

An Interview with Thomas Zlaket

Arizona Supreme Court Chief Justice Thomas A. Zlaket joined that state's highest court less than a decade ago, with no prior judicial experience. He has quickly become one of the country's most influential jurists, encouraging additional, innovative practices in the forward-looking Arizona court system and leading national efforts to improve public trust and confidence in the courts.

Zlaket's quick rise to leadership in the courts should not have been a surprise. A successful trial lawyer in Tucson, he had been the president of the Arizona Bar Association.

As a lawyer, he headed a commission to reform civil case discovery. That effort resulted in what are known in Arizona as the "Zlaket Rules," reforms instituted in 1992 that placed limits on overall discovery, provided for required initial disclosures, limited most depositions to no more than four hours, increased judicial involvement in managing the discovery process, and encouraged alternate dispute resolution. Zlaket worked for these reforms outside of his own state as well. When a committee appointed by the Illinois Supreme Court considered discovery rule changes in 1995, Zlaket came to Illinois to testify.

"There has been resistance from lawyers because the rules contain a cultural change," Zlaket told the panel. But, he asserted, the changes were necessary ones. "We have forgotten that discovery was a place to get ready for trial," he said. "It has turned into an economic war of oppression."

Zlaket began a five-year term as chief justice of the Arizona Supreme Court in 1997. Once again, he has promoted change, whether it be change in the culture of the courts to greater emphasis on customer service, improvement in collections and enforcement of support, expanded Internet access, or reforms to the lawyer discipline system. He co-chaired the 1999 National Conference on Public Trust and Confidence in the Justice System. In 2000, Zlaket received

the Paul C. Reardon Award from the National Center for State Courts in recognition of his already highly distinguished service to the judiciary on a national level.

COURT REVIEW: *Usually I'd start with an easier question, but let's get right to it. What do you think are the major issues facing courts nationally today?*

ZLAKET: Well, obviously building and maintaining public trust and confidence is the number one issue. And, as you know, it has been the focus of my efforts now for several years. Not just me, but



many people across the country have been concerned about the issue, have devoted considerable time to it, and I think now we're becoming aware of the fact that this institution that we have taken for granted . . . really does require some nurturing. So I think the first thing is to build public trust and confidence and to realize that that's an ongoing effort; it's not a one-time deal. It is something that needs to be done perpetually by dedicated people who want to expose the public to the court system and to want to make the court system responsive to the public—that's the first thing,

And that's a big umbrella-type issue that lies over the top of a lot of other things.

The most pressing issue that comes to mind now for me is the status of *pro se* litigants and what we do with them. You know, we have for a very long time taken the attitude that people who come into a courtroom without a lawyer assumed the risks, so to speak. They take the chance of being there without a lawyer, without any knowledge of the law, without any knowledge of the rules of evidence or the rules of procedure, and we have treated them as though they're going to be held to all of those rules, even though they have no formal training or background or experience in them. That, I think, is a mistake. And what we are now seeing, given the fact that lawyers' fees have gone from \$50 an hour to \$150 an hour to \$250 an hour—in some major metropolitan areas, they're up to \$300 and \$400 and even \$500 an hour. I keep saying, "Who can afford those prices?" I can't. I don't know if you can, but I can't. And most of the people with whom I speak cannot afford to pay a lawyer those kinds of rates. That being true, I expect that we will see what I sometimes call a tidal wave of *pro se* litigants probably just to get people's attention. I may be exaggerating a little bit for effect, but I do think that we now see in the statistics an increase in self-represented litigants who either have chosen not to hire a lawyer or don't feel they can afford a lawyer, and so they'd rather represent themselves. And, as a consequence, we have to deal with these folks. Now some people respond, and they say, "Well, you see those in domestic relations courts." That's wrong. We're seeing them in all kinds of civil cases now.

CR: *What do you say to judges who feel that the system works better with lawyers, and, therefore, they shouldn't do anything to encourage pro se litigants?*

ZLAKET: I agree the system does work better with lawyers. So what? That's my answer. So long as we, as judges, cannot solve the problem of providing lawyers

to people because of the cost of providing lawyers to folks, to ordinary citizens, to the average Americans, we are stuck with the problem of self-represented litigants at the door. They walk in the courthouse; they want justice, and they're entitled to it under the Constitution, just like the person who has a lawyer. So what do I say to those judges? If you can't solve the problem of providing expensive legal representation to people—if you can't somehow solve the problem of finding lawyers, then you have an obligation to take care of those who are self-represented.

CR: *Do you find lots of resistance to helping pro se litigants?*

ZLAKET: I get that same response that you raised in your question all the time. I'm about to go to Utah later on this week and speak to their judges, and we're talking about *pro se* litigants. And I know, I know that question is coming. Because every time I discuss it with a group, there is a small group of judges who say, "You know what, I don't want us to make it easier for *pro se* litigants to come in the courthouse doors. I don't want to hear about your self-service center in Phoenix where you help *pro se* litigants fill out the forms and file their own cases. I don't want to hear about your quick-court experiment, where you've had these automated kiosks all over Arizona where people could go, and for a very inexpensive price, get court-ready forms ready for filing. I don't want to hear about any of those efforts on the Internet that you out there in Arizona have undertaken to provide forms and some keys to the mysteries of the courthouse over the Internet to people who don't want to hire lawyers, because you are making it easier for self-represented litigants to come in the door, and that complicates our lives as judges, because it's harder to manage a case with self-represented litigants." I hear that! And I'd say to those people, "You're supposed to be judges. This justice system doesn't just exist for people with lawyers. How can we as judges—you and I—justify that kind of an approach?" I rather think the answer is that we need to find solutions for unrepresented litigants to make it easier, not harder. Otherwise, we're going to turn away a lot of people who need justice and who can't get through the door.

CR: *Have you found or been able to tell whether your discussion with that group of judges who are skeptical of efforts to help pro se litigants is effective? Are you able to change minds there, or is there a hard-core group that appears to be resistant to any change that would encourage pro se litigation?*

ZLAKET: There is a hard-core group. But, you know, they're all pretty wise, and even though they come into the discussion with a built-in bias, or they have very strong feelings, they cannot answer the one question that is the stumbling block for all of us when we reach the point in the discussion where we ask, "What is the answer to that?" Do we turn these people away? Do we close our eyes to them? Do we continue to say what we used to say and have for so many years? I mean you've heard the litany from the bench. I've heard the litany from the bench. It goes, "Mr. Jones, I have to tell you that you don't have a lawyer in this courtroom, and you are at a distinct disadvantage, and I want you to know that the law requires that I treat you the same way as I would treat you if you had a lawyer. That means I'm going to hold you to the rules of evidence, which you don't know; I'm going to hold you to the rules of procedure; I'm going to hold you to the law, which you've never studied; and I have to do that. I cannot favor you; I cannot help you. Therefore, you are at a distinct disadvantage in this courtroom, and I'm telling you that right up front."

Now, I've heard that litany. I've been in a courtroom representing clients when I was a lawyer when the other side was unrepresented, and the judge engaged in that litany, and I thought to myself, "That's a pretty intimidating speech." Now if we start really giving that every time we have self-represented litigants, and we are seeing those numbers increase, I think we're chasing people away from the very forum in which they're entitled to get some adjudication of their rights and obligations.

CR: *When a trial judge takes that posture and not only gives the speech, but also practices the speech, obviously, a pro se litigant would be at a significant disadvantage, and arguably, justice would not be achieved. Do you see any approach that an appellate court would take in that situation, or is that one that simply ends up in the trial court discretion category?*

ZLAKET: [It] probably ends up in the trial court discretion category. In my state, there are appellate decisions that talk about the fact that *pro se* litigants should be held to the same standards as those who have lawyers and to the same rules, and so all judges feel obliged to follow those precedents—and they should. But we haven't had any recent decisions dealing with this subject for a long, long time. All of those precedents are old. They're 30, 40, 50 years old.

The world has changed a lot. Legal fees have gone up a lot. We've seen more *pro se* litigants now. I think it's the obligation of appellate courts—and especially supreme courts in those jurisdictions where supreme courts set the rules of procedure—I believe it's our obligation to reexamine the way we do business and to reexamine the rules that we follow. And if we see, as I do, a continuing trend toward more and more self-represented litigants in our courthouses and in our courtrooms, I think we need to revise the rules by which we operate.

And I say this to lawyers, and they look at me skeptically. The bar associations are in denial. They don't want to see this coming. But my answer is that those of us who are charged with administering this justice system—the judges, you and I, the administrators, the people who are duty-bound to make sure the courthouse stays open for citizens to adjudicate their rights and obligations—those of us in that position have got to do something. If we cannot figure out how to get cheaper legal services to the people, then my only other answer, the only one I could think of, is to change the rules to accommodate the increase in the number of self-represented litigants, because it has historically been that we designed the judicial system for lawyers.

We've designed our present system with the idea in mind that most people would have lawyers, and historically, that's been true. So we put in all these rules, evidence, procedures that are designed really for lawyers to understand and apply. If we're going to recognize that the number of lawyers in our courtroom is going down, then I think we need to change the rules to accommodate the majority of people that we see. And that majority is starting to look like it's going to be self-represented in more and more kinds of cases, starting

with domestic relations, moving on to landlord-tenant, starting to creep into the tort area. Small-claims courts are getting bigger and bigger jurisdiction, at least in my state they are. It used to be \$500. Well, it's not \$500 anymore. Limited jurisdiction courts are getting bigger and bigger civil jurisdiction. So I think it's inevitable.

And now the question is—are we up to the task of redesigning a court system that can still accommodate lawyers and can still put the safeguards in, or maintain the safeguards that the rules of evidence and our current rules of procedure were designed to provide, but at the same time, make it easier to deal with self-represented litigants? Easier for them to get in and get the justice they need, easier for us to manage them, because it's a terrible management problem. Any good judge—any experienced judge will tell you it's a lot easier to handle a court proceeding where there are lawyers and where we all know what the rules are than when you've got litigants who are confused, who sometimes speak out of turn, who argue with rulings, who just don't know how to behave. So it is a real challenge, and I can't figure out any other answer. It just seems to me we've got to go back to the drawing board and make some changes in the way we do things.

Now there are a couple of other things that people have suggested. Obviously, if legal insurance ever takes off in this country the way health insurance has, that might alleviate some of this problem. It might make lawyers more available to the average citizen, and that's who we're talking about. You and I have talked for years about providing legal services for the poor. When I was president of the bar association in Arizona more than a decade ago, we used to concentrate our efforts on how we get legal services to the poor. We talked about the Legal Services Corporation, and we talked about our local efforts to stimulate *pro bono*, and volunteer lawyers' programs, and things like that. The rich already had their lawyers and the major corporations. We never worried about them. But the middle class in those days was able to afford a lawyer once in awhile. Now what's happening is that the middle class is rapidly falling out of the group that can afford to hire a lawyer, and so the poor, as we use it in the analysis, the term "poor" is

including more and more Americans when you talk about the ability to hire a lawyer. So if some insurance company or companies get going with an idea of a huge-coverage legal insurance across a wide spectrum of citizens in this country, assuming they think they can make money at it . . . , that might be one answer. I've been working hard on getting lawyers to give *pro bono* time, and we've been successful, but we aren't keeping up with the demand. I mean we've got firms giving more and more and more *pro bono* hours every year, and they're doing it voluntarily, and they're doing a great job, and we keep falling further and further behind in terms of the number of people who don't have lawyers.



CR: Do you have a statewide reporting requirement for *pro bono* ?

ZLAKET: We have an aspirational goal—I think it is 50 hours a year per lawyer—and there is a statewide report in process that the state bar goes through, but it's not mandatory. . . . I haven't heard about mandatory *pro bono* for a long time. I'm not much in favor of mandatory *pro bono*. To me it's an oxymoron to say mandatory *pro bono*. I mean it insults the legal profession, because it says that this great profession that serves the public will only respond if it's made to do so. So I don't think it does any favors in terms of the public perception of the lawyers. At the same time, I would not want to be a client that had a lawyer representing me who was forced to represent me. I wouldn't

like that much. I wouldn't be sure that that lawyer would be helping me all that much or very enthusiastic about our case.

CR: On the public trust and confidence front, one thing I understand that you have initiated in Arizona that may be unique is to bring in to your supreme court groups that may be interested in policy issues, like domestic violence advocacy groups. What have you done, and how have you responded to people that would say the courts need to stay independent of people who are advocating positions?

ZLAKET: I guess you could take that attitude if you want. I never thought that there was much benefit to sticking my head in the sand and acting like the problems will go away on their own. Quite frankly, I have not seen any inclination on the part of the victims' rights groups or the court-watchers to go away. If anything, they are becoming more active in my state and more vocal in my state. They're publishing newsletters, providing letters to the press about the justice system and about particular judges in courts. I hear judges say, "Ignore them." I don't want to ignore them. I've never solved a problem in my life by ignoring it. I'm not suggesting these are problems. I've got to tell you that I have now met with a number of victims' rights groups and a number of court-watcher groups, and I have discovered that some of their criticisms are right on [target]. They do have legitimate complaints against some judges and some courts.

CR: Do you meet with them personally, or do you have a meeting of your whole court, or what have you been doing?

ZLAKET: So far, we've been meeting with representatives of the various victims' rights groups together, not the whole court, but I met with them with my vice chief justice. The two of us met with them several times, and then I've missed the last couple of meetings, but he has been there, and we have also had staff there. We've had our AOC executive director and his number two person. We've had some of the AOC department heads who deal with various areas about which there may be complaints, whether it's juvenile issues or whether it's probation issues. In other words, we're giving them a chance to talk to us, and then we're investigating their complaints and trying to see if we can make things a little better.

Sometimes a phone call to a judge is all

that's required, because a lot of our judges are so busy, so stressed, they have fallen into bad habits and don't realize that an offhand remark or constantly coming out on the bench late or treating an occasional witness badly sends the wrong message. And to those people out in the audience, to those people who are watching, it doesn't look like a little thing. It might seem to the judge like it's a little thing. And taken in the context of the judge's whole calendar, whole day, and all the important issues that he or she is dealing with—it seems like a little thing. But it's not a little thing to those people in whose case that outburst took place or those people who are watching in the back of the court.

So it kind of follows my philosophy and all, that we're dealing in a new age. I have encouraged my judges to get out of their offices, to get out of their black robes, to get out into their communities and be visible. I understand that there are ethical constraints on all of us—you and me. I'm not suggesting that we change roles. I still believe that there have to be restraints on judges in terms of their community involvement. I don't think judges can raise funds. I don't think we can attend certain kinds of gatherings, politically or for fund-raising purposes. I do think we have to be careful about appearances and anything that suggests partiality or favoritism. But I think we make a terrible mistake when we disappear.

I have thought for years that you and I have known lawyers who have been really community activists. I mean really out there: Boy Scouts, boys and girls clubs, Big Brothers, Little Brothers—they've been in everything. And people see them and say, "Oh, he's a lawyer," or, "She's a lawyer. Boy, they're very active." And then all of a sudden they go on the bench, they put on a black robe, and they disappear from the face of the earth. I think that's a terrible mistake.

I look at my own court, the Supreme Court of Arizona, which in former years had been perceived as hiding, mysterious beings, who never come out of their chambers. Editorials written asking, "Who are these guys?" I mean, you know, it's like *Butch Cassidy and the Sundance Kid*: Who are these guys? And I think that's a mistake. I think that when you are invisible that it's easy to

demonize the court. When judges don't come out and show their human side, they're easily demonized. They're easily characterized as aloof and arrogant. When their decisions then come out, it's like it's handed down by some oracle coming from on high. I don't think that's helpful. I want our judges to be out talking about the justice system, talking about how good it is, talking about how careful we try to be, and how it's still human, and we sometimes will make mistakes. And we're no different than anybody out there in our courtrooms. We're not special. We have a different job, but we live in the same neighborhoods, and our kids go to the same schools, and we pay the same taxes, and



you and I've got the same car payment and mortgage payment, and we have parents who get old and die, and we worry about our kids, and we cry and laugh. We're no different. We just have a different job. People out there need to know that. And I found that every time I've gone out and had a dialogue with citizens' groups around my state, once they find that you're human, once they find out they can talk to you, all of a sudden the barriers drop, and it is a dialogue that's so productive about how we might get better, how we might do things better in the courthouse, how it might be friendlier and less intimidating. It's really, really good.

I still remember a gal who came up to me in Flagstaff, Arizona, after we had a citizens' summit all day, and she walked up to me. I was getting in my truck, and

she said, "You know what? You're not a bad guy." She said it in such a way that it sent a real message. I mean she had come to this thinking the Chief Justice of Arizona must be some weirdo or some intellectual snob or some special person. When she found out I wasn't any different than she was, all the barriers were down, and I think that's a lot healthier than a relationship where we try to set ourselves apart because we're special—or we think we're special.

CR: *You've talked about judicial outreach as being something that not only includes judges going out into the community, as you've been describing, but also involves judges making the person's experience in the courthouse less intimidating—that a person who arrives at the courthouse and goes through the metal detectors is immediately a little less comfortable than they might be in their own home or business and that there are very few things we do in the process to make them feel at home. What do you see as the judge's role inside the courthouse in making it a better public service institution?*

ZLAKET: Well, the judges, if they have time—and that's quite frankly what the problem is, that most of the judges I know are really working very hard morning until night. They don't have much time. They're either in the courtroom or they're working on under advisement motions, or they're trying to manage their own calendars, or they're filling in for somebody else. What I would really like to see is a judge every once in awhile going out and talking to the people in the courthouse. "How are you doing? I'm a judge here, and I just wondered, you know, how you're being treated. I'd like to know: Is my staff taking care of you? Is there anything that we could do to make it better?"

Yes, I understand that we are a public institution with a very weighty obligation of resolving human disputes. At the same time, some people have suggested that we need to treat our—our customers like they're customers. I mean, every time I use that word, a lot of traditionalists shy away. Lawyers and judges don't like to hear the word "customer." And while I understand they're not technically customers in the same way that Kmart has customers, I do think the word sends a pretty clear message that we are in a public service enterprise, and

that we need to give public service. And I don't know how you rate yourself or how your people are doing without talking to the public once in awhile.

Our judges have gone some extra steps in an effort to make the experience a little more pleasant. For example, I have presiding judges in Pima and Maricopa counties who meet with a new panel of jurors whenever a new panel is sworn in, and they sit and talk with them. They don't wear black robes during that. They come down in a coat and a tie, and they just sit down and introduce themselves, and they talk about the experience as jurors, and we have the one-day-per-year rule, you know, and so they explain that to them, and they talk about civic duty, and our judges are very frank. They say to those prospective jurors, "We wish we could pay you more, and we've tried to get more money for you from the legislature, and we can't, but please understand that what you're doing is important." I think there are benefits to be reaped from that. We have surveys of our jurors who say, "That was really nice. We kind of like somebody coming down rather than the old way." When I was a lawyer, those jurors never saw any judge, except when they got pulled into the courtroom, and that figure came out in the black robe, sat up on the bench, and started saying, "Call the jurors into the box." I think the same is true with the people that stand in line at our clerk's counters. I think the same is true with witnesses, how we treat our witnesses, and whether they're made comfortable.

Now I understand that we're all restricted in terms of our finances, and some of the rooms we put these people in are stark and badly furnished and not comfortable at all, and I want to try to make that experience a little better if I can get somebody to do it. And I just think the whole idea of educating our people in the courthouse—from the security guard that runs that x-ray machine at the door to the clerk to the bailiff to the people in the clerk's office who process the paperwork—they need to be told every day that you are here to serve the public. Do it with a smile, and do it with courtesy. And treat these people—understand that they're nervous; most of them don't want to be here—treat them with some courtesy, and it'll

pay off in the long run. I don't expect anybody walking out saying, "Wow, that was fun. I want to come back tomorrow." I think that's unrealistic. I mean, nobody wants to go there, but I would like them to walk out saying, "I think I got treated fairly, and I think I was treated well." That's all.

CR: *On the public trust and confidence front, the national conference that you co-chaired in 1999 suggested as one of its themes that a perception of inequality in the courts was, if not the biggest problem, at least one of the biggest problems—that minority groups, in particular, felt that they were not treated fairly in America's court system. Given that that's a societal problem as well as a courts' problem, is*



there anything effective that the courts can do about it?

ZLAKET: I hope so, because I think if we don't address it head-on, and if we don't get involved in a dialogue about how to solve it, it's an issue that is so explosive that I think it could bring this court system to its knees, and I'm not exaggerating. I don't think it's a perception anymore, I think it's a reality. We can talk about perception of inequality all we want. But I think that there's more than that, as you know from the conference in Washington. The message came back pretty loud and pretty clear that the justice system in America favors the rich over the poor and that the justice system in America favors majorities over minorities. Well, on the latter

point, I don't think it takes much imagination to know that that's more than a perception: that's a reality. All you have to do is go through any of our juvenile detention centers. All you have to do is go through any of our prisons and look at the faces. What you see is a huge minority population compared to the majority population. Now that may not be true across the country, because there are some states that have very small minority populations. But you come from my state, where there's a large Hispanic population, for example, and you see that it is true, and you wonder, why is that? And it's not just a question of how our judges are treating people. This is a bigger problem. Your question alludes to the bigger problem.

When complaints are registered against the justice system, most complainants don't discriminate. They don't say "the court system." They don't say "the third branch of government." They don't understand that there's any distinction. For them, the justice system starts with a cop on the street, and it doesn't do much good to say to those people, "Oh, that's the executive branch; that's not the judicial branch." They don't want to hear what branch of government it is. They don't care about that. Their justice system starts with that cop that pulls up and stops them, maybe because they're black, maybe because they're brown, maybe because of the neighborhood they're in. They don't think they're being treated equally. And every conference I've been to where this has been discussed, that's at a very high level. There has always been the same complaint by the minorities. It is: "All we want to is to be treated the same as you. We don't want to be treated any better, but we don't want to be treated any worse. If the police officer doesn't stop you when you're driving through the neighborhood, why stop us when we're driving through the neighborhood?"

CR: *So what does the justice system do?*

ZLAKET: The justice system has to enter a dialogue that starts with the cop on the street—at least I'm talking now about the criminal justice system—a dialogue that starts with a cop on the street and goes all the way through to the corrections officers. Now we're in the middle of that. The third branch is in the middle of that, but the front-

end—the cops, the prosecutors—those are executive branch people. Then comes the court system. And then comes the corrections people, and they're the executive branch. There needs to be a discussion that starts with all of those people getting together and recognizing the problem and starting to address it. We're not going to address it ourselves because we can't control who comes through the courthouse doors. We have no control over that. If you bring us a disproportionate group of minorities, if you bring us a disproportionate group of poor people, it looks like our system is discriminating. We've got to include in that dialogue the front end and the back end—the police and the prosecutors, because the prosecutors right away make charging decisions, obviously, that may or may not be skewed—and I don't know—that may or may not be balanced according to race or according to wealth. And the back end, the probation departments, the corrections people, you need all of those.

CR: *Have you begun any discussions like that?*

ZLAKET: Oh, you bet. We're meeting with police officers. We had a meeting with our state police and our big metropolitan police officers. We've got the attorney general in on the discussion. We've got the county attorneys and the big counties in on the discussion, and we're starting to address the problem. It's a huge problem, and it's not going to be solved easily. It is a problem that is going to require our best minds.

The other half of it, of course, is—you know, I have to laugh when I listen to all of the politicians talk about, there's been a decline in violent crime in the last decade in this country. I just saw another article about it. Everybody takes credit for it. The legislature says it's because we passed all those really tough sentencing laws, and we're locking all those people up. The cops say it's because we've really gotten tough on crime, and we're locking those people up and throwing away the key.

CR: *You're not going to say it's the judiciary, are you?*

ZLAKET: I'm not going to say it's the judiciary. I'm going to say it's the economy. I think that anybody who doesn't recognize that [this is] an era when this country has [had] more prosperity the

last eight to ten years than it had seen in a long time, the unemployment rate among majority and minority citizens is as low as it's ever been. What a surprise that the violent crime rate goes down. I mean, does anybody doubt that there's a correlation? I'm no sociologist, but I think I do understand enough to know that poverty is a contributor to crime. And when people are more prosperous, the crime rate goes down. And the next time we have a recession or a depression, the crime rate will go up. So I don't think there's any magic bullet in locking people up.

But go to the second part of your question, the presumption that the justice systems favors the rich over the



poor. Is that just a perception based on O.J. Simpson and some of these other high-profile defendants that have been able to amass a defense team that had to cost millions of dollars? I don't think it's perception: I think it's clearly a reality. I do think rich people do better in our courts than poor people, because they can afford to hire all the expert witnesses, all the help, all the jury consultants, all the high-priced lawyers. What can we do about that? I don't have the answer to that one. That one may become an eternal problem. We're worried now, as our earlier conversation today shows, we're worried just about getting people lawyers, just getting the average citizen a lawyer, much less getting the average citizen a Johnny Cochran team with all the

experts and all the jury consultants and all the things that major corporations and the very rich in our society now are able to bring into our courtrooms.

CR: *You're not about to announce a constitutional right to jury consultants in Arizona?*

ZLAKET: No. We're not going to do that.

CR: *Let me ask you –*

ZLAKET: Nor are we going to prohibit them.

CR: *Let me ask about a couple of other topics. First, I'd like to talk with you a moment about your philosophy as a justice of a state supreme court. How would you describe your own judicial philosophy?*

ZLAKET: I'm going to leave that to the people who read my opinions. I really hate labels. I really do. I have grown up with a deep aversion to the practice of labeling people as "liberal" or "conservative," to the practice of calling judges "activists." That is a word that to me has never meant anything, except that people who use it misunderstand the role of the judge in the development of the common law, which is what we do in this country.

CR: *If someone were willing to read your opinions and wanted to start with one of your opinions to look at how you approach and decide cases, what would be a good starting point?*

ZLAKET: I don't know. I can't answer that. I really can't. I have no favorite opinions. Each one I take as best I can.

My biggest complaint has been—and I'm sure that all appellate judges feel this way, and I think all trial judges feel this way—we're criticized on the basis of what the press reports as our results. I've heard criticism about my decision, and I've always asked—the first question I ask, whoever the critic, is, "Did you read the opinion?" The answer is inevitably "no." I have never had someone who said, "Yes, I read the opinion. I disagree with it." That person would win me over instantly. I'd say, "Well, then, I want to hear what your comments are. Tell me why you disagree. I really want to know."

That never happens. Instead, it's, "Did you read the opinion?"

"No, I read the newspaper article about it."

"Really? I spent 35 pages and six months working like a slave over this

opinion, drafting and redrafting, reading all the cases, trying to do the research, working with my law clerks to produce this thing, and you're going on the basis of six inches of type in a newspaper? Please! How can we have any discussion?"

We publish our opinions on the Internet. Anybody can access them there. Nobody wants to read it. Nobody wants to know what goes on in your trial courtroom, if you are a trial judge. They just read about the fact that so-and-so was turned loose by you on the streets, that you acquitted this particular defendant, or that you suppressed certain evidence that was found. You suppressed drugs that were found in the trunk of the car.

Remember the federal judge in New York, Judge Baer, when he suppressed the drugs that were found in the car? God, the political fuel was incredible—by a bunch of people who had no idea what went on in that courtroom. They only read something in the newspaper. And they were political people who should have known better, because they were lawyers. The President of the United States, a lawyer; his political opponent at the time was a lawyer. [They] should've known better, these lawyers, and they didn't. They criticized until the judge finally changed his decision, which I thought was a disgraceful period in our American legal history, a disgraceful black mark on us, because it smacked right against the independence of the judiciary.¹

People misunderstand that term, too. I don't mean independence in the sense that we are so independent that we're not publically accountable, but I do mean that when a judge decides a case, he or she must be free from outside pressure, whether it's political or any other kind of pressure.

CR: *Let me ask you about a final topic, a more positive one. Arizona has influence in the national judiciary beyond its popu-*

lation base. One of the members of the Supreme Court, Justice O'Connor, obviously, is from Arizona. Arizona's been a leader in the jury reform movement –

ZLAKET: Two of the members of the Supreme Court—Bill Rehnquist, the Chief Justice, is from Arizona.

CR: *Did he practice in Arizona?*

ZLAKET: He did.

CR: *Well, two of nine is even better for this question. Arizona's been a leader in the jury reform movement, a leader with pro se litigation, a leader in a number of other ways. What makes Arizona a leader among the nation's courts?*

ZLAKET: The dry heat. (Chuckle) I don't know. I've been asked that question so many times, and it really is true—we seem to be on the cutting edge of a lot of issues. We seem to be more willing to experiment with things that other courts are reluctant to try. I don't know why. I don't think that we're any more adventuresome than anyone else. I think we are tied to precedent and tradition just like every other court in the country. But I would like to say that our leadership, present company excepted, has been rather visionary, and I think we have realized that this is a different world.

I tell a story about a meeting that I was at not long ago where there were a number of chief justices present, and I want to kind of keep this unidentifiable, because I don't want to name any names. Everybody was in good faith during this discussion. And we were talking about making changes, how you make change happen in this system. And there was a group that thought that the change had to come from the top, and it came from the top in the form of almost an order.

I mean, if you're in a constitutional structure, as I am in Arizona, where the supreme court has administrative authority over all the courts, and the chief justice really has that administrative authority, then change sometimes comes about with an order that says,

from this point on, we're going to do things this way in all the courts, and it's not optional, it's mandatory. Or, sometimes, we'll adopt an experiment on a limited basis in a few select courts around the state to try something new. But we're able to do that because the chief justice is able to issue an order saying, "On an experimental basis, we're going to try this just to see how it works, and if it works, we'll expand it to the rest of the state." Like our model court program—we were one of nine model courts. We process kids now—dependent children—we get them in and out fast. Within a very short time, these kids are either reunited with their parents back home, or they're put up for adoption so that they can get into a loving home at a reasonable age, unlike our old practice which went on for much too long, where we keep kids in foster care for God knows how long. It was a tragedy. And then they'd get too old to be adopted. So we tried that on an experimental basis, and then we expanded it statewide. Now every court in the state is following that model court process. But it has to come from the top, the direction, the vision has to come from the top.

Now, sometimes it comes from the bottom. Sometimes, somebody, one of the judges says, "I've got an idea." I mean that was Judge Dann's jury reform. And it comes to the chief justice—who was not me at the time (it was my predecessor), who was receptive to it, and said, "Let's give it a try." Well, it was heresy at the time. A lot of people still think we're a little wacky. But we tried it, and we think it works well. And now others are starting to copy. So it is this idea that we encourage some experimentation and some different thoughts. And here's the reason why: Our branch of government tends to be the most tradition-bound branch of all. We are the slowest to change, we're the most reluctant to change. It may have something

1. Editor's Note: The case discussed was before United States District Judge Harold Baer. In his initial decision, he suppressed as evidence a large quantity of cocaine that had been found in the defendant's car. *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996). After that decision was criticized, during the presidential campaign, by President Clinton, Senator Bob Dole, and 140 members of Congress, Judge Baer had a rehearing and reversed the suppression

order. *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996). For a general review of the facts and issues involved, see Monroe H. Freedman, *A Symposium on Judicial Independence: The Threat to Judicial Independence by Criticism of Judges—A Proposed Solution to the Real Problem*, 25 *HOFSTRA L. REV.* 729, 737-43 (1997). Professor Freedman concluded that the Baer case was "[a]n instance in which a judge's independence was, in fact, compromised." *Id.* at 737.

to do with the fact that we are trained to rely on precedent.

Our whole lives are precedent. The word precedent binds us. When I first came to government eight and a half years ago, I was a private practitioner before I got this job. When I first came, I was stunned at the number of times people would say to me—when I asked why we did something a particular way—they would respond, “Because we’ve always done it that way.” I have encountered that in clerks’ offices. I have encountered that in judges’ chambers. I have encountered that at judicial conferences. And it’s the silliest answer I’ve ever heard. There is no business that is surviving today in this country that does not periodically reevaluate itself and look at the way it does business and try to improve to meet the changing society.

Back to my story. There was a group of chief judges—chief justices and chief judges—who said, “Well, I can’t tell my judges what to do. I can expose them to best practices and hope that they adopt them over a period of time. I can’t tell them what to do.” And there was this group that said, “Nonsense! We’re going to tell them what to do, and we’re going to make some changes. Otherwise, it’s going to take years to turn this boat around.” It’s like turning the *Queen Mary*, you know, it takes a long time.

Finally, a fellow in the back of the room held up his hand. He was a guest there at this meeting, and he was the chief counsel for a huge multinational corporation with its headquarters in this country. And he said, “I’ve listened to you people talk. I’ve got to tell you, you just don’t get it. You don’t have a clue what’s going on out in this world today.” He said, “We’re in an age of instantaneous transactions. My company will do hundreds of millions of dollars worth of business on the Internet this coming year with a push of a button, the push of a key on a keyboard. And I hear you talking about changing slowly, and you’re going to make these changes slowly, and you’re going to let your judges come to it. You don’t get it. It’s just the same reason why big business now is looking for alternatives in civil dispute resolution. We’re going to private judges, we’re going to arbitrators

and mediators. We can’t wait three to five years for a decision from your court system. We’ve got to make some business decisions based on what you decide our rights and obligations are. Tell us whether we win or lose, but tell us quickly so that we can make those business decisions and get with it, because the economy’s moving too fast, and you are moving too slow.”

And then he sat down. You could’ve heard a pin drop in that room when he was done. And the message was: We, as a court system, can’t sit still. We constantly need to look at how we work, how we operate, how we move paper, how we move cases, how we process people through the system, how we file.



Everybody’s talking about electronic filing. Is there any doubt in my mind that it’s a reality? It’s not an experiment. It’ll be here. It won’t be here in 20 years; it’s going to be here in two years, or less. I mean, technology is changing every six to eight months in a revolutionary way.

So I think that we have seized on the idea that we can’t sit still. We’ve got to look at everything that we do, and see if there’s a better way to do it, or at least to try a new way. And we have failed a lot. I don’t want to sit here and say all of our experiments have been successes. Sometimes we tried some things that we don’t like very well, and we discard them. We say, “Okay, we tried that, but the results are inconclusive, or it really hasn’t been good enough, or we can’t

afford to fund it, or let’s forget it.” But [at least] we’re thinking.

We’re building some courtrooms now that are in Maricopa County, which is Phoenix, state-of-the-art courtrooms. They have got all the cameras and audio equipment and computer hookups and everything you can imagine. I don’t think we’ll be building any more old-style courtrooms in Arizona, assuming we can afford to build the new courtrooms. Along the way, though, it causes problems. We’ve got court reporters who are worried about their longevity in our system and there’s a tradition that we have to break away from. I’m not suggesting, by the way, that we’re going to get rid of our court reporters. There’s no move afoot to do that. But, just look at court reporters. They’ve gone from the court reporter I knew when I was a lawyer to the real-time court reporter of today, and you can sit and watch them produce on a screen the testimony you just heard two seconds before.

So everybody’s got to get with the program, including the courts. And I don’t know why we’ve been in the forefront of that, except just a willingness on the part of our leadership and our court administration people to give it a try. That’s our motto: “Give it a try.” If it doesn’t work, we’ll try something else, but let’s see if we can do it better.

CR: Thank you.