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The issue begins with an examination of the development of drug courts, the most highly visible of the many “problem-solving courts” developed in recent years. The first drug court was created little more than a decade ago in 1989; today, there are more than 1,200. No doubt there have been many lessons learned along the way, and we try to find—and explore—those lessons in the lead piece in this issue.

New York’s Center for Court Innovation convened a group of 19 judges, court administrators, and others involved with drug courts to discuss what has worked, what hasn’t worked, and where drug courts may go from here. Aubrey Fox and Greg Berman of the Center for Court Innovation have provided an introduction to the discussion, which is followed by an edited transcript of the full-day discussion that took place. We think you’ll find it of interest.

The issue includes three other articles. United States Magistrate Judge Morton Denlow explains how to make sure that a settlement conference results in a settled case, not additional disputes over what was agreed upon. He includes a helpful checklist a judge can use to make sure that everything that should be covered actually has been discussed and agreed upon.

The last two articles were runner-up entries in the American Judges Association’s law student writing competition over the past two years. Victoria Cecil reviews the judicial selection process in Florida, and then proposes several changes that might make merit selection more useful there. Benjamin Berger discusses the use of metaphor in judicial opinions, including review of some specific cases from Canada in which metaphor has been effectively used as a tool of persuasion.

We close with two reminders about Court Review. First, we welcome letters to the editor, book reviews, essays, and articles from our readers. You can contact me at sleben@ix.netcom.com to discuss any potential contributions. Second, we remind you that all Court Review issues from 1998 to the present are available on the web at http://aja.ncsc.dni.us/courtrv/review.html. In addition, our articles from 1998 to the present are available in full text on LEXIS in their combined law reviews database. —SL
Since assuming the presidency in Maui last September, I have been invited to attend numerous meetings of other organizations. The AJA reciprocates by inviting the president of these organizations to attend our meetings. This interaction between the AJA and these organizations provides for a closer working relationship between the respective memberships. Listed below are some of the meetings I have attended and a brief description of what occurred at these conferences.

- **Criminal Justice Summit on Impaired Driving sponsored by the National Highway Traffic Safety Administration in cooperation with the National Criminal Justice Association**—November 21-22, 2002, Washington, DC. The National Highway Traffic Safety Administration (NHTSA) is an agency within the U.S. Department of Transportation. Approximately 100 participants, all of whom deal with issues involving criminal justice and impaired driving, attended the summit. Representatives from law enforcement, the judiciary, court administrators, corrections, criminal justice, prosecutors, public defenders, and traffic safety attended. The focus was to identify problems within the criminal justice system in dealing with impaired drivers, with a special emphasis on repeat offenders. The attendees were each assigned to breakout groups, which discussed issues pertaining to enforcement, prosecution, adjudication and disposition. At the conclusion, the participants made recommendations to Dr. Jeffrey Runge, MD, the NHTSA administrator.

- **Conference of State Court Administrators, Midyear Meeting**—December 5-7, 2002, Captiva Island, Florida. The three-day conference was presided over by their president, Patricia Tobias, who serves as the Administrative Director of the Courts for the State of Idaho. One of the main topics discussed at the meeting was the issue of managing the court funding crisis. Other topics of the educational program included a report from the National Center for State Courts, developing performance measures for court operations, a security summit update, and problem-solving courts.

- **American Judges Association Executive Committee Meeting**—January 16-19, 2003, Santa Barbara, California. The date of the meeting was selected to provide a meeting of the AJA's officers midway between the Annual Educational Conference in Maui and the Midyear Meeting in Billings, Montana. The committee reviewed issues pertaining to the budget, the Annual and Midyear Conferences, site selection protocols, membership, the National Center for State Courts, and the AJA House of Delegates. This meeting enables the Officers to review those issues vital to the governance of the association.

- **Conference of Chief Justices, Midyear Meeting**—January 26-30, 2003, Williamsburg, Virginia. The Conference of Chief Justices was presided over by its president, Judith S. Kaye, Chief Judge of the State of New York. Much of the work of the conference, as is the case of many organizations, is conducted through its committees. I attended several of the committee meetings, including the State-Federal Relations Committee and Public Trust and Confidence in the Judiciary. Other topics and educational sessions included NAFTA, international trade agreements, and a roundtable discussion regarding confronting challenges.

- **National Association for Court Management Midyear Meeting**—March 2-4, 2003, Tucson, Arizona. The conference was convened by NACM's president, Joi Sorensen, who serves as the Assistant to the Executive Officer of the Los Angeles County Superior Court. Topics of the educational sessions were unequal treatment in the justice system, court interpretations, serving the self-represented, developing cultural competency, and overcoming poverty barriers to equal treatment within the courts. Workshops were also conducted involving judicial branch education as a best practice, problem-solving courts, and defining racial and gender bias, with a discussion of resolutions to those problems as well as developing cultural competency.

- **National College of Probate Judges Spring Conference**—May 7-10, 2003, Galveston, Texas. Judge Lawrence A. Belskis of Columbus, Ohio, president of the college, presided over the meeting. The topics of the educational sessions included modeling a successful volunteer guardianship program, Texas probate law and procedure, community property systems, what psychiatrists wish probate judges knew, and probate reforms.

In conclusion, we share many of the same problems and concerns with these other organizations. We benefit by mutually exchanging ideas on how best to resolve these issues.
Perhaps no criminal justice innovation has spread as rapidly in recent years as drug courts, which offer judicially monitored treatment as an alternative to incarceration for non-violent addicts. The first drug court was launched in Dade County, Florida, in 1989. Today, there are more than 1,200 drug courts either in operation or in planning across the country. More than 226,000 defendants have participated in these programs.

Drug courts are the most prominent example of a wave of “problem-solving” innovation that has sought to change the way courts operate in this country. Alongside drug courts, domestic violence courts, community courts, family treatment courts, mental health courts, and other specialized courts are using the authority of the judicial branch in new ways—in an effort to improve outcomes for victims, communities, and defendants. These problem-solving courts employ new tools and new methods—such as requiring defendants to appear regularly before judges to report on their compliance with court orders, or adding social scientists, drug treatment counselors, and other service providers to the courtroom team.

The first generation of problem-solving courts has achieved some provocative results—none more so than drug courts. Independent research credits drug courts with reducing rates of drug use and re-arrest among participants. Also, treatment retention rates—a key indicator of long-term sobriety—are twice as high for participants in drug courts as opposed to individuals who seek out treatment voluntarily.

To date, the drug court movement has largely been a grassroots phenomenon, driven by a highly motivated cadre of judges, prosecutors, and court leaders. Based on the demonstrated success of drug courts—and the enthusiastic public attention these courts have generated—a number of states have begun to take the next step, seeking not just to replicate pilot drug courts, but rather to test system-wide the viability of new approaches to the problem of addiction. Their focus is on building systems at a state level, either through special judicial branch-led efforts (as in New York), legislation (Indiana), or collaborative efforts that bring together the heads of statewide agencies like corrections, courts, and social services (Utah).

Clearly, drug courts are at the brink of moving into a new stage of development. Acknowledging this reality, in March 2002 the United States Department of Justice, working with the Center for Court Innovation, brought together a select group of judges, practitioners, and thinkers from around the country to discuss the future of drug courts. The goal of the roundtable was two-fold: first, to unearth some of the strategic, conceptual, and practical challenges that practitioners face in attempting to bring drug courts into the mainstream of court operations, and second, to provide a road map to drug court advocates in addressing those challenges.

Perhaps not surprisingly, the topic proved to be a complicated one. During a day-long conversation, court administrators, judges, legal scholars, and experts in other fields of social policy innovation grappled with a series of difficult questions. How do you “go to scale” with an idea like drug courts? Is the goal to promote continued replication of the drug court model? Or is the goal to advance drug court principles and strategies, making sure they take root in every courtroom? Most important, how do you institutionalize innovation? Will the drug court approach lose its effectiveness if it becomes business as usual?

Several key themes emerged from the discussion. Many, though not all, participants agreed that going to scale meant more than “hanging more signs on the door” (a phrase coined by University of Wisconsin law professor Michael Smith) or merely increasing the number of drug courts in existence. Instead, participants seemed eager to distill the “active ingredients” or “essence” of the drug court model—and to encourage the spread of drug court principles as opposed to expanding the number of drug courts. Adele Harrell, a researcher at the Urban Institute who has written extensively about drug courts, put it best when she suggested that success for advocates might lie in drug courts fading “out of existence as their tenets become embedded in practice.”

The desire to spread elements of the drug court approach—and not replicate drug courts per se—has some important implications. First and foremost, it means that advocates must identify which elements of the model that they wish to see incorporated into the broader court system. This is a more difficult task than it might at first appear. Participants at the roundtable articulated a number of core drug court elements. For Utah state court administrator Gary Becker, the essence of drug courts is the creation of new partnerships between courts and state treatment agencies. For law professor Smith, it is “the idea that sentencing is a responsibility of the court over a long term.” San Diego Judge James Milliken and Indianapolis prosecutor Scott Newman cited concrete goals: providing judges with more comprehensive assessments and more sophisticated management information tools to guide sentencing decisions and help track offender compliance with court orders. And for New York Deputy Chief Administrative Judge Joseph Traficanti, who’s leading an ambitious statewide effort to create drug courts in each of New York’s 62 counties, the goal is to make it possible “for any defendant, in any jurisdiction, to go into treatment.” The fact that participants in the roundtable (most of them drug court proponents) were unable to reach consensus on the core elements of the drug court approach suggests that more work has to be done before advocates attempt to mainstream them.
In addition to tackling conceptual problems, participants also addressed strategy questions. Participants returned again and again to the challenge of institutionalizing the drug court model without dampening the spirit of innovation that led to their creation in the first place. “[P]eople don’t respond well to being told, ‘You have to do this,’” said Lisbeth Schorr, an expert on social policy innovation based at Harvard University. She added: “You can’t mandate belief in a program.” Indianapolis prosecutor Scott Newman agreed, arguing that key leaders must have “[t]ransformative personal experiences” if they are to buy into the drug court idea.

Roundtable participants repeatedly articulated the tension between the need to ensure quality control as an idea goes to scale and the imperative to preserve local flexibility. One way this was expressed was the effort to distinguish “institutionalization” from “bureaucratization.” “Bureaucracy creates a coercive style of leadership that forces other people to act in a certain way,” Scott Newman said, while “institutionalization is a motivational style of leadership which gets people inspired.” Many participants argued that the best way to promote institutionalization without bureaucratization was to create an intermediary entity that would provide the technical assistance and support necessary to ensure the quality of implementation at individual sites. This would help drug courts “move from a system based on charisma to one based on standards and principles,” without sacrificing local control, according to Columbia University law professor Michael Dorf.

Participants also highlighted the need for drug courts to create new partnerships or strengthen existing ones as they mature. One example cited was the need to work with state drug and alcohol agencies, which not only manage large sums of money (from federal health and human service grants) but also have responsibility for guaranteeing the quality of treatment services. Going to scale will be “next to impossible” without involving the commissioners of state alcohol and drug agencies, said Valerie Raine of the Center for Court Innovation.

A second area for potential collaboration are state legislatures, which in many places are eager to create a statutory framework (and provide funding) for drug courts. Partnerships with state legislatures can either help or hinder drug courts, as the examples of Utah and Indiana suggest. While Utah provided a statutory framework that allowed federal treatment resources to be redirected to drug courts—clearly a positive development—in Indiana, pending legislation seeks to codify how drug courts are defined, a development that many feared would severely limit local flexibility. This suggests that drug court advocates will have to proceed cautiously in working with legislatures.

In addition to airing out conceptual and strategic challenges, participants shared their reservations about institutionalization—and in particular its potential unintended consequences. “Today’s innovation is tomorrow’s conventional wisdom,” warned Michael Smith. “I think we need to find a way to go to scale that’s open to constant change, revision and discovery. Otherwise, you just make it more difficult for the next innovator.” In that vein, Adele Harrell cautioned against “overselling the promise” of drug courts, a shortcoming of past criminal justice innovations that have come and gone.

Despite these reservations, participants were cautiously optimistic about the prospects for institutionalization, pointing out that drug courts have already made significant strides forward. Perhaps the most heartening news of the day came from Lisbeth Schorr. Schorr, who has spent the greater part of her professional life thinking about government innovation, remarked that in discussing drug court institutionalization, participants had already reached an unusual level of sophistication. “[T]his is a far better, more rigorous discussion than I am used to hearing,” she said.

What follows is an edited transcript of the discussion, which took place over six hours in a conference room in Washington, D.C.

**SETTING THE STAGE**

**Francis Hartmann:** Where are drug courts in the “going to scale” process?

**Greg Berman:** I want to read two quotes that I think speak directly to that question. The first is from John Goldkamp, a researcher at Temple University, speaking about drug courts: “What we have now is
not a bunch of little hobbies that judges have in isolated jurisdictions, but rather a paradigm shift that larger court systems are trying to come to grips with. The question isn't, 'Are the courts supposed to be doing this?' It's, 'What are you going to do about it?' How does it fit in?' It's no longer a question of whether this should be invented." The second is from Michael Smith, who's here with us today. He says, "It seems to me there are two different ways to go to scale. One is to use problem-solving courts as laboratories to improve the way they do business. The other is to build a new system devoted to proliferating problem-solving courts. That choice may turn out to be critical." These two statements underline the theme for today's conversation—an acknowledgment that drug courts are attempting to move from the margins of the court system to the mainstream. I think the challenge is: how do you go to scale in a way that is thoughtful and deliberate?

Marilyn McCoy Roberts: When the Department of Justice got into the business of supporting drug courts in 1994, there were about 30 or 40 drug courts around the country. Today we're nearly to the 800 mark and have quite a few more—400 or so—in the planning stages. What's remarkable is that drug courts, which initially didn't attract much interest from court administrators, have now been embraced by the leadership of court systems around the country.

James Milliken: One problem that going to scale will hopefully address is the exclusion of populations that need our services the most. For example, federal and state grants for juveniles exclude kids who have been violent or who have gang associations. Now that we know the medicine works, we need to expand the system so that we can provide the medicine to everybody who needs it.

Joseph Traficanti, Jr.: I think institutionalization does mean, at least in part, the creation of more drug courts. I see it as a fundamental issue of fairness: two people arrested in different places for the same crime should have the same opportunity for treatment.

Michael Smith: For me, the question is: what are we taking to scale? The answer can't simply be to put more signs on the door. We have to know what the active ingredient of innovation is. Otherwise we won't be able to spread the idea.

ANALOGIES
Hartmann: Drug courts are not the first criminal justice innovation to attempt to go to scale. What have we learned from other efforts in the field?

Smith: Let me offer two examples. The first is pretrial diversion programs developed in the 1960s. Public and professional opinion supported this idea, and it quickly became the norm. But nobody had really done the research to understand whether the program had the desired effects. Ten years later, when we finally did the research, we found that the diversions made no difference in outcomes. The second example is point scales for the bail system. In the 1980s, I was visiting another state and came under attack for a point scale they'd instituted that wasn't working. I was told they'd come up with the scale based on an article I'd written about the Manhattan bail project in 1960. I said, "It's 1980. This is a different state. And we abandoned that scale in 1970 because we found it had no empirical basis. What are you doing?"

John Stuart: As a defender, I can tell you that my clients were being denied bail based on that point scale all through the 1980s in Minnesota. It's unfortunate that we didn't have this conversation 20 years earlier!

Smith: The lesson I'm trying to highlight here is the danger of replicating a specific model to another context. If you want to go to scale, you've got to know why, and you've got to be very careful to avoid harm creation.

Hartmann: Mike Scott, what can you tell us about your experience with problem-oriented policing?

Michael Scott: We've had some success in getting police officers to do beat-level problem-solving, using street savvy, common sense, and some rudimentary statistical analysis to target local concerns. We've had less success with higher-level problem-solving, applying more rigorous research methods to study a class of problems experienced across a whole jurisdiction. A police agency's enthusiasm for problem-solving tends to wax and wane with the arrival and departure of individual champions within the department—when the champions leave, the innovation disappears as well. Many people still cling to fairly simple notions of what police departments can do, with no sense of what a broad range of responses could really be possible. Problem-oriented policing remains optional; it has not been institutionalized. One reason this is so is that there is no external constituency saying, "Give us more of that problem-solving stuff."

Hartmann: Is there a tension between trying to turn each police officer into a mini-problem-solving unit himself versus trying to arm departments with better analytical and research tools to problem-solve on a higher level?

Scott: So far, the funding has been geared toward line officers who want to go forth, do good, and interact with the community. Unfortunately, that's a heck of a lot more politically appealing than the idea of hiring a bunch of research analysts who work back at headquarters to study community problems. And I think it's fair to say that line-level cops have held up their end of the problem-oriented policing bargain a lot better than the police executives have. In fact, we have line officers to thank for much of the replication that we have seen. Policing is a profession that relies heavily on oral tradition, cops learn from talking to one

"One problem that going to scale will hopefully address is the exclusion of populations that need our services the most. Now that we know the medicine works, we need to expand the system so that we can provide the medicine to everybody who needs it.” — James Milliken
We've come to the conclusion that stories are the best training tool—so at our annual conferences, cops spend the bulk of their time sharing examples of what they're doing. If you can get enough of the individual stories out, you can build a critical mass of support for a new idea like problem-oriented policing—or drug courts, for that matter.

Hartmann: Are there other criminal justice analogies out there?

Stuart: To me, the inescapable historical analogy is the juvenile court movement, which succeeded spectacularly in going to scale. The first juvenile court opened in 1899; every state had one within about twenty years. The most prominent problems with juvenile courts—as they became widespread and institutionalized—were lack of due process, poor fact finding, indefinite jurisdiction over people based on a small offense, and idiosyncratic judging. It was a lawless court. As we develop drug courts, we need to keep this experience in mind.

Smith: It might also be useful to bear in mind that in its earlier days, the juvenile court was a mechanism thought to be useful in controlling immigrant populations. It was a strategy for dealing with groups that were marginalized, and making sure they stayed that way. If drug courts are falling into that part of the pattern, we may want to be very careful to leave this form of social control behind when we take them to scale. One way to avoid that problem is to bring drug courts to white university towns and suburbs, thereby legitimizing a system which is currently so pointed at African-American youth.

Scott Newman: I have a different take on the issue of race. What we've found is that young African-American males are opting out of drug court at a disproportionate rate; they are more likely to say, “I'll do my time instead.” They simply aren't as fearful of the conventional system.

Hartmann: We've brought some outsiders to this discussion—experts who have been involved in taking innovative programs to scale in fields other than criminal justice. What have you heard so far? What lessons can you draw out for us?

Lisbeth Schorr: I see five key lessons regarding how to go to scale. The first is the need to distill the essence of an innovation. Unless you spell out what you're doing with some specificity, you can't spread the model. Another lesson is attention to those elements that don't travel easily from site to site. In many programs I've looked at, one of the essential components is the practitioners' belief in what they're doing. You can't mandate belief in a program when you replicate or systematize it, but you must take belief into account through training. The third point is recognizing the importance of context. In my experience, the biggest mistake of replicators is thinking that because their program is wonderful, the surroundings won't destroy it when they plunk it down in a new place. But the surroundings do destroy the program unless you provide high-quality training. The context is the most likely saboteur of the spread of good innovations. Part of the context that can undermine innovation is the demand for evidence, and what that demand does to the innovation itself. The demand for proof by funders, elected officials, and others has led practitioners to look for outcomes that are easy to measure rather than the outcomes they're really after. The fourth point is that practitioners should arm themselves to look for patterns rather than proof. As you begin to notice patterns that reappear when you have success, and as those observations accumulate, you can start to offer some very persuasive evidence, if not “proof,” of what works. Finally, almost all successful scale-up efforts I've seen have had an intermediary organization to provide legitimization and to articulate the essence of the program to be replicated. The importance of an intermediary cannot be underestimated.

Bernardine Watson: At Public/Private Ventures, we're very interested in alternative strategies for working with high-risk youth. We've developed three kinds of criteria for determining whether a program is ready for replication. The first is the program itself, and whether it actually addresses the recognized need or problem. Clearly this isn't an issue for drug courts. The second is whether it does so through methods that are considered credible by the field. Finally—and this is the thorny area that Lee Schorr talked about—we ask whether the program has proof of success and measurable results. The social service field has set a very high bar for how to prove that a program works: often the field requires a random assignment study to determine success. But very few programs can muster this kind of data. We were able to do it in the case of Big Brothers, Big Sisters, an organization with a well-defined model, a name brand, and funders willing to invest the money necessary for long-term and very expensive research.

Schorr: In the last 20 years, the rhetoric in the field has really improved. Everyone knows what they're supposed to say about their program. But that doesn't mean they're actually doing it. Another function that an intermediary can play is to go beyond rhetoric in analyzing what makes a program work.

ASSETS

Hartmann: Are there reasons to be optimistic about the prospects of drug court institutionalization? Do courts bring any particular assets to the business of going to scale?

Eric Lane: The evolution of unified state court systems is one important asset, because it has allowed the judiciary to become a real branch of government in the sense that it can assign resources, delegate responsibilities, and make things like drug courts happen that never would have been possible 25 years ago.
**“We . . . know from public opinion surveys that while citizens may not be aware of what a drug court is per se, they do approve of the model’s basic elements.”**

— Greg Berman

**Hartmann:** I would nominate a few more assets. One is that the judicial system is independent. Unlike police departments, the courts don’t have mayors or the city council looking over their shoulders. They have much more freedom and power than almost any part of the executive branch. A second asset is that judges think in terms of precedent; they’re willing to be guided. Finally, drug courts have received a lot of support and encouragement from the federal government.

**Kevin Burke:** Another asset, I think, is the willingness of drug courts to be evaluated. People are no longer prone to make policy by anecdote.

**Stuart:** I think drug courts appeal to people’s desire to have hope. We have seen an awful lot of criminal justice programs in recent years that have not worked and have become more and more punitive. With drug courts, people see that we’re not using leeches to cure disease: we’re switching to antibiotics. The mainstream judicial system is still using leeches.

**Newman:** I would point to the favorable newspaper articles and widespread community support for their drug courts.

**Berman:** Whether it’s a community court like Red Hook or a drug court or some other kind of innovation, I think it’s possible to embed the new values we’re talking about today in architecture, technology, and research benchmarks—all kinds of things other than personnel. You’ve got to try to inoculate yourself against the inevitability of the first generation leaving.

**Valerie Raine:** Until recently, drug courts have been created from the grassroots up, thanks to entrepreneurial judges and attorneys. When drug courts are imposed from the top down, how will that change things? As you go to scale, do you take drug courts and make lots of them, thereby retaining some control over the process? Or is what we’re seeking a new approach to judicial conduct? In which case, shouldn’t our efforts be focused on inculcating this approach into judicial decision-making in every courtroom? Of course, the risk is losing control and having what was once an innovative approach become just another case-processing mill. These are difficult questions that don’t have any easy answers.

**Schorr:** You’re right to be aware that people don’t respond well to being told, “You have to do this.” I would be very leery of trying to impose the idea of drug courts on people who don’t want to implement them. But it’s a very different thing to say, “You have to do what is necessary to implement an idea you’ve already endorsed.” You always have to invent some part of the innovation on site. You can’t manufacture the desire to create something like a drug court from above. That’s a recipe for disaster.

**Roberts:** This is true. You can talk to almost any drug court professional in the country, and be told that there have been favorable newspaper articles and widespread community support for their drug courts.

**Berman:** We also know from public opinion surveys that while citizens may not be aware of what a drug court is per se, they do approve of the model’s basic elements. In very high numbers, they like the idea of judges reaching out to clinicians and asking their advice on drug cases and they approve of court-mandated treatment as opposed to incarceration.

**SPREADING THE WORD**

**Hartmann:** Last summer I visited the Red Hook Community Justice Center, where it’s easy to see that all the people who work at the court are true believers in what they’re doing. My question is what happens when the true believers leave? Can we talk about how to create and perpetuate local buy-in?

**Berman:** It all goes back to training. It can be done. The Department of Justice assembles training programs to help people plan drug courts, and we’ve seen the different stakeholders arrive and shake hands with each other because it’s the first time they’ve met. Some are longtime enemies. We watch them go through a process of learning to appreciate each other’s point of view, and developing the rudimentary skills of behaving like a team when they go back home.

**Newman:** I was part of one of those training teams several years ago. I was the hard-hearted prosecutor; our presiding judge was the hidebound traditionalist. I bonded with our drug court judge when I found out he snores very loudly on airplanes. Even workshop travel was part of the bonding process! I think transformative personal experiences among key figures are essential to institutionalization.

**Watson:** All the training in the world won’t make a difference if the site you’ve chosen can’t operate the program. In trying to spread drug courts, I think you have to be careful to pick places where the capacity exists to implement a new program.

**Schorr:** I’m not sure I agree with you on this point. I think you start by looking at places that really need the innovation and then try to create the infrastructure to support it. I would choose a place that’s needy over a place that’s ready to innovate.

**CONCERNS AND OBSTACLES**

**Hartmann:** We’ve talked a lot about how you go to scale and how you spread the word about drug courts. Before we go any further, I want to make sure everybody’s had a chance to air their concerns about the institutionalization of drug courts. What makes you nervous here?
**Smith:** I’d be concerned about an over-reliance on arrests as a way of addressing drug abuse. There’s an infinite supply of addicted persons out there. The more capacity you create, the more cases you’re going to have. There may be no way to get ahead of demand. I worry that in creating drug courts, we may be holding ourselves back from coming up with other solutions to the problem.

**Newman:** I don’t really share your concern. The idea that a judge in a drug court would recruit the police into gathering up fodder for his treatment program and get them to abandon opportunity deprivation or some other strategy doesn’t strike me as real. In Indianapolis, we do both.

**Adele Harrell:** My big concern is that drug courts don’t fall into the trap of overselling their promise, something I think we have to guard against very carefully.

**Michael Dorf:** I agree. What makes us think a court can solve a complicated social problem like drug abuse? The 1960s and ‘70s were the high water mark of optimism in the judiciary’s ability to address problems like prison overcrowding, school segregation, and a lack of mental health treatment services. What we’ve seen in the last 20 years or so is growing skepticism in judges’ ability to address broad social issues.

**Roberts:** I think we have enough drug courts. What we need are more drug court clients. Most drug courts are fairly small experiments. Are they dealing with all the people they could be?

**Newman:** I have a public safety concern about allowing more serious criminals to be eligible for drug court. I get letters from inmates asking that I let them out early so they can continue their walk with Jesus. My feeling is that Jesus can walk in a reformatory just as well as outside, and so too can drug treatment.

**Burke:** I think there’s a need to continue to explain to the 25,000 trial judges around the country that a drug court is an enjoyable assignment. Without that buy-in, you won’t be able to build momentum to expand drug courts. Judges also need cover, because this is a profession that doesn’t encourage risk-taking and falling flat on your face.

**Dorf:** Another potential problem with going to scale is that drug courts today operate by penalty default—they use the threat of incarceration to get people to enter the program. If you go to scale, you take away that option. Entering drug court would no longer be voluntary.

**Smith:** I have a slightly different take on this question. Today’s innovation is tomorrow’s conventional wisdom—the standard operational procedure that’s desperately in need of change. I think we need to find a way to go to scale that’s open to constant change, revision, and discovery. Otherwise, you just make it more difficult for the next innovator.

**Lane:** That’s a very important point. I think drug courts are going to fail at some point. The question is how much good we do within that time frame and whether we’re preparing an end game for the next innovation to come forward.

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**TREATMENT**

**Hartmann:** Expanding the drug court approach will inevitably require new connections with the treatment community. What kind of challenges are presented by partnerships with treatment providers?

**Burke:** Accountability is one challenge. Drug courts hold the defendants accountable, but don’t always do a good job of holding the treatment provider accountable.

**Harrell:** I agree. I think we have a real issue of quality control. When you start dealing with several thousand people instead of several hundred, you have to figure out how the courts can set up the right mechanisms to ensure treatment quality, and that treatment programs are holding offenders accountable. We’re facing a serious problem with drug treatment capacity right now; some programs have a staff turnover rate of 50% each year.

**Chico Gallegos:** One major problem with ensuring effective drug treatment is that many assessment tools don’t take into account the specific cultures and populations drug courts are dealing with. Cultural competence is important among both treatment providers and court personnel.

**Roberts:** Another issue is the question of where treatment begins and ends. Drug courts have expanded the concept of treatment beyond its traditional definition. With drug courts the goal is not simply to get participants sober, as it might be in a straight-up treatment program, because then you just end up with a sober criminal. The idea is to work on the behavior that is problematic to the community. So for drug courts the goal is not just sobriety but also law-abiding behavior.

**Harrell:** Flexible thinking about treatment is key. Over the next few years, our ideas are going to change as knowledge in the field grows. The process of being able to react to and incorporate these changes in the definition of effective treatment should be part of how we think about taking drug courts to scale.

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**LEADERSHIP**

**Hartmann:** Where is the leadership going to come from to expand drug court programs? Can the judiciary do it by itself?

**Daniel Becker:** In Utah the leadership for drug courts originates from a judicial council that first put in place certain broad definitions—one being that our drug courts would be post-plea, and another being that treatment would remain an executive branch function. Those definitions helped transform the
In five years, I would like to see—in every state and across the country—the resources available for any defendant, in any jurisdiction, to go into treatment. This can be achieved . . .

— Joseph Traficanti, Jr.

drug court judge from rogue status to legitimacy. More and more judges have since begun to express interest in drug courts. We are now reaching a critical mass. We have enough people engaged in the programs that we need much more intensive resources than what we’ve been working with up to this point. In our state, that need has meant bringing the legislature into play—and as the state becomes more involved in the administration of drug courts, a tension has developed between accountability and real innovation.

Hartmann: How valuable is something like the endorsement of problem-solving courts by all 50 state court chief judges and court administrators in convincing more people that the model is worth the investment?

Burke: The fact of the matter is that the Conference of Chief Justices is a pretty conservative group. This may be the first time they’ve passed an endorsement that is pro-active in nature, and it has been a great help in getting people’s attention. As soon as it was passed, I went back to our judicial council in Minnesota and was able to argue that it was time to move our drug courts away from “pilot” status.

Stuart: Judicial support is obviously key, but it seems inevitable that state court systems will have to devise a strategy for approaching the state legislature. Federal grant money alone won’t bring drug courts to scale over the next five years.

William Vickrey: In California, we have been fortunate to get the legislature to fund a separate committee to serve as the institutional voice on the planning, advocacy, and guidance of drug courts. We also have legislation, initiated by the courts, that created a joint committee of the Department of Alcohol and Drugs and the judiciary to oversee drug court funding.

Becker: In Utah, we’ve passed a statute allocating 13% of every dollar of state funding dedicated to drug court to general court operations—to be spent by the judiciary, and 87% to testing, treatment, and case management—to be spent by the Department of Human Services. I predict that states that successfully redirect federal money for substance abuse and treatment into the drug court arena will be the frontrunners in drug court institutionalization.

Raine: That’s a critical issue. Health and Human Services block grants bring huge amounts of funding to state alcohol and drug agencies. Going to scale will be next to impossible without involving the commissioners of these agencies.

Hartmann: Scott, if you were the czar of drug courts in Indiana, what would you want from your state legislature?

Newman: I think it’s important to be careful how you define what’s being taken to scale. A bill in Indiana has proposed codifying the ten components of drug courts into law. While I understand the urge, I don’t think it’s appropriate. I would instead structure the law to create an intermediary body that would help certify drug courts as well as provide incentives for their implementation. When Indiana created public defender commissions, for example, we allowed counties to tap into additional state funds if they had established a legitimate program. We preserved for each county the ability to create, within broad parameters, qualify for matching funds, and work with an intermediary that was responsible for articulating standards. This approach avoids some of the problems of bureaucracy.

Dorf: On that note, I think one of the central challenges of going to scale is to have “bigness” and coordination without bureaucracy—and that’s where the idea of an intermediary comes from. An intermediary can assess what’s happening in the field; gather detailed, accurate information from local players; develop some sense of what the best practices are; and relay that information back to the players. This is the kind of institutional architecture I think you need if you want to move from a system based on charisma to one based on standards and principles.

Hartmann: Lee, let me put you on the spot. Institutionalization versus bureaucratization. What’s the difference?

Schorr: If I knew, I would have written another book about it! That’s a very hard question to answer. The term bureaucratization carries a negative connotation today that it didn’t have in the Progressive Era. I think when we use a word like institutionalize, what we’re suggesting is that we find the time and opportunity to allow for local variation and to move away from excessive rigidity.

Newman: To me, bureaucratization creates a coercive style of leadership that forces other people to act in a certain way. Institutionalization is a motivational style of leadership, which gets people inspired and allows them to build their own teams and create programs with some flexibility. You have to move beyond that to a system less dependent on leadership, or you’ll end up with a coercive situation in which other people feel they have to act a certain way. I think we all favor the kind of leadership that allows people some flexibility.

LOOKING AHEAD

Hartmann: Where do you want drug courts to be in five years, and what single significant investment would you make to get them there?

Traficanti: In New York, my goal is to disappear by 2003, leaving in place the resources and infrastructure necessary for local sites to carry the drug court idea forward. In five years, I would like to see—in every state and across the country—the resources available for any defendant, in any jurisdiction, to go into treatment. This can be achieved by making it possible for judges to electronically access information from the bench, including available program slots and available beds.
Becker: I’d like to see less emphasis advance the ball on institutionalization.

Smith: I would like to see every court in loftier goal of rebuilding communities.

Gallegos: concerned leaders of the community.

officers, but also chief lawyers who help more than just the chief law enforcement broad role to understand their roles more

Scott: I would love criminal justice practitioners to understand their roles more broadly than they currently do. Prosecutors should see themselves as more than just the chief law enforcement officers, but also chief lawyers who help us think about community standards and public safety. Judges should see themselves not just as decision-makers but as concerned leaders of the community.

Gallegos: I’d like to see evidence that drug courts have made inroads in the broader, loftier goal of rebuilding communities.

Stuart: I would like to see every court in my state thinking of itself as a substance abuse court, and operating with the kind of consciousness about these issues that we’ve been talking about today. The investment to be made is in the time needed to talk about what the justice system is really doing and whether it's working.

Harrell: I share the vision of making this a way of doing business across the justice system, and maybe even fading drug courts out of existence as their tenets become embedded in practice.

Schorr: I feel very envious of all of you because this is a far better, more rigorous discussion that I am used to hearing. And as I walk away from this table, I think what's most exciting is the idea that drug courts open doors for the court system in general to become more problem-solving, in terms of thinking more broadly about problems and solutions.

PARTICIPANT BIOGRAPHIES

Daniel Becker has been Utah’s state court administrator since September 1995. He previously served in various positions in the North Carolina Administrative Office of the Courts from 1985 to 1995. Becker is a member of the board of directors of the Conference of State Court Administrators and received a Distinguished Service Award from the National Center for State Courts in 2001.

Greg Berman is the director of the Center for Court Innovation, a public-private partnership in New York dedicated to enhancing the performance of courts. The Center functions as the New York state court's research arm, while also disseminating information about court innovations nationally. One of the Center’s founding members, Berman has overseen the planning of several problem-solving initiatives, including a community court, youth court, community service program, and community mediation center. He is currently working on a book about problem-solving justice, to be published by the New Press.

Kevin Burke is the chief judge of Hennepin County, Minnesota, the largest judicial district in the state, and an adjunct professor of law at the University of Minnesota. Before becoming a trial court judge, he worked in private practice and as an assistant public defender. For many years he chaired the Minnesota State Board of Public Defense, where he was one of the leaders in the effort to improve and expand the state’s public defender system. He received the National Center for State Courts’ Distinguished Service Award in 2002 in recognition of his work with chemically dependent defendants, corrections, and the public defender system.

Michael C. Dorf is vice dean and professor of law at Columbia University School of Law. With Laurence H. Tribe, he is the coauthor of On Reading the Constitution (Harvard University Press, 1991). With Charles F. Sabel, he is currently working on Democratic Experimentalism, also to be published by Harvard University Press. A graduate of Harvard College and Harvard Law School, he served as a law clerk to Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit and to Justice Anthony M. Kennedy of the United States Supreme Court. After his clerkships, he joined the law faculty of Rutgers University (Camden) in 1992, where he remained until 1995, when he moved to Columbia.

Chico Gallegos has traded his trial practice in New Mexico for a position as staff counsel and chief financial officer of the Native American Alliance Foundation, a nonprofit organization that promotes and advocates for the establishment, development, and enhancement of tribal justice systems and tribal programs that serve as important expressions of sovereign, self-governing nations. In a nationally publicized case, Gallegos appeared before the Supreme Court of New Mexico in January 2000, successfully arguing the right of non-English-speaking citizens of New Mexico to sit upon juries. He has served on the executive board of the New Mexico Association of Drug Court Professionals and the board of the National Association of Drug Court Professionals.

Adele Harrell, Ph.D., is director of the program on law and behavior at the Urban Institute. She has been actively engaged in studies of drug abuse since 1975. She is currently evaluating Breaking the Cycle, a program linking court and treatment services for drug-involved defendants and testing the validity of a risk prediction instrument for use by pretrial services; she recently completed an evaluation of the Brooklyn Treatment Court services for female offenders; she previously studied the impact of the Children at Risk Program, a comprehensive drug prevention program for youth 11 to 13 and conducted a five-year experimental evaluation of the District of Columbia drug court.
Francis X. Hartmann is executive director and senior research fellow of the program in Criminal Justice Policy and Management at the John F. Kennedy School of Government at Harvard University. His current research focuses on how criminal justice agencies and communities work together to produce public safety and on partnerships between communities and police that have produced tangible results. His Kennedy School courses focus on criminal justice policy. Previously, Hartmann was director of research and evaluation for New York City's Addiction Services Agency, director of the Hartford Institute of Criminal and Social Justice, and a program officer at the Ford Foundation.

Scott C. Newman served as the elected prosecutor for Marion County, Indiana for eight years beginning in 1995. While in office, he took an aggressive stance toward crime, resulting in sharply curtailed plea bargaining and a record number of jury trials and convictions. In addition, Newman initiated many new services for crime victims, including the creation of the "Center of Hope" program at four area hospitals. This program addresses the emotional, medical, and legal needs of sexual assault victims outside the chaotic atmosphere of the emergency room. Before taking office as prosecutor, Mr. Newman served as an assistant U.S. attorney for the Southern District, Indiana. He is now in private practice in Indianapolis.

Eric Lane is the Eric J. Schmertz Distinguished Professor of Public Law and Public Service at Hofstra University School of Law, where he has been on the faculty since 1976. In addition to teaching and writing in the areas of legislative process, civil procedure, statutory interpretation, and state and local government, Lane has a long history of involvement in government reform and public service. From 1993 to 1995, he served as counsel to the New York State Temporary Commission on Constitutional Revision, and from 1987 to 1989, he was the executive director and counsel of the New York City Charter Revision Commission. Lane is a trustee of the Vera Institute of Justice and the Neighborhood Defender Service of Harlem.

Valerie Raine is the director of drug treatment programs at the Center for Court Innovation. She assists the Honorable Joseph J. Traficanti, Jr., in developing drug courts across New York State, and serves as the chairperson of Judge Traficanti's Curriculum and Training Committee for the New York State Courts Drug Treatment Program. She also oversees numerous national technical assistance projects that are supported by the Department of Justice. From 1996 to 2000, she was project director of the Brooklyn Treatment Court, where she helped develop and manage New York City's first drug treatment court. Previously, she worked for the Legal Aid Society, Criminal Defense Division, in Kings County, where she was appointed attorney-in-charge in 1994. She is a member of the Association of the Bar of the City of New York, where she sits on the Council on Criminal Justice. Raine received a B.A. from Hunter College in 1977 and a J.D. from the University of Virginia in 1982.

Marilyn McCoy Roberts is special advisor to the administrator of the Office of Juvenile Justice and Delinquency Prevention. Before that, she served as director of the Drug Courts Program Office at the United States Department of Justice. Under her direction, that office administered a drug court grant program and provided financial and technical assistance to drug courts. Roberts has staffed and directed national scope research projects and has written on a number of court administration topics, including legislative relations, and substance abuse and gender bias in the courts. She is a fellow of the Court Executive Development Program of the Institute for Court Management of the National Center for State Courts.

Lisbeth Schorr is a lecturer in social medicine at Harvard University and director of the Harvard University Project on Effective Interventions. She is also the author of two books—Common Purpose: Strengthening Families and Communities to Rebuild America (1997) and Within Our Reach: Breaking the Cycle of Disadvantage (1988)—related to improving the lives of at-risk children. Through her many experiences with social policy and human service programs and leadership with national efforts on behalf of children and youth, she has become an authority on "what works" to improve the future of disadvantaged children, their families, and their communities.

Michael Scott is an independent police research and management consultant based in Savannah, Georgia. He was recently a visiting fellow with the United States Department of Justice, Office of Community Oriented Police Services. Scott was formerly the police chief in Lauderhill, Florida, where he founded its municipal police department in 1994. Prior to that, he was a special assistant to the police chief for the St. Louis Metropolitan Police Department, where he guided the implementation of problem-oriented policing. He has also served as a senior researcher at the Police Executive Research Forum, as a legal assistant to the New York City Police Commissioner; and as a police officer in Madison, Wisconsin.

Michael Smith has been a law professor at the University of Wisconsin since 1995. He was director of the Vera Institute of Justice from 1978 to 1994; in 1974, he had established a Vera office in London and served as its director until 1977. Previously, he was a journalist for Time-Life, a freelance writer, and a litigator. Recently he served on the National Commission on the Future of DNA Evidence (chairing its working group on legal issues), the editorial board of Crime and Justice, and the advisory board of the Federal Sentencing Reporter. His recent research and writing have been concerned with the law and practice of sentencing and corrections.

John Stuart is the Minnesota state public defender, supervising public defense throughout Minnesota. Prior to assuming this post, he was assistant public defender for Hennepin County, Minnesota, representing approximately 400 clients a year in adult felony and juvenile court cases, and
trying roughly 200 cases over a 12-year period. He has served in various capacities to improve the criminal justice system in Minnesota, including on the Supreme Court Racial Bias in the Courts Task Force, the Supreme Court Juvenile Justice Task Force, and the Juvenile Code Revision Task Force. Stuart is a past vice president of the National Legal Aid & Defender Association, and he is active in the both national and Minnesota associations of criminal defense attorneys. Stuart is co-author of Felony Sentencing in Minnesota and has written several articles on criminal procedure and juvenile justice.

Joseph J. Traficanti, Jr. has served as deputy chief administrative judge of the State of New York since 1991. In October 2000, he was appointed the court system's first director of court drug treatment programs, in which capacity he oversaw the implementation of the judiciary's comprehensive substance abuse treatment initiative with the creation of specialized courts to exclusively target addicted offenders. Additionally, Traficanti serves as Ulster County surrogate and an acting supreme court justice in the Third Judicial Department. He has also served as acting Presiding Judge, New York State of Claims, and chief assistant district attorney in Ulster County. Traficanti is a graduate of Siena College and the New York Law School and has attended the National Judicial College in Reno, Nevada.

William C. Vickrey is the administrative director of the California State court system, a position he has held since 1992. Prior to that, he was the state court administrator for the Utah court system and the executive director for the Utah State Division of Youth Corrections. A past president of the Conference of State Court Administrators, Vickrey received a Leadership 2000 Award from the National Association of Drug Court Professionals for his vision and leadership in the development of drug court programs in California. In 1995, he received the Warren E. Burger Award, one of the highest honors from the National Center for State Courts, for his significant contributions to the field of court administration. He also received the James Larson Award from the Utah Corrections Association in 1984 for outstanding contributions to that field.

Bernardine H. Watson is executive vice president and director of civil sector programs at Public/Private Ventures, a national, nonprofit, policy research organization based in Philadelphia, Pennsylvania. She is responsible there for developing, funding, implementing, and overseeing projects in the youth development and community building fields. Her work has spanned a number of project areas, including mentoring, young fathers, national service, juvenile justice, youth employment, and faith-based initiatives. For six years, she served as the director of Public/Private Venture's Community Change for Youth Development initiative.
Concluding a Successful Settlement Conference:  
It Ain’t Over Till It’s Over

Morton Denlow

Have you ever attended a settlement conference and come away thinking the case was settled, only to later find out that your adversary has a different understanding of the settlement terms than you and your client? This is a frustrating experience, but is completely unnecessary. Careful lawyers and judges prevent such confusion by ironing out the details of a settlement at the time an agreement is reached. Leaving specific settlement terms unresolved to a later date may result in an unenforceable settlement or possible litigation to enforce the settlement. 1

Settlement conferences play an important role in the resolution of litigated disputes. Judges and mediators spend numerous hours and even days working with parties to bring about a settlement. With only 2.2 percent of all federal civil cases going to trial, settlement is the predominant means by which cases are resolved. 2 Although most cases are settled by the parties without direct involvement by the court, numerous cases are settled with the assistance of the court or mediators at a settlement conference or court-sponsored mediation.

This article explains the steps parties and the court should take to insure an enforceable settlement. By paying careful attention to all necessary issues for resolution at the time a settlement is reached, parties can prevent future misunderstanding and conflict over the settlement terms. The principal issues parties face at the time a settlement is reached include 1) monetary terms; 2) scope of releases; 3) confidentiality of the settlement terms; 4) disposition of the litigation; 5) enforcement of the settlement; and 6) documenting of the settlement. This article explores these issues and strongly suggests that parties discuss, resolve, and memorialize the understandings reached at the settlement conference or as soon thereafter as is practicable in order to minimize later problems. A settlement checklist is provided for parties to use at the conclusion of the settlement conference. The use of a settlement checklist can assist parties and the court in accomplishing this goal.

I. MONETARY TERMS

Most settlements involve payment of money by the defendant to the plaintiff. At the time a settlement is reached, the parties agree on how much is to be paid. This is generally a straightforward pronouncement such as, defendant agrees to pay plaintiff $100,000. However, there are a number of additional monetary issues, which should also be discussed and resolved. First, parties should agree to the timing of the payment and whether payment will be made at the time of the exchange of the executed settlement documents or some other date. Second, parties should agree as to whether payment will be made in a lump sum or installments. Third, if the settlement contemplates installment payments, the parties should discuss how the agreement will be enforced in the event of default. Will the court retain jurisdiction to enforce the settlement or will a separate action be necessary? 3

Fourth, the parties should also agree whether the settlement amount includes plaintiff’s attorney fees and in whose name to issue the check. Alternatives include payment to the attorney’s client trust account, to the attorney and client jointly, or directly to the client.

Fifth, the parties should discuss how they intend to treat the payments for tax purposes. Does a portion of the settlement proceeds constitute wages for which withholding taxes will be taken? Will the defendant be issuing an IRS 1099 form and if so, in whose name and tax ID number? The characterization of the payments in the settlement agreement can have significant tax implications. For example, the circuits are split on the issue of whether a contingent fee is part of the client’s taxable income. 4 The success of a settlement agreement may depend on a thorough discussion and consensus as to payments in light of their inherent tax implications. 5

Sixth, parties should verify whether there are any lien claims to the settlement proceeds and if so, whether and how they will be satisfied. Defendants and their insurance carriers

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Footnotes

1. Higbee v. Sentry Ins. Co., 253 F3d 994, 999-1000 (7th Cir. 2002) (no settlement was reached where three material issues were left unresolved at settlement conference with court).


3. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381 (1994) (holding that where case is dismissed, court loses jurisdiction to enforce settlement unless compliance with settlement is made part of the dismissal order or the court specifically retains jurisdiction to enforce the settlement contract).

4. Kenseth v. Comm’r, 259 F3d 881, 883 (7th Cir. 2001) (holding the contingent fee amount is taxable as to the client and citing cases evidencing the circuit split).

5. See Young v. Comm’r, 240 F3d 369 (4th Cir. 2001). “[The plaintiff’s] anticipatory assignment of a portion of her settlement proceeds to her attorney does not foreclose taxation of those proceeds . . . .” Id at 377. Further, the issue of which party was responsible for paying capital gains taxes resulting from the appreciation of property transferred pursuant to the settlement agreement was also decided. Id. at 379-80.
may not make payments if there is an unresolved issue concerning attorney liens.6

Finally, in personal injury cases, parties may consider structured settlements, which provide for payments over a specified period of time. The question of who and how the structured settlement will be funded should be resolved.7

II. THE FORM AND SCOPE OF RELEASES

Releases are an important topic to be discussed and resolved at the settlement table. In a personal injury case or where there is no ongoing relationship between the parties, a general release of all claims, whether or not raised in the litigation, is usually requested. A general release of claims covers “all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry.”8 Where the parties have an ongoing relationship, they may seek to limit the scope of the release to the claims raised in the litigation. Defining the breadth of the release can be instrumental in both the prevention of and prevailing in future litigation.9 In addition, the question of whether the release will be a one-way or mutual release can also arise. For example, in an employment discrimination case, a terminated former employee may request his ex-employer to provide a mutual release to prevent future claims arising out of his past employment conduct. Many defendants contemplate receiving a release but not giving one.

In certain circumstances, parties prefer a covenant not to sue rather than a release. Where the litigation is resolved as to one party, but is continuing as to other parties, a covenant not to sue may avoid the problem of inadvertently releasing a remaining party.10

III. CONFIDENTIALITY

Confidentiality is a frequent issue in settlements. Oftentimes, defendants insist upon confidentiality of the settlement terms because they are fearful of encouraging others to bring similar actions against them. Frequently, confidentiality is not discussed, but appears in the draft of the settlement agreement from defendant on the assumption plaintiff will not object.11 However, if a term appears in the written agreement that was not previously orally agreed upon, it is unenforceable.12 Therefore it is crucial that all terms be thoroughly discussed and defined.

A confidentiality provision raises a number of issues. First, is the provision mutual? Second, what can the parties say? Are they permitted to disclose the fact of settlement without disclosing the terms? Can they say the dispute has been resolved, nothing, or refer all inquiries to defendant? What exceptions to confidentiality will be permitted? Generally, exceptions are made for disclosures to attorneys, accountants, and close family members and by order of court. A confidential settlement agreement may be disclosed if it is filed in court and ordered sealed.13

Another frequent issue is the question of damages in the event of a breach. Defendants frequently seek liquidated damages as a method of insuring compliance with the confidentiality provision. The question of the enforceability of such a provision arises when it becomes a penalty.14

IV. ENFORCEMENT OF THE SETTLEMENT AND DISPOSITION OF LITIGATION

A settlement agreement is a contract. If a settlement agreement is breached the aggrieved party does not want to file a new lawsuit to enforce the agreement. Therefore, parties should discuss the proposed enforcement mechanism. Among the methods used are an order allowing the court to retain jurisdiction, a dismissal of the underlying litigation without prejudice until the settlement is completed, or a consent decree. A federal court loses jurisdiction over the case unless the dismissal order includes a provision specifically retaining jurisdiction, requiring compliance, or incorporating the settlement into the dismissal order.15

The issue of the disposition of the litigation is tied into the issue of settlement enforcement. Most defendants require a dismissal of the litigation with prejudice to protect against a refiling

7. See Gregory Scott Crespi, Selling Structured Settlements: The Uncertain Effect of Anti-Assignment Clauses, 28 PEPP. L. REV. 787 (2001) (discussing the widespread practice and the resulting litigation caused by plaintiffs, who have entered into structured settlements, later attempt to assign deferred payment rights to a finance company in exchange for a lump sum).
9. See Blockley v. The Work Center, Inc., No. 99 C 1421, 2000 WL 127118 (7th Cir. 2000) (holding that the release is not limited to back injuries sustained during the course of employment because the language “any and all” back injuries is comprehensible).
10. Aiken v. Insull, 122 F.2d 746, 751 (7th Cir. 1941). “[A] covenant not to sue is not the same as a release, and has no effect upon the liability of the other wrongdoers to the injured person . . . .” Id.
11. See Meck & Assoc., Inc., v. First Union Ins. Group, No. 99-2519-CM, 2002 WL 1998204 (D. Kan. Aug. 6, 2002). Although the parties had orally reached an agreement as to the essential terms of the settlement, their actions and statements did not demonstrate their intent to make the agreement confidential. Id. at *3.
12. See Defalco v. Oak Lawn Public Library, No. 99 CV 02137, 2000 WL 263922 (N.D. Ill. Mar. 1, 2000). Orally, an agreement in principle was reached, however the court held that the subsequent written agreement was unenforceable because there was no meeting of the minds with respect to the meaning of the confidentiality agreement and scope of release. Id. at *1, *5.
13. See Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002) (requiring disclosure to intervening newspaper of confidential settlement agreement sealed by district court).
14. See Checkers Eight Ltd. Partnership v. Hawkins, 241 F.3d 558, 562 (7th Cir. 2001). A provision in an agreement is a liquidated damages clause if “(1) the actual damages from a breach are difficult to measure at the time the contract was made; and (2) the specified amount of damages is reasonable in light of the anticipated or actual loss caused by the breach.” Id.
of the same claims. However, if the litigation is dismissed with prejudice, a new action may be necessary to enforce the settlement.16 This can be a problem where installment payments over a period of time are called for under the settlement. The court retains jurisdiction to enforce a settlement where the parties’ obligation to comply with the terms of the settlement agreement are made part of the dismissal order either by 1) a provision retaining jurisdiction over the settlement agreement, 2) a provision requiring compliance with the settlement agreement, or 3) incorporation of the terms of the agreement into the order.17

V. CONFIRMING AND DOCUMENTING SETTLEMENT

Once a settlement is reached during a conference, the court should bring the parties together to confirm all terms. An important issue concerns how the settlement terms will be memorialized. One option is to place all of the settlement terms on the record in open court.18 This approach is problematic where a party seeks to keep the settlement terms confidential. Once the agreement is placed on the record, it becomes quite difficult to prevent a third party from obtaining access.19

A second option is to attempt to memorialize the settlement terms in writing. Attached, as Exhibit A, is a Settlement Checklist/Term Sheet, which can be completed and signed at the settlement conference. While there is no guarantee the settlement will not later fall apart, the more comprehensive the terms reached at the settlement conference, the less likely future problems will arise. The checklist can also be used by the court to make sure all important issues are discussed during the settlement conference. A third option is to specify a date by which a written confirmation of the settlement terms and settlement draft will be prepared and a time by which other parties may raise objections. Courtesy copies should be sent to the court and firm dates should be set for completion of the settlement documents. The shorter the time frame the better.

The party representative’s authority to enter into the settlement should be confirmed at the settlement conference. If the client is not present, the attorney should be required to demonstrate that she has express authority to settle the lawsuit or the client should be made available by telephone to confirm her agreement to the settlement terms. In certain jurisdictions, the authority of an attorney to represent a client in litigation is separate from the authority to compromise and settle the lawsuit.20

VI. CONCLUSION

Once an agreement is reached at a settlement conference, the real work begins. Counsel and the court must take the time to meet and review all settlement terms and confirm the understandings reached while all parties are present. The agreement should be placed on the record or memorialized in a contemporaneous writing. Failure to do so can lead to lost settlements and needless litigation.

Morton Denlow has been a magistrate judge in the United States District Court for the Northern District of Illinois, Eastern Division, in Chicago since 1996. Before his appointment, he was a trial and appellate lawyer in complex commercial litigation for 24 years. He graduated cum laude from the Northwestern University School of Law in 1972. He can be contacted at morton_denlow@ilnd.uscourts.gov.

16. See Miener v. Missouri Dep’t of Mental Health, 62 F.3d 1126, 1127-28 (8th Cir. 1995) (holding that the district court did not have jurisdiction to enforce settlement where dismissal order did not require compliance with settlement agreement and where jurisdiction was not retained).
17. Kokkonen, 511 U.S. at 381.
18. See Lynch, Inc. v. Samatamason Inc., 279 F.3d 487, 490-91 (7th Cir. 2002) (at the end of a successful settlement conference the judge should call in a court reporter and dictate the terms of the settlement, and make sure the parties agree).
19. See Jessup, 277 F.3d at 929 (granting a newspaper publisher access to a settlement agreement that had been sealed and deposited in federal court).
JUDGE’S SETTLEMENT CHECKLIST/TERM SHEET

CASE NAME: ___________________________________________ vs. ___________________________________________

CASE NO. ______ CV ____________________ DATE: __________________________

A. PAYMENT OF MONEY TO: ______________________________ FROM: _________________________________________

1. Total amount to be paid: $ _____________________________________________________________________________

2. When: ______________________________________________________________________________________________

3. Payment terms: ______________________________________________________________________________________
   ____________________________________________________________________________________________________

4. Does payment include attorney's fees? Yes or No _________________________________________________________

5. Any third party liens to be paid from proceeds? Yes or No __________________________________________________

6. Tax Treatment: _______________________________________________________________________________________

7. Other payment terms: ________________________________________________________________________________
   ____________________________________________________________________________________________________

B. RELEASE / COVENANT NOT TO SUE (circle one)

1. a) One Way or (b) Mutual: ____________________________________________________________________________

2. Scope of Release:
   a. General: __________________________________________________________________________________________
      1) All claims raised in the litigation, or
      2) All claims, whether or not raised in the litigation.
   b. Limited: __________________________________________________________________________________________

3. Scope of Covenant: ______________________________________________________________________________________

4. Exceptions: __________________________________________________________________________________________

5. Other Terms: _________________________________________________________________________________________
C. CONFIDENTIALITY: Yes or No ______________________  MUTUAL: Yes or No ____________________________

1. What can be said about litigation?
   a. Dispute amicably resolved, or
   b. Nothing, or
   c. Other: __________________________________________________________________________________________

2. Exceptions to confidentiality: __________________________________________________________________________
   ____________________________________________________________________________________________________

3. Liquidated damages in event of breach: Yes or No __________________________________________________________

4. Amount: $ _____________________________ (Not too large to avoid being a penalty)

5. Other confidentiality terms: ____________________________________________________________
   ____________________________________________________________________________________________________

D. ENFORCEMENT OF SETTLEMENT AGREEMENT BY COURT

1. Do parties desire court to retain jurisdiction to enforce settlement agreement? Yes or No __________________________

2. If yes, do parties agree that dismissal order will (should include at least one):
   a. Provide for retention of jurisdiction by the court to enforce? Yes or No _____________________________
   b. Require compliance with the settlement agreement? Yes or No _____________________________
   c. Incorporate terms of settlement agreement into dismissal order? Yes or No ____________________________

E. DISPOSITION OF LITIGATION:

1. Dismissal of litigation: a) with prejudice or b) without prejudice.

2. Dismissal without prejudice with leave to reinstate litigation on or before ________ for the purpose of: a) proceeding
   with the litigation or b) enforcing the settlement. In the event a motion to reinstate is not filed on or before above
date, dismissal becomes with prejudice.

3. Other terms regarding disposition of litigation: __________________________________________________________
   ____________________________________________________________________________________________________

F. CONFIRMING AND DOCUMENTING SETTLEMENT:

1. Do parties wish to place settlement on the record? Yes or No ____________________________

2. Settlement terms to be confirmed in writing? Yes or No ____________________________
   (a) Draft agreement to be prepared by ____________________________

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and sent to other parties on or before ____________________________________________________________________________

(b) Other parties to respond by ____________________________________________________________________________

3. Final settlement agreement to be executed on or before: ____________________________________________________________________________

4. Will settlement agreement be filed in court? Yes or No ____________________________________________________________________________

5. Other terms regarding documenting settlement: _________________________________________________________________________________

____________________________________________________________________________________________________

G. EFFECTIVE DATE:

1. A binding agreement today; or
2. No binding agreement until settlement agreement is fully documented and signed.

H. FULL AUTHORITY TO ENTER INTO SETTLEMENT AGREEMENT? Yes or No

Identify party representatives and title:

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

I. OTHER SETTLEMENT TERMS:

1. No admission of liability. ________________________________________________________________________________

_________________________________________________________________________________________________________

J. EMPLOYMENT CASES

1. Ability to reapply: Yes or No _______________________ 2) Type of reference: ______________________________________

_________________________________________________________________________________________________________

K. NEXT COURT DATE:

_________________________________________________________________________________________________________

AGREED TO: AGREED TO:

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________
In the November 2000 election, the citizens of Florida had the opportunity to switch from the nonpartisan elective system to a merit selection and retention system for selecting trial judges in their respective circuits and counties. Although the majority of Florida voters favored electing their trial judges, this issue has spurred intense debate in the legal community concerning which is the better method for judicial selection. The crux of the debate centers on whether the judiciary should be independent or accountable to the public. On one end of the spectrum, judges are seen as heads of a branch of government that should be accountable to the citizens of their jurisdiction. On the opposite end, judges are viewed as different in that ethics, and not politics, dictate their governmental role. It is this ideological disparity that fostered the creation of the merit selection and retention system.

Prior to the November election, the merit system was being promoted as a great compromise of both ideologies. Merit selection is a form of direct appointment and is intended to preserve judicial independence. Merit retention is a form of popular election and is intended to encourage accountability. Although the merit system comprises two distinct methods of judicial selection to serve both interests, it is ineffective for judicial selection. Specifically, merit selection increases the politics that encompass direct appointment, and merit retention revisits the campaign issues that plague popular elections. However, some significant changes in the merit system would make it more effective for judicial selection.

**MERIT SELECTION**

The concept of merit selection evolved from the direct appointment method used in the federal system for judicial selection. However, merit selection replaces the appointive role of the executive branch with an independent nominating commission which select judges solely on the basis of merit. Although the idea for merit selection was proposed in the early 1900s, it wasn't until 1976 when Florida adopted this method for selection of appellate judges. Proponents contend that merit selection retains the benefits of direct appointment, i.e., judicial independence. However, the very element that ensures judicial independence, i.e., appointment, also threatens judicial independence because of its political tendencies.

**The Merit Selection Method**

The current merit selection method used to select Florida’s appellate judges is the same as that proposed in November’s election for selecting trial judges. Basically, this method uses judicial nominating commissions, which are formed for each judicial circuit and district around the state, including one for the supreme court, in the event of a vacancy. Each commission is composed of lawyers and lay persons for the purpose of recruiting, investigating, and screening judicial candidates. The commission selects between three to six most qualified judicial candidates and submits the list to the governor. The governor then appoints one judge from the list of nominees. To understand the “merit” element of this method of judicial selection, we must discuss the nominating procedures in more detail.

**JNC Membership**

Each judicial nominating commission (hereinafter, “JNC”) consists of nine members who are appointed in groups of three from three separate appointing authorities. First, the governor appoints three JNC members, who consist of lawyers and lay persons. Those persons interested in a gubernatorial appointment to a JNC must complete and submit an executive appointment application to the governor’s office. Once all applications have been received, the governor’s legal office reviews the applications and informally interviews the applicants. The legal office then discusses the applicants with the governor and makes recommendations for appointment. The governor then selects three people for appointment to a JNC.

Next, the Florida Bar’s Board of Governors appoints three Florida Bar members. Those attorneys interested in serving on a JNC must complete and submit an application. Once all of the applications are received, the Board of Governors forms

**Footnotes**

2. See id. at 533-39.
5. See id. § 11(d). Currently, there are 26 JNCs.
8. See id.
9. See McClellan, supra note 1, at 531.
11. See id. (The application is actually titled “Questionnaire for Gubernatorial Appointments.”)
12. Interview with Reginald J. Brown, Deputy General Counsel to Governor Jeb Bush (June 28, 2000).
13. See id.
14. See id.
16. See id.
a screening committee to review the applications and make recommendations to the board for each JNC vacancy. The board then decides on three lawyers to serve on a JNC.

The final three JNC members are lay persons appointed by a majority vote of the six members previously appointed by the governor and the Florida Bar. These members also complete and submit an application. Once all of the applications are received, the six JNC members conduct their own screening and interviewing process to determine the three remaining JNC members. Diversity in JNC membership is encouraged but not mandatory. Legislation that mandated the appointment of at least one minority from each of the three separate appointing authorities was ruled unconstitutional.

Once a person is appointed to serve on a JNC, he or she is required to attend the “JNC Institute” for proper training. The Florida Bar conducts this “institute,” which is a one-day training seminar held at least once a year that is designed to educate new JNC members on the nominating process. In addition to educational training, the seminar also provides an opportunity for commissioners to discuss improvements in the JNC process.

The JNC Screening Process

The purpose of JNCs is to recruit, investigate, and screen judicial candidates to fill vacancies on the bench. Currently, the only legal requirement for most judicial candidates is that they must be members of the Florida Bar for at least five years. However, the JNCs also consider a nonexclusive list of criteria set forth in the uniform rules and conduct extensive background investigations and personal interviews subject to the uniform rules.

The JNC screening process begins when judicial candidates submit a comprehensive application to the JNC of relevant jurisdiction. Since the application does not request information regarding race or ethnicity, diversity among the applicants is encouraged through notices to minority bar associations. Once all of the applications are received, the JNC determines if the applicants meet the initial legal requirements for the office and conducts extensive background investigations on the candidates.

The background investigations of the judicial candidates vary depending upon the vacancy. For instance, a vacancy on the supreme court may require a more extensive background check than would a judgeship for a district court of appeal or circuit court. Once the background investigation is complete, the JNC then personally interviews the candidates. These interviews are open to the public and are usually announced in local papers or on a notice posted at the courthouse. Each JNC can employ its own interviewing process subject to the uniform rules. These interviews are notoriously arduous and involve tough personal and professional questions that usually address sensitive social issues.

Once the investigations and interviews are complete, a majority vote of the JNC members determines the final list of at least three judicial nominees. This list is then submitted to the governor in alphabetical order without any ranking or additional recommendations.

Upon receiving the list of nominees from the JNC, the governor’s legal office begins its screening and interviewing process. The intensity of this screening process depends on the judicial vacancy. Once the investigations and interviews are complete, the governor meets with the legal office and then appoints one nominee from the final list to fill the judicial vacancy.

Arguments Regarding Merit Selection

The ideological debate between judicial independence and accountability is an interesting one. Advocates for merit selection contend that an appointment system for judicial selection preserves judicial independence by minimizing political influence, ensures judicial quality through an autonomous screen-
ing process, and promotes judicial diversity through rules and persistence. Opponents argue that merit selection sacrifices accountability and merely substitutes one political system of selection for another. Although arguments for both sides are convincing, the contention that merit selection preserves judicial independence falls.

The main argument supporting merit selection is that it retains judicial independence because the process minimizes political influence. However, any kind of political influence, no matter how slight, jeopardizes judicial independence. The problem lies primarily with the JNCs' current nominating procedures, which create an atmosphere that is ripe for political influence and manipulation. This potential for abuse is evidenced in several incidents involving judicial candidates, JNC members, and the selection process.

For example, in 1996, a lay member of a JNC in Ft. Lauderdale resigned his position after a newspaper uncovered his failure to reveal his past business relationship with a candidate for circuit court. Specifically, the JNC member had once been president, and the judicial candidate vice president, of a now-defunct firm in downtown Ft. Lauderdale. In fact, this past business relationship was not uncovered until after the candidate made the final list of nominees. Currently, the uniform rules mandate JNC members to disclose to the JNC panel all personal, professional, and business relationships with an applicant. But there is no law that requires such disclosure.

Another incident that raised suspicion with JNC operations occurred in 1997, where Governor Chiles appointed an individual to a JNC before the vacancy was even announced. The former JNC member kept his resignation of his JNC position a secret from the public and the other JNC members out of deference to Governor Chiles who appointed him. However, Governor Chiles appointed a new JNC member before the resignation or the JNC opening was made official. Even more strange was the fact that the new JNC appointee was a longtime political friend of the former JNC member. Although both JNC members and the governor denied any wrongdoing, the mere appearance of impropriety spoke volumes.

Probably the strongest example of the potential for political manipulation on JNCs is an incident that occurred in 1996 in Palm Beach. Suspicion of the JNC began with the commission’s recommendation of three judicial candidates who were conspicuously unqualified. In fact, the JNC chair sent Governor Chiles a letter apologizing for the selection, which then prompted a formal investigation into the JNC’s operations. Shortly thereafter, the commission quickly ousted their chairman in a secret meeting. Although the investigation was hampered due to uncooperative JNC members and lack of evidence, it was revealed that one of the three judicial nominees was the wife of a member of the Florida Bar’s Board of Governors. Further, this board member-husband was instrumental in appointing two attorneys to the JNC who, in turn, effectively advocated the wife for a judgeship. Also, one of the JNC’s strongest supporters of the wife’s judgeship was a long-time political friend of the husband. Additionally, there were allegations that during the wife’s interview with JNC members, some members “shepherded” the wife past questions addressing several discrepancies on her judicial application. Nonetheless, even though some critics called for the disbandment of the JNC, the commission continued operating.

Besides JNC membership, another source for political influence; and Stephanie Smith, Sach’s Role on JNC Attached; Ex-Bar Official: Lawyer Tried to Stack Nomination, SUN-SENTINEL (FT. LAUD.), Jan. 6, 1996, at 1B (candidates who had 25 years legal experience or who were sitting county court judges were suspiciously not considered).

58. See Grogan, supra note 56.

59. See id.


61. See Grogan, supra note 56 (the JNC recommended the wife to the governor on a 7-2 vote).

62. See id.


44. See Symposium, supra note 6.

45. See Remsen, supra note 3, at 9.


47. See id.

48. See id.

49. See Uniform Rules, supra note 7.

50. See Nevins, supra note 46.


52. See id.

53. See id.

54. See id.

55. See id.


57. See id. See also, Bill Douthat, Witnesses: Politics Moves JNC, THE PALM BEACH POST, Jan. 3, 1996, at 1B (one candidate made several lies regarding her income and legal experience on her application, and another clearly appeared untrustworthy during his interview); and Stephanie Smith, Sach’s Role on JNC Attached; Ex-Bar Official: Lawyer Tried to Stack Nomination, SUN-SENTINEL (FT. LAUD.), Jan. 6, 1996, at 1B (candidates who had 25 years legal experience or who were sitting county court judges were suspiciously not considered).
ence are the closed JNC deliberations.66 Interestingly, school board deliberations regarding appointment of a new superintendent are constitutionally required to be open to the public.67 However, JNC deliberations regarding the selection of judicial nominees are currently closed to the public.68 Naturally, this secrecy could facilitate backroom dealing and foster public distrust.69 This was evident in the incident involving the Palm Beach JNC and a recent incident involving the Fifth District Court of Appeal JNC. In 1999, a JNC member spoke out against the actions of two JNC colleagues who had personal meetings with sitting appellate judges to gather facts regarding judicial candidates.70 It was argued that although judicial ethics allow judges to communicate “factually and succinctly” to the JNC, the appearance of impropriety is manifest because the meetings were conducted privately.71 Hence, it is reasonable to conclude that closed JNC deliberations would also create the appearance of impropriety, as well as perpetuate public distrust of JNC operations and fuel suspicions of favoritism and political maneuvering.72

Finally, another source for potential political abuse in JNCs is the considerable opportunity for lobbying. Currently, there is no rule censuring contact with JNC members during the nomination process.73 Consequently, former JNC members report receiving numerous phone calls and letters from the candidate’s friends, relatives, clients, and influential community leaders.74 Also, there were some incidents where the candidates themselves would attempt direct contact with a JNC member.75 But efforts have been made to curb lobbying efforts of JNCs. Recently, the Judicial Nominating Procedures Committee discussed developing an advisory letter that would inform candidates as to what constitutes appropriate contact with JNC members.76 Nonetheless, until a rule limiting contact between JNC members and judicial candidates or their supporters is implemented, merit selection has the potential of becoming a lobbying contest instead of a merit contest.77

The apparent opportunity for political influence in JNC operations is not the only threat to judicial independence. The governor’s influence regarding judicial appointments also plays a significant role in maintaining politics in the judiciary.78 For instance, the governor can politicially control a JNC by appointing someone based upon personal friendship or political relationship.79 More importantly, the governor’s JNC appointees could then influence the other three lawyers when determining the remaining three lay members. Thus, the governor could arguably control the list of judicial nominees because of his or her dominating influence over the commission.80

Advocates for merit selection concede that merit selection is not perfect, but contend that it preserves judicial independence because political influence is minimized. However, any amount of political influence can threaten judicial independence. Even the appearance of political abuse or manipulation can promote public distrust of lawyers and the entire judicial system. The fact that merit selection has already existed in Florida for over twenty years does not exemplify success. Merit selection is not perfect, but its flaws can be corrected.

**MERIT RETENTION**

Merit retention is a form of the elective system where voters decide whether to retain the incumbent judge by casting a simple “yes” or “no” vote on ballots within the territorial jurisdiction of their court.81 If the judge obtains more affirmative votes, then he or she is retained for another term of judgeship.82 Thereafter, the trial judge would stand for review every six years.83 However, if the judge receives more negative votes, their judgeship is deemed vacant and is subsequently filled through the merit selection process.84 Although merit retention is thought to provide a democratic balance to the merit selection process, it resurrects the problems inherent in judicial elections.85 To fully understand this reasoning, we must first discuss the arguments regarding the election method.

**The Election Method**

In the November 2000 general election, Florida citizens voted to continue selecting their trial judges in their respective communities by popular nonpartisan elections.86 Advocates for judicial elections contend that this method of judicial selec-

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67. See id. See also FLA. CONST., art. I, § 24(b).
68. See Uniform Rules, supra note 7.
69. See Editorial, supra note 66.
71. See id.
72. See Editorial, supra note 66.
73. See Russell, supra note 10.
74. See Russell Troutman, Florida Judicial Nominating Commission, 54 FLA. B. J. 534 (1980) (Mr. Troutman discussed his experiences when he was a member of the Florida Supreme Court JNC). See also McClellan, supra note 1, at 547.
75. See Fla. Bar Online, News Media Center, Mark D. Killian, Panel Takes Testimony at Third Merit Selection Hearing, <http://www.flabar.org/newflabar/publicmediainfo/ftbnews/99nov15-8. html> (Nov. 15, 1999) (Alfonso Perez, Jr. stated that when he chaired the 11th Circuit JNC “county court judges who wanted to be elevated to the circuit bench would appear behind me in a pew in church and I knew they weren’t members of the church”).
76. See Overton, supra note 25.
77. See McClellan, supra note 1, at 547.
78. See id. at 548.
79. See id.
80. See id.
81. See Symposium, supra note 6, at 417.
82. See id.
83. See FLA. CONST., art. V, § 10(a).
85. See id.
86. See Symposium, supra note 6, at 420.
elections provide a more democratic means of judicial selection, the judiciary is a unique branch of government where legal ethics—instead of politics—govern judicial behavior.

The main argument against judicial elections for which there appears to be no resolution is the issue of judicial campaign contributions. Like all elections for public office, judicial elections cost money, and the expense necessary to run a judicial campaign is substantial high. Although some judicial candidates are able to finance their own campaigns, private financial contributions from lawyers, law firms, and special interest groups are the norm. Consequently, judicial independence, impartiality, and ethics are compromised, and the appearance of impropriety becomes apparent. This concern is evidenced in several Florida cases.

For instance, in Mackenzie v. Breakstone, the plaintiff’s attorney contributed $500 to the trial judge’s husband’s circuit court campaign, and the defendant moved to disqualify the trial judge on these grounds. The trial judge denied the motion as legally insufficient. On appeal, the Third District court held that the $500 contribution by the plaintiff’s attorney contributed $500 to the trial judge’s husband’s campaign contributions. The court believed that although this legislation did not negate the plaintiff or attorney in excess of the amount of $500 expended for the campaign of a judge, it did virtually eliminate the appearance of impropriety.87

89. See id. at 418.
90. See Symposium, supra note 6, at 419.
91. See id. at 1334.
92. See id.
93. See id. at 1334.
94. See id. at 1334.
95. See id.
96. See id. at 1334.
97. See id.
98. See id.
99. See id.
100. See id.
101. See id.
102. See id.
103. See id.
104. See id.
105. See id.
106. See id. Canon 7B(2)[now C(1)] of the Code of Judicial Conduct provides:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any persons or corporation authorized by law. A candidate’s committees may solicit funds for his campaign only within the time limitation provided by law. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Fla. Stat. § 106.08(1) (1987), provided in pertinent part:

(1) No person, political committee, or committee of continuous existence shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:

(e) To a candidate for county court or circuit court judge, $1000.
(f) To a candidate for retention as a
imize any appearance of impropriety. Also, the court feared that to rule otherwise would result in judicial chaos, where too many attorneys and judges would be barred from cases due to campaign contributions. However, Justice Kogan and Justice Overton mentioned changing to a merit retention system in light of the problems presented in the case.

Like the majority in Breakstone, election advocates believe that statutory limits and disclosure requirements would alleviate the problems associated with judicial campaign contributions from other lawyers. For instance, it is believed that requiring all campaign funds through campaign committees creates a kind of anonymity that minimizes the appearance of possible quid pro quo relationships. However, other factors may reveal a contributor's identity. For example, the very disclosure laws that require candidates to file reports revealing their campaign contributions would also reveal the contributors' names. Also, fund-raising events where the candidates come in direct contact with their supporters and volunteer workers would easily reveal contributors. Thus, funding through campaign committees would not eliminate the appearance of quid pro quo.

Also, monetary limits on judicial campaign contributions do not eliminate the appearance of impropriety, because the problem is not the amount of money contributed, but the act of contributing itself. Although Breakstone held that a contribution from a lawyer alone was legally insufficient to require disqualification of a judge, the appearance of impropriety still lingers. Mere acceptance of campaign funds, whether through a committee as required or individually, creates a financial relationship between the judge and the contributor, which virtually induces a quid pro quo effect. Consequently, this mere appearance of impropriety diminishes public confidence in judicial impartiality and independence. Because campaign contributions are an integral part of judicial elections, the problems associated with them render the elective system unsuitable for judicial selection. The consequential appearance of impropriety, and the fact that legal ethics essentially govern the judicial office, prevents popular elections from being an acceptable method for judicial selection.

The Merit Retention Method
Although merit retention is promoted as the answer to maintaining democracy in selecting our judges, it resurrects the same problems inherent in judicial elections. For instance, merit retention elections require citizens to vote whether to retain the incumbent judge based upon “merit,” or his or her record. Therefore, retention elections are uncontested by other judicial candidates. However, incumbent judges can still be contested by special interest groups causing campaign contribution issues to return. However, adequate education of the public could minimize potential opposition during retention elections and, thus, abrogate the need to campaign and solicit contributions.

The main problem with merit retention elections is the return of campaign contribution issues. Currently, pursuant to merit retention procedures, a judge cannot actively campaign or raise campaign funds unless faced with active opposition. Advocates for merit retention believe that because the incumbent is uncontested, campaign contributions become less significant. However, although retention elections are uncontested by judicial candidates, an incumbent can still be contested by a disgruntled special interest group.

For instance, in 1990, Florida Supreme Court Justice Leander Shaw faced strong opposition from Citizens for a Responsible Judiciary because of an opinion he authored that struck down a statute requiring parental consent before minors could obtain an abortion. Although a majority of lawyers and judges believed Justice Shaw was a competent justice, his retention was still intensely challenged. As a result, he was forced to raise and spend approximately $300,000 on his retention campaign. Ultimately, over 40% of Florida's citizens voted to remove Justice Shaw.

(g) To a candidate for retention as a justice of the Supreme Court, $3000.

It should be noted that this language has changed. Currently, Section 106.08(1), Florida Statutes (1999), prohibits contributions in excess of $500 to any candidate for election or retention, or any political committee supporting or opposing said candidates.

Section 106.07, Florida Statutes (1987), requires a designated campaign treasurer to file regular reports disclosing contributors and the amount of contribution.

107. See id. at 1337.
108. See Symposium, supra note 6, at 419.
111. See id. at 322.
112. See id. at 313.
113. See id.
114. See id.
115. See McClellan, supra note 1, at 556.
116. See id.
117. See Peter D. Webster, Selection and Retention of Judges: Is There One “Best” Method? 23 FLA.ST.U.L. REV. 1, 10 (Summer 1995).
118. See McClellan, supra note 1, at 555-56. See also Norman Krivosha, Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method, 40 S.W.L.J. 15, 21 (1986).
119. See FLA. JUD. CODE OF CONDUCT, Canon 7C(2).
120. See Liontas, supra note 110, at 317.
121. See Webster, supra note 117, at 35-36.
122. See McClellan, supra note 1, at 549.
123. See id.
124. See Webster, supra note 117, at 36.
125. See id.
Also, Florida Supreme Court Justice Rosemary Barkett faced strong opposition from several different groups in her 1992 retention election. The Citizens for a Responsible Judiciary, who was the same group that opposed Justice Shaw two years earlier, opposed Justice Barkett's retention for joining Justice Shaw's majority opinion striking down parental consent for abortions.126 This group also campaigned that Justice Barkett was “soft on crime” and managed to get more than half of the state's law enforcement and state attorneys to oppose Justice Barkett's retention.127 Also, Florida Right to Life opposed Justice Barkett for her opinion which stated that permanently incapacitated people who have a living will or the like are not subject to forced feeding.128 Consequently, Justice Barkett received one of the lowest bar poll ratings ever given to a supreme court justice in the history of the bar’s merit-retention process.129 As a result, Justice Barkett raised between $260,000 and $300,000, most of which came from lawyers, to fight her opposition.130 Her campaign included television commercials and radio ads, literature, and personal appearances.131 Ultimately, Justice Barkett was retained with only 60% of the vote.132

These examples demonstrate that incumbent judges in retention elections are still fair game for opposition. Once an incumbent judge's retention is opposed, the judge must engage in a costly campaign that is primarily funded with private campaign contributions. Thus, a change in the merit retention process is very much needed.

PROPOSALS FOR CHANGE OR ALTERNATIVES

The proposed compromise in the merit selection and retention method for judicial selection is not perfect. However, judicial independence and accountability can coexist with a few adjustments. For instance, changing the composition of JNCs and reforming JNC procedures with regard to judicial selection will significantly decrease political influence and improve judicial quality. Also, adequate education of the retention process combined with bar polls and judicial evaluations will encourage judicial accountability. Thus, if the public is properly educated and informed, the need for retention campaigns would be greatly reduced.

Proposed Changes in Merit Selection

As previously noted, one problem with merit selection is the potential for political influence. In order to eliminate this problem, some reform in the merit selection system is required. This reform includes changing the composition of the JNC and implementing laws that would open JNC deliberations to the public and restrict lobbying of JNC members.

First, altering the JNC composition would minimize the potential for political abuse. For instance, change the number of JNC members from nine to seven. The three Florida Bar appointments and three lay-member positions would remain. However, the third set of gubernatorial appointments would be replaced with one member from the Judicial Qualifications Commission (JQC).133 Each of the thirteen JQC members would serve on two of the twenty-six JNCs. Since the purpose of the JQC is to investigate judges and justices for alleged judicial misconduct during their term of office, it seems logical that a JQC member participate in judicial selection.134 Moreover, removing the governor's participation in the JNC membership and adding a JQC member to the mix would essentially decrease political influence and increase the focus on quality.135

The governor should not be completely removed from the judicial selection picture. The new seven-member JNC would still provide a list of three to six nominees for judgeship to the governor for appointment. To maintain accountability, the governor's appointment would be confirmed by the Senate. This would provide the necessary “check” on the governor's judicial appointments.

Additionally, because the JNC membership would be reduced from nine to seven, each JNC should be funded in an amount sufficient to retain two full-time investigators to assist in background checks, interview preparation, and general reviews on candidates' qualifications.136 These investigators would come from the private sector and would be chosen by a majority vote of the JNC membership. Also, with regard to diversity in JNC membership, section 43.29 and the uniform rules of JNC procedure would still encourage the appointment of minorities to serve on JNCs.

Another remedy that would virtually eliminate political influence is to open JNC deliberations to the public and maintain a public record of the vote. Currently, the uniform rules of JNC procedure prohibit open deliberations and do not require recording of the votes.137 Also, legislative efforts in

126. See Thomas J. Billitteri, Chief Justice Fights for Her Life on Bench, St. Petersburg Times, Oct. 12, 1992, at 1A.
128. See Billitteri, supra note 126.
129. See Rado, supra note 127.
130. See id.
131. See Diane Rado, Barkett's Support in Bar Poll Is Low, St. Petersburg Times, Sept. 12, 1992, at 6B; see also Billitteri, supra note 126.
132. See Rado, supra note 127. (In 1980, Justice Joseph Boyd received a bar poll rating of 59 percent due to scandal for which he was nearly impeached in the early 1970s.)
133. FLA. CONST., art. V, § 12 provides for a Judicial Qualifications Commission consisting of thirteen members: two district court of appeals judges, two circuit court judges, two county court judges, four Florida Bar members, and five lay persons appointed by the governor.
134. See FLA. CONST., art. V, § 12(a)(1).
135. However, the addition of a JQC member to a JNC will require an amendment to FLA. STAT. § 43.29(2) (1999), which currently prohibits a judge or justice from being a member of a JNC.
136. See Webster, supra note 117, at 40.
137. See Uniform Rule, supra note 7.
both houses to open JNC deliberations have failed.\textsuperscript{138} Allowing the public to view deliberations would ensure that politics and prejudices are not playing a role in the final selection. More importantly, if the final selection is challenged, the voting process would be documented for review.\textsuperscript{139} Thus, JNC deliberations should be made open to the public to eliminate the potential for wrongdoing.

Finally, another solution for removing politics is to implement a law severely limiting contact between candidates, or their supporters, and JNC members. Recently, JNC members discussed developing an advisory letter informing applicants of what constitutes appropriate contact with JNC members.\textsuperscript{140} However, such a mandate would be more effective if it were implemented as part of the uniform rules of JNC procedure or as a provision under § 43.29 of the Florida Statutes. Specifically, this mandate would permit a JNC to publicly announce a time period in which it could receive information on the judicial candidates. Once the specified time period has expired, any contact regarding the candidates would be deemed unlawful lobbying. This may result in disciplinary measures or penalties for the respective candidate. Furthermore, this mandate would require JNC members to immediately disclose any contacts received after the specified time period from either the candidates or their supporters, or they too may be subject to discipline. Establishing a rule or law limiting lobbying efforts would curb the appearance of political influence while allowing for public participation.

These proposed solutions to the concern of potential political influence in the merit selection process virtually eliminate politics while maintaining the delicate balance between judicial independence and accountability.

\textbf{Proposed Changes in Merit Retention}

The core problem with merit retention is not so much the return of campaign funding issues as it is the lack of information to assist the average voter. In fact, the proposed solutions for improving the publication of merit retention information may help resolve the issues associated with retention campaign funding.

First, the electorate must be educated on the merit retention process. Studies have showed that a majority of Florida voters are confused about the retention process.\textsuperscript{142} However, in order for the public to appreciate merit retention, the public must first understand the fundamentals of the judiciary.\textsuperscript{143} Specifically, the public should understand the importance of a judge’s impartiality in decisions based on the rule of law and the distinct functions of the trial and appellate courts. Then local newspapers and the Florida Bar should join forces to educate the public on how the merit retention system works and what the expectations are from the electorate.\textsuperscript{145} Once the public understands the merit retention process, then it should be provided with adequate information regarding a judge’s record in order to assess judicial performance when determining a judge’s retention. This could be accomplished by combining bar ratings with sufficient information from an independent source.

For instance, in 1988, Colorado established performance evaluation commissions. These commissions, composed of lawyers and lay persons, assess judicial performance and provide information to both the public and the judges being evaluated.\textsuperscript{146} Specifically, the commissions distribute questionnaires to court personnel, law enforcement officers, jurors, and other people who regularly converse with the courts.\textsuperscript{147} Commission members also personally interview the judges and observe them in the courtroom.\textsuperscript{148} Upon completion of their evaluations, the commissions educate the public and inform the judges who have been evaluated with the results.\textsuperscript{149} This method of judicial evaluation, which employs citizen participation, was deemed a success and became part of Colorado law.\textsuperscript{150} Incidentally, this program was formed on the belief that public interest in retention elections would increase if the public was involved in the evaluation process.\textsuperscript{151}

\begin{footnotesize}
\begin{enumerate}
  \item Senate Bill 0396 passed the Senate Judiciary Committee but died 5/5/2000 in Committee on Rules and Calendar. House Resolution 0923 passed the House Judiciary Committee but died 5/5/2000 on calendar.
  \item One of the problems that hampered the investigation involving the Palm Beach JNC in 1996 was that deliberations were closed and no record or minutes were kept of the voting process.
  \item See Overton, supra note 25.
  \item See Troutman, supra note 74, at 537.
  \item See Fla. Bar Online, supra note 84.
  \item See Nicholas P. Lovrich, John C. Pierce, and Charles H. Sheldon, \textit{Citizen Knowledge and Voting in Judicial Elections}, 73 JUDICATURE 28, 33 (June-July 1989) (“...actual knowledge of the courts has a more powerful impact upon voting participation than self-imagined informedness”).
  \item See Gail Gray, \textit{The Bar’s Role in Assuring an Independent Judiciary}, 21 PENNSYLVANIA LAWYER 36, 40 (Jan./Feb. 1999).
  \item Recently, the Florida Bar formed a special committee that has developed a plan to educate the public about merit selection and retention. The committee is called the Merit Selection and Retention Implementation Special Committee, and their plan includes preparing educational videotapes, appointing local team captains statewide to speak, providing specialized pamphlets and videotapes to supplement speakers, issuing news releases, and producing television programs. See Fla. Bar Online, Merit Selection and Retention Implementation Special Committee Report, <http://www.flabar.org/newflabar/organization/board/apr00min.html> (accessed June 18, 2000).
  \item See Liontas, supra note 110, at 317. See also Justice Ben F. Overton, \textit{Trial Judges and Political Elections: A Time For Re-examination}, 2 U.FLA.J.L. & PUB.POL’Y 9, 21 (1988-89) (The commissions consist of ten members, two appointed by the speaker of the House of Representatives, two appointed by the president of the Senate, three appointed by the governor, and three appointed by the chief justice of the Colorado Supreme Court.)
  \item See Overton, supra note 146, at 21.
  \item See id.
  \item See Liontas, supra note 110, at 317-18.
  \item See id. at 318.
  \item See Remsen, supra note 3, at 9.
\end{enumerate}
\end{footnotesize}
Another suggestion would be to expand the Florida Bar’s Judicial Evaluation Committee’s current judicial evaluation program. This committee primarily monitors the performance of all judges, whether sitting or up for retention, by distributing secret ballots to attorneys statewide. The results are shared with the judges who participate in the program and the public. However, this program could be expanded to include more extensive evaluations of those judges seeking retention. Like Colorado’s citizen-based commissions, the bar’s Judicial Evaluation Committee could conduct similar detailed evaluations of the judges up for retention and publish the results. This evaluation, coupled with bar poll ratings, may be more effective when informing the public on judicial performance.

Additionally, recommendations from the Judicial Qualifications Commission would significantly increase the credibility of information on judicial performance. Currently, the JQC is only charged with investigating judges for alleged misconduct. However, a constitutional amendment broadening the JQC’s authority to include evaluations of judges who are seeking retention would be very beneficial. Thus, combined information on judicial performance produced from the Florida Bar poll ratings, reports from an evaluation commission (whether citizen based or a bar subcommittee), and the JQC may prove very effective in providing the necessary assistance to average voters so they could better review the record of a judge who is seeking retention.

Moreover, candid information on judicial performance from these sources may curb the need to campaign against opposition because the record will sufficiently speak for itself. In the event a judge’s retention is opposed, the news media should permit the judge to publicly respond, and the response should be limited to an explanation of the legal reasoning or principle exercised in the case at issue. More importantly, in the event a judge’s record is unjustly criticized, the local bar association should assist in “setting the record straight.” Naturally, the public is best served if these responses were published in newspapers that are widely circulated, and not just in legal publications. Thus, providing explicit information on judicial performance coupled with limiting the mode of response to opposition may essentially abrogate the need for retention election campaigning and fund raising.

The success of merit retention depends on properly educating the public on the merit retention system and adequately conveying to the public effective and sufficient information regarding the judges’ records. Also, setting boundaries for a judge’s response to opposition may alleviate the need for campaigning and fund raising. Thus, these proposed solutions virtually eliminate the potential appearance of impropriety associated with judicial campaigns while maintaining democratic participation.

CONCLUSION

A majority of Florida voters have decided to continue electing their trial judges and preserve a democratic means for choosing judges that only judicial elections can provide. However, the inherent need for campaign contributions renders the elective system unsuitable for judicial selection. Furthermore, the various statutory provisions and ethical codes on campaign practices do not eliminate the appearance of impropriety entirely. The merit system was promoted as the great compromise between the democratic accountability provided in popular elections and the essential judicial independence provided in direct appointments. Although this compromise appears viable, the same political influence that permeated direct appointment and the same campaign issues that plagued popular elections are revisited.

For merit selection and retention to truly be a great compromise, modifications must be made in both systems. The proposed changes in JNC composition and procedures would ensure more judicial independence and quality. Also, providing useful information regarding a judge’s record from credible sources would essentially alleviate the need for zealous campaigning for retention. The fact that the merit system has already been in existence in Florida for over twenty years does not denote success. These changes should be considered and implemented now if advocates want voters to extend the merit system to the selection of trial court judges.

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153. See id.
154. See FLA. CONST., art. V, § 12(1).
155. See Remsen, supra note 3, at 9.
157. See id.
158. See id.
Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text

Benjamin L. Berger

Socrates: Let’s look at it this way. If we differed, you and I, about which of two things was more numerous, would our difference on these questions make us angry and hostile towards one another? Or would we resort to counting in such disputes and soon be rid of them?
Euthyphro: We certainly would.
Socrates: Again, if we differed about which was larger and smaller, we’d soon put an end to our difference by resorting to measurement, wouldn’t we?
Euthyphro: That’s right.
Socrates: And we would decide a dispute about which was heavier and lighter, presumably, by resorting to weighing.
Euthyphro: Of course.
Socrates: Then what sorts of questions would make us angry and hostile towards one another, if we differed about them and were unable to reach a decision? Perhaps you can’t say offhand. But consider my suggestion, that they are questions of what is just and unjust, honourable and dishonourable, good and bad…

Plato’s Euthyphro, 7b-d.

The judicial decision-making process is not one for which resolution arises from counting, measuring, or weighing. Rather, the courtroom is a field for debate about the interpretation and application of values as embodied in or reflected by the law. Decisions reached in court are judgments and not mathematical conclusions in that the inherently contestable nature of the issues at stake precludes an outcome that is self-evident to all. As such, although there is an element of fact-finding that emerges in a judicial opinion, there is also always a subjective valuation of the principles at stake; to draw on Socrates, there is always an assessment “of what is just and unjust, honourable and dishonourable, good and bad.” Most often, the process of judicial decision making involves an intermediate process in which fact-finding and subjective evaluative efforts intermingle and end up informing one another. So the judicial decision is both explanatory and explorative, revealing facts and drawing principled conclusions that tell a story about what is just and why it is so. In this way, the judicial opinion straddles the worlds of science and fiction—concerned as it is with uncovering facts, but always normatively concerned with the story that emerges.

These qualities make the judicial opinion, the product of this ambivalent hermeneutic, an extremely complex literary genre. The difficulties arise not only from the disparate processes of fact-finding and value judgment, but from the various functions that a judicial opinion serves once it has been rendered. There is the immediate conflict between or among litigants that the courts must resolve. It is necessary for the court to arbitrate the discrete matter of concern to the parties involved. But the judicial text is also a synthesizer. It filters the body of existing law into a series of well-defined propositions that are then applied to the case at bar. These propositions are then looked to and interrogated in subsequent cases. As such, each judgment assumes a place within the jurisprudence and stands as precedent for future decisions. Throughout each of these functions, the judicial opinion carries out a symbolic role as well. The judgment must stand as an example of the proper functioning of the justice system and, in so doing, reflect the health and vigour of the process. A given judgment must persuade a reader both that a fair resolution has been effected and that the decision is a correct application of the rule of law. Thus, the judicial opinion is not just a reflection of an opinion and a representation of authority, but also a device that must persuade while maintaining the legitimacy of the legal system.

An additional challenge emerges when the court decides that there must be a change in the law. To this list of disparate purposes is added a further persuasive need—the judgment must demonstrate why what was once good or true or just (or, indeed, lawful) is no longer adequate. It is at these turning points in the law that the rhetorical nature of judgments becomes most apparent. While there is always an element of persuasion and argument in the judicial opinion, it is at these moments of change that the need for effective language is most exigent. I will argue that a critical component of the judge’s linguistic toolbox is metaphor and that this device is most necessary and effective at these turning points in the law. A metaphor has the ability to bridge the abstract and the concrete, using elements of similarity to effect a seemingly natural appeal to common sense, and to mold the future development of jurisprudence. This critical role for the metaphor in legal judgments emerges from a consideration of the structure and functions of a judicial opinion and the complementary functions of metaphor. This relationship between the judicial decision and metaphor is confirmed by an examination of key metaphors in the development of Anglo-Canadian jurisprudence.
THE JUDICIAL OPINION

The Canadian judicial opinion assumes an organized form and structure. This particular form becomes a kind of template for decisions to which legal professionals become accustomed. Although there can be variance among the precise structures adopted by a particular judge, there is nevertheless a common form that can be discerned. This form is the means by which the content of legal decisions is communicated to and, subsequently, understood by the community, broadly defined. As such, this structure is not just an organizational form, but is the focus for community debate on the topic at hand as well as the paradigm of legal reasoning that configures the ensuing conversation. The conventional form of the decision constitutes a structuring of legal knowledge and thought in a communicative social document and, as such, can be understood as the foundation for a legal rhetoric. J. B. White recognizes that this rhetorical character has implications for the social and cultural functions of law:

...[T]he fact that the law can be understood as a comprehensibly organized method of argument, or what I call a rhetoric, means that it is at once a social activity—a way of acting with others—and a cultural activity—a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works.1

Canadian judgments generally begin with a statement of the facts of the case. The conflict, crime, or dispute is described in a sort of narrative that is ultimately aimed at delineating the main issue at trial or on appeal. A distilled statement of the critical legal point in question generally follows this narrative. This final section sets the scene for the legal argumentation that will follow.

The next portion of the judgment characteristically consists of the history of the case. An appellate court will recount the arguments and reasoning offered in the lower courts and describe the manner in which the law and facts were interpreted at these stages. Next, the court sets out what it sees to be the relevant law used to decide the issue under consideration. This description will likely include a presentation of relevant statute law and a survey of the case law, both of which will inform the reasoning of the court. Essentially, this process is the assemblage of all sources of authority that the judge or judges will have to consider while coming to a decision. Often, the judgment will include excerpts from past decisions and will extract what the court understands to be the critical principles that will affect the judges’ determination in the case. At this point, the judicial opinion has laid out the facts, the history of the case, and the critical law. The essential component of the decision follows, in which the court turns its attention to the application of the law to the facts.

Here the judgment crystallizes and the court draws its final conclusions as to the appropriate disposition of the case in light of the applicable principles of law. This structure, briefly outlined, demonstrates that the judicial opinion involves a series of tasks. A judgment must successfully delineate facts, canvass legal history, assemble and assess the applicable law, and arrive at an appropriate conclusion. From this constellation of tasks, one can discern a number of purposes for the judgment. Importantly, it is not the purpose of the judicial opinion to act as a means of reaching a decision. Rather, once the opinion is written, “the judge’s intellectual effort has already been achieved, his deliberation finished, and there remains only the question of form.”2 Indeed, C. Perelman argues that “the important thing is not the passage from premises to conclusion but the way the judge justifies his premises both in fact and law.”3 This process of justification is achieved by accomplishing three objectives. First, the judgment must maintain the authority and integrity of the legal process. Second, the opinion must attract authority for the discrete point of law that the court has decided. Finally, and particularly in cases where the court departs from established law, the decision must persuade the reader that justice has been carried out.

The authority of the judicial system substantially depends upon the appearance that it has conformed to the rule of law. The rule of law demands, among other things, that decisions are reached through a reasonable and transparent process. The law must not appear capricious or arbitrary in the deployment of its power. As well, the courts must apply the duly constituted laws of the country as enacted by the democratic legislature. “The older (primarily Judaic and Christian) tradition saw the law as a set of authoritative commands, entitled to respect partly from their antiquity, partly from their concordance with the law of nature and of God.”4 To the extent that these sources are no longer regarded as the fount of authority in a modern liberal state, the judicial opinion must garner its legitimacy from the reasoned manner of its application. By conforming to the due process of law, including both transparent and equitable reasoning as well as the application of the legitimate laws of the nation, the judicial opinion asserts the legitimacy of the processes of justice and, in so doing, argues for its own authority.

The judgment also asserts the legitimacy of the law to which it appeals. The courts operate on the principle of stare decisis, which dictates that previous decisions made on a similar topic ought to be binding on subsequent courts. This doctrine, also

Footnotes
3. Id.
4. Supra note 1, at 685.
texts to shape and constrain what should be done in the present. This principle provides the law with a legitimacy derived from the history and collective experience of the law. James Boyd White imagines what a system without judicial opinion would be like:

One's first reaction might be to think that in such a system there would be no precedent, no argument from precedent, and in this sense no law: every question would be argued as an original matter, without the advantage of the collective experience over time that the judicial opinion provides. We would be deprived of a crucial method of learning from the past, indeed, of a way of making ourselves over time.

When a judicial opinion appeals to past law, it at once justifies the interpretation that the court is about to adopt and affirms the weight and significance of the principle of stare decisis. It is for this reason that some have commented that “a judicial system relying on precedents requires by its very nature citation from prior opinions. . . .” Through the use of precedent the writer is able to claim authority for the law itself. In addition, the affirmation of stare decisis in a judgment ensures that it, too, may be relied upon in the future for its own precedential value. The effect of precedent is to affirm past law, legitimize present rulings, and to mold the future development of the law. As such, each decision has a circular authoritative effect or “self-legitimizing” nature in addition to a prospective impact.

Both of these functions (ascribing authority to the justice system and to the law itself) rely on an element of persuasion in judicial opinions. Judges face a number of persuasive tasks. They must convince the reader that the system has operated properly, that the law is itself legitimate, and that the court has arrived at a just resolution as between the litigants. This persuasion requires the judge to use language in a rather literary fashion: “without persuasion, law could not be law, and without fiction, there would be no persuasion.” The judge is effectively constructing a “story” of the case—a story that will be more or less convincing, commensurate with the consistency and coherence of its internal structure and arguments. Again, the social nature of the judicial opinion emerges from an appreciation of its persuasive elements. A judgment is written with an audience, or audiences, in mind and it is the child of the legal system, which is itself a cultural institution. So while a judicial decision is always invested with certain inertia toward clarity, the argumentative nature of the text invests it with an element of uncertainty—will the argument be successful, will the reader be persuaded? As P. Goodrich observes,

While the law is undoubtedly invested with a peculiarly “concrete” force or function, its argumentative method and justificatory rhetoric encode a relation to the social in a manner that can never be either verified or falsified.

But an additional persuasive burden is imposed when the court decides that the law should change or be reconceptualized. Suddenly, the court must justify its departure from the weight of precedent but must not, in the process, throw into question the legitimacy of law or the justice system. To meet this task, all tools in the judge's linguistic toolbox must be employed. The balance of this paper will argue that recourse to metaphor is an essential technique used in judicial opinion to discharge the judge's persuasive burden and that metaphor is particularly used where the court sets out to alter the law.

**THE METAPHOR**

The metaphor has attracted the concerted and sustained attention of philosophers, philologists, linguists, rhetoricians, and semioticians for much of written history. This seemingly simple linguistic trope has proven to be a touchstone for intense debate regarding the nature of language and of thought. With Nietzsche, the metaphor became a modern philosophical problem of language that has carried forth into 20th century. The structuralists, represented by Jakobson, Saussure, and Barthes, forwarded a theory of metaphor that focused on the semiotics of language and thought. The mass of literature that has accreted around the concept of metaphor is complex and intriguing. However, for the purposes of this analysis, the starting point for understanding the basic functioning of metaphor is Aristotle:

Metaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species, or on grounds of analogy.

At core, the metaphor is a linguistic means of drawing together two objects, items, or concepts. The metaphor “des-
ignates a verbal/symbolic relationship (usually based upon similarity) between two concepts or images which mutually describe or enhance each other.”11 This conceptual relationship consists of describing one thing with reference to another, thereby linking particular features of the two. As such, metaphor is “both a peculiar or aberrant form of naming things and is also a potentially logical act of predication attributing a resemblance. . . .”12

But this tension between peculiarity and logic is precisely what affords the metaphor its rhetorical force. The semblance of absurd equivalence is followed by a realization of similarity and this conceptual progression effects a number of purposes, particularly when the metaphor is used to communicate or interpret an abstract idea. First, when a metaphor is used to describe a concept in terms of a familiar object, the realm of the abstract and the concrete are bridged. Second, to the extent that the metaphor refers to the qualities of this everyday object, this trope makes an appeal to “common sense.” Finally, once established, the ultimate logic of the equivalence drawn can have the effect of shaping the manner in which the abstract concept is ultimately understood. These selected functions of metaphor have particular resonance in legal discourse. Each serves a function in communicating legal reasoning and gaining authority for judicial decisions.

The metaphor is particularly apt as a means of explaining complex or abstract ideas. By drawing the idea together with a familiar item or phenomenon, the metaphor provides a conceptual bridge for the reader to follow:

The metaphor provides the “abstract,” imageless thought with an intuition drawn from the world of appearances whose function is ‘to establish the reality of our concepts’ and thus undo, as it were, the withdrawal from the world of appearances that is the precondition of mental activities.13

The metaphor is the vehicle that carries the reader from a world of common objects, and their attendant qualities, to the realm of ideas. By effecting this link, the metaphor acts to “guarantee the unity of human experience”14 in that even the realm of ideas. By effecting this link, the metaphor acts to

artificial terms assigned meanings particular to the legal world. These terms are functional and instructive in the legal realm and for the purposes of analysis, but when the courts must present their findings to the public, these abstract constructions will not suffice. Perelman recognizes this use of metaphor arising from the need for communication:

From artificial languages are excluded vagueness, imprecisions and analogic and metaphoric uses of notions. . . . As soon as the strict rules imposed artificially by language yield to the hermeneutic requirement, the same words will no longer have the same meaning; a significance given in one context can no longer be valid in all others; the use of analogy and metaphor can no longer be denied, but, on the contrary, imposed by the desire for communication and comprehension.15

Thus, while for the purpose of analysis the courts can refer to the constitutional division of power by use of special terms such as “interjurisdictional immunity,” “paramountcy,” and “double aspect fields,” they consistently resort to the term “watertight compartments” to convey the strict segregation of provincial and federal powers. The metaphor carries with it an explicative power that inheres in its ability to bridge the concrete and conceptual worlds. As such, the metaphor acts as more than a mere linguistic flourish or stylistic embellishment—it is a mode of thought that concretizes and, in so doing, communicates abstract or peculiar concepts. Thus, “through incorporation of tropes into legal opinions, what is abstruse and obscure becomes concrete and comprehensible.”16

Attendant upon this communicative clarity is the ability of the metaphor to make an appeal to common sense. Through the equation of the abstract with the everyday, what is alien and novel is rendered familiar and, in some sense, obvious. H. Arendt reflects that

The simple fact that our mind is able to fund such analogies, that the world of appearances reminds us of things non-apparent, may be seen as a kind of “proof” that mind and body, thinking and sense experience, the invisible and the visible, belong together, are “made” for each other, as it were.17

Once the reader accepts the equivalence or “link” between the abstract concept and the everyday, the implications of these common qualities become apparent. A set of “obvious” inferences flows from the familiar characteristics highlighted by the metaphor. For example, the notion that love is precious or must be treated with care is self-evident—common sense—once it is accepted that “love is like a rose.” As Lakoff and Johnson note:

Because so many of the concepts that are important to us are either abstract or not clearly delin-

12. *Supra* note 9, at 105.
14. Id. at 109.
15. *Supra* note 2, at 156.
16. *Supra* note 7, at 47.
eated in our experience (the emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.).

This appeal to common sense is of critical importance to the juridical metaphor. If the court is arguing that a particular idea must be interpreted in some fashion and can draw a metaphor-ical link to an analogous situation in common experience, artificial judicial reasoning can appear to be simple common sense. Returning to the division of powers example, a court arguing that legislative powers must be tightly constrained within particular bounds makes an apt analogy to the “watertight compartment.” If legislative powers are “watertight compartments,” then it is common sense, or obvious, that there should be no overflow between powers. Thus, legal discourse can use the metaphor to afford the legitimacy of common sense to its own reasoning. This use of the metaphor is apropos, given that cases arise from common experience and the principles arising from judicial opinion must, ultimately, be used in common experience: “since the story both begins and ends in ordinary language and experience, the heart of the law is the process of translation by which it must work, from ordinary language to legal language and back again.”

Finally, the metaphor functions to shape subsequent thought about the concept that it modifies. Any metaphor emphasizes certain qualities while hiding others, thereby focusing subsequent attention on only those common features upon which it depends. This is particularly true where a “fresh” metaphor is introduced because this newly revealed relationship is immediately defined in terms of the qualities that its creator has stressed.

New metaphors, like conventional metaphors, can have the power to define reality. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which forces us to focus only on those aspects of our experience that it highlights, leads us to view the entailments of the metaphor as being true. Such “truths” may be true, of course, only relative to the reality defined by the metaphor.

Once the relationship is accepted, future discussion about the abstract element of the metaphor is shaped, limited, and constrained by the conceptual definition that the trope has created. Consider the spatial metaphors associated with the concept of “control.” Control is associated with the spatial concept “up” as in “I have control over him.” Once this association is accepted, the tendency is for this formative relationship to guide future conceptualizations of control: “he is under my power,” “I’m on top of the situation,” “I have it under control,” etc. This pattern does not preclude other constructions of the concept, but the metaphor-ical association between “control” and “up” is a very powerful one.

The same dynamic takes place when metaphors are used in legal opinions. Once a legal concept is imbued with the “spark of imagination” of metaphor, this linguistic relationship exerts a substantial coercive and constraining effect on future thought about the law. Certain aspects of legal problems are drawn out by metaphors and subsequent thought focuses upon these highlighted characteristics. As such, the use of metaphor in judicial decision making is a means for the court to extend its approach to a legal principle or concept beyond the particular case by fixing upon particular dimensions or qualities of the law in question. These metaphorically centralized qualities become the lens through which the problem is seen in the future while other dimensions of the problem not captured by the metaphor fade into the rhetorical background. This constraining effect is heightened by virtue of the principle of stare decisis (itself a metaphor—to “stand” by a decision), discussed earlier. The doctrine of precedent and the very language employed by the judge combine to create metaphorical limits upon judicial reasoning.

Ultimately, each of these uses of metaphor in judicial opinions contributes to the overall project of a set of judicial reasons—to persuade. For the law to retain its legitimacy, its audiences must be convinced that legal institutions are arriving at just and appropriate conclusions. Robert Gordon comments as follows:

...[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.

This need to persuade is heightened where the courts attempt to make a substantial change in the law. In these cases, the judicial opinion must convince the reader that the just resolution to a case requires a departure from the weight of historical interpretation as well as a reformation of the way in which the law ought to deal with a given issue. To the extent that it is able to render the complex simple, appeal to common sense, and structure thinking about a particular issue, the metaphor can be seen as a powerful tool to be used in this task.

19. Supra note 1, at 692.
20. Supra note 18, at 157-8.
“Two examples will focus this argument on particular instances in the history of Anglo-Canadian jurisprudence when the metaphor was used to argue for a significant change in the law.”

The English court also remarked that “customs are apt to develop into traditions which are stranger than law and remain unchallenged long after the reason for them has disappeared.” The Privy Council agreed that this was likely the intent of the drafters. The English Privy Council from the Supreme Court of Canada, was a landmark case for first-wave feminism. The appellants argued that the Crown must prove the guilt of an alleged murderer beyond a reasonable doubt. Also called the “Persons Case,” Edwards, an appeal to the English Privy Council from the Supreme Court of Canada, was a landmark case for first-wave feminism. The appellants asserted that the Crown must prove the guilt of an alleged murderer beyond a reasonable doubt. Although, once accepted, there are a series of common-sense propositions that follow from this metaphor, note that there is nothing self-evident about the association itself. Indeed, the Privy Council could just as easily have argued that the BNA Act is a non-animate rock, set down in writing and not to be reshaped, only to be discarded and replaced. But by seizing upon certain characteristics of the written document—namely, its adaptability and capacity for change—the Privy Council argued that the Constitution should allow for change. Decided in 1935, Woolmington remains a starting point for the analysis of Anglo-Canadian criminal law. It is read in first-year criminal law courses to teach students the fundamental concept that an accused is presumed innocent until proven guilty beyond a reasonable doubt. Yet, when decided, there was nothing self-evident about this assertion of principle. Rather, many held fast to the notion that once the Crown proved that the deceased died at the hands of the accused, it was the accused’s responsibility to rebut the presumption that he possessed the intent to kill. At trial, the judge in Woolmington charged the jury in the following way:

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.

But, having surveyed the English criminal law, the House of Lords reversed the decision of the trial judge and asserted a new fundamental principle:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt. . . . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether
the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.28

The impact of this declaration cannot be overestimated. Modern Canadian jurisprudence has remained faithful to this notion and the presumption of innocence is now considered a hallmark of trial fairness.

How does one account for the ascendancy of this principle articulated in Woolmington? Surely the consonance of the presumption of innocence with certain principles of natural justice is somewhat explanatory. But another aspect of the enthusiastic adoption of this concept is the persuasiveness with which its importance was argued. The court’s choice of metaphor played no small role in this rhetorical victory. Once again, this case demonstrates that the metaphor can bridge the gap between the abstract and the concrete. Lord Sankey, the author of this judgment, was able to explain the complex interconnectedness of principles in the criminal law as well as the central importance of the presumption of innocence in this system by using the simple metaphor of a single golden thread within a web. In this construction, the “golden thread” is the most valuable element in the web. It will not tarnish. If severed or removed, the beauty and value, if not the integrity, of the web as a whole would be diminished.

28. Id. at 481 (emphasis added).
bounded by the limits of the metaphor, debate can continue as to what precisely it means to say that the Constitution is a “living tree.” In contrast, the metaphor of the “golden thread” effectively ends the creative-interpretive discussion. More than providing boundaries and guiding thought, this image fixes a single approach to the concept that it explains and concretizes. This distinction demonstrates that it is not sufficient to recognize simply that legal metaphors shape thought. The choice of metaphor—in this case, the choice between one that is generative and one that is constractive—can profoundly affect the manner in which legal thought is affected.

METAPHORS IN JUDICIAL OPINION—CONCLUDING REMARKS

This article has focused upon the explanatory and persuasive powers of the metaphor when used in judicial decision making. It is important to recognize, however, that alongside its positive rhetorical uses, the juridical metaphor also has the potential to mislead, distort, obscure, and distract. The process of simplification can remove complexities that ought to be explored. An appeal to common sense, though rhetorically powerful, is open to abuse, particularly where justice and the majority view diverge. While seizing upon certain qualities of a particular idea by means of a carefully crafted metaphor can shape future thinking, it can equally constrain the fluidity and creativeness of jurisprudential thought.

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As such, the argument advanced in this paper is not a normative claim as to the desirability of metaphors in judicial opinion. Rather, it is an investigation into and reflection of the rhetorical nature of the judgment—a character in which metaphor participates. A judgment is not a declaration of fact—it is an assertion of the just. The metaphor is an instrument used in the persuasive project of judicial decision making, an undertaking to arbitrate disputes and interpret legal principles while maintaining and asserting the legitimacy of the law.


The story of Justice William O. Douglas has elements of interest to just about anyone. Appointed to the U.S. Supreme Court at age 40, he wrote 1,164 full opinions, including 486 dissents, along with 32 books. While serving on the Court, he found time to seek to join Franklin Delano Roosevelt’s ticket as the candidate for vice president in 1944, to gain a reputation as a great outdoorsman (with many of his books recounting his travels), and to marry four times, cheating on each of the first three wives with the woman who would be next.

As Bruce Allen Murphy demonstrates in his book, however, Douglas was also something more—a liar. And not just to his wives. No, Douglas lied about his background in ways that today would get any college football coach fired. He claimed to have served in the military and was buried in Arlington National Cemetery. His military service actual consisted only of service for 10 weeks at the end of World War I in the Students’ Army Training Corps in Walla Walla, Washington. He claimed to have suffered from polio as a child, but never had the disease. He claimed to have graduated second in his class and to have just missed out on a clerkship with Justice Harlan Fiske Stone. His law school classmates, who knew he was neither second in the class nor a close runner-up for the clerkship, gave him the moniker “The Approximate Mr. Justice Douglas” after he told that tale, with one of them noting that Douglas was “always a little general about the facts.” Murphy shows, through painstaking research, that Douglas was not just a little general—he was intentionally deceptive about matters large and small.

Despite the disclosures of Douglas’ lies and bad behavior, Murphy is not judgmental and presents a balanced biography, full of detail about events that captivate interest. For example, he recounts the circumstances leading up to Douglas’ issuance, as a single justice, of an order effectively requiring President Nixon to halt bombing in Cambodia during the Vietnam War. A federal district judge had ruled that the bombing must stop, but the Second Circuit had stayed the order and a congressional end to funding for the bombing was to take place within two weeks. Justice Marshall, the circuit justice, had already denied a request to set aside the Second Circuit’s stay order. But neither that nor the looming congressional deadline kept Justice Douglas from agreeing—even before Marshall had ruled—to hear the matter if Marshall refused to lift the stay. Douglas scheduled a very public hearing in the courthouse in his hometown of Yakima, Washington, then dictated his opinion on a Friday evening to his entire staff (two secretaries and two law clerks who were all trying to take it down together) from a series of pay phones along the road, fearing government wiretaps and some action to thwart issuance of his decision. His opinion was reversed by the full Court a mere six hours after it was issued.

Murphy’s book has generated many reviews, with the most interesting perhaps penned by Judge Richard Posner (and available online at http://www.law.uchicago.edu/news/posner-antihero.html). Posner notes that he met Douglas when Douglas was 64 and Posner was a clerk for Justice William Brennan: “Douglas struck me as cold and brusque but charismatic—the most charismatic judge (well, the only charismatic judge) on the Court.” Posner concludes from Murphy’s evidence that “Douglas turned out to be a liar to rival Baron Munchausen” and that Murphy’s book is a “riveting biography of one of the most unhorsefigers in modern American political history.” If you don’t have time or sufficient interest to read the full book, a quick read through Posner’s review will leave you entertained and provide greater detail of the book than we have room for here.