member Mike Feuer (D-Los Angeles) sponsored, Assembly Bill 1557. The Judicial Council also supported the bill. AB 1557 called for a reduction of the number of peremptory challenges from 10 to 6 in all single-defendant misdemeanor cases.³ The bill was considered very briefly by the Assembly's Public Safety Committee, which took no action on the bill. The failure of the bill to gain any traction in the Legislature appears to be attributable mainly to opposition from the most influential prosecution and criminal defense advocacy groups.⁴

The CJA proposal involved a modest, timely improvement and deserves the Legislature's further consideration.

The Burden of Jury Service in Misdemeanor Cases

The problem of substantial noncompliance with jury obligations continues to be a serious concern for the California court system. On August 2, 2007, a legal newspaper, *The Recorder*, reviewed the one-day, one-trial jury system, which was initiated in 2000 as one of a number of reforms designed, in part, to diminish citizen dissatisfaction with jury service. The article noted that while court officials claimed the new system was working well in Los Angeles and San Francisco, 30 to 40 percent of prospective jurors still failed to respond to the summonses. This figure is consistent with preliminary statistics gathered by the ongoing Jury Data Project of the Administrative Office of the Courts (AOC), which show that in 2004 and 2005, 31 percent and 43 percent, respectively, of all available summoned jurors in California failed to respond to summonses.⁵

The problem of citizen disaffection and noncompliance with jury obligations is not new. As early as 1996, the AOC took notice of major problems associated with the administration of jury trials in California. The Blue Ribbon Commission on Jury System Improvement and the Task Force on Jury System Improvements, both appointed by the Judicial Council, worked for eight years on a comprehensive program to reform the process of jury trial administration. The task force's final report on this process was first published in April 2003 and revised in April 2004.⁶ In the report, the commission and the task force specifically recommended, among other proposed reforms, that the number of peremptory challenges be reduced to 3 in all misdemeanor cases.⁷ The report noted that the existence of a proportionally larger number of peremptory challenges in criminal cases, instead of ensuring the selection of more diverse, representative juries, actually had the

potential of increasing the nonrepresentative nature of any particular jury panel.⁸ It also noted that the American Bar Association (ABA) *Standards Relating to Jury Use and Management* recommended that peremptory challenges be limited to 3 in misdemeanor trials. By a vote of 14-5, the commissioners recommended a reduction of peremptory challenges to 3 in misdemeanor cases, with one commissioner voting to reduce the number to 5. The recommendation also was reaffirmed in a 2004 AOC publication titled *Examining Voir Dire in California*, which summarized an in-depth study of the California courts conducted with the assistance of the National Center for State Courts (NCSC). The study considered a variety of issues related to jury selection practices in California courts. It too endorsed a proposal to reduce the number of peremptory challenges in misdemeanor trials to 3.

Despite the conclusions in these studies and despite the fact that AB 1557 would have reduced the number of challenges in misdemeanor cases to 6 and not 3, the opposition by both prosecution and criminal defense advocacy groups to such legislation remains adamant. These groups provide no real justification of the status quo, nor have they addressed why the AOC's detailed studies are not persuasive. Nor, in opposing AB 1557, did these groups even acknowledge the serious problem of citizen apathy and hostility directed at California's jury system, as evidenced by the large numbers of persons who simply vote with their feet by failing to comply with jury summonses.

What Do Other Jurisdictions Do?

It is noteworthy that California is one of only three jurisdictions in the United States that permits more than 6 peremptory challenges in misdemeanor cases.⁹ New York and New Jersey are the other two. Forty-seven states and the federal courts provide for 6 or fewer challenges in misdemeanor cases.

The most common number permitted is 3 challenges, which is the number allowed in the federal courts and the courts of 22 states. Seven states allow 4 challenges, 8 states allow 5, and 10 states allow 6.

Given that 47 states allow 6 or fewer challenges in misdemeanor cases, one would expect that those who support allowing a larger number of peremptory challenges could point to the demonstrable benefits. For example, it would be important if California's greater number of peremptory challenges resulted in materially lower hung jury rates. Lower hung jury rates might suggest that California did a better job of lowering the cost of trials by weeding out renegade individuals or small juror cliques that prevented unanimous verdicts. Lower hung jury rates would mean fewer trials, thus saving money. Yet the advocacy groups in California who consistently have resisted any legislation to reduce the number of peremptory challenges have no statistical information supporting such a position.

Demonstrated Benefits, Speculative Costs

Available statistics suggest that a reduction to 6 challenges in misdemeanor trials would have no negative effect. The Superior Court of Riverside County provided statistical information in support of AB 1557. The information reflected the total number of peremptory challenges used in each of the 276 misdemeanor jury trials conducted in Riverside County in 2006. The most telling statistic is that more than 12 peremptory challenges were used in only 86 of the 276 trials. In other words, in more than 70 percent of all tried cases, each party averaged 6 or fewer challenges.¹⁰ These figures indicate that neither side has perceived a need to use more than 6 challenges in most cases. This fact alone raises a legitimate question as to whether the benefits derived from having extra jurors in those few cases where both sides might use more than 6 challenges outweigh the cost, monetary and otherwise, of summoning

eight or more additional prospective jurors in the thousands of cases where neither side will exercise more than 6 challenges—or where the jury panel is sent home without ever seeing the inside of a courtroom because some or all of the cases scheduled for that day have been resolved.

Furthermore, no statistical information suggests that the rate of hung juries would increase if California were to reduce the number of peremptory challenges for misdemeanors. In 1999, the NCSC published in its *Judicature* magazine the results of a broad study of hung juries and the various factors contributing to them. This study included hung jury rates in felony cases in 30 of the largest urban state court systems, including the Superior Courts of Alameda, Fresno, Los Angeles, Riverside, San Francisco, and Santa Clara Counties in California. The rates were calculated as an average rate for a three-year period from 1996 through 1998.

This study clearly showed that felony hung jury rates in California and other states do not correlate to the number of peremptory challenges available to the parties at trial. The study readily recognized that there has been little in the way of consistent record keeping by the state courts with regard to hung jury rates, and, as a result, the statistics are less than conclusive. It also recognized that many variables might significantly affect hung jury rates in particular locations, including prosecutorial charging and plea bargaining practices, preferences by defense counsel for bench versus jury trials, and the overall socioeconomic composition of the community. Nevertheless, with the exception of San Francisco County, with an overall hung jury rate of 4 percent of all tried felony cases, the California counties covered in the study had hung jury rates that were equal to or substantially higher than 13 of the 14 other state jurisdictions that allowed fewer than 10 peremptory challenges.¹¹ In addition, New York and New Jersey, which also provide for 10 or more challenges for noncapital felonies, also had hung jury rates that equaled California's rates.¹²

The hung jury rates for felony cases within California courts varied greatly despite the fact that the number of peremptory challenges (10) was the same in all cases. The lowest hung jury rate occurred in San Francisco (4 percent) and the highest rate in Los Angeles (14 percent). Simply put, the number of hung juries in California and nationwide appears to have little to do with the available number of peremptory challenges. Furthermore, the NCSC study provided no reason to believe that a statistical correlation between the number of peremptory challenges and hung jury rates would exist in misdemeanor cases where no such correlation exists for felony cases.

Clear Benefits, No Demonstrated Detriments

In response to chronic problems associated with the repeated summoning of jurors, including the significant nonresponse rates of persons who have been summoned, the AOC has spent substantial resources since 1996 attempting to modernize and make practical changes to the way that California courts deal with prospective jurors. The AOC and the CJA have continued to recognize that the problem persists and that clear, partial solutions exist, including reducing the number of jurors called on to serve in misdemeanor cases. Most other states allow 6 or fewer peremptory challenges in misdemeanor cases; the largest number of states permit only 3. There is no evidence to suggest that some significant detriment has resulted from these states' decision to permit significantly fewer challenges than does California. The clear benefits to be derived from the proposal include:


- Improved public attitudes about the jury system, since the proposal would require citizen participation as prospective jurors only when necessary to achieve fair trials
- Reduced financial and other costs to prospective jurors because they would be called for jury service less

frequently, thus forgoing lost earnings, expenses for child care, and other expenses associated with jury service

- Reduced administrative costs to the courts because many fewer jurors would be summoned and processed by administrative staff
- More productive courts because shorter trials would free up judges and staff to attend to other work, including additional trials

The AOC/CJA proposal to reduce the number of challenges in misdemeanor cases deserves more complete consideration than that given to AB 1557. The short shrift the proposal has received to date may be caused by its relatively low position in the Judicial Council's legislative agenda. However, it is as likely due to firm opposition to the bill from influential prosecution advocacy groups that have provided no reasoned argument for their opposition other than the generalization that they favor fair trials.¹³ Prosecution advocacy groups are singled out here because it is perfectly understandable why criminal defense attorneys and their advocacy organizations would oppose this legislation. Criminal defense attorneys have an obligation to do whatever they can to ensure that the system works to their clients' advantage. Statistics show that defense attorneys use peremptory challenges more often than do prosecutors.

District attorneys are in a different position than defense attorneys. In addition to the successful prosecution of cases, district attorneys have an obligation to use the public's time and money in a cost-effective way. This obligation includes making sure that citizens are summoned as prospective jurors because their presence is truly necessary to the fair administration of justice. When citizens are repeatedly and unnecessarily called to serve as jurors, this fact should be of major concern to prosecution advocacy groups. If they are not prepared to endorse the partial solution that has been fully re-

viewed and endorsed by the AOC and the CJA for more than a decade, district attorneys and their advocacy groups owe it to the public to suggest other equally effective proposals to address the problem. 

Charles B. Burch is a judge of the Superior Court of Contra Costa County and a former federal prosecutor.

Notes

1. Even though use of peremptory challenges has long been a part of the justice system, there is no state or federal constitutional right to peremptory challenges. See *People v. Wheeler* (1978) 22 Cal.3d 258, 281, fn. 28.

2. These figures are taken from the 2007 *Court Statistics Report* published by the Judicial Council/Administrative Office of the Courts.

3. The bill would not effect a change in the number of challenges for misdemeanors carrying a 90-day maximum sentence. Peremptory challenges in such cases are already limited to 6 per side. See Code Civ. Proc., § 231(b).

4. The California District Attorneys Association sent two brief letters, dated May 2 and 16, 2007, reflecting the association's opposition to the bill. Similarly, on April 13, 2007, the California Attorneys for Criminal Justice sent a brief letter to Assembly Member Feuer advising him of the group's opposition to his bill. In response to a request to provide materials or information in support of their opposition apart from their terse letters, a representative of each group indicated that there were no such materials to be submitted in support of these letters.

5. These preliminary statistics were provided by a representative of the AOC's Jury Data Project in San Francisco. The term *available jurors* means jurors who were served with a summons and were not otherwise excused, postponed, or disqualified.

6. See Judicial Council of Cal., *Final Report: Task Force on Jury System Improvements* (2003, 2004), www.courtinfo.ca.gov/reference/documents/tfjsi_final.pdf.

7. *Id.* at pp. 47-48.

8. *Id.* at pp. 60-61.

9. While *misdemeanor* has slightly different meanings in different jurisdictions, the term

is used in this article to mean any criminal offense carrying a maximum sentence of one year in custody.

10. This figure is consistent with the experience of this writer. In the 43 misdemeanor trials over which this writer has presided from May 2005 to date, the parties used more than 12 total peremptory challenges in only 24% of the cases. The Superior Court of Riverside County provided no breakdown regarding which party used more than 6 peremptory challenges in any given case. In this writer's 43 cases, the defense used more than 6 challenges 16 times (37% of all cases) and the prosecution used more than 6 challenges only 6 times (14% of all cases).

11. In California courts, the hung jury rates were, by county: Alameda, 11%; Fresno, 8%; Los Angeles, 14%; Riverside, 8%; San Francisco, 4%; and Santa Clara, 8%. In non-California jurisdictions, the hung jury rates were: Pima, Ariz., 5%; Pinellas, Fla., 2%; Fulton, Ga., 3%; Macomb, Mich., 3%; Oakland, Mich., 1%; Wayne, Mich., 6%; Hennepin, Minn., 2%; St. Louis, Mo., 4%; Philadelphia, Pa., 3%; Shelby, Tenn., 14%; and Pierce, Wash., 6%.

12. The hung jury rates in these other jurisdictions were: Middlesex, N.J., 6%; Bronx, N.Y., 5%; New York, N.Y., 8%; Erie, N.Y., 5%; Kings County, N.Y., 6%; Monroe, N.Y., 4%; Nassau, N.Y., 3%; Suffolk, N.Y., 4%; Westchester, N.Y., 6%; Dallas, Tex., 6%; Harris, Tex., 8%; and Travis, Tex., 11%.

13. California District Attorneys Association, position in opposition to AB 1557, Assembly and Senate analyses, p. K, http://info.sen.ca.gov/pub/07-08/bill/asm/ab_1551-1600/ab_1557_cfa_20070507_100215_asm_comm.html.

In Conflict Over Judge Judy

By
Arthur Gilbert

My contribution to the Fall 2007–Winter 2008 issue of *California Courts Review* was a fictional story about identical twins, Supreme Court Justice Aston Peel and his brother, Axel Peel, a successful litigation attorney. Justice Peel abhorred television’s Judge Judy. He wrote inflammatory articles denouncing her unseemly judicial behavior. This in turn led to a series of events involving apparent deception. Fearful that these events were about to spiral out of control, Axel argued that, despite Judy’s indiscretions, Aston should cease his attacks.

Several readers talked to me about the story. Some asked whether Justice Peel heeded his brother’s advice. I am not sure but am inclined to think that he did. Some thought it curious that the protagonists were twins. I know of identical twins who were both well-respected judges and are now successful private judges. There is no similarity between these judges and the characters in my story. That one of the twin judge’s chambers was a stone’s throw from my own is beside the point.

Perhaps I created the characters in the story as twins because their views reflect my own conflicting views about Judge Judy and other daytime television judge shows. Rail as I may, these TV judges have a right to be on television even though they present a distorted view of our judicial system. They just make it harder for real judges to administer justice in real courts of law.

Our trials are conducted in conformity with rules of procedure and evi-

dence, and most judges treat parties and witnesses with dignity and respect. Unfortunately, a growing number of litigants, witnesses, and jurors expect trials to replicate those they see on television—with maybe a break now and then for a commercial.

I think most of us cringe when we hear Judge Judy say to a party, “On my dumbest day, I am smarter than you on your smartest day,” or to a lady who has had kids by four different husbands, “Madam, on Father’s Day, your home needs a revolving door.” But like Axel Peel in my story, I find myself agreeing with many of her decisions. Often she sagely advises a party on how to live a better life or accept responsibility for his or her actions. But these positive attributes are overshadowed when she degrades and insults parties. Unfortunately, her tongue-lashings boost her popularity. If she acted like a real judge, she would be off the air in a week.

One TV judge, who could not come close to calling himself a competitor, was the pugnacious former mayor of New York, Ed Koch. He took over the court once occupied by the distinguished Judge Joseph A. Wapner. In the past, Judge Wapner’s fine judicial demeanor was acceptable to humans. He then became a popular judge on *Animal Court*, where he was reputed to have had a large canine audience. Judge Koch’s show, however, went to the dogs. He was summarily removed from the bench by a body that makes the Commission on Judicial Performance seem like a pussycat in compar-

ison—the television-viewing public. Why such a harsh rebuke? The once formidable mayor seemed more like Bambi when compared to Judge Judy.

She, on the other hand, is so feared, and therefore so popular, that like Catherine, Hannibal, Attila, and Ivan, she needs only a first name. However, seen by hundreds of millions throughout the world, she needs no appellation after her name. A description like “the Great,” “the Hun,” or “the Terrible” would be superfluous.

Retired UCLA law professor Michael Asimow wrote an article about the blitz of daytime television shows in the 1999 edition of *The Judge’s Journal*, a publication of the American Bar Association. Professor Asimow believes that the public likes to see the quick resolution of a dispute based on what is right rather than on “legal technicalities.” Viewers want to see a justice system controlled by a judge and one “that rewards good values, personal responsibility, and a strong sense of right and wrong.” He also postulates that Judge Judy’s popularity is attributable to people’s yearning to experience human relationships with real people. He speculates that this was why millions of people visited Jenni’s Web site. You may recall that Jenni had a camera trained on her prosaic daily activities 24 hours a day from 1996 to 2003.

I looked up her site, JenniCam. I am sure Jenni is a nice person and all, but I agree with Professor Asimow—Jenni was boring. Probably not as boring as I am. That’s why I didn’t put my life on




Dennis M. Perluss

the Web or even write a diary about my ordinary day. This would be a typical entry: “Got up, fed the cats, went to work. Read some briefs. Had a cup of green tea. Damn, spilled some on the brief. Oh well, I can still read the wrinkled pages. What is that blurred word? Is that a ‘not’? Wrote up a draft of the case. Not sure if it’s right. Read some cases that seem on point.” Zzzz. Get the idea?

Professor Asimow understands the attraction that Judge Judy has for so many people. She is in your face, but she is a real person. He disapproves of Judy’s combative style and cautions real judges always to be courteous and respectful to everyone in the courtroom. No one would disagree with that admonition, but for fear of offending someone, are judges supposed to leave their personalities in their chambers when they sit on the bench? Are they fungible arbiters of justice?

The patron saint of judicial ethics, Judge David M. Rothman (Ret.), of the Superior Court of Los Angeles County, recognizes the dilemma and sees room for a middle ground. His book, the *California Judicial Conduct Handbook*, is the bible of judicial ethics. In chapter I, section 1:52, it is written: “[J]udicial personality is important to the fabric of the judicial system and it would be dangerous to that system were the judiciary to become a group of faceless bureaucrats who attempt to fit into a mold in order to stay out of trouble.”

Judge Rothman believes that judges should not become so absorbed with issues of judicial ethics, conduct, demeanor, and discipline that they lose common sense and the reality that they are, after all, only human. In short, they must find the right balance.

Both Peel twins have a point. Maybe if the three of us went to lunch, we could sort this thing out. You can be sure I would wind up with the check. 

Arthur Gilbert is presiding justice of the Court of Appeal, Second Appellate District, Division Six, in Ventura and a regular contributor.

Bringing the Dangers of Politicized Elections to Life

BY DENNIS M. PERLUSS

In *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, the United States Supreme Court, by a 5–4 vote, held that First Amendment protections extend to campaigns for judicial office and invalidated a state ethical rule prohibiting judicial candidates from announcing their views on disputed legal or political issues. The concerns expressed in the wake of the *White* decision—that highly politicized judicial contests would proliferate, particularly as federal circuit court rulings extend the reach of the Supreme Court’s decision—do not seem exaggerated. As Justice Ming W. Chin wrote in his “An Introduction to the Work of the Commission for Impartial Courts” in the last issue of this journal, “[I]n many states, courts increasingly are coming under attack from partisan and special interests seeking to influence judicial decisionmaking, and judicial elections are becoming more like elections for political office: expensive, nasty, and overly politicized.”

The very real threat to the independence and integrity of an elected state judiciary created by *White* and its progeny is the centerpiece for John Grisham’s new novel, *The Appeal*, in which Grisham conjures up an unregulated judicial election campaign barely imaginable in our worst nightmares. The story begins with a stunning courtroom victory for Wes and Mary Grace Payton, a husband-and-wife legal team, who hear the jury return a \$41 million verdict in favor of their client Jeannette Baker, a widow whose husband and son died of cancers caused by drinking the contaminated water in their rural Mississippi county—water polluted by Krane Chemical Company’s illicit dumping of toxic chemicals. The Paytons have additional clients waiting to bring their own wrongful death lawsuits against Krane, promising further large jury verdicts that could ruin the company, but billionaire corporate raider Carl Trudeau, Krane’s New York-based CEO, vows that “not one dime of our hard-earned profits will ever get into the hands of those trailer park peasants.”

Trudeau’s plan, implemented by stealth marketing and consulting firm Troy-Hogan, is to alter the balance on the Mississippi Supreme Court, which ultimately will hear Krane’s appeal, by replacing a moderate justice who typically votes with the

majority in 5–4 decisions in favor of plaintiffs in similar liability cases with someone who can reliably be expected to protect the interests of the business community. The candidate recruited is Ron Fisk, a 39-year-old junior partner in a small-town insurance defense law firm: “Young white male, one marriage, three children, reasonably handsome, reasonably well dressed, conservative, devout Baptist, Ole Miss law school,

ion, which found that the defendant’s confession had been coerced, and was but one of eight justices joining in the reversal). The ads also portray her as favoring strict gun regulation (based on isolated comments in an opinion dealing with a hunting accident, but political death in the Deep South nonetheless) and supporting same-sex marriages (an issue then pending in the Mississippi courts because Troy-

around him or to ask what price he ultimately may be expected to pay.

To avoid being a spoiler, I will not reveal the results of the election or the outcome of the appeal in *Baker v. Krane Chemical Co.* I will say that *The Appeal*, like Grisham’s other legal thrillers, is a thoroughly engrossing story, complete with one unexpected plot twist.

The novel is not without its flaws. The main characters are essentially one-dimensional—the Paytons are far too decent to be real, Carl Trudeau is an overdone caricature of a predatory corporate miscreant (with the obligatory emaciated trophy wife), and Ron Fisk is hopelessly naïve. But although not great literature, *The Appeal* is a fun read, and perhaps the popularity of Grisham’s work will help the public understand the dangers inherent in unregulated judicial elections. **RR**

Dennis M. Perluss is the presiding justice of the Court of Appeal, Second Appellate District, Division Seven. Before his appointment to the appellate bench in 2001, he was a superior court judge for two years and practiced trial and appellate law for more than 24 years.

The very real threat to the independence and integrity of an elected state judiciary . . . is the centerpiece for John Grisham’s new novel, *The Appeal*, in which Grisham conjures up an unregulated judicial election campaign barely imaginable in our worst nightmares.

no ethical glitches in the law career, not a hint of criminal trouble beyond a speeding ticket, no affiliation with any trial lawyer group, no controversial cases, no experience whatsoever on the bench.”

The crusade to vilify incumbent justice Sheila McCarthy and elect Fisk is breathtaking. A highly organized \$4 million campaign, funded by a wide range of business political action committees and special interests dedicated to limiting plaintiffs’ tort recoveries, includes “soft” ads emphasizing Fisk’s sincerity and wholesome commitment to fundamental family values and “hard,” misleading attack ads condemning Justice McCarthy as a liberal who is soft on criminals (criticizing her vote to reverse the conviction of a child molester while failing to mention that she had not authored the court’s opin-

Hogan had fabricated a case raising it, but on which Justice McCarthy had not taken a position). There are also push polls that spread propaganda in the guise of surveying voters, Fisk campaign speeches from church pulpits followed by endorsements from local ministers, and a healthy dose of dirty tricks.

Justice McCarthy initially fails to respond to the attacks but eventually mounts a significant, albeit largely restrained, campaign funded in large measure by contributions from the state’s trial lawyers. Fisk, selected as the candidate because “he was just old enough to cross their low threshold of legal experience, but still young enough to have ambitions,” is too caught up in the thrill of the campaign and the prospect of sitting on the Supreme Court to seriously question what is happening

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J. Richard Couzens



Tricia Ann Bigelow

The New Life Term for Sexually Violent Predators: Is It Prospective Only?

BY J. RICHARD COUZENS AND TRICIA ANN BIGELOW

On September 20, 2006, Governor Arnold Schwarzenegger signed Senate Bill 1128, the Sex Offender Punishment, Control, and Containment Act of 2006, into law as an urgency measure. About a month later, on November 7, 2006, the voters passed Proposition 83, the Sexual Predator Punishment and Control Act, commonly known as Jessica's Law. Both pieces of legislation dramatically altered the potential disposition of many sex crimes. The new laws also made several major changes to statutes governing a sexually violent predator (SVP). (Welf. & Inst. Code, § 6600 et seq.)

Among the significant changes was that the commitment term was made an indeterminate life term rather than a renewable two-year term. Based on the California Supreme Court decision in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, there was little question that the new laws would apply to all original SVP petitions filed after the effective date of the new legislation, even though the predicate offense was committed before that date.

However, there was considerable uncertainty over the application of the new rules to persons who had previously been designated as sexually violent predators and who were committed to two-year terms that expired after the effective date. Several recent appellate decisions have settled most issues related to the application of the new laws.

Neither legislative change contained any express provision dealing with its prospective or retroactive application. Enactments by the voters and the Leg-

islature generally are given only prospective application unless a contrary intent is indicated. (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79–80; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206–1207; *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 979–981.) Generally, “[t]he presumption is very strong that a statute was not meant to act retrospectively, [wherein] [i]t ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.” (*U.S. Fidelity & Guaranty Co. v. U.S.* (1908) 209 U.S. 306, 314.)

Defense attorneys have contended that because the legislative changes could be given only prospective application, they could not apply to any person previously designated a sexually violent predator. Further, they argued that because the new statutes eliminated any reference to extension of commitments, those currently designated as SVPs should be released after their current SVP terms. Prosecutors, on the other hand, have argued that the legislation not only applies to renewal petitions but also automatically converts all existing SVP commitments to life terms without the need for further court proceedings. Several recent decisions have addressed each of these issues.

The first case was *People v. Shields* (2007) 155 Cal.App.4th 559, in which the defendant originally had been committed as a sexually violent predator in

2001. A petition to extend his commitment was filed in June 2005, before the enactment of the new legislation. After the enactment of the new laws, but before the petition was heard on its merits, the district attorney amended the petition to request the imposition of the indeterminate term. The defendant argued that because the new legislation eliminated all reference to extension proceedings, under the plain meaning of the statutes he was entitled to an unconditional discharge at the end of his current commitment. Given the intent of the legislation to *enhance*—not *restrict*—the confinement of SVPs, the court observed that “any such argument would strain credulity.” (*Id.* at p. 563.) *Shields* concluded that the trial court had jurisdiction to commit the defendant for an indeterminate term.

A similar argument was made in *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275 and *People v. Carroll* (2007) 158 Cal.App.4th 503. *Bourquez* concluded that, in most circumstances, repeal of a statute granting authority of the government to act—in this case to extend an SVP commitment—would terminate all pending actions. However, given the obvious intent of the legislation to hold persons in treatment until they are no longer sexually violent predators, a savings clause may be implied so that the trial court has jurisdiction to extend the commitment.

Both defendants argued that if the court did have jurisdiction to extend the commitment, it could be only for a two-year term. In rejecting this contention, both *Bourquez* and *Carroll* observed that, because proceedings to

extend an SVP commitment are not review hearings or a mere continuation of a prior proceeding but are entirely new commitment proceedings, the new procedures apply to all petitions, whether they are an original or an extension proceeding. Under such circumstances, there is no retroactive application of the law.

The critical characterization of an extension proceeding was stated in

mental disorder and dangerousness. As we have concluded, each recommitment requires petitioner independently to prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant's mental state."

Finally, in *People v. Whaley* (2008) ___ Cal.App.4th ___ [2008 D.A.R. 3123], the court concluded that the increased

Welfare and Institutions Code section 6604.1(a), the indeterminate term began on the date the court issued the "initial" order of commitment. In this case, that would mean the original 1999 commitment. Interestingly, the People argued that support for its interpretation was found in the legislative changes that deleted all references to extension proceedings. In rejecting the People's argument, *Whaley* found the reference to the ambiguous terms of the statute and ballot arguments insufficient to overcome the presumption that new legislation is to be applied only prospectively. "[W]e construe the reference to an 'initial' order in section 6604.1, subdivision (a), as reflecting when the commitment term begins for a person first committed to an indeterminate term, rather than demonstrating intent by the voters to retroactively apply an indeterminate term to those already committed." (Original italics.) The defendant can be committed to an indeterminate term only if as a result of a new extension proceeding he or she is currently found to be a sexually violent predator.

Time will tell which argument prevails. RR

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“The danger in this mischaracterization is that it may suggest to a jury that the defendant must prove he is no longer an SVP; in any case it certainly lessens petitioner’s burden by improperly establishing a datum of mental disorder and dangerousness.”

People v. Salomon Munoz (2005) 129 Cal.App.4th 421, 430: “It is tempting in the SVP recommitment context to characterize the issue as whether anything has changed since the last determination such that the defendant is no longer an SVP. This, however, is a potentially prejudicial mischaracterization. Petitioner is required in a recommitment proceeding to prove beyond a reasonable doubt that the defendant is an SVP, not that he is still an SVP. The danger in this mischaracterization is that it may suggest to a jury that the defendant must prove he is no longer an SVP; in any case it certainly lessens petitioner’s burden by improperly establishing a datum of

commitment term does not apply to any commitment existing before the effective date of the legislation. The defendant had been adjudged an SVP in 1999, and the commitment was extended thereafter for two additional two-year terms. A petition to further extend petitioner’s commitment was filed in 2007. While that petition was pending, the People filed a motion seeking to retroactively convert the defendant’s original 1999 commitment to an indeterminate term by operation of law and without any need to show that the defendant currently met the definition of a sexually violent predator.

The primary thrust of the People’s argument was that, as provided in



José Dimas

The Need for Court Interpreters: Gaining Federal Support

BY JOSÉ DIMAS

Individuals with limited English skills need court interpreters because they cannot otherwise defend themselves or advance their arguments in a court of law in the United States. These people come to court seeking protection from an abusive spouse, combating unwarranted debt collections, attempting to maintain custody of their children, or fighting eviction from their homes, and some are defendants in criminal cases. Misunderstandings caused by the lack of qualified court interpreters in these cases can irrevocably disrupt people's lives. The deeper consequence is an erosion of confidence in the fairness of our judicial system.

Scope of the Problem and Minimum Standards

Census data show that state courts face increasing challenges in providing interpreter services. In 1990, an estimated 6.7 million persons age five and older living in the United States did not speak English well. By 2000, this figure had grown dramatically to 21.3 million persons, and by 2005, 23.2 million—a 246 percent increase between 1990 and 2005.

The National Center for State Courts (NCSC) has supported efforts to establish a minimum set of standards for court interpreters. One such method is to certify court interpreters by using performance examinations. Certification ensures that court interpreters are not only sufficiently proficient in interpretation skills but also are knowledgeable about legal terminology and court procedures.

The NCSC supports the Consortium for State Court Interpreter Certification, which has developed examinations that test court interpreter proficiency

and has made those evaluations available to its member states for use in assessing interpreters' qualifications. Before the development of these tests, very few states were able to reliably gauge interpreters' skills. The availability of testing enables courts to implement a standardized, reliable process for qualifying court interpreters. Since its inception, the consortium has grown from 4 to 40 member states, working together to share language and testing resources.

The consortium also has developed a number of standardized tests in different languages. Thus far, four Spanish test versions, two Russian tests, and one test each in Haitian Creole, Hmong, Korean, and Vietnamese are used by consortium members.

Pressure From the Feds

The U.S. Department of Justice (DOJ) has asked all state court administrators to "take reasonable steps to provide meaningful access to Limited English Proficiency (LEP) individuals." In a December 2003 letter, U.S. Deputy Assistant Attorney General Loretta King reminded state courts that as recipients of federal assistance they must comply with several statutes, including title VI of the Civil Rights Act of 1964. This law prohibits discrimination on the basis of race, color, national origin, sex, and religion. This letter to state court administrators followed a guidance (67 Fed.Reg. 41455 (June 18, 2002)) on meaningful access for LEP individuals.

The guidance suggested factors that courts could consider to determine when language assistance might be required to ensure meaningful access. These included the number or proportion of LEP persons within a state,

the frequency in which LEP individuals come into contact with the court, and the costs to a state to implement a court interpreter program.


The Conference of State Court Administrators (COSCA) and the NCSC have been interacting with the DOJ on this guidance since it was released. The group has met with DOJ representatives and most recently shared best practices with it, such as the NCSC's *Model Judges Benchbook on Court Interpreting*.

In 1990, an estimated 6.7 million persons age five and older living in the United States did not speak English well. By 2000, this figure had grown dramatically to 21.3 million persons, and by 2005, 23.2 million—a 246 percent increase between 1990 and 2005.

Proposed Legislation

The Conference of Chief Justices (CCJ) and the COSCA have long sought federal assistance in dealing with interpreter issues facing the courts. Indeed, it is the federal government's inability to stem the flow of undocumented immigrants that partially contributes to this problem. The CCJ and the COSCA went on record in 2003 asking the federal government to establish a program to help state courts provide interpreter services. They found an ally in Senator Herb Kohl (D-Wis.), who sponsored such legislation in the 108th Congress and who has introduced his bill in Congress every year since then.

Senator Kohl's legislation (Senate Bill 702) would authorize a grant program to support state court interpreter efforts in the amount of \$15 million annually for five years. The DOJ would award the grants and model the distribution of funds after the successful Court Improvement Program administered by the Children's Bureau of the U.S. Department of Health and Human Services. States applying for the grant would receive a base amount of \$100,000. The rest of the funds would be distributed to each state based on its percentage of residents age five or older who speak a language other than English at home.

Senator Kohl has attempted to attach his legislation to comprehensive immigration reform legislation for each of the past three congressional sessions. The failure by Congress to approve an immigration bill has prompted Senator Kohl to place it on the Senate Judiciary Committee's calendar for consideration in the first two weeks of April. We urge you to contact the senators from your state and ask them to co-sponsor and support this important legislation. 

José Dimas is a government relations associate with the National Center for State Courts in Washington, D.C., and a regular contributor.

Direct Calendaring Systems Work



Lee Edmon



William F. Highberger

By
Lee Edmon and William F. Highberger

In his article titled "The Compelling Need for a Civil Master Trial Calendar System" (*California Courts Review*, Summer 2007), Judge Elwood Rich (Ret. 1980, Superior Court of Riverside County) called the direct calendar system used in Orange, San Diego, Los Angeles, and many other California trial courts "an utter failure." His concerns are based on the premise that fewer trials are being held, citing anecdotal evidence that some individual calendar courtrooms are not conducting trials every working hour of every day. While the well-chronicled phenomenon of the "vanishing trial" in virtually all American courts raises serious questions worthy of discussion, there is no support for the conclusion that the increased use of individual calendaring is the cause of, or even a significant factor contributing to, the declining number of trials. Indeed, we believe that Judge Rich's analysis overlooks the positive effects of case management in direct calendar systems.

The True Measures of Effectiveness

In looking at this issue, we start from the basic proposition that the civil justice system exists to resolve disputes under the rule of law. In some cases that is by trial, but an overwhelming number of disputes are resolved through means other than trials. Trials—and calendar systems, for that matter—are means to the ends of timely and effective dispute resolution. In our view, the number of civil jury trials, or even the number of days in trial, is not the most important measurement of the effectiveness of the civil court system. Instead, there are a number of equally, if not more, important measurements of how well the system is functioning, including (1) how many cases are resolved; (2) how long from the time of filing it takes for cases to be resolved; (3) how firm trial dates are; and (4) how efficiently cases are being tried.

In Los Angeles, all these measures of success significantly improved after the shift in the 1980s in most of our civil courts from a master calendar system to an individual calendar (I/C) system. That does not mean that the individual calendar system necessarily is better than the master calendar system. Indeed, in Los Angeles we use both,¹ but our experience with the I/C system for more than 20 years leads us to conclude that master calendar systems are not inherently more effective than individual calendar systems.

Master Calendar's Documented Problems Before "Fast Track"

In the late 1970s and early 1980s the Los Angeles courts' master calendar system was ineffective. This was not the fault of the judges serving at that time but rather was due to the lack of case management tools in the Code of Civil Procedure, Civil Code, and related rules of court. Many scholars in this area cite the need for effective case management tools as an absolute *sine qua non* for timely case resolution, and these were lacking at the time.

Complaints were not required to be served for several years. Cases often did not get set for trial until they were three years old. The first trial date was commonly understood to be an illusion, so some counsel did not even prepare, and those who did typically found that their efforts were of little real value to their clients because, owing to the unavailability of courtrooms, long continuances were common. Only the older, "five-year" cases were actually going out to trial.

Because defendants anticipated that their cases would not go to trial in less than five years, there was little incentive to settle early. Plaintiffs with serious personal injuries waited five years or longer without recompense, if they did not give in to the pressure put on them by the delay in getting to trial. Parties who had to pay their attorneys (e.g., in contract disputes and most business litigation) often incurred unnecessary fees because of multiple false starts.

When cases actually got to trial, memories had faded, witnesses were missing, and physical evidence was often hard or impossible to get by subpoena or otherwise. None of this promoted just outcomes.

The civil system needed improvement. Legislation that provided goals, mandates, and tools for the courts to speed case resolution was drafted.

1986 Trial Court Delay Reduction Act and Its Successes

The backlogs and delays ultimately reached such a crisis level that, in 1986, the California Legislature adopted as a pilot project the Trial Court Delay Reduction Act, Government Code section 68600 et seq.² The legislative history of the act states:

In September 1985, the Committee on Courts of the State Bar released its report entitled "Reducing Delay in California Trial Courts." Many of the committee's findings and recommendations are similar to the proposals contained in this bill. Specifically, the committee concluded that one of the major causes of trial court delay is the "local legal culture." Also, the committee urged adoption of "case management techniques to eliminate delay . . . the key ingredient [of which] appears to be early and continuous case management [that] requires that judges actively manage the scheduling of cases rather than letting events take their course."³

The legislation did not mandate a particular case management system, but there was a fairly express requirement that the pilot program courts designate a cadre of judges to work together to tackle the problem. As correctly observed in the legislative history, a change in settled legal culture does not come readily, and only the consistent effort of judges working in concert with the bar brought about meaningful change. Civil case management tools allowing judges to force cases forward on a much more expedited timeline also were authorized for the pilot program courts. In this context, a number of California's trial courts first adopted individual judge assignment systems and hybrid systems to improve the quality and efficiency of their civil case management processes. Once implemented, they had their intended beneficial effect.

The Court of Appeal has highlighted the success of I/C judges with case management authority in changing the prevailing legal culture:

"[The Trial Court Delay Reduction project] clearly represented a fundamental change in the approach to the problem of court congestion. It embraced the principle of active judicial management which required that trial judges aggressively monitor and manage litigation from the filing of the first pleading until final disposition. This effort to transfer control of the pace and timing of litigation from the lawyers to the trial judge was a major departure from long-accepted traditional practice." (*Reygoza v. Superior Court* (1991) 230 Cal. App.3d 514, 522 [281 Cal.Rptr. 390].) "For a civil case, 'the entire purpose of an all-purpose assignment [is] to expedite complex matters by permitting one judge to handle the entire matter from start to finish, acquiring an expertise regarding the factual and legal issues involved which will expedite the process.'" (*Ibid.*)⁴

The Judicial Council's July 1991 *Report to the Legislature on Delay Reduction* found I/C case management had a substantial positive impact in Los Angeles's Central District under the pilot program:

The ability of the court to assure firm trial dates during the pilot-program years improved substantially compared to preprogram years. Three out of four trials started on their first assigned trial date during program years, compared to one in four in 1987. The court reduced substantially the length of jury trials, which produces an important de facto increase in available judicial resources.⁵

The initial pilot experiment in Los Angeles and elsewhere went so well that the Legislature replaced the 1986 pilot program with the 1990 Trial Court Delay Reduction Act,⁶ which applied to

virtually all civil and criminal courts. Once the “fast-track” program was made applicable to all civil courtrooms statewide, Los Angeles committed all general jurisdiction civil courtrooms in the Central District to I/C “fast track.” The results were dramatic: the backlog shrank, time to case resolution shortened notably, and, on average, the duration of trials also shortened.

As firm trial dates, coupled with available courtrooms for trial, are the surest path to case resolution, Los Angeles judges made every effort to be open on the first date set for trial and to share cases when needed to deal with the inevitable overbooking that would occur on any one judge’s I/C docket on a given day. Once the bar, litigants, and insurers realized that trial dates actually mattered, cases settled earlier, reducing the number of cases unresolved before trial was supposed to begin. This freed up more trial capacity, which helped clear out the backlog.

Independent Experts Find I/C Case Management at Least as Effective

The judges and court management in Los Angeles have had ample opportunity to observe what does and does not work in case management based on a wealth of actual experience. Nevertheless, it is important to note that legal scholars with no connection to our court have reached the same conclusion. Based on studies of a wide variety of courts, legal scholars have concluded that individual calendaring does a better job of encouraging judicial officers to utilize active case management techniques that are most often associated with timely case disposition.

For example, a 1990 Institute for Civil Justice (ICJ) report relating to delay reduction stated:

Researchers usually argue that a master calendar system minimizes

waiting time (thereby increasing efficiency), allows the court to capitalize on the specialized judicial personnel, and is flexible enough to minimize scheduling problems. However, delay in disposing of civil cases is generally greater in master calendar courts. This increased delay may arise from the duplication of effort in master calendar courts and from judges’ lack of responsibility and accountability for a specific set of cases. . . . *Courts with individual judge calendars for civil cases usually have substantially less delay than courts with a master calendar system.*⁷

Although not all literature on calendaring endorses individual calendaring as strongly as the 1990 ICJ study, generally the literature also does not favor master calendar systems over individual calendar systems. According to one American Bar Association study on caseflow management, “[c]ourt professionals who have studied this topic realize that caseflow excellence can be achieved under both master and individual assignment systems as well as under a variety of ‘hybrids’ found in courts across the country.”⁸ Significantly, “[t]he elements common to individual calendar systems, master calendar systems and hybrids that successfully deal with the business of the courts suggest that what is important is not who is in charge, but rather that someone is, not that some particular assignment system exists, but that some person or persons manage the system that does exist.”⁹ Another recent article concluded that “any kind of case assignment system is likely to have both advantages and disadvantages. The challenge for any court is to integrate its calendar system with its caseflow management plan in a way that optimizes results.”¹⁰

All agree that effective case management depends on a combination of two key resources: (1) the existence

of procedural tools that allow bench officers, not attorneys exclusively, to control the pace of litigation; and (2) bench officers with a commitment to controlling their dockets who also have adequate training and resources to make it work.

The “Vanishing Trial” Is Not a Reason to Eliminate I/C Systems

Without question, the frequency of jury and nonjury trials in both state and federal courts has noticeably declined in recent decades. However, the fact that trials have declined does not establish that master calendar systems are inherently better or more efficient than single assignment systems.

The phenomenon of the “vanishing trial” has been discussed extensively in recent times.¹¹ Many reasons have been offered to explain the decline of trials, including the increased use of mediation and arbitration, the high cost of pretrial activities including discovery, the unpredictability and higher stakes at trials (and greater incentives to settle), the greater length and costs of trials, substantive and procedural law changes, the availability of fewer lawyers with trial skills, and changes in case management. Many factors are contributing to the “vanishing trial.” To our knowledge, no commentator has ever before ascribed the “vanishing trial” to the use of an I/C docket system.

Regarding the last factor mentioned—case management—many courts throughout the country appear to have significantly improved their ability to manage cases. These improvements have occurred under both single-judge assignment systems and master calendar systems. Improved case management, in turn, has produced more settlements and fewer trials. Most regard this as a positive development, even though it has reduced the number of jury and nonjury trials, because it has

led to the resolution of more disputes at lower cost to litigants, the courts, and the public.

The Number of Trials in Progress Is Not a Valid Measure of Judicial Productivity

Judge Rich offers his anecdotal assertion that one can walk the hallways of certain courthouses and not see a witness on the stand during court hours. One can also assert, however, that that may mean the I/C system is working.


The overwhelming consensus of academics who study case management techniques nationwide and across many case types is that the single most important factor for facilitating case resolution is that the parties know that a courtroom is available and will be used to commence trial or hearing absent compromise. Thus, the existence of trial-ready courtrooms is a good, not an evil, and also tends to be self-perpetuating as the bar and litigants acknowledge the reality of firm trial dates and available courtrooms and act accordingly.

Moreover, in Los Angeles, judges not presently engaged in trial are working to resolve cases. They conduct settlement conferences, sometimes at great length and in multiple sessions. They also need and use such time to wrestle with complex summary judgment and summary adjudication motions. Now that a judge has a case for all purposes, the time spent on such motions is time well invested because it educates the trial judge on the issues left to be tried if the motion is denied. Other law-and-motion practice can be equally time-consuming and also an early opportunity for the judge to have a dialogue with counsel on the key legal and factual issues in the case, an invaluable case management technique.

Our judges are hard-working and productive, but the number of witnesses sworn, exhibits marked at trial,

or juror days served is not the correct measure of their effort. The pending active case inventories over time, the average time to case resolution, and the number of cases completed in a given time period are much better measures. Based on these criteria, the public is well served.

Individual Calendar Systems Produce Positive Results

The “vanishing trial” is not the result of I/C civil calendar management in Los Angeles or elsewhere. Judge Rich ignores too many facts when making his assertion that I/C case management is an “utter failure.” The record is clear: California courts have made tremendous strides toward greater satisfaction of civil litigants and attorneys through their I/C-grounded efforts at delay reduction. Both I/C and master calendar systems can be used effectively to serve the public and the bar as long as the bench is given the needed procedural tools and shows a collective commitment to docket control. Los Angeles, Orange, and San Diego trial courts, using individual calendar systems, are providing a high level of dispute resolution service every day. 

Lee Edmon is supervising judge, civil, and William F. Highberger is assistant supervising judge, civil, for the Superior Court of Los Angeles County. Judge Edmon was appointed to the court in 2000; Judge Highberger, in 1998.

Notes

1. The Southeast District of the Superior Court of Los Angeles County uses a master calendar system for general civil cases; Central and the other districts use I/C calendars for general civil cases.
2. Stats. 1986, ch. 1335, § 1 et seq., pp. 4743–4747.
3. Assembly Bill 3300 (1985–1986 Reg. Sess.) as introduced Feb. 18, 1986.

4. *Sunkyong Trading (H.K.) Ltd. v. Superior Court* (1992) 9 Cal.App.4th 282, 290–291.

5. Judicial Council of Cal., *Report to the Legislature on Delay Reduction* (July 1991), pp. VIII-1–2.

6. Stats. 1990, ch. 1232, § 3 et seq., pp. 5139–5149; Gov. Code, § 68600 et seq.

7. James S. Kakelick et al., *Averting Gridlock Strategies for Reducing Civil Delay in the Los Angeles Superior Court* (RAND 1990), p. 6, italics added.

8. Maureen Soloman and Douglas K. Sommerlot, *Caseflow Management in the Trial Court: Now and For the Future* (ABA 1987), p. 33.

9. *Id.* at p. 44.

10. David Steelman et al., *Caseflow Management: The Heart of Court Management in the New Millennium* (Nat. Center for State Courts 2000), p. 160.

11. The leading article on this subject is Marc Galanter, “The Vanishing Trials: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 *Journal of Empirical Legal Studies* 459. Subsequently, many other articles have been written on this topic.

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