

Court Review

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Court Review

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EDITOR'S NOTE

This issue marks the fourth of what I call "the new *Court Review*," closing out another volume for this quarterly publication. In early 1998, we began to rethink what we wanted from *Court Review* and how we could produce it. We had a great deal of freedom, since we had no articles on hand, aside from student writing competition entries.

We began with a total revision of the layout of the journal. We added two new features to each issue: an interview and the Resource Page (see pages 42-44). We recruited a top-notch editorial board to help recruit authors and identify good topics. And we began to make contacts wherever we could to get good article submissions.

Because of the redesign and the lack of articles on-hand, our first "new" issue didn't come out until August 1998. Beginning with that issue, we have published a year's worth of issues in nine months. We thank all of those who have helped, especially our authors, our editorial board, Judge Gerald Elliott (who spearheaded approval of all of the changes) and the staff of the National Center for State Courts. Our next issue, Spring 1999, will be received by you while it is, indeed, still Spring. By the Summer 1999 issue, we will be back on a normal publication schedule, with the issue received by readers about July 1.

In this issue, we take stock of public opinion of the courts — and ways courts can shape it — through an interview on a new national survey commissioned by the American Bar Association; through an article by David Rottman reviewing a mass of data available from national surveys and from more than twenty individual state surveys; and through an article by Pamela Casey on how the Trial Court Performance Standards can provide ways to focus and improve court performance. We have two essays: one on how ADR may stave off a flood of Y2K lawsuits and one introducing readers to the State Justice Institute. And Professor Charles Whitebread provides an update on recent civil cases from the United States Supreme Court.

We hope that you have found that we have been delivering on our promise of providing more, and more useful, information to you on the pages of *Court Review*. This is your journal, and we'd appreciate hearing from you regarding what you like and don't like, as well as your suggestions for what we should cover. We also invite submission of Letters to the Editor, and article, essay and book review submissions. Author submissions and inquiries — or other comments about *Court Review* — can be sent to me by e-mail at sleben@ix.netcom.com.

— SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth at page 44 of the Fall 1998 issue. *Court Review* reserves the right to edit, condense or reject material submitted for publication.

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

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President's Column

Paul Beighle

One of AJA's long-range goals is to be an active, leading voice in the judiciary. I am extending an offer to each member to add his or her name to the list of judges who presently are participating — or would be willing to actively participate — in national events.

Since our annual meeting in Orlando in September, I have received many requests to appoint AJA members to participate in special projects or to serve on panels dealing with national issues. Some examples:

— September 11, 1998, a call from Kay Farley at the National Center for State Courts asking for candidates to sit on a judicial advisory committee on the issue of child support enforcement;

— October 1, 1998, a call from Frank Gavin at the Institute for Court Management looking for AJA representatives for a national planning committee on the future of judicial education and a joint planning group on trial court judicial leadership;

— October 21, 1998, a call from Tom Henderson at the NCSC for someone to serve on a committee working on issues about juveniles in adult courts. These are just a sample of the requests I have received and filled. I know President Strickland-Saffold received many similar requests, as did President Rosinek during his term and as will Judge Elliott when he becomes AJA president later this year.

The problem is not that AJA is being asked to do too much. Most of the members I have contacted for assignments have been willing, even eager to participate. The problem is in knowing where to turn within AJA for appropriate referrals. Just looking over a list of the AJA membership or hearkening back to what I personally know about individuals is a sketchy way of getting the right person to act for an express purpose. Doing an extensive, time-consuming inquiry among the membership would be too unwieldy and would not provide the necessary information in a short time, which is usually all one is given. What is needed is a directory.

We have a breakdown of the types of courts AJA members sit in — appellate, general jurisdiction, limited jurisdiction, arbitrator, federal and administrative — but we don't have a list of members who are available to participate in planning groups and committees. We also don't have the necessary information about each judge's special area of knowledge, practice, skill and interest. Having such a list would make it infinitely easier for me, and for future presidents, to identify the right AJA person to appoint to one of these positions.

I have asked the National Center to provide support for such a directory and Shelley Rockwell is looking into the logistics. In the meantime, I invite those AJA members who would like to sit on national committees, or participate in national planning groups, to send me their names, the names of their courts, the jurisdiction of their courts, the specific types of cases handled by their courts, their areas of specialization or personal interest, and their contact information. I will maintain this informal directory until we are able to construct a more permanent one. My address is on the inside cover of this publication. My fax number is (206) 615-0920; my e-mail address is paul.beighle@ci.Seattle.Wa.us.



Judge John Mutter will be making a similar announcement regarding a list of nominees for positions on the board of the National Center for State Courts. We should be able to consolidate the lists when they are compiled.

There has been further effort to implement the provisions of the AJA Long-Range Plan. The proposals contained in the plan were adopted as goals at the annual meeting in 1996. The organization needs, however, to make provisions for implementation of the six goals. The issue was raised at the final Board of Governors meeting in Orlando and the Executive Committee assumed the task.

In order to define the scope of the task and to assign responsibility for follow-up, the committee held a working retreat in October. Dr. Frank Gavin of the Institute for Court Management acted as the leader of the session and Dr. Tom Henderson of the National Center staff was on hand to assist. With their help, we spent the day devising a comprehensive plan of action and assigning tasks to committee members. The specific topics assigned for action were: improved meeting schedule; closer coordination of education activities; improvement of the web site; evaluation of the committee structure; closer liaison with the American Judges Foundation; development of improved methods to gain and retain membership; more effective public relations; greater utilization of the House of Delegates; and changes in the resolution process.

Progress on these tasks was the major topic of discussion at the Executive Committee meeting in January. The Executive Committee agrees that we are working toward the stated goals by involving the committees of the organization and by getting fresh ideas from other sources. We solicit the opinions and views of all AJA members in our work to become an even more effective judicial organization.

Y2K Meets ADR:

Monitoring Y2K Filings Encouraged

Elizabeth Kent and Douglas Van Epps

Rarely, if ever, have courts had such advance warning of potentially calamitous levels of litigation as we now have with the possible deluge of Year 2000 (Y2K) computer problem litigation. Some commentators estimate that more than \$500 billion in business costs will be incurred in an attempt to avoid Y2K problems — and that as much as \$1 trillion may be incurred in business delays and attorney fees generated from Y2K computer-related problems. In addition to direct litigation, there will also no doubt be litigation over insurance coverage and exclusions, particularly since the projected Y2K losses are said to exceed the combined reserves of all North American property and casualty insurers. Many law firms now sport Y2K divisions, and the number of law firm web sites offering Y2K legal counsel is growing weekly.

Since only a few law suits have thus far specifically identified Y2K incompatibility as the chief claim, the judiciary's assessment of the likely level of Y2K litigation remains in the realm of speculation. However, there are a few steps courts can take now to begin making assessments and to plan for the future. These include monitoring Y2K litigation, nationally and locally, and ensuring that appropriate dispute resolution processes are in place to accommodate Y2K litigation.

Of course, for courts, as with other governmental entities and the private sector, the first priority must be to ensure that internal systems will not be affected. Court information officers should be working closely with consultants and/or hardware and software vendors to ensure that dockets run smoothly and that the integrity of fiscal records will be maintained. This is particularly important for courts to monitor since, according to a recent survey by the National Association of Counties, only half of the nation's 3,069 counties had strategic plans in place to deal with

potential computer failure caused by the Y2K problem. At a minimum, courts should ensure that language is added to existing contracts with vendors to ensure negotiation and mediation of Y2K problems that may affect the courts' internal functions.

Our purpose in this essay, though, is to discuss how courts can handle the Y2K litigation of others, not how to handle shortcomings in a court's own computer systems. Y2K cases may not be like the mass torts of the past few decades. They may not slide easily into the similar damages classifications of the asbestos cases, nor have the causation similarities of the silicone gel implant cases. Although some disputes allow for easy consolidation, this may not be true for many Y2K cases because they will arise in many different ways, involving diverse parties. More than ever before, and to borrow a quote from Frank Sander and Stephen Goldberg, we'll need to examine how to "fit the forum to the fuss."

If the legal web sites offer any clues as to the likely causes of action, courts are most likely to see personal injury claims, product warranty cases, board of director breach of fiduciary duty claims (for non-disclosure of Y2K problems), and contract disputes. Although the traditional litigation track may be appropriate in certain cases, courts should give consideration to assessing whether alternative dispute resolution (ADR) processes might be more appropriate. Among the most amenable dispute resolution processes for Y2K disputes might be mediation, non-binding arbitration, specialized dockets and masters, and early neutral evaluation.

MEDIATION

Mediation is a confidential, structured process through which a neutral person or persons assist the disputing parties themselves to arrive at a mutually satisfactory and binding resolution

of a dispute. Mediators do not have the power to impose a decision. Instead, they are trained to help parties communicate and explore creative solutions to their problems. Mediators keep parties focused on the future instead of dwelling exclusively on the past.

Looking forward is critical when continuing relationships are involved, such as with vendors and consultants. And mediation can be successful even if parties cannot settle the entire dispute, because it can help them to resolve those issues capable of resolution, and isolate issues only courts can decide, thereby speeding the pace of litigation.

NON-BINDING ARBITRATION

Court-annexed, non-binding arbitration programs for personal injury cases are commonplace in many areas. Generally, courts refer cases likely to be limited in damages. Upper limits for these programs vary by jurisdiction, but range from damage ceilings of \$25,000 up to \$150,000 in some programs. Arbitrators are often volunteer attorneys or attorneys compensated on a per case basis; honorariums may range from \$50 to \$300 per case. Usually programs allow either party an appeal to a court, but sanctions and costs (sometimes including the other side's attorney fees or costs incurred after arbitration award) may be imposed on a party that does not significantly better its award.

SPECIALIZED DOCKETS/SPECIAL MASTERS

Some Y2K cases may be extremely complicated, calling for specialized technological expertise to assist in unraveling complex computer hardware or software issues. And damages may be difficult to calculate, calling for an in-depth understanding of accounting and business practices.

If there truly is a flood of Y2K litigation, a specialized docket may be attractive to litigants, as well as to the judges

in the jurisdiction. Panels of judges skilled in Y2K issues could be designated to hear these cases. Alternatively, or in tandem, special masters could be appointed by judges to help resolve complex discovery issues or to make fact findings.

EARLY NEUTRAL EVALUATION

Early neutral evaluation is a non-binding settlement technique designed to assist parties and counsel in resolving disputes early, rather than later in the life of a case. A respected neutral with experience in the field serves as the evaluator. After hearing a brief presentation of the evidence from all parties, the evaluator provides a non-binding analysis of the case. The evaluator may then help the parties negotiate a resolution if mutually agreed to by the parties.

MONITORING Y2K

Information technologists, business people, and lawyers all seem to agree that Y2K problems will begin surfacing in the first quarter of 1999 as businesses running two-year budget (or other) projections run beyond December 31, 1999. And while difficult to gauge at first whether an action is filed as a Y2K dispute (unless a special case code is adopted to better identify filings), courts should closely monitor whether actions appear grounded in Y2K issues.

Judges, at early scheduling or settlement conferences, can recommend any of the above processes, particularly for cases in which the parties to the suit (e.g., businesses and computer consultants or vendors) need to continue working together to solve an urgent computer systems problem. The collaborative mediation process, for example, would help parties focus on immediate solutions better than parties engaging in the adversarial litigation process.

Another option would be to enact a rule of general application — or to enter an early order in a specific case — requiring parties to engage in an ADR process by a time certain in the case (for example, sixty days after the answer is filed). Another, less intrusive, alternative is to require parties to state (perhaps in a pre-trial statement) that they considered an ADR option, to discuss what process they used, or, if they didn't use an ADR option, why not, and which

party declined. Hawaii currently has such a rule for all civil cases in its court of general jurisdiction. See Hawaii Cir. Ct. R. 12.

If it becomes clear that Y2K filings will seriously impact the court's caseload and that ADR is required to assist in managing the cases, creating special mandatory programs, such as non-binding arbitration or mediation programs, may be the most appropriate response. Because the programs will be court-connected or supervised, there will be adequate judicial supervision of both the procedural and substantive aspects of the programs. There are many models the programs could follow, including referral to panels paid by the courts, volunteer panels, and private providers.

It is imperative that courts monitor the Y2K situation in the months ahead. If Y2K litigation does become problematic for docket management, as many speculate, courts may have some months to create appropriate solutions. For some states, creating a new category to complaint filing forms may be viable. This case code or category would be one that asks plaintiffs to note (in addition to all existing requirements) whether the cause of action arises out of a Y2K problem. By monitoring the number of these cases, in addition to existing contract, tort and other pre-existing categories, court administrators can determine whether there really is a Y2K litigation caseload problem. If so, they will have a better understanding of the magnitude of the problem, its potential impact on the courts, and the types of cases that fall into the Y2K category. All of these steps will give decision makers more information to help them best craft reasonable alternatives. The Hawaii Judiciary has already begun to implement a system to monitor filings in its trial courts and at the appellate level. Michigan's State Court Administrative Office is monitoring Y2K litigation at both the state and national level.

CONCLUSION

The crystal ball is not yet sufficiently clear for anyone to see what anticipated Y2K problems will mean for courts. But there are steps courts can take to keep a current inventory of Y2K disputes and to create processes to facilitate their resolution. At a minimum, courts should

closely monitor Y2K litigation nationally to best guide the development of Y2K case management strategies.



Elizabeth Kent is the Director of the Hawaii Judiciary's Center for Alternative Dispute Resolution. A graduate of the William S. Richardson School of Law at the University of Hawaii, she has served as a law clerk at the United States Court of Appeals for the Second Circuit, as a staff attorney at the United States Court of Appeals for the Ninth Circuit, and in private practice at Paul, Johnson, Park & Niles, concentrating in commercial litigation. She has taught business law at the University of Hawaii; is a mediator for the Neighborhood Justice Center and an arbitrator in the Hawaii court-annexed arbitration program; and sits on the Hawaii Medical Claims Conciliation Panel.



Douglas Van Epps serves as Director of Michigan's Community Dispute Resolution Program, which includes Michigan's Agricultural Mediation Program and its Special Education Mediation Program. These and other dispute resolution initiatives are administered through the State Court Administrative Office, a division of the Michigan Supreme Court. Van Epps, a graduate of Wayne State University Law School, formerly served as an assistant prosecuting attorney and serves as a mediator and facilitator.

An Introduction to the State Justice Institute

Richard Van Duizend

Founded by Congress more than a decade ago, the State Justice Institute (SJI) is charged with the unique mission of fostering innovations in judicial administration that would improve the quality of justice in state courts throughout the United States. Yet, despite its origin in a federal statute and its accomplishments, many judges remain unaware of its mission, its organizational structure, and its ability to assist courts and judges. For those unfamiliar with SJI, this essay seeks to introduce you to its most important features. For those who already are aware of SJI and some of its work, this essay seeks to enhance your understanding and to promote your interaction with us.

SJI is the only federally-funded grant program focused solely on improving the administration of justice in the state courts. It was established by the State Justice Institute Act of 1984, 42 U.S.C. § 10701 *et seq.*, but it is not a federal agency. Rather, SJI is a non-profit corporation governed by a board of directors whose members are appointed by the President and confirmed by the United States Senate. By law, the board must include six state court judges, a state court administrator, and four public members, no more than two of whom may belong to the same political party. The judicial and state court administrator members must be selected from a list submitted to the President by the Conference of Chief Justices. Thus, to paraphrase Lincoln, SJI is of the state courts, by the state courts, and for the state courts.

The Institute's efficient operation and responsiveness to the most critical needs of state courts of all types (civil, criminal, juvenile, family, probate, and appellate) and at all levels distinguish it from most federal grant agencies. Since it became operational in 1987, SJI has awarded more than \$100 million to sup-

port more than 1,100 projects. Courts in every state have received at least one SJI grant. Other types of grantees include national court support organizations, such as the National Center for State Courts; national court education organizations, including the National Judicial College and American Academy of Judicial Education; national and state court membership organizations (such as the National Council of Juvenile and Family Court Judges and the National Association for Court Management); universities; bar associations and other non-profit groups; and individuals.

SJI operates four separate grant programs. Its primary program is the annual project grant cycle to support innovative research, evaluation, educational, demonstration, and information sharing projects. Projects grants may be for up to \$200,000, although award amounts over \$150,000 are rare.

This cycle begins with the submission of "concept papers" in late November. A concept paper is a statement of the need for a project, the benefits it would provide to the courts, the approach that would be taken, the products that would be produced, and a line-item budget. Each concept paper may be up to eight pages, double-spaced. Nearly 200 were submitted this year. The papers are reviewed and summarized by SJI staff, and are then considered by the board at a meeting in early March. Projects requiring less than \$40,000 that are fully and clearly described in the concept paper can be approved for award at that time. Applicants requesting larger grants may be invited to submit full applications (up to twenty-five double-spaced pages) for more complex, innovative programs that demonstrate the potential for assisting or providing a model for state courts around the country. Those applications are due in mid-May and are considered by the board for award at the end of July.

There are three other SJI grant programs — technical assistance, curriculum adaptation, and scholarship. These are for smaller grants than are provided under the project grant program.

Under the technical assistance grant program, awards of up to \$30,000 can be made to local courts or state court systems to enable them to obtain consultant expertise to diagnose a critical problem affecting a court and to recommend a solution. Like all SJI grants to state and local courts and other units of government, technical assistance grants require applicants to provide matching support equal to at least fifty percent of the amount requested; the match may be in cash or may be in-kind assistance (*e.g.*, the time of judges and court staff devoted to the project). The technical assistance grant program operates quarterly. All that is required are a letter explaining the project in sufficient detail, a budget, and the concurrence of the state's chief justice or the chief justice's designee. Generally, ten to fifteen requests are received and three to four awards are made each quarter.

Curriculum adaptation grants of up to \$20,000 may be awarded to a court or state court system to modify and test for local use, a model curriculum developed under an SJI grant. Curriculum adaptation grant requests may be submitted at any time. As with technical assistance grants, only a sufficiently detailed letter, a budget, and the state chief justice's concurrence form are required.

The Institute also awards scholarships of up to \$1,500 to enable judges and court managers to attend out-of-state educational programs. The scholarship funds are to be used for airfare and tuition. Scholarship applications and concurrence forms may be submitted during specified sixty-day periods each quarter for educational programs beginning during the following quarter. For programs to occur between July 1

and September 30, 1999, for example, applications must be submitted between April 1 and June 1, 1999. They are approved primarily on a first come-first served basis.

Among the projects supported by recent SJI grants are:

— Development of a curriculum on children in adult courts by the National Judicial College (Judge Jeffrey Rosinek, former AJA President, was instrumental in the development of this project);

— Several projects to help courts cope with the growing number of self-represented litigants, including using the Internet to deliver forms and instructions to pro se litigants in New Mexico, evaluating different types of courthouse assistance offices in Idaho, and convening the National Conference on Unrepresented Litigants in Court (under a grant to the American Judicature Society);

— Documentation and analysis of the use of electronic filing in state courts by the Rand Corporation;

— Presentation of the National Symposium on the Future of Judicial Branch Education, scheduled for October 7-9, 1999, in St. Louis, by the National Association of State Judicial

Educators and a coalition of other court organizations; and

— Continued support for the National Center for State Courts' Technology Information Exchange Service and Court Information Service.

The fruits of SJI-funded research projects are available to you in many ways. SJI-designated libraries (usually your state supreme court's library) exist in 48 states, the District of Columbia, Puerto Rico and the Virgin Islands. Each of these libraries – as well as the National Center for State Courts, the American Judicature Society, the National Judicial College and the JERITT project at Michigan State University – receive a copy of each product of SJI grants, including written reports, articles, books, manuals, videos, computer programs and CD-ROM's. A list of all grants funded by SJI is available on the SJI web site. For additional information about SJI, including fact sheets describing the procedures for each program, the necessary forms, the full grant guideline book as printed in the Federal Register, and a list of grants, check the SJI website at <http://www.statejustice.org>. Or, if you're among the many who still prefer to talk to a real person, please feel free to

call David I. Tevelin, SJI's executive director, at 703-684-6100, extension 214.



Richard Van Duizend served as deputy director and chief of the program division of the State Justice Institute from 1987 until April 1999. Before joining SJI in February 1987, he served as a senior staff attorney with the National Center for State Courts and was director of its Washington project office. He also has served as a project attorney with the American Bar Association and on the staffs of the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Pima County, Arizona, Public Defender's office. Mr. Van Duizend earned his J.D. and A.B. degrees from Harvard University.

For more information about the State Justice Institute...

SJI-designated libraries exist in 48 states, the District of Columbia, Puerto Rico and the Virgin Islands, as well as at the National Center for State Courts, the American Judicature Society, the National Judicial College and the JERITT project at Michigan State University. All SJI-funded grant products since 1991 have been sent to every in-state library. The location and contact person for each library can be found in Appendix II of the SJI's 1999 Grant Guideline, which can be downloaded via SJI's web site.

SJI's web site (<http://www.statejustice.org>) includes a list of all non-scholarship grants awarded by SJI since 1987. Projects are listed chronologically and by special interest categories. Contact persons are listed for each grant project. Also included at the web site are SJI's report of its first ten years, *Improving the Quality of American Justice, 1987-1997*, grant guideline and application forms, and the quarterly *SJI News*, which provides a convenient eight-page summary of recent SJI grants and projects.

The JERITT web site (<http://jeritt.msu.edu>) contains a searchable database that includes summaries of more than 900 SJI grant products. JERITT, the Judicial Education Reference, Information and Technical Transfer Project, is a national clearinghouse of information about judicial branch education that SJI has supported since its inception in 1989. Although the web site focuses on judicial education, the products of almost every SJI grant are summarized on the site, regardless of topic. JERITT can also be reached by phone (517-333-8603) or by fax (517-432-3965).

SJI staff can be of assistance in providing information to you. In addition to Executive Director David Tevelin, a full staff listing is provided at the web site, along with each staff member's extension number. Program managers are listed on the web site directory, along with their areas of expertise (e.g., dispute resolution, court management, domestic violence, scholarships, etc.), so that you can make contact directly with the staff member most likely to have the information you're seeking. A staff directory is included on the SJI web site. Or, if you're not a web searcher, just call SJI at 1-703-684-6100 and follow the prompts, or contact extension 200 for help.

An Interview with Phil Anderson and Marilyn Goldman

In February, the American Bar Association released the results of a nationwide opinion survey taken by phone of 1,000 respondents in August 1998. The survey showed that eighty percent of Americans believed that “in spite of its problems, the American justice system [was] the best in the world.” Despite some trouble spots, confidence in the courts was higher than in a similar national survey taken twenty years ago, while confidence in most other major institutions fell or stayed the same.

We talked about the survey results with Phil Anderson, the ABA’s president, and with Marilyn Goldman of M/A/R/C Research, who was the lead researcher for the survey.

Anderson is a Little Rock, Arkansas, lawyer who chaired the ABA’s Coalition for Justice, charged with the responsibility of strengthening public confidence in the justice system, from 1994 to 1997. His service to the legal community began shortly after his graduation from the University of Arkansas law school in 1959, where he was editor-in-chief of the Arkansas Law Review. He has been a member of the ABA House of Delegates since 1979.

Goldman is vice president and Chicago regional manager for M/A/R/C Research, where she does marketing research. She has a Master of Arts degree from Michigan State University and has twenty-five years of marketing and advertising research experience, primarily for Fortune 500 companies.

COURT REVIEW: *Let me start with this: What was the genesis of the ABA doing a public opinion survey at this time?*

ANDERSON: Well, we’re going to have a national conference in May on public trust and confidence in our system of justice. That will be in cooperation with the Conference of Chief

Justices, the Conference of State Court Administrators, and the League of Women Voters.

In preparation for that joint conference, the American Bar Association has had two symposia. The first was on judicial independence and judicial accountability. The second one was on public perceptions of the justice system. And in preparation for the second symposium, we commissioned a national poll.

CR: *Before we get into all the details of the results, what was the most surprising thing to you from this survey?*

ANDERSON: The most surprising thing to me was the high level of trust and confidence in our system of justice, despite problems [with it]. That was the single most surprising thing. And akin to that is the recognition of problems with regard to racial bias in the justice system.

But even with relatively high marks [overall], forty-seven percent of the people surveyed believe that the people are treated differently because of race. Still, [even] with that problem, there is the eighty percent confidence level in the system as a whole.

GOLDMAN: I would agree with that, and I’d also add that the lack of knowledge of some very, very basic, simplistic concepts of our justice system was surprising to me as well.

ANDERSON: Let me say that that didn’t surprise me. I expected the survey to show that. And I think that it underscores the necessity of greater training in civics in the primary and secondary school systems in the United States.

CR: *Let me get back to that — the possible solutions for some of the problems that were identified in the survey — and move for a moment to what the survey said about overall trust and confidence in the judicial system, as compared to other*

American institutions. Ms. Goldman, if I understand correctly, you designed this survey to track with some prior surveys?

GOLDMAN: Yes, [primarily with] the 1978 Yankelovich research.

CR: *How did the results this year compare to ones 20 years ago?*

GOLDMAN: For the most part, there were some things that stayed the same, some things that showed significant increases, and some things that showed some deep declines from 20 years ago. [One that improved quite a bit was] the U.S. Supreme Court, that was significant.

CR: *Well, in the results overall, for example, the U.S. Supreme Court rose from 36 percent to 50 percent in terms of people having high or extremely high confidence in it.*

GOLDMAN: Correct.

ANDERSON: The levels of confidence of all kinds of courts increased.

GOLDMAN: That’s correct.

ANDERSON: And confidence in the local police also increased significantly.

CR: *Do you have any theory as to why that occurred, or is there anything in the data that would indicate that?*

GOLDMAN: Well, from everything that I can glean from this research, I think a lot of it has to do with people having put the courts on a very high pedestal and believe that they’re doing their job. We know that they believe judges are very qualified for their jobs, and I think these measures become summations of that.

CR: *Yet measures of some other entities fell quite a bit. The media fell from twenty-nine percent to eight percent.*

GOLDMAN: Correct.

ANDERSON: By the way, this was conducted in the second week of August 1998, and it was before the impeachment proceedings, so if we took a survey again today, there would be probably dif-

ferent findings with regard to the press. Wouldn't you think so, Marilyn?

GOLDMAN: Well, it might. I mean, some of this might be the carry-over from [the] O. J. Simpson [case]. We've certainly seen that from the study. We also saw a decline in confidence in the U.S. Congress, and I would certainly think that that may be different today, as a result of the impeachment hearings, if we were to conduct the research again.

ANDERSON: But there was also a decline in confidence in doctors, organized religion, public schools.

GOLDMAN: Right.

CR: *In terms of trust and confidence overall, there was quite a bit in your survey attempting to determine the relationship between confidence and trust in the court system and the detail of knowledge or participation in the system. What were your main findings there?*

GOLDMAN: The major finding was that the more knowledge a person had, the more confidence they tended to have in the system overall, as well as in the ... components. That's probably the major implication out of that.

CR: *The survey indicated that those who were found to be the most knowledgeable were more likely to be white than non-white, men as opposed to women, higher educated as opposed to less educated, higher income, and middle-aged respondents.*

GOLDMAN: Exactly.

CR: *The survey also showed that almost all groups had significant experience with the system. What would lead these groups to be, ultimately, more knowledgeable about it [than the others]?*

GOLDMAN: One of the things we also found out is that if you had a positive court experience, you were more likely to have confidence in the system than if you had a negative court experience. And one of the things that did come out is that business people and people who are wealthier also have more confidence. So the demographics seem to coincide with some of the attitudinal, experiential situations that we find in this research. I think that they are related.

CR: *Could you explain for a minute how you went about determining whether people were knowledgeable about the courts?*

GOLDMAN: We had a series of



about seventeen questions. They covered things like asking people what the three branches of government were, to name them, to identify them on an unaided basis; then [they were told] the three branches of government and [we] asked them what their functions were. We asked them to identify on an unaided basis who the Chief Justice of the United States Supreme Court was, and then we had a series of ten true and false statements, and we asked them to indicate whether or not they were true or false.

And based on their responses to the seventeen different questions or different possible answers that they could give us, we classified them based on knowledge levels. If they were able to correctly

name anywhere from thirteen to seventeen of the questions, we considered them to be high in their knowledge base, and anything six or lower were low, the rest being middle levels of knowledge. So they were based on some pretty factual pieces of information.

CR: *And did the person's self-reported level of knowledge about the system correlate with their ability to answer specific questions?*

GOLDMAN: Yes, it did. We got a significant correlation between the two at a point three three (.33) level, which was significant, at the ninety-five percent [confidence] level. So pretty much what that says is that if you believed yourself to be fairly knowledgeable about the system, [there's a] pretty good chance that you were.

CR: *Given that the people with more knowledge about the system had a higher, more positive opinion of it, is the message to the courts the simple one that we need to get more information out to let people know what we're doing?*

ANDERSON: That's absolutely true. And this survey also showed that sixty-one percent of the people surveyed wanted to know more about our system of justice, and, of that number, the overwhelming majority, seventy-five percent, wanted to learn that from judges.

I believe that it says to judges, we have to let people know more about our justice system, and I think that it says to our public schools, you have to start teaching civics earlier. I know you're going to get back to that, but that is what that message is.

CR: *Well, on that subject, the survey indicated that twenty-five percent of the respondents could not even name one branch of the government, and less than forty percent could name all three without help.*

GOLDMAN: That's right.

CR: *Does that indicate a serious problem with our educational system?*

ANDERSON: It indicates a very serious problem with what children are being taught and what they retain.

CR: *It may be what they retain. I gave my in-home quiz last evening to a seventh grader, and he was able to immediately name all three branches of the government.*

GOLDMAN: Good for him, [but] that's where I was surprised.

ANDERSON: We've had a genera-

**CONFIDENCE IN PROFESSIONS
AND PUBLIC INSTITUTIONS
1978 and 1998**

	1978 Survey	1998 Survey		
	Extremely or Very Confident	Extremely or Very Confident	Somewhat Confident	Slightly or Not at All Confident
U.S. Supreme Court	36%	50%	35%	15%
The Local Police	40%	47%	33%	20%
Medical Profession/Doctors	50%	46%	39%	15%
Accounting Profession/ Accountants	NA	39%	44%	15%
Organized Religion	41%	37%	30%	31%
Federal Courts other than U.S. Supreme Court	29%	34%	45%	21%
Judiciary/Judges	NA	32%	46%	22%
U.S. Justice System in General	NA	30%	43%	27%
State and Local Courts	23%	28%	47%	25%
The Public Schools	37%	27%	38%	35%
The Executive Branch of the Federal Government - Office of the President, Cabinet Depts.	27%	26%	36%	37%
The Executive Branches of State/Local Government - Office of Governors, Mayors, etc.	21%	24%	50%	26%
The State Legislatures	21%	19%	41%	39%
Your State's Prison System	17%	19%	41%	39%
U.S. Congress	23%	18%	47%	35%
The Legal Profession/ Lawyers	NA	14%	44%	42%
The Media	29%	8%	32%	60%

Source: American Bar Association survey of 1,000 respondents taken by telephone August 6-31, 1998; Yankelovich survey of 1,931 respondents taken in 1978. ABA survey results released February 24, 1999. Note: The figures shown in **bold numbers** indicate a difference between the 1978 and 1998 results that was statistically significant at the ninety-five percent confidence level.

tion in which civics has not been consistently taught in the United States as it was before the 1960s. There have been some good changes in the past few years in some states requiring by legislation that civics be taught in the primary grades. But for most of the past generation, civics has been relegated to a senior high school course called American Government as a required course. Of course, civics has been an elective course in many high schools. But there are other things that are receiving emphasis, math and science particularly. And civics has not had the time devoted to it that our society demands, because we must have an educated society in order to support the type of government that we have in the United States.

CR: *Beyond public education, what indications does the survey give about actions that courts and judges could best take to improve public trust and confidence?*

ANDERSON: I believe that if the courts would permit the televising of trials gavel to gavel — not snippets, but gavel to gavel — it would be a great, continuing civics lesson for the people of the United States. I also believe that the survey indicates that judges are going to have to take a more active part in their communities. There are some courts that have an outreach program, but it's a two-way street. The public can learn from judges, but judges can also learn a lot from the public, particularly the members of the public who are involved in the justice system in some way, either as jurors, witnesses, or parties, or just people who come to the courthouse to pay their taxes.

CR: *Ms. Goldman, you did some fairly rigorous analysis in your report trying to determine which specific factors led to trust and confidence, which ones were already in pretty good shape and the courts needed to try to maintain, and also ones in which some effort would be expected to result in an increase in public trust and confidence.*

GOLDMAN: Right.

CR: *Could you explain what factors you think the state and local courts in particular, and state and local judges, would best focus on to try either to maintain — or to enhance — public trust and confidence?*

GOLDMAN: Well, looking at what

seem to be the biggest drivers of confidence, there are two areas to look at. [First are] those areas that you want to maintain, which are clearly about how the courts provide information and how they treat people while they're in court, which is very positive right now and something that we need to maintain. We want to deal with access to the courts, people being able to get a lawyer when they need one, get to court when they need [to] – [that] certainly is another area that's important in driving confidence, but seems to be in pretty good shape.

The areas where we really need to deal with improvement are in the treatment of minority groups and different subgroups within the community, which we've already talked a little bit about – [also,] how people are sentenced, in terms of [sentences] being too lenient, and getting off on technicalities [are] areas where we need improvement. Court costs and how long it takes to get through the court system is another area where we need to generate some improvement and [that] will also drive people's confidence [up], as well as the more altruistic issue of judges and lawyers contributing and being part of the community, [which] is also an area that we could focus on for improvement.

CR: *With respect to each of the areas you just listed, I take it that your analysis showed those were important factors in public confidence in the court.*

GOLDMAN: Yes.

CR: *And in each of those cases, they were low enough that there is substantial room to improve those scores?*

GOLDMAN: On certainly, at least four of those areas, that's exactly true.

CR: *Which would be the areas that would, if worked on, be most likely to result in improvement in trust and confidence?*

GOLDMAN: Two major areas. One would be the treatment of minority groups, and the other has to do with sentencing, and people not being able to get off on technicalities and appeals. Those will influence people's confidence the most.

ANDERSON: The technicalities issue is obviously one where public education is needed.

GOLDMAN: Right.

OPINIONS OF JUDGES			
PEOPLE BELIEVE THAT JUDGES ARE WELL QUALIFIED,			
	Strongly Agree/ Agree	Neither Agree Nor Disagree	Strongly Disagree/ Disagree
Most judges are extremely well qualified for their jobs	54%	20%	25%
ARE NOT OVERPAID,			
	Strongly Agree/ Agree	Neither Agree Nor Disagree	Strongly Disagree/ Disagree
Judges are not paid enough given how much work they do	14%	31%	51%
AND, SAY ONE THIRD, COULD DO MORE FOR THE COMMUNITY.			
	Strongly Agree/ Agree	Neither Agree Nor Disagree	Strongly Disagree/ Disagree
Most judges do not contribute enough to their community through donations of time, legal services or money	33%	38%	26%
Source: American Bar Association survey of 1,000 respondents taken by telephone August 6-31, 1998.			

ANDERSON: And I think that if people become more familiar with how trials are conducted, that they would be more forgiving when they realize that what they call technicalities are constitutional protections that protect them just as much as they protect the accused.

CR: *Mr. Anderson, let me turn for a moment to the perception of the public of lawyers. The survey had some fairly troubling results seemingly for lawyers. A majority said we would be better off with fewer lawyers, and only fourteen percent overall were extremely or very confident in the legal profession. Further, the lowest levels of confidence in the legal profession were among those who had the greatest knowledge of the court system. Did these results trouble you as president of the American Bar Association?*

ANDERSON: Of course, those numbers are disturbing, and I think that lawyers are simply going to have to continue their contributions to the public through representation of the poor on a pro bono basis and in participating in their communities as many, many

lawyers have done since the founding of the Republic. The one problem is that people don't know what lawyers do, and they don't know the role of lawyers in our system of justice. Civics education, in addition to teaching students what judges do — that is, judges protect our freedom and enforce our rights — would also teach students what lawyers do. But the ABA will continue its work on a broad variety of pro bono programs for immigrants, for the poor, for children, and other aspects of American life, and if lawyers continue to recognize their public responsibility as a professional responsibility, that image eventually will change.

CR: *You had two days of seminar and discussion groups in Washington after release of the survey data. Were there any important points out of that discussion that you might be able to share with us?*

ANDERSON: Oh, it was a very productive two days that we spent, and I think that the judicial outreach aspect of the symposium was important, and a part of the program that we had on edu-

**PUBLIC KNOWLEDGE OF THE COURTS
SOURCES OF INFORMATION**

As Self-Reported, the Public's Most Important Sources of Information about the Justice System Are:

Personal experience	63%
School or college courses	59%
Books/library	58%
Jury duty	57%
Lawyers/attorneys	43%
Materials available from the court	43%
Television news	41%
Family member	40%
Television news shows like 20/20, 60 Minutes, Dateline	37%
Local daily newspaper	36%
National newspapers	35%
Radio news	31%
High profile cases	28%
Internet	23%
Word of mouth	22%
Television trials like Court TV	20%
Magazines	16%
Radio/TV talk shows	15%
Court programs like People's Court/Judge Judy	11%
Television dramas	9%
Movies/videos	7%

Question: "For each source [I read to you], please tell me how important each source is to you in getting news or information on the justice system. When answering, please use the following scale: extremely important, very important, somewhat important, slightly important, or not at all important." Percentages reported are those who rated the source as extremely important or very important. (N = 1000.)

Most want to know more,

Yes, want to know more	61%
No, don't want to learn more	39%

Question: "Would you care to learn more about the justice system?" Yes/no answers. (N = 1000.)

and would like to hear from judges.

Desired Sources of Information:

Judges	75%
Retired judges	73%
College/law professors	70%
Teachers	70%
State/local bar assoc.	69%
American Bar Assoc.	68%
Lawyers	58%
Civic groups	56%
Any type of media	51%
Other	6%
None of the above	2%

Question: "From which of the following sources would you be interested in receiving or learning more about the justice system? [list read to respondents]" (N = 610.)

Source: American Bar Association survey of 1,000 respondents taken by telephone August 6-31, 1998.

cational opportunities was also exciting and gave us things to talk about. It is also somewhat frightening. The state of public education in the United States right now is something that we all need to be aware of, and, working with educators, I think that we can reintroduce civics as an important component of the curriculum in the United States. And over time, and by time I mean at least a generation, we will see positive results.

CR: *One of the areas that Ms. Goldman mentioned — and the survey results showed needed improvement — was the way in which ethnic and racial groups are treated, or at least the perception of the way they are treated. The American Bar Association has done some surveys recently of lawyers in that area as well. What's the picture that emerges to you, Mr. Anderson, of the status of treatment of ethnic and racial minorities in our courts from these surveys?*

ANDERSON: The surveys clearly show that there is a perception of racial bias in the justice system by the minorities. The perception is not limited to any particular region in the United States. It's coast to coast. It's throughout the justice system, and I think that we have to accept that the reality is that there is racial bias in the justice system, and we must do something about it. The American Bar Association has several programs in place now in an effort to eliminate racial and gender bias in the justice system, and this means that we have to intensify our efforts.

CR: *You also mentioned that this survey was leading up to a conference in May. What do you hope to accomplish when that conference is completed?*

ANDERSON: We have high hopes for the conference in May. We have asked every chief justice in the United States to assemble a team of lawyers and nonlawyers, members of the community to travel to Washington in May for a conference on public trust and confidence in our justice system, with the goal of charting national strategy to be pursued over years in every state in an effort to strengthen trust and confidence in the justice system. And I believe that we will come out of that conference with a national strategy, and that we will have a program that will continue for several years focused and directed on the specific goal of strengthening public confi-

**PUBLIC KNOWLEDGE OF THE COURTS
WHICH GROUPS ARE THE MOST KNOWLEDGEABLE?**

Actual Level of Knowledge	Race		Age			Sex	
	White N=828	Non-White N=172	18-34 N=263	35-54 N=503	55-older N=233	Men N=460	Women N=540
High	28%	18%	21%	29%	24%	34%	19%
Medium	52%	42%	51%	52%	47%	47%	53%
Low	20%	40%	28%	19%	30%	19%	26%

Actual Level of Knowledge	Income			Education		
	Under \$35K N=348	\$35K-\$75K N=425	\$75K-Over N=160	High School or Less N=307	Some College - College Grad. N=499	Post-Grad. N=191
High	14%	28%	41%	5%	23%	67%
Medium	49%	56%	48%	49%	60%	30%
Low	36%	17%	11%	47%	17%	3%

Note: Actual knowledge was determined by the number of correct answers to seventeen factual questions about the courts. Respondents were asked to identify the three branches of the government, who the Chief Justice was, and to indicate whether certain statements were true or false. Example statements: "If you go to court, you are required to have a lawyer," and, "Everyone accused of a crime has the right to be represented in court by a lawyer." Those with 13-17 right answers were scored as having high knowledge (26% of respondents); those with 8-12 right answers were scored as having medium knowledge (50% of respondents); and those with 0-7 right answers were scored as having low knowledge (24% of respondents).

Source: American Bar Association survey of 1,000 respondents taken by telephone August 6-31, 1998.

dence. This is an ambitious project, but I believe that it is one that has tremendous potential.

CR: Let me ask a final question to each of you. The readers of this interview are judges throughout the country. Is there some additional piece of information that we haven't covered that you think the average judge reading through [this] information about your survey would be particularly interested in knowing?

ANDERSON: I think that the lesson is that every member of the judicial community, the judges, the clerks, the bailiffs, all of them must be sensitive to the people who come to the courthouse, and treat them courteously and with understanding and compassion. That one lesson, I believe, is one that should be taken to heart throughout the United States.

CR: Ms. Goldman?

GOLDMAN: My feeling is that people have a tremendous amount of faith and trust in the U.S. justice system, and that it is up to each and every individual involved in the execution of that system to really put forth to make that reality as close to [the] people's ideals as they possibly can. There are a lot of executional problems, but people still firmly believe it is the best in the world. And I think that's really important.

CR: Thank you both very much.

SUGGESTIONS TO IMPROVE THE COURTS

To improve the justice system, tax dollars should be used for:

Requiring schools to teach about the judicial branch and how it relates to the other branches of government	93%
Providing education and information to help people understand the justice system	86%
Encouraging judges and lawyers to seek the ideas of average people when planning court improvements	77%
Hiring top quality translators whenever needed	77%
Providing opportunities for people to volunteer their time to help the courts	76%
Having staffed information desks in every courthouse	71%
Establishing citizen advisory committees for the courts	59%
Providing extra resources to let courts be open weekends and evenings	57%

Question: "I'm going to read a list of suggestions that have been made to improve the justice system. For each one, please tell me if you believe tax dollars should or should not be used to make these changes. [List read]" (N = 1000.)

Source: American Bar Association survey of 1,000 respondents taken by telephone August 6-31, 1998.

On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?

by David B. Rottman

Startling findings from public opinion surveys sometimes change how people think so substantially that they become a part of conventional wisdom about a topic. A case in point is the belief that experience with a court reduces rather than enhances a person's confidence in the courts. The main piece of evidence underlying that belief comes from a landmark public opinion survey conducted in 1977, *The Public Image of the Courts*. The most striking conclusion highlighted in the report is that "those having knowledge and experience with the courts voiced the greatest dissatisfaction and criticism."¹

This article uses recent public opinion surveys to establish whether the gloomy conclusions from the 1977 survey still apply, to interpret the dynamics that translate court experience into opinion, and to rethink the ways courts might seek to gain and maintain public trust. The starting point, a reassessment of the 1977 survey findings, yields a less negative, but still troubling, view of court experience's impact. However, even the troubled past is not prologue, because since 1977 the extent and nature of public contact with courts has changed dramatically. Recent statewide opinion surveys track those changes and suggest that sheer, undifferentiated court experience is not in itself related to opinions. Rather, particular kinds of experience tend to promote or reduce confidence. Negative images of trial courts, partly fueled by mass media depictions, appear to be influential. Programs that improve court performance in areas like access to justice are the surest tools courts can wield in strengthening public support. That will not be enough. Courts need a reliable set of tools that promote a positive image among infrequent and non-court users.

A LOOK BACK

The Public Image of the Courts survey was a massive enterprise; certainly no subsequent survey about the courts or the legal system published before 1999 approached its breadth and

depth.² Interviews were conducted face-to-face with 1,931 randomly selected adults. Similar questions were asked of 317 "active" attorneys, 194 state and local judges, and 278 community leaders (mayors, state and local legislators serving on judiciary committees, local media staff, etc.).

The pattern of responses to questions in the survey did suggest that having had one's day in court was associated with negative views about the courts. It is less certain that the evidence was sufficiently clear and strong to justify pessimistic conclusions about the inability of courts to educate the public or to take affirmative steps to enhance public trust and confidence through changes in court policies.

The 1977 survey provided three main ways to assess what the public thought about the courts. One was a question soliciting the level of trust and confidence respondents had in the people running "state and local courts." The perceived need for court reform was another single-question measure of opinion (with responses ranging from "in no need" to "in great need" of reform). The third basis for differentiating positive from negative views came from a series of questions asking respondents whether individual attributes of courts were a problem.³

Experience with the courts was also measured in three ways. Opinions about the courts were considered separately for respondents with and without any court experience, claiming different levels of self-rated familiarity with the courts, and graded as having different degrees of "actual" knowledge (i.e., tested through a short quiz) about the courts. Forty-three percent of the respondents reported some form of experience with state or local courts. Seventy-four percent of survey respondents described themselves as having no familiarity at all with "state courts" and sixty-three percent as having no familiarity at all with "local courts." Tested knowledge of the courts was graded as extensive for twenty-eight percent of the respondents.⁴

Footnotes

1. Yankelovich et al., *Highlights of a National Survey of the General Public, Judges, and Community Leaders*, in NATIONAL CTR. FOR STATE COURTS, *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 21 (1978) [hereinafter *COURT BLUEPRINTS*]. These conclusions continue to be regarded as authoritative. See, e.g., Julian V. Roberts and Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, in THE HANDBOOK OF CRIME AND PUNISHMENT 31, at 46 (Michael Tonry, ed. 1998).
2. However, two new national surveys focus exclusively or substantially on public opinion and the courts. Findings from a 1998 national survey sponsored by the ABA were published in February 1999 in AMERICAN BAR ASSOCIATION, *PERCEPTIONS OF THE U.S. JUSTICE SYSTEM* (1999). The National Center for State Courts conducted interviews for *How the Public Views the State Courts: A*

National Survey funded by the Hearst Corporation, in early 1999; survey findings will be released in May of 1999.

3. Questions included how serious respondents thought the following problems were: "Courts that are expensive for those who must use them;" "Judges who show little interest in people's problems."
4. A cautionary note: Actual and self-rated court knowledge vary strongly with the respondent's educational level, income, and race or ethnicity. See *COURT BLUEPRINTS*, *supra* note 1 at 8. Opinions about the courts also vary strongly according to those interrelated socio-economic factors. See Laura B. Myers, *Bringing the Offender to Heel: Views of the Criminal Courts*, in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 46, at 56 (1996). Therefore a direct comparison of, say, self-rated familiarity with opinions about the courts is likely to be misleading because it incorporates the influence of other factors.

Problem Number One: A lack of statistical testing Two sets of comparisons exemplify the persuasiveness of the 1977 survey findings on the link between court experience and perceptions of the courts. First, those *without* court experience tended to express more confidence in “state and local” courts than did those with such experience. (See Table 1.) A re-analysis of the information in Table 1 confirms that the difference was statistically significant, but also finds the difference was so slight as to be of no practical significance. Simply put, knowing whether someone has had court experience is not a useful way to predict their level of confidence in the courts.⁵

Confidence Level In State/Local Courts:	Any State Court Experience %	No State Court Experience %
Extremely confident	2	6
Very confident	17	20
Somewhat confident	35	40
Slightly confident	25	22
Not at all confident	20	10
Uncertain	1	2

*Question: Now I'd like to talk to you about your *confidence* in different institutions in American society. Here is a list of American institutions. As far as the people running these institutions are concerned, how confident do you feel about each institution?
Source: COURT BLUEPRINTS, Table II.2

Second, there was evidence that those who claimed a “high” level of familiarity had less confidence in the courts than did those who reported less familiarity with the courts. (See Table 2.) But there was very little distinction in the results among those with “moderate,” “low,” or “no” familiarity. As a result, the relationship between familiarity and confidence is not statistically significant.

5. Statistical significance offers assurance that our survey-based comparisons (e.g., between the proportion of court users and non-court users that have high confidence in the courts) are not due to chance. Chance is a consideration because we are using interviews with a small but randomly selected group of adults (a sample of some 800 to 2,000 is used in the typical national survey) to represent the opinions of *all* United States adults, who number in the millions. A sample is randomly drawn if each adult in the United States has the identical likelihood of being included. No single random sample, however, will exactly represent the adult population. So we need to find a way of deciding whether we should take seriously differences between users and non-users in our sample. Statistical significance offers a benchmark. Observed differences

Confidence Level in State/Local Courts:	FAMILIARITY WITH STATE COURTS			
	High %	Moderate %	Low %	None %
Extremely confident	3	7	2	6
Very confident	15	17	18	21
Somewhat confident	37	36	42	35
Slightly confident	24	25	25	21
Not at all confident	21	15	12	14
Uncertain	-	-	1	3

*Question: See Table 1.
Source: COURT BLUEPRINTS, Table I.9

There is, however, additional evidence supporting the view that those with more court experience had lower opinions of the courts. Thirty-one percent of those with at least some court experience believed that courts stood “in great need of reform” compared to sixteen percent of those who had no personal experience with the courts.⁶ The overall relationship is statistically significant, but once again is not large enough to be of any practical consequence. A perceived “great” need for reform was stated by thirty-six percent of those with high self-reported familiarity with the courts, compared to twenty percent of those who reported a low level of familiarity.⁷ Again, while statistically significant, the relationship is very weak. Overall, a social scientist would judge that the case for a negative impact from court experience was not proven because the observed differences either lacked statistical significance or, if statistically significant, were far too small to serve as a basis for drawing policy conclusions.⁸

Problem Number Two: All experience and knowledge are not the same. The 1977 findings are intriguing, but there are limits to how much we can learn from such analysis, at least from the 1977 survey. Quite simply, all experiences should not be treated equally, but the 1977 Yankelovich survey report largely did so. Criminal defendants will experience the courts differently than

between groups are noted only when tests indicate that there is only one chance in twenty (or, more rigorously, one chance in a hundred or even in a thousand) that the observed difference between individuals in our sample with court experience and those without such experience in our survey could exist when in fact there is *no* difference in the opinions of all court users and non-users.

6. COURTS BLUEPRINTS, *supra* note 1 at 24, Tbl. II.3.
7. *Id.* at 17, Tbl. I.10. This relationship is statistically significant.
8. The apparent weakness of the above evidence is noted in Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respects: How Wisconsin Citizens View Their Court*, 82 JUDICATURE 59, 64 (1998).

witnesses in a civil trial, and witnesses differently than jurors. A simple dichotomy of any experience versus no experience fails to consider differences in the frequency and variety of contact with the courts. This lack of nuance means that all manner of contacts with the court were evaluated the same.

A more focused look undermines the claim of negative consequences from court experience. For example, those survey respondents who felt that they knew the most about traffic courts gave those courts a high rating compared to other kinds of courts.⁹

Also, both “familiarity” with and “knowledge” of the judicial branch of government are strongly related to the educational attainment, income, social class, and race or ethnicity. Differences in confidence by levels of knowledge and familiarity thus also reflect differences in people’s social backgrounds.¹⁰

There are other limitations to what we can learn from the 1977 survey. The analysis of the survey data was relatively unsophisticated, geared toward what was needed to make a clear and direct presentation to a large conference audience. The kinds of analysis needed to tease out the nature of the experience to opinion connection have never been attempted. The age of the survey data is also a major limitation. A great deal has changed in the public’s contact with the courts.

A CHANGING NEXUS: COURTS AND PUBLICS

On balance, it seems sensible to treat the basic finding that those who knew the courts well rated them less highly than those with little or no knowledge as a working hypothesis in need of further empirical testing given its standing as a part of conventional wisdom about courts.¹¹ The main empirical test

is whether the 1977 survey findings remain relevant.

Public opinion changes slowly for the most part. The broad contours of public opinion and the courts are, therefore, likely to have persisted. There is less certainty that experience with the courts continues to foster negative perceptions. The reason for that uncertainty is a sea change in the nature of public contact with the courts.

Since 1977, the composition of jury pools has become far more representative, special small claims procedures have become universal, and the nature of the disputes that bring people to the courthouse has changed. The broad dimensions of that change can be seen in the changing workload of the courts themselves. Between 1984 and 1996, *civil* case filings increased by thirty-one percent, *criminal* filings by forty-one percent, and *small claims* cases by forty-one percent. The largest increases, however, were in the areas of domestic relations, where case filings grew by seventy-four percent, and in juvenile cases, which rose by sixty-three percent. Traffic cases, the staple of court contact during the 1970s, declined by fifteen percent over the 1984-97 period. As a point of comparison, the United States population increased by twelve percent over those years.¹²

The change in the nature of people’s court experience has been more dramatic still. Surveys conducted by or on behalf of state judicial branches permit an approximation of what has changed. (See Table 3.) In 1977, six percent of American adults had ever served on a jury. Statewide surveys conducted in the 1980s and 1990s suggest that between twenty to thirty percent of adults had experienced jury service.¹³

This change resulted from an era of reform that featured the removal of legal prohibitions to jury service by women and

9. See Barry Mahoney et al., *Courts and the Public: Some Further Reflections on Data from a National Survey*, in COURT BLUEPRINTS, *supra* note 1, at 83, 93.

10. See COURT BLUEPRINTS, *supra* note 1, at 15. A further complication is that differences in tested knowledge may reflect differences in the way people learn about the courts. For example, the statement, “In a criminal trial, it is up to the accused to prove his innocence” is one of the true or false questions used to test a person’s court knowledge. Those with low incomes, low levels of education, and who belong to minority groups were far less likely to answer “false” to that question than were their higher income, educated, white counterparts. See COURT BLUEPRINTS, *supra* note 1, at 8. This “knowledge” gap may reflect differences in how people accumulate knowledge of the legal system. The content of knowledge obtained from experience “at the street level” may differ from that obtained in the classroom.

11. The Yankelovich survey’s findings are consistent with another major survey carried out during the 1970s, the ABA’s 1973-74 *Legal Needs of the Public* survey, which included five questions rating the courts. Former defendants and plaintiffs in court cases were less confident in the fairness, quality of judges and judging than others (a significant difference was found in four of the five statements asked). The sharpest contrast came in response to the statement, “Judges . . . give adequate attention and time to each individual case.” See Barbara A. Curran & Inge Fryklund, *Opinions and Perceptions*, in THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 236, 235 tbl. 6.8 (Barbara A. Curran, ed. 1977). Those who had served as jurors or appeared as wit-

nesses in a court case were less likely than those who had appeared in court to agree with the statement, “Judges are generally selected from the most able members of the legal profession.” See *id.* On the other statements, however, jurors and witnesses did not differ from the views expressed by non-court users to a statistically significant degree. See *id.* at 239 tbl. 6.9.

12. BRIAN OSTROM, ET. AL., EXAMINING THE WORK OF THE STATE COURTS 1996 (1997).

13. The report prepared based on the 1977 survey offers conflicting estimates of the proportion of the American public that has served as jurors: at various points rates of six, eight, and twelve percent are offered. See Mahoney, *supra* note 1, at 94 n. 20. The six percent figure is cited here because it is based on responses to the most direct question, which asked whether the interviewee had ever served on a jury. The jury service estimates cited from state surveys refer to that or a very similarly worded question (variations include “served on a jury in a case” (Massachusetts) and “ever been a juror” (Iowa)). It is uncertain whether such wording allowed respondents to clearly distinguish *having served* on a jury from *having received a jury summons but not served* on an actual jury. However, the North Carolina (1995) survey offers reassurance: while twenty-two percent reported having been called and served as a juror, an additional thirty-one percent reported being called but not having served “in the past, but not in the last year” (seven percent said they had been called but did not serve in the last twelve months, and two percent that they had been called and served). See WILKERSON AND ASSOCIATES, NORTH CAROLINA COURT SYSTEM RESEARCH 34 (1995).

members of minority groups and the practice of using exemptions to discourage their jury service. In 1977, the impact of the “key-man” system, in which jury commissioners selected their jury pools from persons, essentially men, known to them as honest, upstanding members of their community was still pervasive. The federal courts abolished the “key-man” system in 1968.¹⁴ States followed the federal courts’ lead with varying degrees of speed.¹⁵ The cumulative effect of court opinions and new statutory provisions opened up jury service to an extent never before experienced. In 1977, the probability that an adult of any age had ever served on a jury was slight; thereafter, that probability grew — and it rose from zero for many groups of Americans.

		% Ever Serve on a Jury	% Ever Court Witness	% Ever Court Observer
1977	NATIONAL SURVEY	6	4	6
1986	MICHIGAN	18		
1988	WASHINGTON	19		54
1991	MASSACHUSETTS	21	22	52
1992	CALIFORNIA	21	20	55
1995	IOWA	24		
1995	MISSISSIPPI	30		
1995	NORTH CAROLINA	22		
1997	NEW MEXICO	27		

Fewer surveys examine the prevalence of court participation as a witness or as an observer. The existing post-1977 survey data suggests a marked increase in the likelihood of being a witness or court observer. (See Table 3.) In the 1977 survey, only four percent of adults reported having ever been a court witness; two state surveys suggest that, by the early 1990s, about one-fifth of all adults had been a witness (California and Massachusetts). The change in the likelihood of ever having observed a court proceeding grew even more dramatically, from six percent in 1977 to about one-half by in 1990 (California, Massachusetts, and Washington).¹⁶

The reported levels of court experience found in a very recent national survey conform closely to what state surveys indicate. The proportion of the population with some kind of contact with the courts has grown significantly since 1977. Indeed, eighty-nine percent of the survey respondents reported some prior court experience and seventy-eight percent reported

some form of “active involvement” with the courts as jurors, witnesses, or litigants. Twenty-four percent of the respondents reported having served on a jury.¹⁷

**WHAT DID THE PUBLIC THINK OF THE COURTS
IN THE LATE 1980s AND 1990s?**

Until this year, no national survey findings comparable to the 1977 survey were available to assess how public opinion about the courts may have changed since 1977. There is, however, an underused body of information accumulated through twenty-three statewide surveys conducted in 21 states since 1984.¹⁸ (See Table 4.)¹⁹ Most surveys focused on public trust and confidence issues in a fairly comprehensive manner and were sponsored by the state’s judicial branch. The untold story that emerges from the heretofore largely untapped twenty-one surveys is mixed in terms of public confidence in, and support for, the courts and judiciary.

Although the surveys do not present a single message, there are some consistencies in the opinions expressed in the various states:

- The public is more (but only slightly more) confident in courts than in the other branches of state and local government.
- “Somewhat confident” probably describes the typical evaluation that the public has of the state courts.
- Questions about state courts of last resort attract responses expressing greater confidence than do questions asked about “the state’s courts” or a particular kind of court.
- The public is poorly informed about the role of the courts and court procedures, and is largely unaware of reforms undertaken by a state’s courts.
- There is no apparent connection between a state’s demonstrated commitment to and action toward court reform and public expressions of confidence or ratings of court performance.
- The public holds certain strong negative images of the state courts: that trial courts are difficult to access, slow to reach decisions, costly to use, difficult to understand, and unconcerned with crime control. In addition, the public in many states is convinced that courts are influenced negatively by political considerations and connections.
- On other matters there are significant differences among states in public perceptions, notably on whether courts treat people of different races and ethnicity the same and on the relative standing of courts vis-à-vis state and local executive and legislative bodies. A perception of racial bias is as high as three-quarters and as low as one-third of respondents to state surveys. States with heterogeneous populations generate the strongest perceptions of unfairness based on race and

14. This was accomplished through passage of the Jury Selection and Service Act, 28 U.S.C. §§ 1861-1878.

15. See generally G. Thomas Munsterman and Paula Hannaford, *Reshaping the Bedrock of Democracy: American Jury Reform During the Last 30 Years*, 36 JUDGES’ J., 1 at 5 (1997).

16. A change of that magnitude is likely to be based, in part, on differences in the methodology and specific questions used in the 1977 survey and those used in the later state surveys.

17. See AMERICAN BAR ASSOCIATION, *supra* note 2, at 29.

18. There have been multiple surveys in New Jersey and Utah during this time period.

19. Another state, Idaho, conducted a survey in 1997. It is excluded from the table because it did not employ random sampling to select respondents. The survey findings are outlined in Craig Hemmens, *Public Knowledge About Courts: A Case Study of Idaho*, 37 JUDGES’ J. 16 (1998).

ethnicity. It is very likely, however, that differences in question format and wording are one reason that perceptions of bias are reported to differ so greatly among states.

- The strongest and most widespread perception of unfairness, however, relates to a belief that the rich are far more likely than others to prevail in legal proceedings.
- The public is far from monolithic. Confidence in and perceptions of the courts vary systematically on the basis of people's racial, ethnic, and socio-economic backgrounds, and differ between men and women. Members of minority groups, including judges and lawyers, perceive the extent of racial and ethnic bias in the courts very differently than their white counterparts.
- There are some areas in which the public gives the state courts high ratings. In particular, there is a strong sense that judges and court staff treat people with courtesy and respect.²⁰

YEAR	STATE	SAMPLE SIZE	POLLSTER TYPE
1984	NEW JERSEY	800	UNIVERSITY
1986	MICHIGAN	789	UNIVERSITY
1988	WASHINGTON	800	COMMERCIAL
1989	ALABAMA	422	UNIVERSITY
1989	RHODE ISLAND	404	COMMERCIAL
1990	UTAH	600	COMMERCIAL
1991	MASSACHUSETTS	400	COMMERCIAL
1991	UTAH	600	COMMERCIAL
1992	CALIFORNIA	1488	COMMERCIAL
1992	NEW JERSEY	800	UNIVERSITY
1992	VIRGINIA	1600	COMMERCIAL
1995	IOWA	803	UNIVERSITY
1995	MISSISSIPPI	670	UNIVERSITY
1995	NORTH CAROLINA	800	COMMERCIAL
1995	WISCONSIN	522	UNIVERSITY
1996	FLORIDA	1042	COMMERCIAL
1997	ARIZONA	511	COMMERCIAL
1997	NEW MEXICO	403	COMMERCIAL
1998	CONNECTICUT	1200	UNIVERSITY
1998	KANSAS	1226	UNIVERSITY
1998	LOUISIANA	1200	UNIVERSITY
1998	MARYLAND	600	COMMERCIAL
1998	TEXAS	1215	COMMERCIAL

WHAT DO MORE RECENT SURVEYS REPORT ABOUT THE EXPERIENCE TO OPINION LINK?

A survey conducted in Louisiana last year was the most ambitious attempt thus far to investigate the link between court experience and opinions about the courts.²¹ In addition to interviewing a random sample of 1,200 Louisiana adults, 800 persons who had used the courts within the past five years were identified and interviewed. The answers given by the respondents with court experience were then contrasted with those provided by respondents who reported no court contact during the past five years.²²

The result was a mixed picture concerning the importance and impact of court experience on opinions. Experience did enhance knowledge about the courts. Court users were significantly more likely to claim that they were familiar with the courts. Specifically, seventy-eight percent of users and fifty-three percent of non-users claimed familiarity with the courts. Court users also claimed that their experience was the main source of their information about the courts (fifty-one percent of users compared to eleven percent of non-users, a group that included those whose court experience had taken place more than five years ago). So while thirty-two percent of non-users cited television as their main source of information and thirty-six percent cited newspapers, the comparable figures for court users were seventeen percent and twenty-one percent, respectively.

The issue now becomes whether the difference in sources of information is associated with the opinions people held about the courts. The answer was mostly no, but partly yes. On a positive note, and in marked contrast to the 1977 survey, opinions of court users in Louisiana were not more negative than non-users. Rather, they provided assessments that were slightly higher or identical to those offered by persons without court experience. Court users were not more likely to approve of how the courts handled criminal cases, to rate judges highly, to approve of the time and cost involved in going to court, or to approve of specific court reform proposals. Nor did they rate the courts higher than non-users or believe in greater numbers that the courts had been improving in recent years. Users and non-users shared much the same set of views.

Instead, the Louisiana survey directs attention to the importance of considering the kinds of court experiences people based their perceptions concerning the courts. The survey distinguished among nine categories of court users. (See Table 5.) There was a pattern in which the approval rating given to the courts was highest for former jurors, traffic defendants, and court employees and lawyers. Approval was relatively high, although less strongly so, for participants in domestic relations cases and witnesses. The lowest ratings were from "visitors" to the courts, civil litigants and victims. Jurors and witnesses tended to offer the most positive assessment of the courts in

20. These conclusions are based on a review of the reports compiled in DAVID B. ROTTMAN, STATE COURT SURVEYS ON PUBLIC TRUST AND CONFIDENCE (National Center for State Courts 1998) and JACK SWEENEY, BAR PUBLIC OPINION SURVEYS CONCERNING LAWYERS AND THE JUSTICE SYSTEM (American Bar Association Office of Justice Initiatives 1998).

21. SUSAN E. HOWELL, CITIZEN EVALUATION OF THE LOUISIANA COURTS: A REPORT TO THE LOUISIANA SUPREME COURT (Univ. of New Orleans 1998).

22. A similar survey emphasizing the user/non-user contrast was conducted in Virginia in 1992.

terms of fairness (in the treatment of minority groups and in treating the poor and wealthy alike). The differences between court user categories were small, however. Perhaps the most notable finding cited in many of the state surveys, as well as the 1977 survey, was the stark contrast between the very high ratings given by court insiders (court employees and attorneys) and the ratings given by all other user categories.

**TABLE 5
OPINIONS OF JUDGES:
LOUISIANA SURVEY (% AGREEING)**

	Judges are too influenced by politics	Judges show little interest in people's problems	Judges are fair and impartial
Jurors	37	69	77
Traffic Court	65	57	85
Domestic	60	44	84
Visitor	64	54	84
Civil Litigant	52	46	84
Witness	49	59	79
Victim	57	56	86
Criminal Defendant	73	51	85
Court Employee/Lawyers	30	73	75

SOURCE: Howell, *supra* note 19 at 42 tbl. 23.

Louisiana respondents, of course, do not necessarily reflect how people nationally regard the state courts. There is other evidence from other state surveys that can help establish whether court experience continues to elicit a negative impression of the state courts. Eight additional state surveys conducted since 1984 compared the attitudes and ratings of those with and those without court experience, often differentiating by the type of court contact.

The most straightforward assessment is to ask litigants, jurors and others whether their experience had a positive or negative effect on the image of the courts. In Arizona, a 1997 survey found that forty-eight percent of court users came away with a more positive impression of the courts and thirty-nine percent had a more negative impression. Generally, court users in New Jersey (1984 and 1992), Virginia (1992), and Connecticut (1998) tended to say that their experience did not

change their image of the courts. Where a change in opinion was reported, it tended to be in a negative direction (people reporting a negative change outnumbered those reporting a positive change by two to one in New Jersey and by three to two in Connecticut and Virginia).²³

Less direct, but still relevant, evidence is available from six states that compared the ratings and attitudes of court users in various categories to those of respondents who reported no court contact. The simplest comparison is in terms of the overall ratings of the courts, which can be made for three states (California, Michigan, and New Mexico). Here, jurors (in one state) and litigants (in two states) tended to rate the courts lower than did those without court experience. These differences were not substantial, however, and no difference existed for one-half of the comparisons. All in all, more recent state surveys suggest a distinct reduction since 1977 in the ratings gap between court users and non-users, but the gap persists.

These and other state surveys also looked at how categories of court users differed from one another and from non-users in attitudes about the courts (e.g., their fairness, speed, and accessibility). The resulting picture suggests considerable progress since the 1977 survey regarding what court experience implies for confidence in and approval of the state courts.

As early as 1988 a survey in Washington pointed to positive change in the impact of court experience: researchers there concluded that “having experience with the court system, in general, appears to have a neutral effect on attitudes”²⁴ and that “familiarity with the court system either has a neutral or positive affect on the public’s attitudes.”²⁵ The direction and magnitude of differences between those with and without court experience varied significantly by the kind of experience, with jurors, as in most surveys, displaying the most positive attitudes toward aspects of court performance.

Perhaps the most positive consequence of having had direct experience of the courts is a very strong belief that court personnel are courteous. A Mississippi survey (1986), for example, found that persons with all categories of experience — except that as a victim — were more likely than others to believe that persons in the courthouse were treated with courtesy and respect, a finding echoed in all other state surveys that asked the relevant question.

Finally, there is evidence that the kind of court also makes a strong difference in what people think about the courts (specifically, from 1984 and 1992 surveys in New Jersey and the very recent Louisiana survey). It is noteworthy that high opinions of the courts were most commonly found among those with criminal court experience. Criminal court experience was associated with higher ratings of judges in terms of fairness, knowledge, care, deliberation and openmindedness (from the New Jersey

23. The difference between Arizona and the other two states is almost certainly attributable to question wording. Arizona did not offer survey respondents the choice of “no change,” recording it only if volunteered by the respondent. The New Jersey and Virginia surveys included “unchanged” as an option read to the respondents. This is a good lesson: survey findings rarely, if ever, speak for themselves and differences across surveys need to begin with an examination of the question wording, placement in the survey (what

kinds of questions preceded the question being examined), and the way “don’t know” responses were handled. There is often no “right” approach to question wording but even a slight difference in wording can drastically alter the way the question is understood by survey respondents.

24. GMA RESEARCH CORPORATION, WASHINGTON STATE JUDICIAL SURVEY, FINAL REPORT 19 (GMA Research Corp., Bellevue, Wash., 1988).

25. See *id.* at 57.

surveys). Generally, the lowest ratings were by individuals with traffic court experience.

In sum, statewide surveys conducted over the last fifteen years suggest that there is no confidence gap between those with and without court experience.²⁶ Surveys and questions on some topics suggest that those with court experience had more favorable views of the courts; in other surveys and on other topics, there was no clear difference associated with experience with the court system. This suggests that the purported negative impact of court experience, which featured so prominently in writings based on the 1977 survey, was not replicated in state surveys conducted in the 1980s. Rather, the issues today are what kinds of experience in which kinds of courts promote or inhibit a positive image of the courts and how people balance court experience against other influences on public opinion such as the media.

WHAT IS THE ROLE OF COURT EXPERIENCE IN SHAPING OPINIONS?

Experiences people have in and with courts are one way in which opinions about courts are shaped. But people with and without direct experience are exposed to other powerful opinion-shapers, notably the mass media and the prevailing overall distrust of government that has prevailed since the late 1960s.²⁷

One interpretation of the respective roles of direct court experience and other opinion-shapers argues that experience trumps other influences. It is claimed, for example, that opinions of persons with court experience stem from perceptions of fairness based on their observations, while opinions of individuals lacking direct court experience stem from their overall low confidence in government.²⁸

If accurate, there are positive and negative implications for the courts from this interpretation. One positive implication is that courts can make changes to court processes that enhance

the sense of fairness with which people leave the courthouse. The academic field of procedural justice leads to the conclusion that people tend to be satisfied with outcomes that they believe stem from fair processes, even if their side lost.²⁹ Enhanced performance by the courts, especially with regard to procedural fairness, therefore, may promote greater confidence among those entering the courthouse.

This gives the courts an advantage over legislatures and executive agencies in securing the public's trust and confidence. Courts, and particularly the U.S. Supreme Court, are viewed as making decisions through consistent, even-handed processes; they also explain the reasoning behind their decisions. Courts are seen as institutions "that can be counted on to make decisions in a fair way" and make decisions only after they assemble all the relevant information."³⁰

The negative implication of the experience triumphs interpretation theory is that courts are relatively powerless to improve confidence among those who are without direct court experience. This is because it is assumed that people without court experience develop opinions about courts that are consistent with their low confidence in and satisfaction with government institutions generally.³¹ There are areas, however, in which courts can potentially change negative opinions that are held by both court users and non-users. Research points, for example, to a public perception that courts are *less* likely than local government to give people an opportunity to express their views.³² Well publicized reforms that respond to that perception might enhance the public image of the courts.

Another interpretation about how court experience influences opinion holds that the dominant influence on public opinion about local courts is a set of negative perceptions largely formed through the media, perceptions that are not readily changed by positive contact with the courts. Court experience in this view does tend to promote confidence.

26. The recent ABA-sponsored public opinion survey reverses the most publicized finding from the 1977 Yankelovich survey. Specifically, in 1998, the more knowledge of the courts and the more court experience people had, the more confident they were in the courts. Confidence in state-level and lower courts was significantly higher among respondents reporting that their most recent court experience was positive (thirty-two percent were extremely or very confident in the courts) than for those reporting a negative experience (fourteen percent). See AMERICAN BAR ASSOCIATION *supra* note 2 at 7, 54. It is not clear, however, that there is a direct link between experiences in court and people's opinions about the courts. Most respondents (eighty-two percent) claimed that their most recent court experience did not change their opinions about the courts. The report on the ABA survey concluded that "those with positive experiences are probably not going to improve their perceptions but those with negative experiences have a good chance of becoming even more negative." See AMERICAN BAR ASSOCIATION, *supra* note 2, at 8. This predictive inference seems unduly pessimistic given the limits in what a cross-sectional survey can support.

27. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 42 (1995).

28. See Susan M. Olson and David A. Huth, *Explaining Public Attitudes Toward Local Courts*, 20 JUSTICE SYS. J. 41, 52. (1998). Olson and Huth also review past research about public opinion on local courts and make a useful contribution to that literature (based on the 1991 Utah state survey).

29. Hibbings and Theiss-Morse *supra* note 25, at 14. For a full explication of the procedural justice perspective, see TOM. R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

30. James L. Gibson, *Understanding of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469 (1989).

31. But other research and interpretation find that the courts are not closely linked in the public mind with the other branches of government. For example, people see the U.S. Supreme Court as a part of the "constitutional system" but not as a part of the "Washington System." Hibbings & Theiss-Morse, *supra* note 25, at 89. This distinction may follow from a general perception that the U.S. Supreme Court is not involved in solving the problems the public sees as being of the greatest concern. See *id.* at 52. On balance, the courts doubtless suffer somewhat from the current low standing of government in the public mind, but it seems sensible to place greater weight on the influence of direct court experience and the mass media on public perceptions of the courts.

32. See Gibson, *supra* note 28, at 493.

However, the positive influence associated with court experience rapidly erodes, giving way to the negative image of courts promoted in the media. The evidence for this interpretation is that “exit surveys” given to court users as they leave the courthouse find relatively high levels of satisfaction, while surveys of court users carried out a few months after their court experience generate lower levels of satisfaction. Random surveys of the general public find still lower levels of satisfaction.³³ This suggests that court contact, whether positive or negative, will tend to be neutral in its impact on people’s overall opinions about the courts over the long haul.

There are indications that the mass media today play a powerful role in forging public perceptions of trial courts. This extends to fictional (television dramas and comedies resolving around legal themes) and non-fiction coverage of the courts, and to the blend of fact and fiction found in programs offered by television “judges” before whom litigants appear on a self-selected basis. The power of such influences is demonstrated by a recent study that surveyed people who had previously had contact with the legal system and asked if they would turn again to lawyers and the courts to resolve future disputes. Survey respondents were asked in detail about their experience with the legal system and the amount and influence of mass media sources of information about the courts. The study concluded that the influence of the media was predominant in shaping that decision, finding that “only the frequent contact with media sources, and not direct legal experiences, may create personal barriers to the use of lawyers for future conflict situations.”³⁴ The same, or a very similar, pattern may apply to the formation of public opinion on trial courts, and blunt what local courts can do to improve their public image.

There are other possible explanations for the limited impact of experience on opinions. The use of elections in selecting state judges is one possible culprit. In contrast to the appointed federal judiciary, the majority of state judges stand for election, whether in retention systems or partisan elections.³⁵ Some surveys show a strong belief that those who provide campaign contributions to judges get special treatment.³⁶ And the existence of campaigns also means that messages — good and bad — transmitted in those campaigns may supersede other messages the courts would prefer to send. This may explain why federal

courts tend to attract higher levels of public confidence and trust than do state and local courts.³⁷

A case can be made, however, that judicial elections connote public accountability, something that the public values greatly. So in some respects judicial elections, most of which are non-partisan and come after an initial appointment process, have positive effects on opinion. But elections place state courts in a bind because the value of offering accountability through elections is negated by perceptions of unfair influence through campaign contributions by the wealthy and powerful. The right balance between accountability and perceived neutrality may be difficult to achieve.³⁸

CONCLUSION: WHY SHOULD JUDGES CARE ABOUT PUBLIC OPINION?

A judge or court manager can reasonably ask why she needs to be concerned with findings from social science surveys on the topic of public trust and confidence. What can surveys add to the wisdom accumulated through direct interaction with the public in courtrooms?

The most general answer is that public opinion, regardless of its accuracy or source, defines the legitimacy of government institutions. A decline in legitimacy poses a particular challenge to the judiciary, which, as Hamilton noted, “has no influence over either the sword or the purse” but is expected to prevent tyranny by the majority and to protect the Constitutional rights of individuals.³⁹

A more practical answer is that current efforts to secure public support for the courts rest on assumptions about what promotes a positive view of the courts. The most basic assumption is that courts should concentrate on efforts to expand public knowledge about the institutional role and court procedures through judicial outreach. Court educational programs, court newsletters, and court visitors programs are based on this idea. That assumption may be too limited, however. Public opinion surveys suggest a surer return may follow from an emphasis on changing court processes in ways that, for example, allow for more direct participation by litigants and more meaningful involvement by the public in court programs. Such changes potentially foster positive experiences and set the stage for enhanced public confidence. There is general evidence that such

33. See Kritzer & Voelker, *supra* note 5, at 63-64.

34. Terance D. Meithe, *Predicting Future Litigiousness*, 12 JUST. Q. 563, 578 (1995).

35. See generally *An Interview with Roy Schotland*, COURT REVIEW, Fall 1998 12 at 13 (reviewing state court election practices in which eighty-seven percent of trial judges stand for some type of election).

36. In Pennsylvania, eighty-eight percent of respondents in a 1998 survey believed that “decisions made by judges in their courtrooms” were, at least some of the time, “influenced by large contributions made to their election campaigns.” *Id.* at 17 (The question wording, however, may encourage agreement by the phrase “at least some of the time.” Other state surveys have found high but more modest levels of agreement with statements concerning judicial involvement in political fund-raising.)

37. Public support for the U.S. Supreme Court, which is high, appears to rest on a different foundation than that for local courts. One rea-

son for that high support is the Court’s unique national institutional role as guarantor of freedom. At any given time, dissatisfaction with the Court by a proportion of the population is high and linked to specific court opinions. However, the effect is short-lived because the Court is seen as protecting basic democratic values and as a champion of justice. There appears to be a predisposition to support the U.S. Supreme Court, rooted in how people learn about our political system. See JEFFREY J. MONDAK AND SHANNON ISHIYAMA SMITHEY, *THE DYNAMICS OF PUBLIC SUPPORT FOR THE SUPREME COURT*. 59 J. POLITICS. 1114. In this view, the U.S. Supreme Court has legitimacy — it enjoys public support that is not contingent on satisfying specific demands. Ultimately the legitimacy of the U.S. Supreme Court rests primarily on the willingness to submit disputes to it for adjudication and acceptance of the finality of its decisions rather than on specific outcomes to disputes. See Gibson *supra* at 469.

38. See, e.g., Gibson, *supra* note 30, at 492.

39. FEDERALIST 78.

efforts by government leaders indeed can engage the public and raise confidence and support, at least in the short-term.⁴⁰

As to public education, it is difficult for lower courts to send out a consistent, coherent message. To the extent they attempt it, it is likely to be drowned out by other messages in the mass media. Still, the public cites current and retired judges as their preferred source for information about the courts and justice system generally.⁴¹ Other effective educational programs may lie beyond the jurisdiction of the courts. Specifically, the educational system at all levels needs to explain the role of local courts in our system of government through a renewed commitment to civic education.

To at least this extent, judges have an interest in becoming informed consumers of survey findings. To make appropriate use of survey data, it is helpful to place public opinion on the courts in a broader perspective. What level of trust do other branches of government and other institutions attract? Trust and confidence in institutions, public and private, has declined continuously and sharply in the United States since the mid-1960s. A similar decline occurred in virtually all industrial countries. Few institutions have been immune; only the scientific community retains the public's full confidence. Among government entities, the public's trust is lowest at the federal level, somewhat higher at the state level, and highest at the local level.⁴²

There are some quasi-technical issues as well. Sensible consumers of surveys recognize that responses to survey questions are not direct measures of court performance. For the most part, public opinion surveys capture people's perceptions, what might be considered an emotional rather than a reasoned response.

The level of public confidence recorded in surveys is strongly influenced by the way questions are worded and the order in which questions are presented. Public expectations and opinions on aspects of court performance are likely to differ between courts of general jurisdiction and courts of limited jurisdiction, but surveys rarely distinguish public perceptions by the type of court. Some public criticism expressed in surveys reflects poor performance by the courts in a particular state or locality and calls for remedial action. Other criticisms reflect perceptions shaped by sensational cases and misunderstandings of the judicial branch's role that must primarily be addressed through public education and judicial outreach.

Perceptions of the courts also are rooted in basic orientations (e.g., "fairness and equality," "protection of society") that cannot be represented by a single survey question. It is these underlying orientations, measured through sets of related questions, that best describe public opinion on courts. Attempts to identify and explore the content of such orientations are rare, however. Similarly, no one survey can be definitive. Each survey offers a snapshot, never fully in focus, of what people think and believe. Knowledge comes from the accumulation of survey

findings and their interpretation and reinterpretation.

In this context, what should we conclude about the influence of court experience on public opinion? First, contact with the courts nowadays seems to have either a neutral or moderately positive impact on how people rate the state courts. This is a dramatic change from the situation described by the 1977 survey, "Public Image of the Courts."

Second, there is some evidence (from one state, Wisconsin, and a short survey) that initial court contact has a very positive input on how the public views the courts. That effect is soon overwhelmed by media depictions of the courts and legal profession, which are playing a key role in shaping public opinion of the courts. Enhanced confidence in the court can be sought by responding to unmet public expectations of how the court process should operate, as in the ability to directly express their viewpoints before the courts. This raises the traditional issues about the efficacy and propriety of self-representation by litigants and concerns over how to balance self-expression with fairness between the parties to a dispute. It appears, however, that those issues may prove unavoidable because of their centrality in how the public evaluates institutions of government.

Third, there is also evidence that the public responds positively to efforts courts make to be more accessible, more sensitive to the perception of fairness in court decisions and procedures, from which litigants and others draw their experience. Fourth, public opinion surveys can contribute to a more sophisticated understanding of why the halo effect of court contact is short-lived and how that effect can be extended.

Fifth, and finally, the Trial Court Performance Standards offer a reasonable framework for translating survey results into policy discussion and decisions.⁴³ The Standards merge the judicial branch's institutional role of interpreting and applying the law independently (independence and accountability), the procedural concerns of making decisions in individual cases (equality, fairness, and integrity) and consumer-related concerns (accessibility and expedition and timeliness). As a leadership tool, the Standards translate the numerous questions asked in surveys into a manageable number of meaningful categories within which patterns can be identified and interpreted, and plans for improvement made.



David B. Rottman is Associate Director of Research at the National Center for State Courts, where he has worked since 1987. He has a Ph.D. in Sociology from the University of Illinois at Urbana and previously worked at the Economic and Social Research Institute in Dublin, Ireland. His current interests include the pros and cons of specialized courts, the potential of therapeutic jurisprudence for the courts, and approaches to civil justice reform.

40. See Marc J. Hetherington, *The Political Relevance of Political Trust*, 92 AM. POL. SCI. REV. 791 (1998).

41. See AMERICAN BAR ASSOCIATION, *supra* note 2, at 101.

42. See the essays in *WHY PEOPLE DON'T TRUST GOVERNMENT* (Joseph

Nye, Philip Zelickow, and David King, eds. 1997).

43. A separate article by Pamela Casey at page 24 of this issue provides a useful introduction to the Trial Court Performance Standards.

Defining Optimal Court Performance: The Trial Court Performance Standards

Pamela Casey

Eleven years ago twelve individuals from the court community met for the first time in Arlington, Virginia, to discuss the fundamental responsibilities of courts. The fruits of their discussion, the Trial Court Performance Standards, articulate the fundamental purposes of courts and offer the court community a way of communicating with each other and their constituents about the work of courts.¹ How the Standards were developed, what they are, and their potential benefits are the subject of this article.

I. SETTING THE STAGE FOR PERFORMANCE

What led to the development of court performance standards? In 1987, court reform focused primarily on the structure and machinery of courts—what courts looked like organizationally and how they did what they did. For example, studies considered how many judges, courtrooms, and computers were needed to accomplish the court's work, and examined issues like what type of calendaring system, jury management system, or management information system was most effective. However, several environmental forces were beginning to push courts — subtly and not-so-subtly — toward a more outcome-oriented approach. Consider the following environmental forces affecting courts during this time:

- In the mid-1980s, many of the nation's criminal courts were facing dramatic increases in their drug caseloads, with concomitant effects on other court caseloads and court business in general.² Some courts responded to the crisis by diverting resources from civil and family cases to handle the drug caseloads. These kinds of responses prompted some judges and court managers to consider questions about the fundamental priorities of courts: "The drug crisis is propelling us to look at this issue of who are we and what are we doing in a very different way than we've historically done."³
- By the 1980s, the professional court manager was a visible and common member of the broader court community.⁴ Many courts now had a professional who was charged explicitly with the task of examining the work of the court

from an organizational perspective — what is the court doing and how can it do it better?

- In the early 1980s, the court community revisited the problem of court delay.⁵ Much of the effort in this area was focused on improving the *process* of moving cases through the system. However, the intense examination of delay led to discussions about its consequences on court *goals* in general, such as access to justice, fairness, and public confidence.⁶
- Although Osborne and Gaebler's *Reinventing Government*, with its emphasis on performance-based public institutions, would not be released until 1992, rumblings that the public was dissatisfied with courts⁷ already were motivating some in the court community to consider ways to demonstrate court effectiveness.⁸ Given shrinking public resources, court leaders were finding that legislators also were seeking information on court effectiveness. Some court leaders were concerned that if the court community did not take up performance issues, someone else — with less information about the courts — would.

These and other forces conspired in the late 1980s to prompt court leaders to develop court performance standards. Court structures and processes were still considered important, but they needed to be evaluated against the ends toward which courts strive.

II. DEVELOPING THE STANDARDS

In 1987, the National Center for State Courts received funding from the Bureau of Justice Assistance to establish the Commission on Trial Court Performance Standards and to support the Commission's work of developing a set of performance standards and measures for state courts. The twelve-member Commission included state and local judges, state and local court administrators, an elected clerk of court and scholars in the area of judicial administration. The Commission was extremely active in the development of the Standards, striving to ensure that the Standards would be relevant to courts and

Footnotes

1. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 1-2 (1997).
2. See Robert D. Lipscher, *The Judicial Response to the Drug Crisis*, ST. CT. J., Fall 1989, at 13, 14-15.
3. *The Drugging of the Courts: How Sick Is the Patient and What Is the Treatment?*, 73 JUDICATURE 314, 315 (1990).
4. See G. Larry Mays & William A. Taggart, *Local Court Administration: Findings from a Survey of Appointed Managers*, 69

JUDICATURE 29, 30 (1985).

5. See Larry L. Sipes, *The National Conference on Court Delay Reduction: Observations*, ST. CT. J., Fall 1985, at 3, 3.
6. See William W. Falsgraf, *The Quest for Justice: Cost and Delay Threaten Equal Access to the Courts*, ST. CT. J., Fall 1985, at 6, 6.
7. See John M. Greacen, *What Standards Should We Use to Judge Our Courts?*, 72 JUDICATURE 23, 24-25 (1988).
8. See *id.* at 26-28.

accurately reflect court goals.

Throughout the three-year development phase, the Commission sought feedback from the court community about its work. In 1989, for example, approximately 5,000 copies of the tentative Trial Court Performance Standards were distributed to individuals and organizations for the purpose of review and comment. In addition, Commission members and staff made presentations to various judicial audiences to keep them informed of the process and to solicit reactions to developing ideas.

The final version of the Standards was released in 1990. They were subsequently endorsed by the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, and, most recently, the American Judges Association. The Standards also were incorporated into the National Probate Court Standards and spawned another project to develop appellate court performance standards.

III. DEFINING COURT PERFORMANCE

The Commission identified twenty-two standards or guiding principles for courts that fall into five broad performance areas:

1. **ACCESS TO JUSTICE:** Trial courts should ensure that the structure and machinery of the courts are accessible to those they serve.
2. **EXPEDITION AND TIMELINESS:** Trial courts should meet their responsibilities in a timely and expeditious manner.
3. **EQUALITY, FAIRNESS AND INTEGRITY:** Trial courts should provide due process and equal protection of the law to all who have business before them.
4. **INDEPENDENCE AND ACCOUNTABILITY:** Trial courts should establish their legal and organizational boundaries, monitor and control their operations, and account publicly for their performance.
5. **PUBLIC TRUST AND CONFIDENCE:** Trial courts should work to instill public trust that courts are accessible, fair and accountable.

These five areas encompass the fundamental purposes and responsibilities of courts. The specific standards in each area are described in the following sections.

A. Access to Justice

Access is a basic requirement of a fair and equitable justice system. Griffin Bell, former Attorney General of the United States, reflected on the importance of access: "There can be no equal justice under law unless all of our people have access to justice . . . It does not matter how fair our laws may be, if access to their enforcement is denied or unavailable."⁹ The five standards included in the access to justice performance area address geographic, economic, procedural, language, or psychological barriers that may inhibit access to a court's services. Specifically, the standards provide that a trial court

should:

- conduct its proceedings and other public business openly;
- maintain facilities that are safe, accessible, and convenient to use;
- provide an opportunity for all who appear before the court to participate effectively, without undue hardship or inconvenience;
- ensure that judges and other trial court personnel are courteous and responsive to the public and accord respect to all with whom they come in contact; and
- maintain reasonable, fair, and affordable costs of access to court proceedings and records — whether the costs are measured in terms of money, time, or the procedures that must be followed.

These standards encourage judges and court staff to look at their courts from the perspective of court users. How easy or difficult is it for the general public to get to the court, find their way around the court, obtain information about the court, participate in a proceeding, and so forth, despite their general unfamiliarity with the court and its procedures?

B. Expedition and Timeliness

In its 1975 decision in *Southern Pacific Transportation Co. v. Stoot*,¹⁰ the Texas Supreme Court noted that delay "postpones the rectification of wrong and the vindication of the unjustly accused," crowds court dockets, increases litigants' costs, pressures judges to take shortcuts, interferes with the prompt resolution of cases in which all parties are prepared, highlights the disorganization of the system, and increases the possibility of error in the fact-finding process.¹¹

As already noted, timely case processing was a serious concern among judges and court staff when the development of the Standards began. In crafting the standards for this performance area, the Commission expanded the concept of timely case processing to all of a court's activities. In so doing, the Commission acknowledged the importance of timely court actions not only to litigants, but to all those involved with the judicial system, including jurors, attorneys, witnesses, criminal justice agencies, social service agencies, and members of the public. Specifically, the three standards in this area ask a court to:

- establish and comply with recognized guidelines for timely case processing while, at the same time, remaining current with its incoming caseload;
- disburse its funds promptly, provide reports and information according to required schedules, and respond to requests for information and other services on an established schedule that ensures their effective use; and
- promptly implement changes in law and procedure.

C. Equality, Fairness, and Integrity

"Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."¹² The standards in this core area of court performance recognize the

9. Address by Griffin B. Bell (Mar. 19, 1978), in NATIONAL CTR. FOR STATE COURTS, STATE COURTS: A BLUEPRINT FOR THE FUTURE 290 (Theodore J. Fetter ed., 1978).

10. 530 S.W.2d 930 (Tex. 1975).

11. See *id.* at 931.

constitutional guarantees of due process and equal protection of the law. They emphasize fidelity to established laws and procedures and the importance of court orders that are explicit and enforceable.

Specifically, the six standards in this area ask a trial court to:

- faithfully adhere to relevant laws, procedural rules, and established policies;
- maintain jury lists that are representative of the jurisdiction from which they are drawn;
- give individual attention to cases, deciding them without undue disparity among like cases and upon legally relevant factors;
- render decisions that unambiguously address the issues presented and clearly indicate how compliance can be achieved;
- take appropriate responsibility for the enforcement of its orders; and
- monitor records of all relevant court decisions and actions for accuracy and proper preservation.

D. Independence and Accountability

The standards in the fourth performance area recognize the importance of “an independent and honorable judiciary.”¹³ They call for the judiciary to maintain its distinctiveness as a separate branch of government, while also maintaining effective working relationships with the other branches of government and with other components of the justice system. In a speech observing the Bicentennial, Chief Justice Warren Burger remarked on the complexity of the relationships among the three branches of government: “But we should always remember that, even though independent, they were intended to be coordinate as well as co-equal. The idea of coordinate clearly implies that the separate powers must be harmonized into a workable whole.”¹⁴

This performance area’s standards also focus on the court’s status as a public institution. They hold a court responsible for developing action plans, obtaining resources for implementing the plans, monitoring its operations, and accounting publicly for its performance. Specifically, the standards direct a court to:

- maintain its institutional integrity and observe the principle of comity in its governmental relations;
- responsibly seek, use, and account for its public resources;
- use fair employment practices;
- inform the community about its programs; and
- anticipate new conditions or emergent events and adjust its operations as necessary.

E. Public Trust and Confidence

The judicial system derives its power and legitimacy from the public’s trust. Thus it is critical that the public “see and know” that justice is being done. The standards in this fifth and final performance area ask a court to consider its overall

performance through the eyes of the various constituencies it serves. The three standards in this area urge a trial court to foster public trust and confidence to achieve the following results:

- that the public perceives the trial court and the justice it delivers as accessible;
- that the public has trust and confidence that basic trial court functions are conducted expeditiously and fairly and that court decisions have integrity; and
- that the public perceives the trial court as independent, accountable, and not unduly influenced by other components of government.

IV. MEASURING COURT PERFORMANCE

Once the Standards were developed, the Commission (now consisting of fourteen members) and staff began developing measures to help a court gauge how well it is performing with regard to the performance goals. The Commission and staff brainstormed about possible measures (there being few existing measures of performance back then), wrote up the most viable, tested the measures in three courts, and then revised the measures based on the test results. The testing phase was important to determine whether: (a) the measures made any sense in the real world of courts, (b) the data actually existed or could be obtained, and (c) the information from the measures would be helpful to those who work in the courts. As a result of this process, seventy-five performance measures were produced.

The Standards and measures subsequently were implemented in twelve courts in four states. The courts varied along several dimensions, such as size, organization, and state law. As the demonstration proceeded, the Commission and staff reviewed the experiences of the various courts and revised measures accordingly. At the completion of the demonstration phase, several of the original seventy-five measures had been modified, replaced, or eliminated. The resulting measurement system included sixty-eight measures.

The measures use a variety of data collection methods and techniques, including: (a) observations and simulations, (b) structured interviews, (c) case and administrative record reviews and searches, (d) surveys of various reference groups, such as the general public, court employees, and members of the media, and (e) group techniques, such as brainstorming and focus groups. The use of multiple measures and diverse sources of information increases confidence in the accuracy and validity of the assessments.

As an example, three measures that rely on structured observations of the court are used to gauge performance on Standard 1.1, Public Proceedings. The first measure verifies that court proceedings that should be open to the public are open; the second examines whether an observer can identify what proceeding is underway in a courtroom; and the third determines

12. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 113 (1949) (Jackson, J., concurring).

13. STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, AM. BAR ASS'N, MODEL CODE OF JUDICIAL CONDUCT (1990), AS SUBMITTED FOR CONSIDERATION AT THE 1990 ANNUAL MEETING OF THE HOUSE OF

DELEGATES OF THE AMERICAN BAR ASSOCIATION, Canon 1, App. a, at 7 (1990).

14. Warren E. Burger, *The Interdependence of Our Freedoms, in AMERICAN COURTS & JUSTICE* 1, 5 (Glenn R. Winters & Edward J. Schoenbaum eds., 1976).

THE TRIAL COURT PERFORMANCE STANDARDS

AREA 1 - ACCESS TO JUSTICE

- 1.1 *Public Proceedings.* The trial court conducts its proceedings and other public business openly.
- 1.2 *Safety, Accessibility and Convenience.* Trial court facilities are safe, accessible and convenient to use.
- 1.3 *Effective Participation.* The trial court gives all who appear before it the opportunity to participate effectively, without undue hardship or inconvenience.
- 1.4 *Courtesy, Responsiveness and Respect.* Judges and other trial court personnel are courteous and responsive to the public, and accord respect to all with whom they come in contact.
- 1.5 *Affordable Costs of Access.* The costs of access to trial court proceedings and records – whether measured in terms of money, time or the procedures that must be followed – are reasonable, fair and affordable.

AREA 2 - EXPEDITION AND TIMELINESS

- 2.1 *Case Processing.* The trial court establishes and complies with recognized guidelines for timely case processing, while, at the same time, keeping current with its incoming caseload.
- 2.2 *Compliance with Schedules.* The trial court disburses funds promptly, provides reports and information according to required schedules, and responds to requests for information and other services on an established schedule that assures their effective use.
- 2.3 *Prompt Implementation of Law and Procedure.* The trial court promptly implements changes in law and procedure.

AREA 3 - EQUALITY, FAIRNESS AND INTEGRITY

- 3.1 *Fair and Reliable Judicial Process.* Trial court procedures faithfully adhere to relevant laws, procedural rules and established policies.
- 3.2 *Juries.* Jury lists are representative of the jurisdiction from which they are drawn.
- 3.3 *Court Decisions and Actions.* Trial courts give individual attention to cases, deciding them without undue disparity among like cases and upon legally relevant factors.
- 3.4 *Clarity.* The trial court renders decisions that unambiguously address the issues presented to it and clearly indicate how compliance can be achieved.
- 3.5 *Responsibility for Enforcement.* The trial court takes appropriate responsibility for enforcement of its orders.
- 3.6 *Production and Preservation of Records.* Records of all relevant court decisions and actions are accurate and properly preserved.

AREA 4 - INDEPENDENCE AND ACCOUNTABILITY

- 4.1 *Independence and Comity.* The trial court maintains its institutional integrity and observes the principle of comity in governmental relations.
- 4.2 *Accountability for Public Resources.* The trial court responsibly seeks, uses and accounts for its public resources.
- 4.3 *Personnel Practices and Decisions.* The trial court uses fair employment practices.
- 4.4 *Public Education.* The trial court informs the community about its programs.
- 4.5 *Response to Change.* The trial court anticipates new conditions and emergent events and adjusts its operations as necessary.

AREA 5 - PUBLIC TRUST AND CONFIDENCE

- 5.1 *Accessibility.* The public perceives the trial court and the justice it delivers as accessible.
- 5.2 *Expedition, Fair and Reliable Court Functions.* The public has trust and confidence that basic trial court functions are conducted expeditiously and fairly, and that court decisions have integrity.
- 5.3 *Judicial Independence and Accountability.* The public perceives the trial court as independent, not unduly influenced by other components of government, and accountable.

whether an observer can actually hear what is going on in the courtroom. Taken together, these three measures tell court officials whether individuals can gain entry to, identify, and hear a particular court proceeding, all components of having open and accessible proceedings.

V. USING THE STANDARDS AND MEASURES

There are two important caveats to note about using the Standards. First, the Standards define court performance — not judicial performance. The Commission expressly stated that the Standards were not appropriate for gauging the performance of *individual* judges. Rather, the Standards address the court as an organization, consisting not only of judges but of all who perform judicial and administrative court functions, including clerks, managers, probation officers, lawyers, and social service providers.

Second, the Standards and measures are intended for purposes of *internal* evaluation, self-assessment and self-improvement. They are not intended or recommended as a basis for cross-court comparison or accreditation programs.

The Standards and measures are tools that judges and court managers can use in a variety of ways. For example, the Standards can be helpful in explaining what courts do. Judges have found the Standards helpful in preparing presentations to civic groups about the purposes of courts or in explaining various court functions to legislators and city council members. Judges and court staff also have found them helpful in communicating with one another and others in the broader justice system.

The Standards can be a resource for developing a court's mission and strategic plan, framing problems or issues, evaluating current court performance, and identifying potential strategies for addressing specific problems. A court can use the entire package or focus on one or two standards and measures. The key is that the Standards and measures do not represent a rigid system; courts should use them as they deem helpful.

Two examples of different implementation approaches might be helpful. The first is the comprehensive approach taken by the Los Angeles Municipal Court in California. After attending an educational program on the Standards, several of the court's judges decided to incorporate the Standards and measures into the court's strategic planning efforts. They established an implementation committee of judges, a commissioner, and executive management staff. The committee led an extensive effort to implement all of the sixty-eight measures, except for those that were not relevant or adaptable to a municipal court jurisdiction or those for which similar data already was being gathered by the court.

The Los Angeles Municipal Court's experience with the Standards provided the court with specific data that was used as a basis for improving various court operations and procedures. As a result of the measurement process, the court laid the groundwork for institutionalizing a culture of continuous self-assessment and improvement. The court has identified a set of measures to incorporate into its routine operations and a set to undertake on a more periodic basis.

The all-encompassing approach of the Los Angeles Municipal Court to implementing the Standards demonstrates how the Standards can be used in a comprehensive way to

inform the on-going strategic planning process of a court. The Los Angeles experience also illustrates the adaptability of the Standards to the limited jurisdiction and municipal court environments.

The experience of the Fifty-Second District Court, First Division, in Oakland County, Michigan, illustrates the use of the Standards to address a particular issue. The judges of that court were interested in learning what the community thought about the court's performance. They also were interested in exploring how the court could work with the community to better serve the public. They started with a measure in the public trust and confidence performance area that sought the general public's perceptions of the court through a telephone survey. Because the judges wanted to reach out to and interact with the community, they decided to obtain the public's perceptions through a series of town hall meetings. They modified the original questionnaire to address some additional issues the court was interested in and made the questionnaire available through newspaper outlets and community organizations.

The judges learned that those who were familiar with the court were satisfied with the court's performance, but that the majority of town hall participants did not know much about the court or how it worked. Consequently, the judges plan to issue an annual report, create an Internet site, and provide news media with information on how certain court processes work. A commitment to print the articles already has been obtained. In addition, the court is in the process of analyzing the questionnaire responses to identify other areas that may need to be addressed and other potential strategies for improving performance.

The Michigan example demonstrates some of the side benefits that can occur as a result of undertaking a measure. The court not only learned how the community perceived its performance (the main reason for conducting the measure), but the court also benefitted from more than twenty positive news reports applauding the fact that it bothered to ask what the public thought. Another benefit was the personal satisfaction the judges and court staff enjoyed as a result of engaging in the process and working with each other. They see their court as an innovative organization that is reaching out to the public and doing good things.

The Michigan example demonstrates how the Standards and measures can be used to address a specific court need. The Fifty-Second District Court modified one measure in one standard area and obtained information, guidance for improvement, and much good will.

VI. RECOGNIZING THE BENEFITS

The Trial Court Performance Standards and measures have made a significant contribution to judicial administration. The Standards and measures represent a shift in thinking about the work of the court — from structures and processes to performance and outcomes. They also focus attention on court users rather than "court insiders." They ask how the system can be improved to work better for the people who have to maneuver through it.

At a recent educational session on the Standards, participants were asked to identify why the Standards would be helpful to them. Some of the reasons offered included:

- They apply to the actual, real life work of the court. The Standards aren't an add-on to "real" work—one more chore; they fit and are part of our real work.
- They provide a foundation to work from.
- They articulate the core values of courts — help courts gain public trust and confidence.
- They recognize the interdependence of courts and other agencies and court users.
- They allow courts to have some independent control over their own evaluation and monitoring.
- They enable administrators, judges, and the community to focus their thinking on the same items at the same time. That will focus on and result in community collaboration and community efforts.
- The goals, measures, and standards are fundamental priorities that all court officers are concerned about and care about.
- The Standards make the legislature more responsive to the needs of the courts through public support and create credibility for the courts with those outside of the courts.
- They offer a vehicle for strategic planning.
- They raise the bar and challenge us to be better than we are.
- They define excellence.
- They provide a motivation for staff.

Beyond this focus on court management and communication, however, the ultimate end of the Standards is to ensure a more responsive justice system. Improved court performance will help ensure, for example, that victims get through the system as expeditiously as possible and are treated with dignity and respect; that child support orders are enforced; and that interagency communication and coordination occurs in cases involving drugs, domestic violence, and mental illness.

For those who would like to get some preliminary indications of how the Trial Court Performance Standards might be applied to your own court, you can take the Court Performance Inventory, found on page 31. For those who want to learn more about the Standards, several reference sources are noted following this article. The Standards represent a valuable resource for self-assessment and self-improvement of trial courts. They are available for as extensive – or as focused – a use as you want to make of them.



Pamela Casey, Court Research Program Director for the National Center for State Courts, is a social psychologist specializing in small group methods, organizational management, survey design, and program evaluation. She earned her Ph.D. in psychology from St. Louis University. Since joining the NCSC in 1986, she has conducted numerous research projects nationally on court-related issues. Her current work focuses on the measurement of trial court performance; court and community relationships; therapeutic jurisprudence, and the organization and provision of health, mental health, and social welfare services to court-related populations.

ADDITIONAL RESOURCES

Want to learn more about the Trial Court Performance Standards and measures? The following publications are available from the National Criminal Justice Reference Service (NCJRS) at 1-800-851-3420 or online at <http://www.ncjrs.org/courdocs.htm>:

Trial Court Performance Standards with Commentary

Trial Court Performance Standards and Measurement System Implementation Manual

Planning Guide for Using the Trial Court Performance Standards and Measurement System

Trial Court Performance Standards and Measurement System Program Brief

Trial Court Performance Standards and Measurement System Fact Sheet.

In addition, the National Center for State Courts (NCSC) maintains a Trial Court Performance Standards Listserv (i.e., an e-mail discussion group) for individuals to ask questions and learn about current efforts to implement the Standards and measures. If you would like to join the Listserv, contact Ms. Hillery Efke at hefkeman@ncsc.dni.us. Finally, the NCSC's Institute on Court Management (ICM) offers educational courses on the Standards several times throughout the year in various locations across the country. You can contact Ms. Christine Staight at 1-800-616-6160, or e-mail her at cstaight@ncsc.dni.us, for information on ICM courses. You can also visit the NCSC's web page at <http://www.ncsc.dni.us>.

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Court Performance Inventory

The Court Performance Inventory is intended to familiarize individuals with the Trial Court Performance Standards and Measurement System developed by the Commission on Trial Court Performance Standards, the National Center for State Courts, and the Bureau of Justice Assistance. The inventory is designed to collect individual perceptions (which may be pooled with the perceptions of others) about specific trial court performance. Results of the inventory graphed onto the Court Performance Profile (located on page 33) can be used to target further diagnostic efforts and management strategies.

DIRECTIONS: Read each of the following fifty statements. Based on your experiences with your court or another court of interest to you, determine whether you believe the statement is BROADLY TRUE or BROADLY FALSE about the way the court performs. If you believe the statement is BROADLY TRUE, place an "X" in the corresponding numbered box on the Court Performance Inventory Response Form found on page 33. For example, if you believe the first statement to be generally true about the court you are rating, place an "X" in the box with the "1" on the response form. Once you have completed the response form, add the number of boxes marked as BROADLY TRUE for each of the five columns. Each column refers to one of the performance areas. Use the five sums to complete the Court Performance Profile, which also is found on page 33.

1. An observer sitting in any courtroom's public seating area will have no difficulty hearing judges, attorneys, litigants, witnesses, and other participants in the proceedings.
2. The total elapsed time it takes the court to dispose of cases once they are filed complies with national standards.
3. The final juror pools used by the court are representative of the demographic characteristics of the jurisdiction's population.
4. The allocation of personnel resources among case types is defensible and based upon logic and reason.
5. The general public (a) perceives the trial court and the justice it delivers as accessible; (b) has trust and confidence that basic trial functions are conducted expeditiously and fairly and that the court's decisions have integrity; and (c) knows that the trial court is independent, accountable, and not unduly influenced by other government components.
6. An undercover law enforcement official, dressed in plain clothes, will not be able to breach either the court's security systems that protect the public or confidential court files and records.
7. An examination of court financial records will reveal that the various types of funds for which the court is responsible are disbursed in a timely manner.
8. An examination of relevant case file documents and court records will reveal that the court closely adheres to key legal requirements.
9. An analysis of the court as an equal opportunity employer would reveal that race and gender distribution for each job category is generally reflective of the available labor pool for each category.
10. Justice system representatives (a) perceive the trial court and the justice it delivers as accessible; (b) have trust and confidence that basic trial functions are conducted expeditiously and fairly and that court decisions have integrity; and (c) know that the trial court is independent, accountable, and not unduly influenced by other components of government.
11. Interpreter services provided by the court are performed by individuals with language proficiency, interpreting skill, and knowledge of professional conduct.
12. The court promptly implements changes in substantive and procedural laws that are a result of federal and state legislation and new federal regulations.
13. A statistical analysis conducted of data collected from closed files for bail, bond, and release on recognizance decisions will reveal that these decisions are not based on extralegal factors such as the defendant's race or gender, the judge assigned to the case, or the geographic location of the court.
14. The court does a good job in disseminating information to the public about its programs and operations.
15. Court employees (a) perceive the trial court and the justice it delivers as accessible; (b) have trust and confidence that basic trial functions are conducted expeditiously and fairly and that court decisions have integrity; and (c) know that the trial court is independent, accountable, and not unduly influenced by other components of government.
16. Observers of court proceedings are likely to find all court personnel courteous and responsive.
17. The court keeps up with its incoming caseload by disposing of as many cases as are filed each year.
18. Record examinations and statistical analyses are likely to reveal that sentencing decisions of the court are based mostly on legally relevant factors and not on extralegal factors such as the defendant's race or gender, the judge

assigned to the case, or the geographic location of the court.

19. A group of knowledgeable persons both within and outside the court would conclude that the court has acted responsibly in responding to public policy issues of concern within the jurisdiction such as domestic violence, discrimination, substance abuse, or others that could have affected the fair and effective administration of justice by the court.
20. Individuals who have had contact with the court such as litigants, jurors, witnesses, victims, or those conducting other business with the court consider the court's decisions and treatment of individuals as fair and equitable.
21. The court takes measures to reduce costs and facilitates affordable access to the judicial system for financially disadvantaged persons.
22. The court responds promptly to requests for information from the public.
23. A broad examination of appeal outcomes reflects that the trial court adheres to substantive laws and procedural requirements.
24. Selected knowledgeable individuals are likely to conclude that the trial court maintains its independence and institutional integrity, but that it still has good relations with other units of government.
25. Regular users of the court (i.e., court employees, attorneys, probation officers, and jurors) are likely to say that they are able to conduct their business with the court with relative ease and convenience.
26. A person relatively unfamiliar with the court will have no difficulty in locating and actually entering the courtroom in which a particular hearing is taking place.
27. The court promptly implements changes in administrative procedures required by the state supreme court and the administrative office of the courts.
28. The court does a good job of communicating clearly the terms and conditions of criminal sentences.
29. The court's responses to requests for information from the media are accurate and timely.
30. The results of a survey of regular court users, court employees, attorneys, probation officers, and jurors are likely to conclude that judges and other trial court personnel are courteous and responsive to the public and all others with whom they come into contact.
31. A person who attempts to determine the specific time and location of a particular court event will have no difficulty getting this information from the court by telephone.
32. Cases scheduled for trial are heard on the first scheduled trial date.
33. The court is well positioned and organized to enforce or facilitate the enforcement of its orders and judgments.
34. A group of knowledgeable individuals is likely to conclude that court personnel practices and decisions are fair.
35. Citizens are likely to report that access to court services is generally not hindered because of costs or complexity of procedures.
36. Persons with physical disabilities are able to conduct transactions in the court with relative ease.
37. The various services available from the court (such as indigent defense services, interpreter services, and mental health evaluations) are provided promptly.
38. A test of the timely retrieval of individual case files will reveal that the court's file control system is reliable and efficient.
39. The court has adequate statistical reporting capacity to make useful assessments of the relationship between the court's workload and the distribution of court resources.
40. Members of the bar who have appeared regularly in the court in the past year would assess the court's actions and decisions as fair and equitable.
41. Court observers are likely to find that litigants are treated with a high degree of courtesy and individual respect by judges of the court.
42. The number of pending cases exceeding national or state time standards for case processing is low.
43. The court clearly states the terms and conditions of obligations imposed as a result of adjudication of a civil dispute.
44. Court employees and media representatives are likely to be satisfied with policies and practices for responding to media inquiries.
45. Court staff will rate highly the degree of independent control that the court exercises over its fiscal operations, personnel, and services related to case flow.
46. Indigent persons who have never tried to obtain legal assistance are likely to obtain affordable legal assistance with relatively routine legal problems.
47. The court complies with established schedules for routine court reports such as statistical reports required by the State administrative office of the courts and the Equal Employment Opportunity Commission.
48. An examination of a sample of case file data will show that most files are complete and accurate.
49. The court conducts periodic internal and external audits of its financial practices and responds to auditors' suggestions for improvements.
50. Court employee responses to structured questions about fairness in personnel practices related to employee morale and competence are likely to reflect general satisfaction.

COURT PERFORMANCE INVENTORY RESPONSE FORM

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25
26	27	28	29	30
31	32	33	34	35
36	37	38	39	40
41	42	43	44	45
46	47	48	49	50
Col. Total	Col. Total	Col. Total	Col. Total	Col. Total

Access to Justice

Expedition and
Timeliness

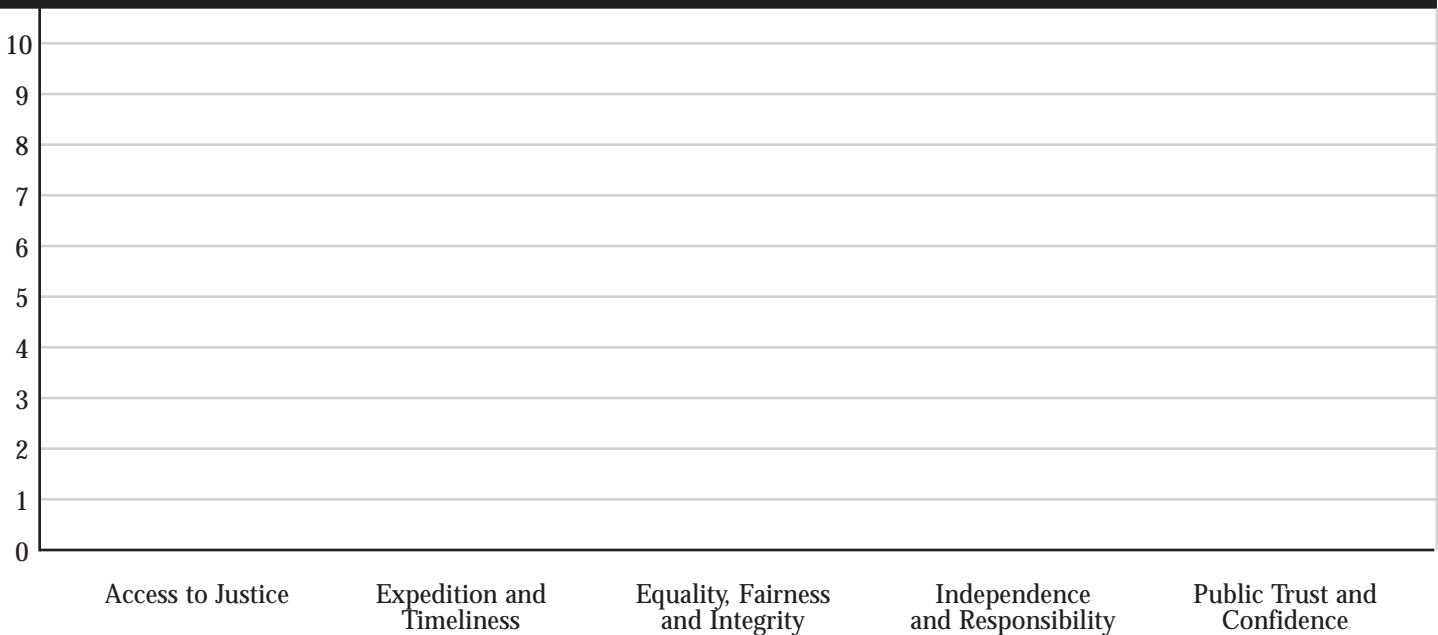
Equality, Fairness
and Integrity

Independence
and Responsibility

Public Trust and
Confidence

Directions: Add the number of X's in each column.

COURT PERFORMANCE PROFILE



Directions: For each performance area, place a dot next to the total number of X's recorded on the response form. For example, if the total number of X's in the Access to Justice column on the response form is three, place a dot next to the three in the first column of the graph. When the total score for each of the five areas has been recorded on the graph, connect the five dots, starting with the dot in the first column and ending with the dot in the fifth column. The lines will depict which areas are rated highest and which are rated lowest. The results can be used to compare perceptions of court performance across court officials and staff and to initiate discussion regarding priorities for targeting improvement efforts.

Source: BUREAU OF JUSTICE ASSISTANCE, TRIAL COURT PERFORMANCE STANDARDS AND MEASUREMENT SYSTEM, App. D (1997).

Recent Civil Decisions of the United States Supreme Court: The 1997-1998 Term

by Charles H. Whitebread

During the 1997-1998 Term, the Supreme Court handed down a number of significant decisions in a variety of civil cases.¹ These decisions addressed First Amendment issues, sexual harassment in the workplace, Native Americans, and the Americans with Disabilities Act. The Court also announced rulings on the attorney-client privilege and the constitutionality of the Line Item Veto Act.

FIRST AMENDMENT

In the recent Term, the Supreme Court addressed two cases raising freedom of speech issues under the First Amendment. In both cases, the Court ruled in favor of the government, consequently restricting freedom of speech rights. One case upheld a candidate's exclusion from a public broadcaster's televised candidate debate; the other allowed the National Endowment of the Arts to consider "standards of decency and respect for diverse beliefs and values of the American public" when awarding grants for art.

In *Arkansas Educational Television Commission v. Forbes*,² the Court held that a state-owned broadcaster's exclusion of independent candidate, Ralph Forbes, from a televised candidate debate was not a violation of the First Amendment, but rather a reasonable exercise of journalistic discretion. In the six to three decision, the Court explained that although the public forum doctrine did not apply to public television broadcasting in general, broadcasting of candidate debates was an exception to this general rule. Applying the public forum doctrine, the Court found that the debates were not a traditional public forum because public television broadcasting had not been historically subjected to "unfettered access." The televised debates did not constitute a designated public forum because the government allowed selective access for individual speakers rather than general access for a class of speakers.



Thus, the debates were a nonpublic forum and the Court applied rational basis review. The Arkansas Educational Television Commission (AETC) excluded Forbes on the following grounds: voters and news organizations did not consider him to be a viable candidate, he had little financial support, and he had no campaign headquarters. The Court concluded that these were legitimate reasons to exclude Forbes and that the AETC made its decision in good faith. Justices Stevens, Souter, and Ginsburg dissented, arguing that AETC's standards

were too subjective and arbitrary to withstand First Amendment scrutiny.

Consistent in its narrow application of the First Amendment, the Court in *National Endowment of the Arts v. Finley*³ upheld the constitutionality of 20 U.S.C. section 954(d)(1), which requires the National Endowment of the Arts "to consider general standards of decency and respect for the diverse beliefs and values of the American public" when judging grant applications. This provision revised the NEA's grant-making process and was adopted by Congress in response to the public outrage over the use of NEA grant money to fund two provocative works, one depicting a "crucifix immersed in urine," the other containing "homoerotic photographs." In order to prevail on a claim that this statute was facially invalid, the respondents would have had to have established that there was a "substantial risk that application of the provision [would] lead to the suppression of speech."

Justice O'Connor, writing for the majority, rejected respondents' argument that the provision prevented the NEA from funding certain categories of artistic expression, because the provision only required the NEA to *consider* standards of decency and respect for American values. Respondents also

Footnotes

1. For an overview of the Court's criminal procedure decisions of the past Term, see Charles H. Whitebread, *Recent Criminal Procedure Decisions of the United States Supreme Court: The 1997-1998 Term*, COURT REVIEW, Summer 1998, at 14. For a more in-

depth review of the decisions of the past Term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 1997-1998 (Amer. Acad. of Jud. Educ. 1998).

2. 523 U.S. 666 (1998).
3. 524 U.S. 569 (1998).

argued that the subjective nature of the criteria allowed the NEA to apply them as a means to discriminate based on viewpoint. In rejecting this argument, O'Connor explained that due to the very nature of arts funding, content-based considerations must necessarily be made. Moreover, the Court's decision was based in large part on the fact that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake." Finally, the provision withstood a vagueness challenge on the grounds that in the context of selective subsidies it would not have been feasible for Congress to have legislated with greater specificity.

NATIVE AMERICANS

The 1997-1998 Term was unique in that the Court decided three cases affecting the rights of Native Americans. The Court ruled against the Native American parties in two cases concerning jurisdictional authority over land, yet held in their favor in a case involving tribal immunity from suits on contracts.

In *South Dakota v. Yankton Sioux Tribe*,⁴ the Court declared that the Land Surplus Act of 1894 diminished the reservation status of the Yankton Tribe surplus lands, thereby transferring primary jurisdiction over the lands to the State of South Dakota. Under the terms of the 1894 enactment, the tribe agreed to "cede, sell, relinquish, and convey to the United States all of the unallotted lands on the reservation" in exchange for one payment of \$600,000 and a \$20 gold piece for each member of the tribe. In reaching its decision, a unanimous Court relied on the following factors: the language of the 1894 Act used to open the Indian lands, the historical context surrounding the passage of the various surplus land acts, and the subsequent treatment of the area in question and pattern of settlement. With respect to statutory language, the Court felt that the "cession" and "sum certain" language of the 1894 Act was precisely suited to terminating reservation status. Turning to the historical context of the 1894 Act, the Court determined that the manner of the preceding negotiations and the tenor of legislative reports manifested "the understanding that by surrendering its interest in the unallotted lands, the Tribe would alter the reservation's character." Finally, the Court's conclusion that the status of the Yankton reservation had diminished was based on the fact that the demographic trend of the lands in question was predominantly non-Indian.

In *Alaska v. Native Village of Venetie Tribal Government*,⁵ the Court concluded that the land owned in fee simple by the Native Village of Venetie Government was not "Indian country" within the meaning of 18 U.S.C. section 1151(b); therefore, the tribe did not have the authority to impose taxes on non-members of the tribe. The Native Village of Venetie Tribal Government had sought to impose taxes on a private contractor hired by the State of Alaska to build a public school on the tribe's lands. Under 18 U.S.C. section 1151, the tribe could

only impose taxes on non-members if it satisfied the statutory definition of "Indian country," which included "all dependent Indian communities within the . . . United States . . ." The issue before the Supreme Court was whether the tribe's land constituted a "dependent Indian community" under section 1151(b).

Justice Thomas, writing for a unanimous Court, held that in order to be classified as Indian country under section 1151(b), the lands "must have been set aside by the Federal Government for the use of the Indians as Indian land" and the lands "must be under federal superintendence." Thomas concluded that the tribe had failed to prove both requirements.

First, the lands were transferred to the tribe pursuant to the Alaska Native Claims Settlement Act (ANCSA), which by its terms evinced a clear break from the tradition of setting aside Indian lands. Also, ANCSA allowed title to the lands to be transferred to non-Indians or to be used for non-Indian purposes. Thus, the lands were not "set aside by the Federal Government for the use of Indians as Indian land."

Second, ANCSA explicitly stated that its purpose was to "avoid a 'lengthy wardship or trusteeship.'" Any protections afforded the tribe's lands under ANCSA were insufficient to constitute "federal superintendence." Consequently, the tribe's lands received pursuant to ANCSA were not Indian country within the meaning of section 1151(b) and the tribe could not impose taxes on non-members of the tribe.

By contrast, the Court expanded the rights of Native Americans in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*⁶ There, the Court held that Indian tribes were entitled to immunity from suits on contracts, regardless of whether the contract was with the government or a private entity, and regardless of whether the contract was carried out on or off reservation lands. In a six to three decision, Justice Kennedy stated that precedent simply could not support a finding that tribal immunity from suit was confined to transactions that occurred on reservations and those that involved governmental activities. Kennedy emphasized that tribal immunity was a matter of federal law and was not subject to diminution by the states. Tribal immunity was not coextensive with state sovereign immunity because the "tribes were not at the Constitutional Convention" and "were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" The Court noted that it reserved for another day the issue of whether there was a need to abrogate tribal immunity altogether.

AMERICANS WITH DISABILITIES ACT

The Supreme Court expanded the individual protections afforded under the Americans with Disabilities Act in two recent decisions.

In *Bragdon v. Abbott*,⁷ the Court held that HIV was a disability under the ADA beginning at the point of infection. This case involved a dentist who refused to fill a patient's cavity in

4. 522 U.S. 329 (1998).

5. 522 U.S. 520 (1998).

6. 523 U.S. 751 (1998).

7. 524 U.S. 624 (1998).

The Supreme Court announced four decisions ... having a significant impact on sexual harassment law.

his office, but offered to do so in a hospital, because she was infected with HIV. Justice Kennedy, writing for the majority, stressed that the ADA should be construed to grant at least as much protection as that afforded by the Rehabilitation Act of 1973, since an almost identical definition of “handicapped individual” was used in both.

The Court then applied a three-part test. The first step in the Court’s analysis was to determine whether HIV infection was a “physical impairment” within the meaning of the ADA. Kennedy wrote, “In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold [HIV] is an impairment from the moment of infection.” Second, the Court addressed whether HIV substantially affected “one or more of [an individual’s] major life activities.” The Court concluded that “reproduction and the sexual dynamics surrounding it” were major life activities, since they were “central to the life process itself.” Third, the Court considered whether HIV was a “substantial limit” on “reproduction.” The Court determined that HIV was a substantial limit on reproduction because “a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected” and further “risks infecting her child during gestation and childbirth.”

Moreover, the Court ruled in *Pennsylvania Department of Corrections v. Yeskey*⁸ that inmates in state prisons were covered under the ADA. The inmate in question had been refused admission into a boot camp facility, as an alternative to the Pennsylvania correctional facility, because of his medical history of hypertension. The district court had dismissed the inmate’s claim under the ADA on the grounds that the ADA did not apply to state prisoners. The United States Court of Appeals for the Third Circuit reversed. In a unanimous decision affirming the Third Circuit, the Supreme Court stated that “the statute’s language unmistakably includes State prisons and prisoners within its coverage” because “the statutory definition of ‘public entity’ includes ‘any department, agency, special purpose district, or other instrumentality of a State.’”

SEXUAL HARASSMENT

The Supreme Court announced four decisions in the recent Term having a significant impact on sexual harassment law. The Court outlined the standard for vicarious liability of an employer for acts of harassment by an employee, as well as the standard for vicarious liability of a school district for acts of harassment by one of the district’s teachers. Also, in a landmark, high-publicity case, the Court expanded the scope of sexual harassment laws to protect against same-sex harassment.

In two companion cases, *Burlington Industries, Inc. v. Ellerth*,⁹ and *Faragher v. City of Boca Raton*,¹⁰ the Court held that an employer could be held vicariously liable for the hostile work environment created by a supervisor. However, where no tangible employment action was taken, the employer could assert an affirmative defense based on the reasonableness of the employer’s actions and the unreasonableness of the employee’s actions. In *Burlington Industries*, Kimberly Ellerth alleged that her supervisor had sexually harassed her by making various remarks that could have been interpreted as threats to deny her tangible job benefits. In *Faragher*, Beth Ann Faragher alleged that her supervisors had created a sexually hostile work environment through repeated, uninvited and offensive touching, lewd remarks, and by speaking of women in a derogatory manner. In both cases, neither plaintiff had suffered a tangible, adverse employment consequence.

The Court relied on principles of agency in reaching its decision in both cases. Under normal principles of agency, the acts of a supervisor may impute liability on the employer where the supervisor was acting within the scope of his employment. However, the Court concluded that acts of sexual harassment were clearly conduct outside the scope of employment. Yet, the Court explained that liability could still be imputed on employers when “workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relationship.” Therefore, when a supervisor makes a “tangible employment decision,” such an act becomes the act of the employer for purposes of Title VII.

The Court went on to state that an employer could assert an affirmative defense by establishing that it had exercised reasonable care to prevent sexual harassment and that the plaintiff had unreasonably failed to take advantage of the preventative opportunities offered by the employer. Elaborating on the contours of this defense, the Court noted that “[w]hile proof that an employer had promulgated an anti-harassment policy with complaint procedure [was] not necessary in every instance as a matter of law,” it certainly could be addressed in litigating the first element of the defense. Similarly, while proof that an employee unreasonably failed to use any complaint procedure provided by the employer was not necessary to prove the second element of the defense, it generally would be sufficient. Justices Thomas and Scalia dissented in both *Burlington Industries* and *Faragher* on the grounds that, where the plaintiff failed to suffer any tangible adverse employment consequence, the standard of employer liability should be *negligence* in allowing the supervisor’s conduct to occur, not vicarious liability.

The Court outlined a different standard for employer sexual harassment liability when the claim is brought against a school district under Title IX. In *Gebser v. Lago Vista Independent School District*,¹¹ the Court held that a school district could be held liable under Title IX for the sexual harassment of a student by one of the district’s teachers only when an official of the district, with the authority to institute corrective measures,

8. 524 U.S. 206 (1998).

9. 524 U.S. 742 (1998).

10. 524 U.S. 775 (1998).

11. 524 U.S. 274 (1998).

had actual knowledge and failed to take action. Unlike determining employer liability under Title VII, the Court refused to apply agency principles in determining a school district's liability under Title IX. Although Title VII expressly prohibits discrimination by an employer through "any agent," Title IX "contains no comparable reference to an educational institution's 'agents.'" Moreover, Title IX is framed in terms of a condition to receiving federal funds, whereas Title VII is in the form of an outright prohibition. The Court emphasized that the remedial scheme under Title IX required notice to an "appropriate" person and the opportunity to comply. Therefore, a remedy for damages should be fashioned along the same lines. Applying these standards, the Court concluded that the school district could not be held liable for the teacher's misconduct because it did not have actual notice, nor did it react with "deliberate indifference."

In the spotlight case, *Oncala v. Sundowner Offshore Services, Inc.*,¹² the Court ruled that sex discrimination where the harasser and the harassed employee were of the same sex was actionable under Title VII. In a short opinion, the unanimous Court reasoned that there was simply no justification for a "conclusive presumption" that employers would not discriminate against members of their own class (here, gender). The Court also pointed to the lack of specific language in Title VII to support barring a sex discrimination claim simply because the plaintiff and harasser were of the same sex. Respondents in this case argued that allowing same-sex sexual harassment claims would transform Title VII into "a general civility code for the American workplace." The Court rejected this argument on the grounds that this risk, while virtually the same for opposite-sex sexual harassment claims, was all but eliminated by the specific limitations of the statute itself.

LINE ITEM VETO ACT

The Court held that the Line Item Veto Act violated the Presentment Clause under Article I of the Constitution in *Clinton v. City of New York*.¹³ The Act granted the President the authority to rescind three types of provisions that had already been signed into law: "any dollar amount of discretionary budget authority," "any type of new direct spending," or "any limited tax benefit." The President subsequently exercised his authority under the Act by canceling section 4722(c) of the Balanced Budget Act of 1997 and section 968 of the Taxpayer Relief Act of 1997. The Court determined that the President's actions both legally and practically constituted an amendment of acts of Congress. This directly violated the requisite processes for repealing a statute set forth in Article 1. The Presentment Clause, Article I, Section 7, clause 2, required presentment to the President "before [the bill] becomes law," giving only the options of signing the bill, vetoing it or allowing it to become law without the President's signature. Since, under the statute, the cancellation of a part of the act occurred after the bill became law, the Presentment Clause was violated. Furthermore, nothing in the Constitution granted the

President the authority to unilaterally enact, amend, or repeal statutes. The Court interpreted this constitutional silence as an "express prohibition" of a line item veto.

ATTORNEY-CLIENT PRIVILEGE

In the last case of the Term, the Court declared that the attorney-client privilege extended beyond the death of the client. In *Swidler & Berlin v. United States*,¹⁴ attorney

James Hamilton sought to protect three pages of notes taken during a meeting with his client, Deputy White House Counsel Vincent Foster, Jr., from being subpoenaed by the Office of the Independent Counsel after Foster took his own life. In interpreting the scope of the privilege, the Court relied on "principles of common law . . . as interpreted by the courts . . . in light of reason and experience." Moreover, the Court emphasized that the attorney-client privilege was "one of the oldest recognized privileges in the law."

The Independent Counsel had argued that allowing an exception to the privilege after the client died, for the limited purpose of obtaining information of substantial importance to a criminal case, would have "minimal impact" on clients' incentives to reveal confidences to their lawyers. However, the Court rejected this argument, finding no case authority to support the assertion that the privilege applied differently in criminal and civil cases.

[T]he Court declared that the attorney-client privilege extended beyond the death of the client...



Charles H. Whitebread (A.B., Princeton University, 1965; LL.B. Yale Law School, 1968) is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School, where he has taught for almost two decades. His oral presentation at the annual meetings of the American Judges Association exploring recent Supreme Court decisions on criminal procedure have been well received for many years. Professor Whitebread gratefully acknowledges the research assistance of Stephanie Zavala.

12. 523 U.S. 75 (1998).
13. 524 U.S. 417 (1998).

14. 524 U.S. 399 (1998).

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Killer "Lived and Breathed" His Estranged Wife's Terror. Kim Barker. Fall 1998 at 21. [reprinted from the *Seattle Times*.]

The Myth of Epidemic False Allegations of Sexual Abuse in Divorce Cases. Marilyn McDonald. Spring 1998 at 12.

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Soluble Problems for the Federal Judiciary: Curtailing the Expansion of Federal Jurisdiction and Other Matters. William H. Rehnquist. Fall 1998 at 4.

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Good Judging and Good Judgment. Stephen C. Yeazell. Fall 1998 at 8.

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Schotland, Roy

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An Introduction to the State Justice Institute. Richard Van Duizend. Winter 1998 at 6.

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Wexler, David B.

The Argument Culture and the Courts. [Book review, reviewing Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue*.] Summer 1998 at 4.

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Recent Civil Decisions of the United States Supreme Court: The 1997-1998 Term. Winter 1998 at 34.

Recent Criminal Procedure Decisions of the United States Supreme Court: The 1997-1998 Term. Summer 1998 at 14.

Yeazell, Stephen C.

Good Judging and Good Judgment. Fall 1998 at 8.

The Resource Page: Focus on the Miranda Rule



THE 4TH CIRCUIT STEPS IN...

In February 1999, in *United States v. Dickerson*, the Fourth Circuit rejected three decades of jurisprudence by finding that a 1968 statute had overruled *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fourth Circuit's decision is available on the Internet at <http://www.law.emory.edu/4circuit/feb99/974750.p.html>. A petition for rehearing *en banc*, filed by the United States, is pending.

Excerpts from U.S. v. Dickerson, 1999 U.S. App. LEXIS 1741 (4th Cir. Feb. 8, 1999) (most citations omitted):

OPINION BY WILLIAMS, J.

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*. ...

Congress enacted § 3501 as a part of

the Omnibus Crime Control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), the Court has never considered whether the statute overruled *Miranda*. Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, no Administration since the provision's enactment has pressed the point.

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. See *Davis*, 512 U.S. at 465 (Scalia, J., concurring). In addition to "caus[ing] the federal judiciary to confront a host of 'Miranda' issues that might be entirely irrelevant under federal law," *id.*, Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced — during an era of intense national concern about the problem of run-away crime — the acquittal and the nonprosecution of many dangerous felons," *id.* This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of con-

fessions in federal court is squarely before us today.

Determining whether Congress possesses the authority to enact § 3501 is relatively straightforward. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, 384 U.S. at 467, disclaimed any intent to create a "constitutional straight-jacket," *id.*, referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Since deciding *Miranda*, the Supreme Court has consistently referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). We have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*. ...

Although Congress enacted § 3501 with the express purpose of restoring voluntariness as the test for admitting confessions in federal court, it is important to note that Congress did not completely abandon the central holding of *Miranda*, *i.e.*, the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifi-

cally lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. Congress simply provided that the failure to administer the warnings to a suspect would no longer create an irrebuttable presumption that a subsequent confession was involuntarily given. ...

DISSENTING OPINION BY MICHAEL, J.

Thirty years have passed since Congress enacted 18 U.S.C. § 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be invoked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501. ...

The majority begins its reach to inject § 3501 into this case with an overstatement. It says that the § 3501 issue is "squarely presented." In its brief to us the government has said plainly, "we are not making an argument based on § 3501 in this appeal." The defendant, of course, does not mention § 3501. Thus, we are not being urged to inject § 3501 into this case by anyone except the *amici*, the Washington Legal Foundation and the Safe Streets Coalition. That is not enough to put the issue of § 3501's constitutionality and application squarely before us. Perhaps the majority recognizes as much, for it quickly moves to an argument about why the court itself should force § 3501 into this case. ...

It is a mistake for our court to push § 3501 into this case for several reasons.

First, courts as a general rule do not interfere with the executive's broad discretion in the initiation and conduct of criminal prosecutions. Forcing the use of § 3501 upon a United States Attorney gets uncomfortably close to encroaching upon the prosecutor's routine discretion. I recognize, of course, that courts have a large measure of control over the course of a case once it is filed. But a decision not to invoke § 3501 in response to a motion to suppress a confession is a matter of prosecutorial strategy. We should leave that to the executive. There is also a related point. In invoking § 3501, the majority overrides 30 years of Department of Justice prosecutorial policy. Any change in this policy should come from Justice.

Second, it is "a sound prudential practice" for us to avoid issues not raised by the parties. This is because "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here. By invoking § 3501, the majority injects into this case the overriding constitutional question of whether § 3501 can supersede *Miranda*. It then decides the question against the defendant, when the only briefing we have on the issue is about two pages from *amici* that the majority agrees with. The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on *both* sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? This question illustrates that the § 3501 issue is so sweeping that we should not be delving into it on our own. ...



INTERNET RESOURCES ON MIRANDA

University of Utah law professor Paul Cassell made the successful argument in *Dickerson* and has written extensively criticizing *Miranda*; one of his articles is available on the web at <http://www.law.utah.edu/faculty/bios/cassell/STANFIN.html>.

On the opposing side, professors Yale Kamisar and Charles Weisselberg have written their reactions to the methods used by Baltimore police to trample the spirit of *Miranda* while purporting to follow its literal rule. They base their view of police procedures on David Simon's book, *Homicide: A Year on the Killing Streets*. The Kamisar/Weisselberg pieces are available at <http://jurist.law.pitt.edu/lawbooks/infeb99.htm>.



RECENT ARTICLES OF NOTE

Paul G. Cassell & Richard Fowles, *Handcuffing the Cops: A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

Paul G. Cassell & Richard Fowles, *Falling Clearance Rates after Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998).

John J. Donohue, III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998).



The Resource Page



NEW BOOKS

LEGAL LANGUAGE. By Peter M. Tiersma. The University of Chicago Press, 1999 (\$26). 314 pp.

Peter Tiersma tackles the question of why legal language differs from ordinary English from multiple perspectives. First, he provides an historical overview of how legal English developed from the time of the Norman Conquest. Second, he shows how and why lawyers tend to use obfuscatory language. Third, he demonstrates that lawyers are capable of communicating in clear terms when they want to do so (e.g., "If it doesn't fit, you must acquit."). Fourth, he shows how a failure to communicate clearly can have dangerous consequences in many areas, including jury instructions in capital cases that often leave juries genuinely uncertain about the most basic of issues – what is an "aggravating circumstance" and how does it differ from the ordinary usage of "aggravation" to mean an annoyance? Last, he points to some solutions to the problems he has surveyed, suggesting careful discarding of those language uses that serve no purpose, while retaining those that actually contribute to the functioning of the legal system.

SUGGESTIONS FOR THE RESOURCE PAGE

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

HOW TO AVOID THE DIVORCE FROM HELL AND DANCE TOGETHER AT YOUR DAUGHTER'S WEDDING. By M. Sue Talia. Nexus Publishing Co., 1997 (\$12.95). 264 pp.

Family law judges may want to recommend this book to attorneys and pro se litigants alike. Sue Talia has practiced family law in California for twenty years. She offers time-tested, common sense suggestions for handling all sorts of issues in a divorce case, focusing primarily on how to reduce damage to the children. Chapter 11 on "Courts and Judges" has one central theme that most judges would like to communicate to parties in family law cases: courts are the choice of last resort in resolving family issues. That chapter alone could make a great hand-out, a good message from the bench at the first conference with parties, or the basis for a good civic club speech.



INTERNET SITES OF INTEREST

JURIST: The Law Professors' Network
<http://jurist.law.pitt.edu/>

The JURIST site, run by Pittsburgh law professor Bernard Hibbitts, makes a great home page for a judge wanting a daily update of activity in the legal world, as well as links to other material of genuine interest. Links are provided up front to legal news from major U.S. newspapers and from various Internet sites. A monthly review of legal books is provided. A "reference desk" is also provided, giving references to court- and judge-related resources, as well as professional organizations, legal dictionaries, legal research Web sites and an online "reference librarian" to whom you can submit questions about how to find something you're looking for. As for the site name, while most of our readers would think "jurist" means judge and would wonder about its use for a site

targeted to law professors, Black's Law Dictionary (Pocket Edition) actually defines jurist as "one who has thorough knowledge of the law; esp., a judge or an eminent legal scholar." So it is quite appropriate for judges to share the JURIST site with law professors, and it receives frequent use from both groups.

Information Technology Association of America

(<http://www.itaa.org/>)

A trade group with a clear point of view, the ITAA nonetheless provides a great deal of information technology information, including a home page specifically devoted to Y2K issues (at <http://www.itaa.org/year2000/>). From the Y2K home page, you can get plain language summaries on the issue, updates on pending legislation, and some materials on the use of ADR to handle Y2K disputes.

CPR Institute for Dispute Resolution

(<http://www.cpradr.org/>)

This ADR-focused organization, listed in the Fall 1998 Resource Page review of ADR resources, also has links to materials on using ADR for Y2K cases (<http://www.cpradr.org/Y2Kinformationpage.htm>).

Pending Y2K Litigation Summary

(<http://www.consult2000.com/>)

A Y2K consulting service, Next Millennium Consulting, has posted a list of pending Y2K litigation. There are summary statements about the claims in each case, providing a good overview of the potential for Y2K litigation.



FOCUS ON MIRANDA

The Resource Page focuses on the *Miranda* Rule at page 42-43.