California Courts Review

A FORUM FOR THE STATE JUDICIAL BRANCH

SUMMER 2007

2007 Bench Bar Biannual Conference

—inside back cover

The Many Changing Roles of Court Executives

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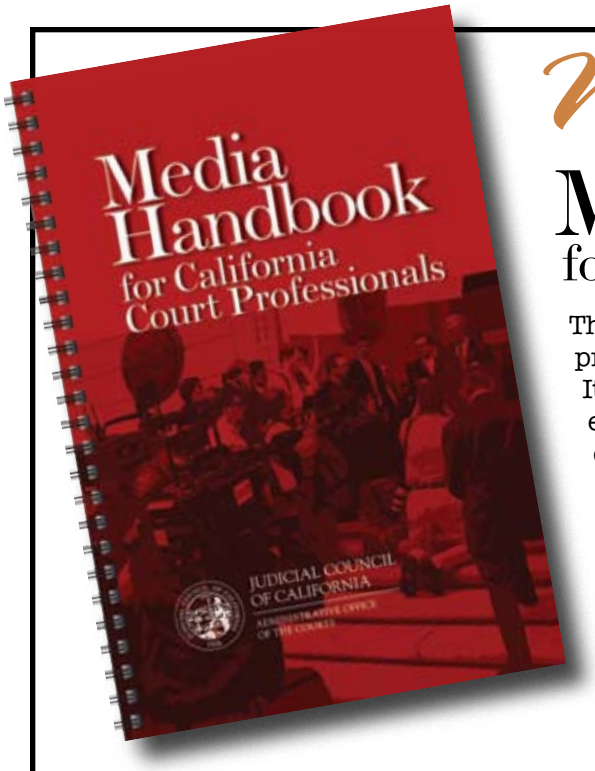
http://serranus.courtinfo.ca.gov/programs/jury



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- How to handle media calls
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- Emergency communications

To receive your complimentary copy,
contact Lynne Mayo, Administrative Office of the Courts, Office of Communications,
at 415-865-7734 or lynne.mayo@jud.ca.gov.

CALIFORNIA COURTS REVIEW • SUMMER 2007

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California Courts Review

SUMMER 2007

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A wise person once said, "Change is the essence of life. Be willing to surrender what you are for what you could become."

In this issue of *California Courts Review,* we focus on change within California's judiciary. Our lead article features an exchange of views by four of the state's most senior court executive officers on their changing roles over the past decade, providing a revealing look at how the changes in the judicial branch have affected their roles, responsibilities, and relationships.

Our second article examines the change brought about by the introduction of complex litigation courts in California. Our authors conducted an exhaustive survey to demonstrate how such courts save time, money, and resources for the judicial system, lawyers, and litigants.

Our third article features change of an entirely different sort. A retired judge took it upon himself to walk barefoot across hot coals to increase his self-confidence and thus his mediation skills. While we do not recommend this action for every judge, the exercise demonstrates how surrendering fear enables one to become self-empowered.

One sad note: Just before this issue went to press, we learned of the passing of Court of Appeal Justice Paul Boland. He was one of the most valuable members of our editorial board, always full of fresh ideas, constructive criticisms, and sharp insights.

And he was always concerned about the welfare of others. When I was seriously ill earlier this year, Justice Boland expressed sincere concern. "If you can handle Irish Catholic prayers, you got 'em from Margaret and me," he told me in one message.

Thank you, Paul, for everything.

—Philip Carrizosa
Managing Editor

On Preserving Judicial Independence

The following are excerpts of remarks delivered by Chief Justice Ronald M. George in August to the American Bar Association on receiving the association's John Marshall Award during its annual convention in San Francisco.

I am deeply honored to receive this recognition from the American Bar Association. I especially cherish being the recipient of an award bearing the name of Chief Justice John Marshall, a jurist who has long been credited with establishing the doctrine of judicial independence as the cornerstone of the rule of law and essential element in our nation's development as a democracy. His actions as Chief Justice and as a leading statesman during the formative years of our nation's history set the stage for how justice is administered today in our state and federal courts. As Chief Justice of California and thus as the person charged with oversight of the largest law-trained judicial system in the world, I every day see the benefits of the course he set.

All of us here probably accept as an established principle that judges are expected to examine and apply the laws enacted by the legislature in an objective and impartial manner—and we recognize that most judges attempt to do so. But these assumptions underlying the role of the courts are not necessarily understood or shared by the public—and their importance all too frequently is lost in the 30-second media sound bites that are the main source of information on judicial decisions for most people. Compounding this state of affairs is the circumstance that, according to a recent survey, two out of three adult Americans are unable to identify the three branches of government.

As lawyers and judges, each of us has a vital interest in ensuring that the public has trust and confidence in our legal system. Courts must be able to act impartially on the evidence and legal principles governing the case at hand, without fear of being stripped of their funding or of their jurisdiction over certain matters by our sister branches of government and without concern that a decision will alienate support from the private interests that seem to play an increasingly pivotal role in the selection of individuals for judicial office.

Courts not only must be impartial—they must be seen as impartial. For courts to exercise their crucial role in the conduct of society, they must have the support of the people they serve. And we cannot take this support for granted.

CAROL SONSTEIN PHOTOGRAPHY

Last fall, I was fortunate to participate in a conference convened by Justice Sandra Day O'Connor at Georgetown University. Among the speakers was Justice Stephen Breyer. He described a poll that inquired whether members of the public believed that judges arrived at their decisions impartially, in conformance with the law. When first conducted several years ago, the poll found that two-thirds of the respondents believed in the impartiality of judges. However, by 2005, when a second poll was conducted, almost half of the respondents believed judicial decisions were driven instead by the personal preferences of the judge.

I dare say that Chief Justice Marshall, a most articulate and effective champion of an independent judiciary, would be dismayed at this public perception. One of his often-quoted pronouncements may be familiar to some of you. He observed: "I have always thought from my earliest youth until now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

Marshall made those remarks during the constitutional convention held in Virginia in 1829. He spoke against a proposal that would have permitted Virginia's legislature, by the vote of a simple majority, to repeal a law establishing the superior courts and to thus end the tenure of those holding judicial office. He firmly believed in the absolute necessity of maintaining a judiciary not vulnerable to inappropriate influences.

During that same event, in a few short sentences, Marshall summed up the role of the judge in words that still carry great weight today: "[The judge] has to pass between the government and the man whom that government is prosecuting,—between the most powerful individual in the community, and the poorest and most unpopular. It is of the [foremost] importance that in the performance of these duties he should observe the utmost fairness. . . . The judicial department comes home in its effects to every man's fire-side—it passes on his property, his reputation, his life, his all." True then. True today.

The California court system has made great strides in improving its ability to meet the needs of the public we serve and in increasing the public's confidence in our legal system. In furthering these goals, we have taken the position that the creation of a stronger judicial branch is an important safeguard in ensuring a court system that is appropriately responsive to the public's needs while remaining impartial and independent.

The public generally does not have a sense of what constitutes the "judicial branch." Unlike the executive and legislative branches, which possess historically distinct identities and duties having a known statewide or national impact, the judiciary as a branch—as an institution—largely has lacked that sense of a concrete character transcending the individual courts and judges of which the branch is comprised.

Here in California, as part of our efforts to ensure an impartial and effective judicial branch, we have committed ourselves—with the assistance of the executive and legislative branches and others—to building a strong statewide judicial institutional identity and infrastructure. Our intention is to provide a stable foundation of funding and resources for the court system as a whole, as a means of ensuring consistently fair and accessible justice across the 58 counties of our state.

The role of the judicial branch is under sharp scrutiny today in every part of our nation—a circumstance not without historical precedent. But history also teaches us that if our judicial system and the rule of law are to continue to endure and flourish, constant effort and commitment on our part will be required. John Marshall's clarity of vision—so vividly articulated—concerning the essential role played by the fair administration of justice in our daily lives, sets a tone for our efforts here at home and in the example we set for emerging democracies around the world. Marshall has provided a goal that remains highly relevant to our time.

Court Briefs

Chief Justice Honored by American Bar Association

Chief Justice Ronald M. George received the 2007 John Marshall Award from the American Bar Association at its annual meeting on August 10 in San Francisco. The award recognizes those dedicated to the improvement of the administration of justice.

As head of the largest court system in the nation, Chief Justice George has paved the way for historic court reforms in California, including state court funding, trial court unification, and state governance of court facilities. In addition, the Chief Justice has led major innovations in the state jury system, family and juvenile law services, and court interpreters and has improved access to justice for the many Californians who cannot afford an attorney.

COURTESY SUPERIOR COURT OF LOS ANGELES COUNTY

Los Angeles Court Hits the Road to Promote Jury Service

The Superior Court of Los Angeles County is using 16 of its delivery vans as moving billboards for jury service, inviting citizens to "Pull up a chair" and "Be the judge." This summer the court had magnetic signs attached to the vans that shuttle among the 50 courthouses in the county, delivering mail, supplies, and files.

The court also debuted a new jury brochure that explains the responsibilities of the courtroom judge, judicial assistant, bailiff, court reporter, and court services liaison. The brochure also lists court-community outreach services, such as self-help centers, the teen court, and public workshops.

Contact: Public Information Office, Superior Court of Los Angeles County, 213-974-5227

More Courthouses Moving to the State

As of June 30, 113 of California's 451 courthouses had been approved to transfer from county to state management. These transfers include more than 30 facilities that were approved on June 26 by boards of supervisors in seven counties.

Transfer of all 451 court facilities statewide was to be completed by June 30, as called for by the Trial Court Facilities Act. But many issues, including seismic concerns, made the deadline unattainable. Senate Bill 145 (Corbett) would extend the transfer deadline through December 31, 2008. The Administrative Office of the Courts (AOC), superior courts, and counties continue to negotiate the transfer of the remaining court facilities throughout the state.

List of Approved Court Transfers

www.courtinfo.ca.gov /programs/occm/documents /Transfers_To_Date.pdf

Seismic Legislation Easing Transfer of Court Facilities

www.courtinfo.ca.gov /presscenter/newsreleases /NR71-06.PDF

Innovative Courts Honored With Kleps Awards

Nine court programs—including projects ranging from a professional development program to a Web site for sharing information with justice partners—received the 2006–2007 Ralph N. Kleps Awards. The biennial awards program recognizes innovative contributions made by individual courts to the administration of justice in California.

The California Bench Bar Biannual Conference September 26–30 in Anaheim will feature workshops and a printed book with more information on this year's recipients. The book, *Innovations in the California Courts,* also highlights major statewide initiatives being implemented in the judicial branch.

Kleps Awards Information, Nominations, Recipients

www.courtinfo.ca.gov /programs/innovations

Contact

Deirdre Benedict, AOC Promising and Effective Programs Unit, 415-865-8915, deirdre.benedict @jud.ca.gov

Judge William J. Murray, Jr., answers a teacher's question during the California on My Honor institute.

Teachers Receive Civics Lessons on Court System

California on My Honor, a civics institute held August 8–10 in San Diego, educated 25 selected K–12 teachers from around the state on the role and operation of the California court system. Participants explored court- and law-related education curricula and programs, reviewed K–12 California civics standards, and created unique lesson plans tailored for use in their own classrooms. They will attend a follow-up meeting on October 26 in San Francisco to share the plans they developed during the institute.

This year's program was a collaboration between court staff and California State University at San Marcos, under the leadership of Dr. Fran Chadwick, professor of education. It expanded on a San Diego institute conducted last year.

Contact

Catharine Price, AOC Promising and Effective Programs Unit, 415-865-7783, cat.price@jud.ca.gov

New Video Highlights Court Programs for Jurors, Public

Court visitors are seeing how courts are improving services for domestic violence victims, self-represented litigants, juvenile defendants, and jurors. *Courts Illustrated* is a new video that features courts using innovative and problem-solving techniques to address issues facing their communities. The 58-minute video, which can be shown in jury assembly rooms or other public areas of the court, is a collection of several news segments from *California Courts News,* the monthly newsmagazine for the courts. The video will also be posted to the California Courts Web site.

Contact

Leanne Kozak, AOC Office of Communications, 916-263-2838, leanne.kozak @jud.ca.gov

COURTESY COURT OF APPEAL, SIXTH APPELLATE DISTRICT

Law Librarians Annual Meeting

Law librarians from the California Judicial Center Library, Courts of Appeal, Administrative Office of the Courts, and Habeas Corpus Resource Center take a break from their annual meeting in San Francisco to be photographed with Chief Justice Ronald M. George (middle) and Administrative Director of the Courts William C. Vickrey (far left).

Meeting participants discussed accounting, the Web-based online catalog project, and how judicial libraries fit into the strategic plan for the judicial branch. These librarians and their colleagues serve more than 1,000 appellate justices and court staff.

Riverside Court Finds Faster Way to Reach the Community

Earlier this year, Presiding Judge Richard T. Fields sent a message to local residents asking them to contact their legislators about the urgent need for more judgeships. But Judge Fields didn't have to drop it in the mailbox. Instead, he simply clicked a button on his computer.

The Superior Court of Riverside County is using an e-mail subscribers list to spread court news to local attorneys, media, and the public. The court has also used the e-mail list to notify the community about proposed or approved changes in local rules, changes in judicial assignments and calendars, and other information affecting the court and its users.

Anyone can sign up for the e-mail list by visiting the court's Web site. The list debuted in July 2006 and in less than a year had more than 1,000 subscribers.

Riverside Court's E-mail Notices

www.riverside.courts.ca.gov/attylitig.htm#STAYING_INFORMED_WITH_RIVERSIDE_SUPERIOR_COURT

Experts Look to Improve, Expand Youth Courts

More than 125 youths, youth/peer court juvenile bench officers and staff, education experts, and youth-focused associations came together at the second statewide Youth Court Summit on June 22–24 at the University of California at San Diego. Participants shared ideas and best practices about youth courts, including discussions about the diversity of California and its courts, risk factors that contribute to criminal behavior, and coordination of efforts to better track recidivism rates.

Youth courts offer an alternative to the traditional justice system. Youths charged with offenses opt to forgo the formal procedures of the juvenile court and agree to a sentencing forum with a jury of their peers—other teens who have been trained to assume justice system roles, including those of attorneys, court staff, and jurors who determine penalties.

Information on Peer/Youth Courts

www.courtinfo.ca.gov/programs/collab/peeryouth.htm

Contact

Donna Strobel, AOC Center for Families, Children & the Courts, 415-865-8024, donna.strobel@jud.ca.gov

Self-Help Clinic for Civil Appeals

Self-help centers aren't just for trial courts anymore. This year the Court of Appeal, Second Appellate District, launched the first self-help clinic for indigent litigants with civil appeals. Like trial court self-help centers, the centers do not give litigants legal advice, just assistance with the process. Located at the appellate court, the clinic is funded by a State Bar grant and Public Counsel provides the attorney. The Second Appellate District also has self-help information online, as do the other appellate courts in California.

Appellate Clinic for Indigent Defendants

www.courtinfo.ca.gov /courts/courtsofappeal /2ndDistrict

Court Employees' Experiences With the Foster-Care System

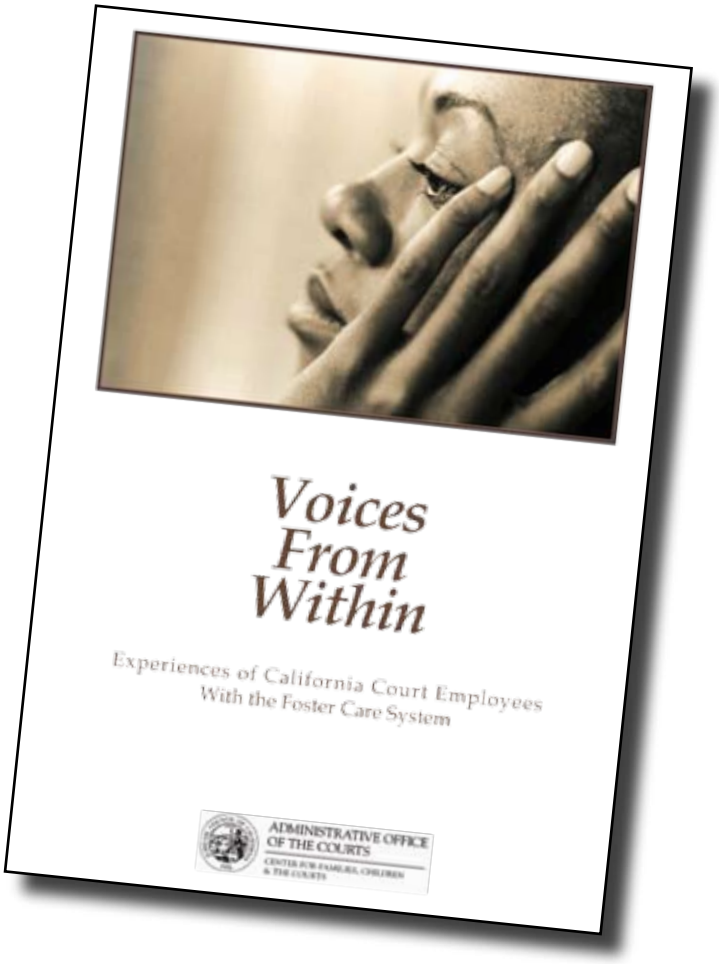
A new booklet highlights the experiences, both good and bad, of people working in the California courts who were in the foster-care system and now lead successful lives. *Voices From Within* also features stories from foster parents and others who have a connection to the foster-care system. The AOC is sharing the booklet with courts and juvenile court policymakers, as well as with youth who are currently in California's foster-care system.

Foster-Care Booklet

www.courtinfo.ca.gov /programs/cfcc/pdffiles /StoriesFromWithinBooklet .pdf

Contact

Stacey Mangni, AOC Center for Families, Children & the Courts, 415-865-7659, stacey.mangni@jud.ca.gov



Ensuring Well-Being of Kids in the Juvenile Dependency System

Has an assessment of the child's mental health, physical health, and educational needs begun? Has the social worker investigated placement with an appropriate relative? Does the child have storage space to safeguard his or her personal belongings?

A new booklet, *Every Child, Every Hearing,* provides courts and other interested parties with statutory rules and key questions that must be asked and followed up on for every child in the juvenile dependency system. The booklet focuses on the initial or detention hearing; rights of foster youth; physical and emotional health; relationships, permanency, and transitions; and cognitive development and education.

***Every Child, Every Hearing* Booklet**

www.courtinfo.ca.gov /programs/cfcc/pdffiles /EveryChild.pdf

Contact

Chantal Sampogna, AOC Center for Families, Children & the Courts, 415-865-7729, chantal .sampogna@jud.ca.gov

Graduate Degrees in Judicial Administration

A new graduate program offers courses and certificates in judicial administration from California State University at Sacramento (CSUS). The Administrative Office of the Courts and several courts are working with CSUS and community colleges to provide court-related courses and certificates. The San Mateo County and San Jose community college districts also offer training for people who want to work for the

courts, as well as courses for court staff who want to move into management. Students can work toward an associate of arts degree in judicial studies.


Ken Torre

CSUS has appointed Ken Torre director of its Judicial Administration Graduate Program. Mr. Torre will continue as executive officer for the Superior Court of Contra Costa County while he assumes part-time director responsibilities at CSUS.

CSUS Judicial Administration Program and Course Listings

www.csus.edu/mppa/judicial/index.htm

New Statewide Commission for Impartial Courts

Chief Justice Ronald M. George has announced the formation of a commission sponsored by the Judicial Council that will study and recommend ways to ensure judicial impartiality and accountability. The commission consists of a steering committee and four task forces, which will study the procedures of selecting and retaining judges; promoting ethical and professional conduct by judicial candidates; better regulating campaign financing and advertising; and educating the public about the judiciary, judicial elections, and judicial candidates.

Information on the Commission and Task Forces

www.courtinfo.ca.gov/presscenter/newsreleases/NR50-07.PDF

Ventura Court Recognized for Defendant Assessment Center

COURTESY SUPERIOR COURT OF VENTURA COUNTY

The Superior Court of Ventura County has received a Justice Achievement Award from the National Association of Court Management. The award recognized the court's QuickStart Assessment Center, which conducts on-site mental health and substance abuse assessments for defendants immediately after their court appearances.

Staffed by Ventura County Behavioral Health Department clinicians, the center provides judges with valuable information for making decisions regarding court orders, sanctions, or incentives. The on-site services are convenient for defendants. Started in 2005, the center assesses more than 100 defendants each month and approximately 1,500 per year.

Contact: Robert Sherman, Assistant Executive Officer, Superior Court of Ventura County, 805-654-2964.

Milestones

The Governor announced the following judicial appointments.

Judge Brian M. Arax, Superior Court of Fresno County

Judge Carol K. Ash, Superior Court of Merced County

Judge Mitchell L. Beckloff, Superior Court of Los Angeles County

Judge Angel M. Bermudez, Superior Court of Riverside County

Judge Colin J. Bilash, Superior Court of San Bernardino County

Judge John R. Brownlee, Superior Court of Kern County

Judge Rhonda Burgess, Superior Court of Alameda County

Judge Edmund Willcox Clarke, Jr., Superior Court of Los Angeles County

Judge Mark S. Curry, Superior Court of Placer County

Judge My-Le Jacqueline Duong, Superior Court of Santa Clara County

Judge Stacy Boulware Eurie, Superior Court of Sacramento County

Judge Mac R. Fisher, Superior Court of Riverside County

Judge Timothy F. Freer, Superior Court of Riverside County

Judge Graciela L. Freixes, Superior Court of Los Angeles County

Judge Matthew J. Gary, Superior Court of Sacramento County

Judge David B. Gelfound, Superior Court of Los Angeles County

Judge Alvin M. Harrell III, Superior Court of Fresno County

Judge Cara D. Hutson, Superior Court of San Bernardino County

Judge John H. Ing, Superior Court of Los Angeles County

Judge Kristi C. Kapetan, Superior Court of Fresno County

Judge Charles J. Koosed, Superior Court of Riverside County

Judge David R. Lampe, Superior Court of Kern County

Judge Robert J. Lemkau, Superior Court of San Bernardino County

Judge Steven A. Mapes, Superior Court of San Bernardino County

Judge Kevin J. McCormick, Superior Court of Sacramento County

Judge Gary A. Medvigy, Superior Court of Sonoma County

Judge Kathryn T. Montejano, Superior Court of Tulare County

Judge John M. Monterosso, Superior Court of Riverside County

Judge Tamara L. Mosbarger, Superior Court of Butte County

Judge Delbert W. Oros, Superior Court of Sacramento County

Judge Elia V. Pirozzi, Superior Court of San Bernardino County

Judge Timothy P. Roberts, Superior Court of Monterey County

Judge Jaime R. Roman, Superior Court of Sacramento County

Judge Roger Ross, Superior Court of San Joaquin County

Judge Michael A. Sachs, Superior Court of San Bernardino County

Judge Wilfred J. Schneider, Jr., Superior Court of San Bernardino County

Judge Dana B. Simonds, Superior Court of Sonoma County

Judge Kathryn A. Solorzano, Superior Court of Los Angeles County

Judge Donna L. Stashyn, Superior Court of Solano County

Judge Xapuri Villapudua, Superior Court of San Joaquin County

The following judges and justice left the bench.

Judge Alice E. Altoon, Superior Court of Los Angeles County

Judge James Allen Bascue, Superior Court of Los Angeles County

Judge Jonathan H. Cannon, Superior Court of Orange County

Judge Ronn M. Couillard, Superior Court of Tulare County

Judge Michael S. Fields, Superior Court of Monterey County

Judge Roger G. Gilbert, Superior Court of Butte County

Judge Thomas D. Glasser, Superior Court of San Bernardino County

Judge Philip S. Gutierrez, Superior Court of Los Angeles County

Judge James P. Henke, Superior Court of Sacramento County

Judge Steven Hintz, Superior Court of Ventura County

Judge Erik Michael Kaiser, Superior Court of Riverside County

Judge Bernard J. Kamins, Superior Court of Los Angeles County

Judge Eddie T. Keller, Superior Court of El Dorado County

Judge Barry B. Klopfer, Superior Court of Ventura County

Judge Lillian Y. Lim, Superior Court of San Diego County

Judge Richard W. Lyman, Jr., Superior Court of Los Angeles County

Judge Jon M. Mayeda, Superior Court of Los Angeles County

Judge Romero J. Moench, Superior Court of Kern County

Judge Michael E. Nail, Superior Court of Solano County

Judge Richard Neidorf, Superior Court of Los Angeles County

Justice Joanne C. Parrilli, Court of Appeal, First Appellate District

Judge Victor H. Person, Superior Court of Los Angeles County

Judge Donna M. Petre, Superior Court of Yolo County

Judge Robert D. Quall, Superior Court of Merced County

Judge Lois Anderson Smaltz, Superior Court of Los Angeles County

Judge R. Michael Smith, Superior Court of Solano County

Judge Peter L. Spinetta, Superior Court of Contra Costa County

Judge Otis D. Wright, Superior Court of Los Angeles County

Judge George H. Wu, Superior Court of Los Angeles County

Judge Ronald T. L. Young, Superior Court of Napa County

Judge Raymond C. Youngquist, Superior Court of San Bernardino County

In addition, Superior Court of Los Angeles County **Judges Philip S. Gutierrez, Otis D. Wright,** and **George H. Wu** were appointed to the federal bench.

The following court executive officer has been appointed.

Richard Feldstein, Superior Court of Tuolumne County

THE MANY CHANGING ROLES OF COURT EXECUTIVES

By
Tressa S. Kentner, Steve Konishi, Len L. LeTellier, and Michael A. Tozzi

Over the last two decades, the role of the California courts has changed enormously. The unification of the superior and municipal courts, shift to state funding of the trial courts, switch to state governance of court facilities, and introduction of technology have caused the courts to operate much differently than in times past. To examine those changes, we invited four court executives with several years of experience to discuss the new landscape.

Our panel was composed of Executive Officers Tressa S. Kentner, Superior Court of San Bernardino County; Steve Konishi, Superior Court of Yuba County; Len L. LeTellier, Superior Court of Sutter County; and Michael A. Tozzi, Superior Court of Stanislaus County. The questions were posed by Philip Carrizosa, managing editor of *California Courts Review.*

CCR: *First, let's get to the fundamental question: How has the role of trial court executives essentially changed over the last 10 or 20 years?*

Konishi: The role of the court executive has always been to administer the courts as effectively and efficiently as possible. It's the manner in which we accomplish our role that has dramatically expanded, with all of the changes that have taken place over the years. I don't think that we necessarily have to be subject-matter experts in all of the issues we are confronted with, but we certainly must have a working knowledge in many more areas than before and be able to provide the proper direction to the appropriate people.

LeTellier: The role of court executive today is much more that of a leader than a manager. The court executive fills the primary role of court leader in the areas of technology, program and policy development, human resources, facilities, and budget management. Twenty years ago, the court had limited authority in these areas and was subject, by a large extent, to county directive. As a result, the executive officer today has much more responsibility and must have a greater knowledge base in many additional areas.

Tozzi: The job today is more technical, more political, and much more demanding. It's still very much hampered by the focus on the presiding judge as the court's leader, especially when that leadership rotates every two years and the rotation has little to do with interest and ability. Advances in technology, the advent of unions and agency shops, increased micromanagement from the Legislature, strategic plans, more financial accountability, funding structure changes, and more emphasis on public access have all made the job more demanding and created the need for continued education of the executive officer.

Kentner: When I started working in the courts in 1990 as a superior court administrator, I was not the clerk of the court and supervised only a small staff. I focused on budget, facilities, caseflow management, and jury administration. I spent the majority of my time on caseflow management. In many ways, I was in a high-level staff support position. All of that changed when the superior court transferred the clerk of the court responsibility from the county clerk to the court administrator. At the same time, we merged the administrations of the superior court and municipal court. I no longer had the time to focus entirely on caseflow management. The next substantial change came when state trial court funding became a reality and the court separated from the county. The executive officer now is responsible for a much broader range of functions.

CCR: *What change in the California judicial branch has affected your job the most—trial court unification, state funding of the trial courts, or state governance of court facilities?*

Tozzi: Unification. Managing and merging two different styles of management [municipal and superior], the outright disdain from superior court judges, the effect of former municipal court judges now in leadership roles in the unified court, the increased role of the Administrative Office of the Courts [AOC] and the regional structures, and the demand and need to speak with a unified voice in Sacramento have given us much to contend with, but it's been fun.

Konishi: For me, it was trial court unification. I had served as a superior court executive officer for nearly 20 years, and the merger with the municipal court significantly changed all areas of court operations. Court unification changed judicial assignments, and court staff had to be merged. Policies, procedures, and forms had to be modified to work in a unified court, and staff had to be trained in new duties. Calendar systems had to be modified along with case management systems, accounting and budgeting functions, and statistical reporting. Unifying as a single trial court has been and continues to be a tremendous challenge. Through attrition, as we replace "old-timers" with new employees who were not part of the segregated court system, it becomes a more seamless operation.

Kentner: The greatest change for me was the result of state trial court funding and the separation of the court from the county. In particular, the changes regarding the status of court employees were particularly significant. Being able to develop a court-specific personnel system and labor agreement has enabled us to creatively manage human resources in ways that I never imagined I would be able to do. The changes have led to many positive developments for the court and its employees. We also have more budgetary freedom. The Judicial Council allocates the budget, and courts have freedom to develop local priorities. The county was much more restrictive.

CCR: *How has the relationship of court executives and presiding judges changed? Are the court executives the leaders of the trial courts now or does that role always have to be filled by the presiding judges?*

LeTellier: I'm sure the relationship varies from court to court, depending on the personalities involved. But to be effective, the executive officer must be respected by the presiding judge for his or her abilities and integrity and must provide the leadership stability to establish the operational continuity necessary for the court to function efficiently and effectively from year to year. It is critical that the court executive and presiding judge work closely together, and it's incumbent on the court executive to forge an effective working relationship that will serve the court well. Now more than ever, they are both leaders and dependent upon each other.

Konishi: For me, the relationship with the presiding judge really hasn't changed. The relationship between the court executive and presiding judge is built upon trust and confidence in one another. In Tulare County, the presiding judge changed every one to two years. Some judges liked to be involved in administrative functions and decision-making while other judges preferred to be less involved in the administration side. It is just a matter of adapting to their different styles and working together as a team. Since coming to Yuba County in 1999, I have been very fortunate to have worked with the same presiding judge, and we have developed an excellent working relationship. I think that working with the same presiding judge has provided the court with stability and continuity. The leadership responsibilities are different, but the presiding judge is the ultimate leader of the trial courts.

Kentner: The presiding judge is the leader of the court as a whole. The court executive is the leader of the nonjudicial staff and functions. In our court, the court executive is part of the court's leadership team.

Tozzi: The executive officer still needs to figure out how the presiding judge thinks and his or her management style and to work with that style. The power base is with the judges, and there are still those [judges] who are "in" with regard to which executive officers are put on key committees. The direction for the trial courts is being set at a higher level. But, having said that, all of the changes that have occurred have been needed because of the structural and the political changes. My only lamentation is that our profession did not keep pace with those changes and now we're playing catch-up. There was no succession planning at the decisionmaking level, the AOC. Those of us who pleaded for growth in the profession were simply not heard. The "mega" courts still lead the way when it comes to meaningful change. That's always been the reality and always will be. It works.

CCR: *What are the characteristics of a modern court executive as compared to those in the past?*

Tozzi: Leadership skills, leadership skills, and leadership skills. Take risks, be political, nurture growth, network, and be involved in the community—super-professionalism always.

Kentner: We must juggle many more activities and make more independent decisions. We must have a deep understanding of technical areas such as human resources and budget management. Although some in the branch may believe we have lost local control to the Judicial Council and AOC, I believe we have significantly more freedom and responsibility than we had with the county, particularly in human resources. Under county administration, we were required to get approval for every new position. Under the current governance, we are given much more freedom to determine our specific staffing needs.

LeTellier: Court executives today must have leadership abilities that will facilitate team building and forge consensus. They must have vision, good communication skills, and the ability to empower. In years past, the role was much more focused on operations management.

CCR: *How do court executives manage employee relations now?*

Kentner: Before the enactment of the trial court employees' legislation,

the county developed a personnel system and negotiated labor agreements for all employees. The personnel system and labor agreements were seldom related to the needs of an individual department or an entity such as the superior court. The court had almost no control over labor negotiations and often was affected by issues totally unrelated to court needs. Now, we are able to develop personnel systems and labor agreements designed to support

the court. We also control recruitment and hiring, which allows us to streamline the process for becoming a court employee.

Konishi: But the bottom line has not changed—employee relations are all about managing our employees with dignity and respect.

Tozzi: There's less latitude and there are more rules, and not as much one-on-one contact with an employee. There are labor negotiations, contracts, requests for proposals, etc. And there's more case law that court executives need to know—for example, about sexual harassment prevention. You learn to adjust, to learn, to avoid land mines, and to educate yourself, your staff, and judges.

CCR: *How has technology changed the way you manage the courts?*

Konishi: Back in the old days, we used typewriters to prepare court calendars and stored information on dumb terminals. Technology has come a long way since then. The emergence of technology has enabled us to become more efficient and better able to serve the public. The amount of information available to the judicial officers, the staff, and the public has increased substantially.

Kentner: Technology has enabled us to work smarter, not harder. We are continually using technology to help us handle our burgeoning caseload. It also helps us to push services out to more people via the Internet.

LeTellier: Although courts in general tend to be conservative institutions that are naturally resistant to change, courts that fail to embrace new technologies to the greatest extent possible will soon be left in the dust. As a matter of routine, a court executive should be considering the availability of technological solutions for issues as they arise.

CCR: *So who do court executives ultimately serve—their judges or the public?*

Konishi: We should be serving both.

LeTellier: As a CEO, I have served "at the pleasure" of judges for 26 years. Ultimately, however, we are all government employees who must constantly strive to maintain the public's trust and confidence.

Tozzi: Both equally. But if I had to give an edge, it would have to be to the public. If we effectively serve and meet the needs and demands of the public, we are serving our judges. In reality, it's a different set of demands—and I'm too old and too gray to be giving out a list of what we do to serve the needs of the judges.

Kentner: I always hope that the two don't differ that much! I believe that I serve both and that a big part of my job is to create an organization that can do both. This question points out one of the biggest changes in the court system in the past 15 years. We have moved from being primarily driven by the needs of the courtroom to focusing on the needs of those who use the courts, jurors, and the public. We have changed from being primarily inner-driven to being driven by the needs of the community at large. Community-focused planning is changing the branch for the better. CR

The Cost $avings of the Complex Civil Litigation Program

By
Paul Kiesel
With
Bryan Borys

When the request came to write an article on California's complex civil litigation program, I wondered how it would be possible to write 2,000 words worthy of publication. More perplexing was the assignment itself: "How do you quantify the financial savings from the complex courts?"

Anecdotally, it has been well accepted that the procedures used in the complex courts—the hands-on case management, the superior court's familiarity with the individual cases, and discovery without using discovery masters—has saved litigants enormous sums of money. However, quantifying the anecdote was a significant challenge.

As luck would have it, Judge Carolyn B. Kuhl of the Superior Court of Los Angeles County reminded me of a survey launched over a year ago to answer this very question. With the assistance of Dr. Bryan Borys, a committee I chaired surveyed 99 firms that practice before the complex courts in Los Angeles County. Using the online service Zoomerang,[1] the committee created a questionnaire to assist in quantifying the savings associated with the complex court. Of the 99 firms surveyed, a statistically valid sample of 57 responded. Thus, the request for an article provides an apt platform for publication of this most interesting survey. Here is a summary of the survey, the results, and our conclusions, along with my thanks to the entire bench and bar committee for the Complex Litigation Court of Los Angeles County.[2]

We asked litigators familiar with the complex litigation program in the Superior Court of Los Angeles County to report their perceptions of cost savings resulting from innovations in the administration of complex cases. While it is difficult to estimate the magnitude of those per-

ceived savings, we can rank various practices in terms of the likely cost savings they bring. We found that the greatest cost savings are likely the result of the accessibility of judges, leading to fewer appearances; savings in discovery costs and in law-and-motion costs through various practices; and savings created by early resolution, brought by familiarity with the case and effective settlement efforts.

Litigators' Perceptions of Cost Savings in the Complex Litigation Program

Rule 3.400(a) of the California Rules of Court defines *complex case* as follows:

> A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

In 1999 the Judicial Council adopted this rule, then numbered 1800, as part of the Final Report of the Complex Civil Litigation Task Force, which authorized complex litigation courts and procedural innovations.[3] The judges assigned to the program in Los Angeles County have pursued a number of innovations intended to effect, among other goals, cost savings to litigants. This survey is an attempt to learn from litigators who are frequent users of the program which of these innovations, if any, have yielded savings.

There is little research on these relatively new procedural innovations, and no study has focused directly on the cost issue. A study by the National Center for State Courts (NCSC)[4] suggests that, across the state of California, cases handled through complex litigation procedures have more activity early in the case[5]—clearly a factor that *increases* litigation costs during the early life of the case. On the other hand, the NCSC study also points out that cases seem to move toward resolution more quickly, which may save costs over a case's entire life. Indeed, this logic is echoed by a RAND study of the broader context of civil procedure reform in the area of discovery costs:

> If early case management and early setting of a trial schedule are combined with shortened time to discovery cutoff, the increase in lawyer work hours predicted by early management can be offset by the decrease in lawyer work hours predicted by judicial control of discovery. We estimate that under these circumstances, litigants on general civil cases that do not close within the first nine months would pay no significant cost penalty for reduced time to disposition on the order of four to five months.[6]

Time to disposition is not the only consideration. The costs of preparing for and appearing at hearings on law-and-motion issues and discovery issues, the costs of conducting discovery, and the costs of document preparation in various stages of litigation are all areas where cost savings may be obtained.

Several procedural innovations employed in Los Angeles County's program hold the promise of cost savings. Most of the innovations stem from the judge's greater familiarity with the case and greater availability, made possible by the program's smaller dockets.[7] Among the innovations, for example,

Most of the innovations stem from the judge's greater familiarity with the case and greater availability, made possible by the program's smaller dockets.

- Early resolution of discovery controversies and greater judicial concern for the efficiency of discovery production should *reduce discovery costs*.
- Because program judges, with their smaller dockets, can focus more attention on a case, they become more familiar with it, allowing quicker and better decisionmaking that should reduce the costs of *law-and-motion practice*.
- Innovative information-sharing techniques (such as case Web sites) should save both time and the costs of *materials production*.
- Flexibility in hearing matters allows quick responses from the bench and early resolution of issues, saving the costs associated with preparing for and making *court appearances*.

In each of these areas we sought to discover, first, whether court users perceive there to be cost savings and, if so, which of the practices are, in practitioners' views, the most effective at

reducing costs. Lacking the means to directly assess costs, we turned to the attorneys for their opinions on cost savings, asking if they perceived that the program created cost savings compared with standard civil courts and, if so, in which areas. We also asked the survey participants to suggest other program improvements.

A survey of 32 questions was created by the committee and posted on Zoomerang.com on March 28, 2006. A nonrandom sample of 90 litigators was selected by the committee judges, who had reviewed their dockets for firms and litigators with experience in the program. The 90 potential respondents were invited to participate by mail (by Judge Kuhl) and e-mail (first by Dr. Borys and later by me). It was made clear to those who were solicited that no Zoomerang responses could be traced back to any respondent.

Fifty-seven completed responses were obtained as of May 14, 2006, for a response rate of 63 percent. The sample was made up of litigators who were very familiar with the program and others less familiar with it. Of the 57 respondents, 40 percent reported having more than 20 cases in the program; 26 percent reported having fewer than 6. The typical respondent reported that half of his or her caseload was in the program. The sample was balanced in terms of plaintiffs and respondents: 43 percent reported that they "typically" represented plaintiffs; the rest, respondents. Statistical analyses showed that plaintiff and respondent counsel did not differ significantly in their views of cost savings.

We were interested in answering two major questions. The first concerned the *existence* of cost savings: Were there perceived cost savings from the practices used in the complex litigation courts? The second concerned the *magnitude* of those savings: How large were the perceived savings? The answers to those questions would, the committee believed, help the judges in the program focus their efficiency efforts in the most productive areas.

Table 1. Practices Sorted by Level of Agreement Regarding Existence of Cost Savings*

Question	Strongly agree	Agree	Total positive responses
24. The ability of the complex litigation courts to be accessible and to address issues as they arise (e.g., telephonic conferences for case management, informal discovery resolutions, telephonic conferences for general housekeeping) reduces the need for more costly formal proceedings.	75%	23%	98%
28. In general, the California complex civil litigation program saves litigants time and money.	63%	31%	94%
16. The ability of the complex litigation courts to fashion nontraditional motion and briefing procedures results in cost savings to the parties.	64%	26%	90%
22. The familiarity of the complex litigation courts with the cases and parties puts the courts in a better position to foster settlement discussions.	45%	45%	90%
18. The ability of the complex litigation courts to take the time to provide comprehensive written orders prevents subsequent confusion over how the orders should be applied.	40%	50%	90%
14. The familiarity of the complex litigation courts with the record reduces the costs associated with law-and-motion practice.	55%	34%	89%
10. The complex litigation courts resolve disputes over written discovery in a cost-efficient manner.	50%	38%	88%
6. The complex litigation courts work with the parties to ensure cost-efficient production of paper and electronic documents.	45%	43%	88%
4. The complex litigation courts' supervision of discovery reduces its overall cost.	58%	26%	84%
8. The complex litigation courts work effectively with the parties to prevent costly disputes over the preservation, collection, and production of electronic evidence.	37%	40%	77%
26. The use of case Web sites to share information, schedule hearings, serve documents, and post orders, among other purposes, results in significant cost savings to the parties.	35%	40%	75%
20. The familiarity of the complex litigation courts with the issues in cases results in more cost-efficient use of expert witnesses.	12%	44%	56%
12. The complex litigation courts' availability for supervising depositions at the courthouse results in more efficient depositions and fewer discovery motions.	20%	20%	40%

*Where "level of agreement" is defined as the sum of "strongly agree" and "agree" responses.

Perceptions of the Existence of Cost Savings

Respondents overwhelmingly reported that the program reduced costs. When asked the general question of whether the program reduced overall costs, 63 percent strongly agreed and 94 percent either agreed or strongly agreed; none of the respondents disagreed with the statement.

The survey questions asked about specific practices used in Los Angeles County's complex litigation courts. Table 1 reports the results of individual questions sorted by strength of agreement.[8] Nearly all of the 13 items received strong support. The strongest perceptions of cost savings were associated with the court's accessibility (e.g., telephonic conferences): 98 percent of respondents agreed that these practices generated cost savings, and 75 percent strongly agreed. Only two practices had less than 75 percent agreement: the cost-efficient use of expert witnesses and the effects of supervised depositions. The survey allowed respondents to suggest that the program increased costs, but only one respondent indicated that it did, and that was from the use of case management Web sites.

Perceptions of the Size of Cost Savings

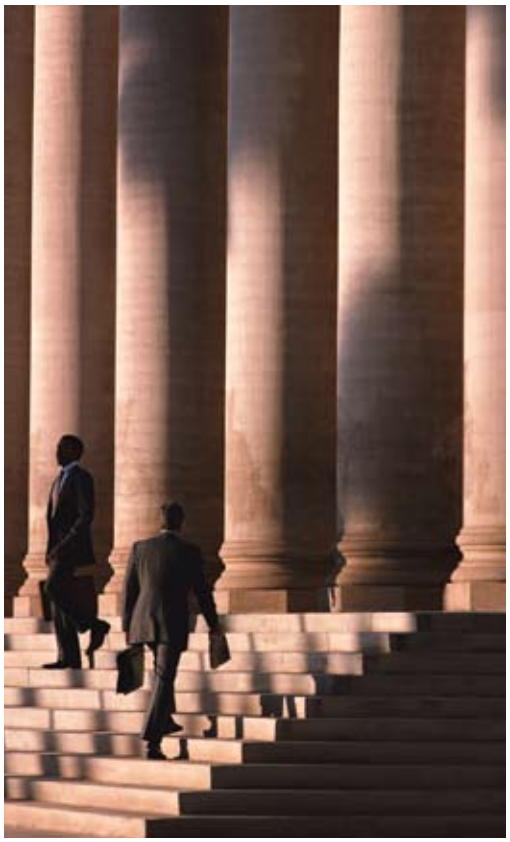
The task of quantifying the magnitude of savings was challenging. Litigators' perceptions of whether there are cost savings and the size of those savings may not correlate: Respondents may agree that a particular practice saves costs, but they may also agree that the cost savings are minimal or may not agree at all on the magnitude of those savings. And, too, one would have to know what the case's costs would have been had the complex litigation program not been in place. So once we calculated an average estimated cost savings, how confident could we be that it was reliable?

To be as conservative as we could about this question of reliability, we allowed open-ended responses to the questions about magnitude and

Table 2. Average Estimated Magnitude of Cost Savings

Items in **boldface** are those for which there was highest agreement on the existence of cost savings, as shown in Table 1.

Question	Average estimate of magnitude
24. The ability of the complex litigation courts to be accessible and to address issues as they arise (e.g., telephonic conferences for case management, informal discovery resolutions, telephonic conferences for general housekeeping) reduces the need for more costly formal proceedings.	36%
10. The complex litigation courts resolve disputes over written discovery in a cost-efficient manner.	36%
16. The ability of the complex litigation courts to fashion nontraditional motion and briefing procedures results in cost savings to the parties.	35%
4. The complex litigation courts' supervision of discovery reduces its overall cost.	35%
22. The familiarity of the complex litigation courts with the cases and parties puts the courts in a better position to foster settlement discussions.	34%
8. The complex litigation courts work effectively with the parties to prevent costly disputes over the preservation, collection, and production of electronic evidence.	34%
28. In general, the California complex civil litigation program saves litigants time and money.	32%
14. The familiarity of the complex litigation courts with the record reduces the costs associated with law-and-motion practice.	29%
6. The complex litigation courts work with the parties to ensure cost-efficient production of paper and electronic documents.	24%
12. The complex litigation courts' availability for supervising depositions at the courthouse results in more efficient depositions and fewer discovery motions.	23%
26. The use of case Web sites to share information, schedule hearings, serve documents, and post orders, among other purposes, results in significant cost savings to the parties.	22%
20. The familiarity of the complex litigation courts with the issues in cases results in more cost-efficient use of expert witnesses.	21%
18. The ability of the complex litigation courts to take the time to provide comprehensive written orders prevents subsequent confusion over how the orders should be applied.	20%



analyzed those responses in terms of the "spread" of the estimates we received. We asked respondents to provide either dollar or percentage estimates of cost savings. Very few respondents gave dollar cost estimates; most estimated percentages. We thus did not analyze the dollar estimates; they were treated as missing data. Many respondents estimated a range of savings (e.g., "20 to 30 percent"). When respondents gave a "spread" estimate, we used the center of the spread for our calculations.[9] Average magnitudes are listed in Table 2.

Six of the 13 practices treated in the survey received average cost savings estimates of 34 to 36 percent. These were also practices with a high degree of agreement on the existence of cost savings. In fact, the correlation between the existence and magnitude of cost savings was 0.63, allowing us to conclude that, in general, the practices with a high degree of agreement on the existence of cost savings were also those receiving the highest average estimated magnitude. There are two exceptions to this finding. First, there is a high level of agreement that comprehensive written orders result in savings (90 percent), but the average perceived magnitude is only 20 percent. Second, there is a high level of agreement that familiarity with the record resulted in law-and-motion savings (89 percent), but the average perceived magnitude is only 29 percent. More detailed analysis suggests that, for three of the practices listed in Table 2—accessibility (question 24), supervision of discovery (question 4), and settlement discussions (question 22)—there is disagreement over the magnitude of savings. In these three areas more than one-third of respondents reported large savings (above 50 percent); more than one-third reported small savings (below 20 percent).

Overall, the observed consistency between the existence and magnitude estimates gives us confidence that the magnitude estimates are useful for rank-ordering the practices in terms of cost savings achieved.

Findings and Conclusions

We find that, based on the self-reported perceptions of a broad sample of litigators familiar with the program, there is good reason to believe that nontrivial cost savings accrue to 11 of the 13 surveyed practices:

- The ability of the complex litigation courts to be accessible and to address issues as they arise (through, e.g., telephonic conferences for case management, informal discovery resolutions, and telephonic conferences for general housekeeping) reduces the need for more costly formal proceedings.
- The complex litigation courts resolve disputes over written discovery in a cost-efficient manner.
- The complex litigation courts' ability to fashion nontraditional motion and briefing procedures results in cost savings to the parties.
- The complex litigation courts' supervision of discovery reduces the overall cost of a case.
- The complex litigation courts' familiarity with the cases and parties puts them in a better position to foster settlement discussions.
- The complex litigation courts work effectively with the parties to prevent costly disputes over the preservation, collection, and production of electronic evidence.
- The complex litigation courts' familiarity with the record reduces the costs associated with law-and-motion practice.
- The complex litigation courts work with the parties to ensure cost-efficient production of paper and electronic documents.
- The use of case Web sites to share information, schedule hearings, serve documents, and post orders, among other purposes, results in significant cost savings to the parties.
- The complex litigation courts' ability to take the time to provide comprehensive written orders prevents subsequent confusion over how the orders should be applied.
- In general, the California complex civil litigation program saves litigants time and money.

On the other two surveyed practices (use of expert witnesses and supervised depositions) there was not strong agreement that savings exist.

We also find that the above list represents a rough rank-ordering of the relative size of cost savings associated with each practice (with the caveat that accessibility, supervision of discovery, and settlement discussions may actually fall lower on the list).

The findings support the hypothesis that active judicial management in discovery, law-and-motion activity, and settlement discussions brings savings in litigation costs to complex cases. They also support the hypothesis that other practices—production of documents, depositions, information-sharing through case Web sites, expert witnesses, and the use of comprehensive written

case management orders—bring savings in other areas, although the support is weaker and the savings likely are less.

Cost is not the only consideration in evaluating innovative practices in the administration of justice: rule 3.400 recognizes the significance of timely disposition and improved decisionmaking by the court, the parties, and counsel.[10] However, research has shown that public perceptions of litigation costs affect public trust and confidence in the justice system[11]—and, certainly, complex civil litigation is one of the costliest areas in the courts. Informal conversations with litigators, an unpublished survey conducted at a Los Angeles conference early in the life of the program, and the absence of widespread criticism in the open-ended responses to the current survey all suggest that the program's ability to reduce costs does not significantly compromise quality. Moreover, the NCSC study suggests that the program improves timeliness.[12] The ability to reduce costs without compromising quality or timeliness marks the complex litigation program as a significant innovation in the administration of civil justice.

The findings support the hypothesis that active judicial management in discovery, law-and-motion activity, and settlement discussions brings savings in litigation costs to complex cases.

The results of this survey confirm our group's working hypothesis, namely that the complex courts save money for litigators and their clients. Although it continues to be difficult to quantify the exact dollar savings, if savings are valued not only in dollars but also in user satisfaction, the complex court program manifestly succeeds on both fronts.

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Bryan Borys, Ph.D., is special assistant to the executive officer of the Superior Court of Los Angeles County and previously taught public administration at the University of Southern California.

Notes

1. Zoomerang is a trademark of MarketTools, Inc.

2. We wish to thank an ad hoc committee of complex litigation program judges (Judges Carolyn B. Kuhl, Peter D. Lichtman, and Carl J. West, Superior Court of Los Angeles County) and attorneys (Phillip A. Baker of Baker, Keener & Nahra LLP, Richard Goetz of O'Melveny & Myers LLP, and Amy Fisch Solomon of Girardi & Keese) for their guidance on this project. Any errors or omissions are the responsibility of the author.

3. See the Final Report of the Complex Civil Litigation Task Force, *www.courtinfo.ca.gov/jc/documents/min1099.pdf.*

4. Paula L. Hannaford-Agor et al., *Evaluation of the Centers for Complex Civil Litigation Pilot Program, Final Report* (National Center for State Courts and Cal. Administrative Office of the Courts 2002), *www.ncsconline.org/wc/publications/res_buscts_complexcivillitigationpub.pdf.*

5. *Id.,* Finding 5, at p. vii.

6. James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND Inst. for Civil Justice 1996), p. 28.

7. The question of whether any observed savings in litigation costs are offset by the cost implications of reduced dockets is beyond the scope of this study. Also regarding docket size, please note that there is some controversy over its appropriate measure because the complex litigation program often handles as a unit groups of cases consisting of multiple filings that have been related, consolidated, or coordinated under the California Rules of Court. Number of filings is the standard measure of court workload (Judicial Council of Cal./Admin. Office of the Cts., *2007 Court Statistics Report*), but the program considers its workload in terms of the number of groups of related cases.

8. Note that strength of agreement is *not* an indicator of size of savings. We take up the latter question in the next section.

9. For the purpose of a sensitivity analysis, we tried another approach in which the endpoints of the spread were used. Results of these analyses were not significantly different in terms of the ranking of cost savings magnitude, so we excluded them from this article.

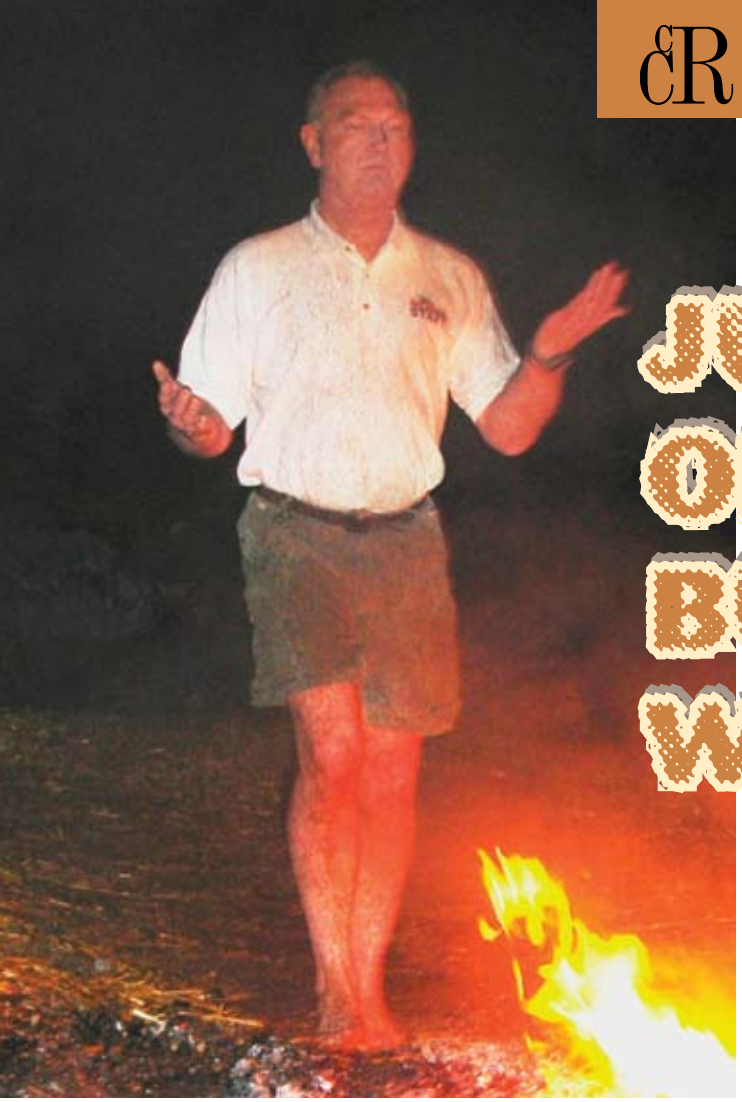
10. We took the survey opportunity to ask two open-ended questions: "What do you like most and least about practicing in the complex litigation courts?" and "Other comments or suggestions?" The responses fell into the following categories. Respondents tended to approve of the following (there were few dissenters on any of the following topics):

- The collegiality, familiarity, and less adversarial climate fostered by the program
- The quality of judges in the program
- Hands-on case management and innovative procedures
- The ability of judges to spend more time on the cases and to be frequently available
- The ability of judges to focus everyone's efforts, to focus on efficiency, and to streamline procedures
- Handling of discovery

The physical location of the program was the only item that was widely disliked. Nine respondents (16 percent) called for future support and expansion of the program.

11. See, for instance, David B. Rottman, and National Center for State Courts, *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys* (Part I: Findings and Recommendations) (Judicial Council of Cal., Admin. Off. of Cts., 2005).

12. Hannaford-Agor et al., p. vi.



JUDGE WALKS ON FIRE BUT NOT ON WATER

By
Darrel Lewis

Like many mediators, I have been told a few times that I must walk on water when I settle one of those "impossible" cases. Naturally I have to deny that, but I can now boast that I do walk on fire. I recently walked *barefoot* on a 20-foot-long bed of 1,200-degree coals.

Since retiring from the Superior Court of Sacramento County eight years ago, I have resolved hundreds of legal disputes, and I continue to take every opportunity I can to enhance my mediation skills, my communication abilities, and my understanding of human nature. Research has shown that the mediator's experience in mediation and his or her self-confidence are the most critical factors in a successful mediation. Recently I decided that if I could walk on fire, my confidence would be boosted even higher, resulting in an even greater success rate in mediations.

In April, I contacted Tolly Burkan of Twain Harte, east of Stockton in Tuolumne County, who has taught firewalking for the past 37 years. Unfortunately he no longer teaches his typical three-hour firewalking seminars to the general public. He does, however, give three-day seminars to select groups of people from all over the world to teach them to become firewalking instructors. I considered my options and decided that if I was going to trust my safety to someone, I wanted the best in the world. Consequently, I am now a certified firewalking instructor. One of the best things about the course was that my 29-year-old son, Jeff, of Roseville, took the course with me.

Walking barefoot on 1,200-degree coals does not involve any "trick" or "illusion." The coals are actually that temperature and will, in fact,

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severely burn one who is not mentally prepared and properly focused on the task. I walked on the coals multiple times on each of the three nights of the course and found that my experience differed each night depending on my degree of concentration.

The first night I was very focused and felt no heat whatsoever during each of the six or seven times I walked on the coals. The second night I was distracted just before the walk, and it felt like I was walking on very hot sand. (Later that evening I discovered that I received a couple of minor blisters.) The sensation was the same each time I walked that night.

The third night I was again very focused except for the last two steps of the 20-foot walk. I felt no warmth or discomfort for the majority of the walk, but I suddenly felt fairly intense heat on the last two steps. Each time I walked on the coals that third night the sensation was the same—no feeling of heat until the last two steps.

Looking back on the experience, I have concluded that I was probably prematurely relieved to reach the end of the walk so my concentration slipped a little. This variation from night to night confirmed my belief that the key to firewalking truly is state of mind, because my degree of concentration was the only variable from one night to the next.

The total course involved many hours of classroom lectures and exercises as well as other "events" intended to overcome fears and anxieties or to teach you that you can do something that may seem impossible or dangerous if you simply focus on what you are doing and make up your mind that you are going to do it.

These activities included breaking boards and concrete blocks with my bare hand, walking on a bed of broken glass bottles, and rappelling down into a 200-foot cavern. Another participant and I bent a 10-foot-long piece of steel rebar by facing each other, placing an end of the rebar at the base of our throats, and then walking firmly toward each other until the bar bent into a U-shape. During another exercise, I placed the metal tip of a target arrow against my throat and the feathered end against a wall, then stepped firmly toward the wall until the shaft of the arrow snapped. The final exercise involved pushing a 5-inch-long (and proportionately thick) sewing needle through the web of skin between my thumb and first finger.

In the needle exercise I assumed there would be no pain if I kept my concentration, much like when I walked on the coals. However, it was *very* painful, and I realized that the lesson to be learned was to persist and work through the pain until my goal was accomplished.

The entire event was very much a spiritual experience because we spent 12 hours a day with 30 people from all over the world with very different backgrounds and goals, but they were all there to learn the various forms of meditation, concentration, and formation of intention. Some of the events were very emotional for some participants, depending on their specific fears or phobias. Some people would cry, whoop, or just be extremely quiet after accomplishing a particular feat.

Personally I had no great epiphany after any one specific event, but, reflecting on the entire course, I found it was very empowering. It has made me realize that I can accomplish nearly any goal if I just focus my energy, believe in myself, and be persistent regardless of the pain, resistance, or disbelief that I, or others, may have.

This experience did, in fact, increase my self-confidence and persistence in achieving resolution in mediations. I know that my self-confidence and inner belief that resolution is possible will transfer to the parties and attorneys in a dispute and will result in more signed agreements. I truly believe that my confidence and my strong intention to reach resolution are felt by the participants and, in turn, increase *their* creativity, confidence, and determination to reach resolution even in the most difficult of cases. &R

Darrel Lewis retired in 1999 from the Superior Court of Sacramento County after 20 years on the bench. He now works full time as a mediator in the Sacramento area.

Judge Lewis (opposite page) and his son Jeff (below) walked on fire by concentrating and overcoming their fear.

California's Circumstantial Evidence Instructions Are Accurate and Fair

By
Mark A. Arnold

In the Spring 2007 issue of *California Courts Review,* Judge Charles B. Burch of the Superior Court of Contra Costa County published an article titled "Let's Reconsider Jury Instructions on Circumstantial Evidence." In the article Judge Burch plucks a concept out of context from a 1954 U.S. Supreme Court case and uses it to mount an attack on instructions 224 and 225 of the *California Criminal Jury Instructions (CALCRIM).* He claims that these instructions and their predecessors misstate the law, place too high a burden on the prosecution, and should be discarded. This analysis is so historically flawed and dangerously misleading that it compels an accurate public response.

CALCRIM 224 and 225 are the only California criminal jury instructions that actually explain, in concrete terms, that a criminal defendant is entitled to the benefit of the doubt. CALCRIM 224 states:

> [B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you *must* accept the one that points to innocence . . . .[1]

Both instructions state:

> Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Judge Burch asserts that these instructions are confusing, incorrect, and in conflict with settled law that direct evidence and circumstantial evidence are entitled to the same weight.[2] To support this assertion, he relies on *Holland v. United States,* which held that a federal trial court's refusal of a pinpoint instruction similar to

CALCRIM 224 was not error.[3] *Holland* observed that "where the jury is properly instructed on the standards for reasonable doubt, such an *additional* instruction on circumstantial evidence is confusing and incorrect."[4] It follows, he says, that CALCRIM 224 and 225 are unnecessary, confusing, and incorrect. However, his analysis omits the historical context in which *Holland* arose and ignores critical distinctions between federal pattern instructions and *CALCRIM*.

Before and after *Holland,* federal jury instructions on the presumption of innocence and reasonable doubt contained the very language about which Judge Burch complains. For example, the 1968 edition of Devitt and Self's *Federal Jury Practice and Instructions—Civil and Criminal* contained this mandate concerning the presumption of innocence and reasonable doubt:

> [I]f the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should *of course* adopt the conclusion of innocence.[5]

Identical language appears in the current pattern instruction on presumption of innocence, burden of proof, and reasonable doubt contained in O'Malley et al.'s *Federal Jury Practice and Instructions*, with no reference whatsoever to circumstantial evidence.[6] These instructions apply to *all* evidence, not just circumstantial evidence.

Holland did not hold in a vacuum that a "two-conclusion" instruction like that contained in Devitt, O'Malley, and CALCRIM 224 is inherently wrong or that it lacked a constitutional basis. It simply held that, in the context of *all* the instructions given, such *additional* instruction would have been redundant and therefore was "confusing and incorrect."[7] This conclusion is amply demonstrated in *United States v. Blackwell,*[8] a recent decision by the Sixth Circuit Court of Appeals addressing just this issue. In *Blackwell* the trial court refused to give a specific, pinpoint instruction on circumstantial evidence that stated, in part:

> Circumstantial evidence alone is insufficient to convict a defendant if the circumstantial evidence would support either of two reasonable probabilities—that a defendant is innocent or that the same defendant is guilty of a particular crime charged. Stated differently, if, based on circumstantial evidence alone, you could find a defendant either innocent or guilty, then you must find that defendant innocent.[9]

The Sixth Circuit affirmed, observing that the trial court had already given the following instructions as to *all* of the evidence:

> Of course a defendant is never to be convicted on mere suspicion or mere conjecture . . . . So if the jury views the evidence in the case as *reasonably permitting either of two conclusions, one of innocence, and the other of guilt*, then of course the jury should adopt the conclusion of innocence.[10]

As *Blackwell* noted, "Both instructions informed the jury that where two reasonable conclusions exist—innocence or guilt—the jury may not convict the defendant. Thus, Defendant's proposed [circumstantial evidence] instruction would not have added any value to the jury charge."[11]

Unlike the federal instructions discussed above, CALCRIM 224 and 225 are not just "additions" to already adequate instructions on reasonable doubt. They are an integral part of California's official instructions[12] and absolutely essential to a fair hearing. The global "benefit of the doubt" instruction, applicable to *all* evidence, appears nowhere in *CALCRIM*'s definitions of reasonable doubt or the presumption of innocence.[13] Nor did such an instruction appear in any version of *CALJIC* going back to the original 1946 edition. The *only* place this language appears is in CALCRIM 224 and 225.[14]

The 1946 version of *California Jury Instructions, Criminal (CALJIC),* the original California criminal jury instructions, once contained language much like that contained in the federal reasonable doubt instructions and approved in federal case law:

> If the evidence in the case . . . is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, *it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt.* [¶] You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If on the other hand one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and reject the unreasonable . . . .[15]

However, this instruction was not central to the reasonable doubt/presumption of innocence instruction. It was lodged behind the definitions of circumstantial evidence, direct evidence, and indirect evidence, and the commentary makes clear that the instruction applied only in cases in which there was no "direct" evidence.[16] Other instructions directed the jury that (1) they must acquit the defendant unless "the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion" and that (2) "every fact essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."[17]

As *CALJIC* instructions evolved through the years, the language of these instructions was consolidated and recaptioned expressly to apply only to circumstantial evidence.[18] The *CALJIC* instructions were completely reorganized and renumbered to the point where the critical language was contained only in CALJIC 2.01 and 2.02 (circumstantial evidence), while instructions on reasonable doubt and presumption of innocence were

pushed back to CALJIC 2.90.[19] The "two-inference" or "two-interpretation" language of the 1946 instructions was diluted to excise the "hypothesis" and "chain of circumstances" language, so CALJIC 2.01 is now almost identical to the *federally* approved *reasonable doubt* instruction:

> [I]f the circumstantial evidence permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation that points to his guilt.[20]

As noted above, similar language appears in CALCRIM 224 and 225, the product of an eight-year task force study.[21] The only difference is that, in California, the instruction applies only to circumstantial evidence cases.

Neither *CALJIC* nor *CALCRIM* places the crucial "benefit of the doubt" language in the body of the instructions on presumption of innocence and reasonable doubt.[22] Instead, the drafters elected to leave this language in the circumstantial evidence section. An unbroken line of cases dating back to the early 1900s mandates that these instructions be given in circumstantial evidence cases.[23] *Holland* and its progeny are factually and legally distinguishable and have no bearing on the viability of CALCRIM 224 and 225 as accurate statements of the law.[24]

In a separate argument, Judge Burch further asserts that CALCRIM 224 and 225 somehow elevate the People's burden of proof. Not so. The language of these two instructions does nothing more than articulate the bedrock principle announced in *In re Winship:*

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged.[25]

California has pared down CALCRIM 224 and 225 from its original pattern instruction, deleting the "chain of circumstances" language; other states and federal courts have not. However, the crucial "each fact" language remains. For example, in *State v. Eagle Star,*[26] the Supreme Court of South Dakota approved this language:

> Each *essential fact* necessary to complete a set of circumstances to establish the defendant's guilt must be proved beyond a reasonable doubt. If the facts and circumstances are consistent with the innocence of the defendant, the jury must acquit the defendant.

Oklahoma's *Uniform Jury Instructions* demand that

> [i]n order to warrant conviction of a crime upon circumstantial evidence, *each fact* necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All of the facts and circumstances, taken together, must establish to your satisfaction the guilt of the defendant beyond a reasonable doubt.[27]

In 1992 (nearly 40 years after *Holland*), the Eighth Circuit Court of Appeals cited the following language with approval:

> Where the case of the State rests substantially or entirely on circumstantial evidence, you are not permitted to find the defendant guilty of the crime charged against him unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and *each fact* which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.[28]

This "each fact" language has been a part of California's pattern jury instructions since 1946. It accurately and concisely states the law and has not proven cumbersome or impenetrable to judges or juries during the past six decades. It exists in the current *CALCRIM* instructions as the embodiment of *Winship*'s admonition:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.[29]

This language is even more essential to a fair trial since the drafters of the *CALCRIM* instructions have elected to eliminate from CALCRIM 220 (Reasonable Doubt) critical language that required the People to prove "each element" of a crime beyond a reasonable doubt.[30]

Public confidence in the fairness of our jury verdicts is indispensable. Citizens have long looked to the courts to protect their rights and the fairness of the criminal process. Revising our circumstantial evidence instructions to facilitate convictions does not engender public trust. The language of these two instructions is the product of six decades of analysis, by the 1997 Task Force on Jury Instructions and by its predecessor Committees on Standard Jury Instructions. CALCRIM 224 and 225 accurately and fairly represent the law in California. Tampering with them is wholly unnecessary. CR

Mark A. Arnold has been the Kern County Public Defender since 1995 and was an adjunct professor for the University of California at Davis School of Law from 1987 to 1995. He is also the author of Criminal Defense Jury Instructions *(Knowles Press 1984) and past-president of the California Public Defenders Association.*

Notes

1. Italics added. CALCRIM No. 225 contains identical language in the context of requiring the People to prove the defendant's mental state beyond a reasonable doubt.

Faced with two or more reasonable conclusions supported by circumstantial evidence, one of which supports a finding that the defendant did have the required intent or mental state and one of which supports a finding that the defendant did not, the jury *must* conclude that the required intent or mental state was not proved by the circumstantial evidence.

2. See CALCRIM No. 223: "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other . . . ."

3. *Holland v. United States* (1954) 348 U.S. 121, 139.

4. *Id.* at pp. 139–140, italics added.

5. Devitt & Self, *Federal Jury Practice and Instructions* (1968 supp.) Presumption of Innocence—Burden of Proof—Reasonable Doubt, § 8.01, italics added; see also 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* (2d ed. 1970) Presumption of Innocence—Burden of Proof—Reasonable Doubt, §11.01.

6. 1A O'Malley et al., *Federal Jury Practice and Instructions, Criminal* (5th ed. 2000) § 12.10.

7. *Holland*, *supra*, 348 U.S. at pp. 139–140.

8. *United States v. Blackwell* (6th Cir. 2006) 459 F.3d 739.

9. *Id.* at p. 765.

10. *Ibid.*, italics added.

11. *Ibid.*

12. Rule 2.1050 (a) and (b) of the California Rules of Court provides: "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California . . . . The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law . . . ."

13. See CALCRIM Nos. 103 and 220.

14. Similar language appears in the special circumstance instructions, CALCRIM Nos. 704 and 705, applicable only to death penalty cases and not at issue here.

15. CALJIC No. 26, italics added. (West 1946); see also *Thomas v. United States* (9th Cir. 1966) 363 F.2d 159, 162, fn. 7; *United States v. Zumpano* (9th Cir. 1970) 436 F.2d 535, 538 ("two opposing conclusions" instruction quoted with approval); *United States v. Wolfe* (9th Cir. 1980) 611 F.2d 1152, 1155, fn. 3 ("two opposing conclusions" language quoted as "correct").

16. CALJIC No. 26 (West 1946).

17. CALJIC Nos. 27, Circumstantial Evidence—Test of Sufficiency, and 28, Each Essential Fact Must Be Proved (West 1946).

18. CALJIC No. 26 (West 1967 supp.).

19. See the following *CALJIC* editions and supplements*:* 3d ed. 1970, 3d ed. 1976 supp., 4th ed. 1979, 4th ed. 1987 supp., 5th ed. 1988, 5th ed. 1996 supp., July 2004 ed.

20. CALJIC No. 2.01 (July 2004 ed.).

21. *CALCRIM* (Fall 2006 ed.), p. v.

22. CALJIC No. 2.90; CALCRIM Nos. 103 and 220.

23. See, e.g., Note to CALJIC No. 26 (West 1946), citing, inter alia, *People v. Clark* (1905) 145 Cal. 727; bench notes to CALCRIM No. 224 (Fall 2006), citing, inter alia, *People v. Heishman* (1988) 45 Cal.3d 147.

24. See also New York State Unified Court System, *Criminal Jury Instructions* (2d ed.) Circumstantial Evidence—Entire Case ("it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence. If there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then you must find the defendant not guilty . . . "), *www.nycourts.gov/cji/1-General/cjigc.html***.** *Tennessee Pattern Jury Instructions (Criminal)* (10th ed.) Evidence: Direct and Circumstantial, No. 42.03 (" . . . you must find that all the essential facts are consistent with the hypothesis of guilt, as that is to be compared with all the facts proved; the facts must exclude every other reasonable theory or hypothesis except that of guilt; and the facts must establish such a certainty of guilt of the defendant as to convince the mind beyond a reasonable doubt that the defendant is the one who committed the offense"), *www.tncrimlaw.com/TPI_Crim/42_03.htm*; *North Dakota Pattern Jury Instructions (Criminal)* (2006 rev. ed) No. K-5.16 ("You can convict a person on circumstantial evidence alone if the circumstances proved exclude every reasonable theory except that the accused is guilty"), *www.sband.org/Pattern_Jury_Instructions.*

25. *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368], italics added. Analyzing the early ancestor of CALCRIM Nos. 224 and 225 (CALJIC No. 28, 1946), the California Supreme Court observed, "Properly interpreted, CALJIC No. 28 applies the doctrine of reasonable doubt *not* to proof of *miscellaneous collateral or incidental facts*, but only to proof of 'each fact which is *essential* to complete a chain of circumstances that will establish the defendant's guilt.' " (*People v. Watson* (1956) 46 Cal.2d 818, 831, italics added.)

26. *State v. Eagle Star* (S.D. 1996) 558 N.W.2d 70, 72, italics added; see also *State v. Holzer* (S.D. 2000) 611 N.W.2d 647, 653–654 (approving this language: "Where the case of the state rests substantially or entirely on circumstantial evidence, you are not permitted to find the defendant guilty of the crime charged unless the proved circumstances are not only consistent with the guilt of the defendant, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.").

27. *Oklahoma Uniform Jury Instructions* (2006 supp.) OUJI-CR-9-5, italics added, *www.occa.state.ok.us/online/oujis/oujisrvr.jsp?o=526*; see also *Patton v. Mullin* (10th Cir. 2005) 425 F.3d 788, 806 (citing the foregoing language with approval).

28. *Karras v. Leapley* (8th Cir. 1992) 974 F.2d 71, 72, fn. 3, italics added.

29. *In re Winship*, *supra*, 397 U.S. at p. 364.

30. CALCRIM No. 220 (Fall 2006 ed.). The earlier version of CALCRIM No. 220 clearly stated that the presumption of innocence required "that the People prove *each element* of a crime beyond a reasonable doubt." (Jan. 2006 ed., italics added.) Now that language appears only in the introductory instructions. (CALCRIM No. 103.) A random partial survey of state jurisdictions revealed that only 2 out of 23 state jurisdictions do not use the "each element" or "every element" formulation when defining the presumption of innocence. A random survey of eight federal circuits (1st and 5th–11th), the four military justice courts, and the District of Columbia revealed that only 3 out of the 13 did not use the "each element" or "every element" formulation.

The High Cost of Public Recognition

By
Arthur Gilbert

In the 1942 film, *Roxie Hart,* Ginger Rogers plays an aspiring actress. When her shady husband kills someone, she takes the rap in the hope that the publicity will enhance her career. (If this sounds familiar, the remake, filmed more than 50 years later, is *Chicago.*)

The media, represented by a horde of loud reporters (the present sobriquet is staff writers), descend on the courtroom like a swarm of locusts on speed. Their photographers are with them, intermittently taking shots of the alluring Ms. Rogers on the witness stand, as her attorney, played by Adolphe Menjou, examines her. Apparently no issue here about cameras in the courtroom. Just before each photo is taken, the judge, played by George Lessey, leaps out of his chair and positions himself next to Ginger to get into the photo. After the "pop" and the flash, the judge scoots back to his chair. He's trying to get in the act, and the more it happens, the funnier it is.

But the judge is merely the referee. The case is about Roxie Hart, charged with a crime. It is not about the judge presiding over the case. That was the philosophy of Judge Rodney Melville, who told me well after the conclusion of the Michael Jackson case, "The case was not about me." Good advice for Judge Judy.

However, one can understand a judge's need for some attention. Judges are the forgotten heroes of trials. People who talk about their past experience in litigation, even when the outcome was favorable, rarely remember the name of the judge presiding. And it is the same with so-called publicity cases. Does anyone remember the name of the judge who presided over the Fatty Arbuckle murder case, the Charlie Chaplin paternity case, the Lee Marvin palimony case? Everyone remembers the litigants, but the judge, without whom there would be no trial, is forgotten. It's not fair. Just imagine a trial without a judge. There would be no one to call the litigants to order, no one to rule, no one to admonish, and no one to call a recess. There would be chaos.

A trial without a judge is just as impractical as a ship without a captain, a country without a president (or dictator), a banana without a peel. And yet, however vital the judge's role, the public at large has little interest in the judge's reasoning. There is a clamor to read juicy tidbits from the transcript, but does anyone, other than the lawyers or a nosy Court of Appeal, want to read a judge's statement of decision or minute order? Not often do rulings garner critical acclaim. You never see a review that reads "Today Judge Smerdly's hearsay ruling was stunning. Numerous publishers are vying for the rights to the transcript. The high interest in the judge's rationale is akin to people's eagerness to read the *Harry Potter* books." But a judge who breaks down in tears on the bench gets publicity—and maybe even a television program.

There is a slightly different twist with Court of Appeal opinions. Nothing is more discouraging than to receive what would be a positive review for a mystery novel: "In *People v. Flotsky,* the writer drops in the reader's lap subtle clues that lead down innumerable blind alleys. Not until the very end is the culprit revealed, to the astonishment of all."

I don't know much about publicity and who is currently famous. Until she wound up in court, I thought Paris Hilton was a hotel in France. In fact, it is. I had not heard of her, but I do know Judge Michael Sauer, who sentenced her. He shrugged off the media hype and did his job.

Publicity belongs with actors, whether they're in or out of court. Take Lindsay Lohan. I didn't know who she was. After my morning workout in the gym, I was sitting at the breakfast bar with the protein energy drink that helps me decide my challenging appeals. I was vaguely aware of some commotion around me and saw a gaggle of teenagers gawking in the window. Could they be looking at me? Not!

I asked, "What's going on?" A friend sitting near me mouthed in a barely audible whisper, "Lindsay Lohan." I said, "Who is she?" Everyone laughed. My friend answered, "She has a break from rehab and is about three feet from you." I turned around to look. Our eyes met. She looked right through me. We were even. She didn't know who I was, nor, I suppose, did she want to know.

Years ago my wife and I went to dinner in Beverly Hills. The waiter gushed, "Do you know who was just here, sitting right where you are?" We didn't. "Julie Christie and Warren Beatty."

Assuming a blasé tone, I said, "Do they know that Arthur and Barbara are sitting where they just sat?" I admit that I wondered if I was sitting in Julie Christie's seat or Warren Beatty's. But to ask the waiter would have blown my feigned indifference.

There was a time when I thought it would be nice to get a little recognition now and then, but a few incidents cured me of that. Hearing "Your honor" while in line at the checkout stand at the market can be unnerving, especially when the tattooed biker in front of you turns around and takes a hard look in your direction. Years ago while shopping at a vitamin store—in my weekend attire, tattered jeans and a sweatshirt—I was reading the ingredients on a bottle of tablets that guarantee to give you the vitality of a 20-year-old. I pondered the question, a 20-year-old what? (The life expectancy of a porcupine is 20 years.) My reflection was interrupted by the manager shouting at me from two aisles away, "Hey, I know you; you're a judge!" Everyone looked at me. I forced a nervous smile. Then he said, "You sentenced me to county jail for driving under the influence." I held my breath. And then he said, "I deserved it. You were fair." Whew. No one rushed up to get my autograph, but when I approached the checkout stand, people moved out of the way.

Some cannot help but acknowledge a judge out of the courtroom with more formality than is necessary. Asking for a ruling on the main entrée at a dinner party can be a tough call. But publicity in the courtroom can be—pardon the expression—even more trying for a judge than is publicity outside the courtroom. For example, Judge Lance Ito, while presiding over the O. J. Simpson trial, found himself thrust into publicity's sharp glare. He wanted to make the trial as open and accessible to the public as possible, a view that is essential to the administration of justice. To that end, he allowed cameras in the courtroom, opening himself up to public scrutiny. It was no fun, but he did his job, and he also did all of us a great service. We became more knowledgeable, if not circumspect, about how to handle a publicity trial.

I admit that I wondered if I was sitting in Julie Christie's seat or Warren Beatty's. But to ask the waiter would have blown my feigned indifference.

Andy Warhol, you can have your 15 minutes of fame. I have concluded that I'm better off without it. I hope everyone will follow my rule: Don't yell "Your honor!" in a crowded theater, a market, or anywhere else other than in the courtroom.

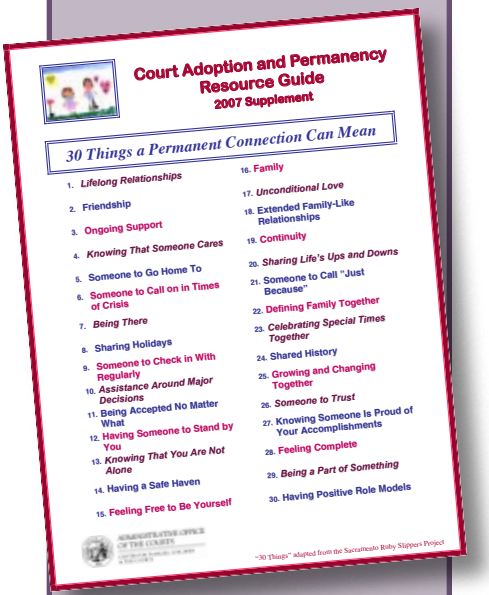
Arthur Gilbert is the presiding justice of the Court of Appeal, Second Appellate District, Division Six, in Ventura and a frequent contributor.

Celebrate Court Adoption and Permanency Month

The state Legislature and the Judicial Council have proclaimed November the month to promote safe and permanent homes for children who have been abused or neglected.

For creative examples of how local courts celebrate the event, order a copy of the *Court Adoption and Permanency Resource Guide*.

Just contact Stacey Mangni with the AOC Center for Families, Children & the Courts at stacey.mangni@jud.ca.gov.



"30 Things" adapted from the Sacramento Ruby Slippers Project


J. Richard Couzens


Tricia Ann Bigelow

Lifting the Fog of *Cunningham: Black II, Sandoval,* and Senate Bill 40

BY J. RICHARD COUZENS AND TRICIA ANN BIGELOW

The California Supreme Court has recently issued two decisions that resolve some of the issues resulting from the holding in *Cunningham v. California* (2007) ___ U.S. ___ [166 L.Ed.2d 856; 127 S.Ct. 856], which struck down the ability of trial judges to make factual findings necessary to impose an upper term sentence. In response to *Cunningham,* on March 30, 2007, the Legislature enacted Senate Bill 40, amending Penal Code section 1170.1(b) to permit judges to impose any sentence from the determinate sentence triad "within the sound discretion of the court." *People v. Sandoval* (July 19, 2007, S148917) ___ Cal.4th ___ [2007 WL 2050897], *People v. Black (Black II)* (July 19, 2007, S126182) ___ Cal.4th ___ [2007 WL 2050875] (opn. on remand), and SB 40 have greatly simplified the life of a felony sentencing judge: in substance, felony sentencing continues as it existed prior to *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham*, with only a few notable exceptions. The cases also establish a framework for analyzing allegations of sentencing error in writs and appeals.

In *Sandoval,* the California Supreme Court gave a forward-looking resolution to the handling of sentencing proceedings after *Cunningham*. Having found a reversible Sixth Amendment violation, *Sandoval* addressed the process of resentencing. The court rejected defendant's argument that she could not be resentenced to more than the middle term. The court found no need to reform section 1170 because the Legislature had amended the statute to afford full discretion to the trial courts to impose the low, middle, or upper term without making factual findings. Under SB 40, the trial court need only specify its reasons for its sentencing decision; it "will not be required to cite 'facts' to support its decision or to weigh aggravating and mitigating circumstances." (*Sandoval*, *supra,* ___ Cal.4th ___ [2007 WL 2050897, at *605].) Reformation of the statute, at least as to crimes occurring after March 30, 2007, was unnecessary because the statute no longer requires the court to make findings of fact before imposing the upper term.

SB 40 did not address whether its amendments apply to crimes committed prior to its effective date. The court found it unnecessary to reach the issue of retroactivity because it had an independent responsibility and authority to fashion a constitutional procedure for resentencing. Although the court declined to adopt a blanket rule for all future cases, *Sandoval* said on remand that it was entirely proper for the trial court to adopt the new discretionary sentencing scheme in section 1170 and the corresponding rules of court. The court found no due process or ex post facto violation in allowing such a revised sentencing procedure. While the court did not address whether SB 40 applies to crimes that were committed before its March 30, 2007, effective date, it seems apparent that *Sandoval* would authorize such an application to those crimes as well.

Black II reaffirmed the court's earlier determination that a trial court's decision to impose consecutive terms under Penal Code section 669 does not implicate the Sixth Amendment.

In summary, the felony sentencing process continues much as it existed before except that selection of the appropriate prison term is now entirely discretionary and the middle term is no longer the presumptive term. There is no need for a jury or court trial on aggravating facts, proof of the facts need not be beyond a reasonable doubt, and the factors do not need to be referenced in the pleadings or served on the defendant. The sentencing judge, however, must give reasons for imposing a particular term, even the middle term.

In summary, the felony sentencing process continues much as it existed before except that selection of the appropriate prison term is now entirely discretionary and the middle term is no longer the presumptive term.

The decisions also give guidance for disposition of appeals and writ petitions based on these sentencing issues. Although neither the recent California Supreme Court decisions nor *Cunningham* addressed the issue of retroactivity, the threshold question is whether *Cunningham* applies to any cases that

were final as of the date it was published. One Court of Appeal recently ruled that *Cunningham* does not apply retroactively. (*In re Gomez* (Aug. 7, 2007, B197980) ___ Cal.App.4th ___ [2007 WL 2247213].) Generally, new rules of criminal procedure do not apply retroactively to cases that are final unless the rule is substantive or a "watershed rule of criminal procedure" implicating the fundamental fairness and accuracy of criminal proceedings. (*Wharton v. Bockting* (2007) ___ U.S. ___ [167 L.Ed.2d 1, 127 S.Ct. 1173, 1180–1181]; *Schriro v. Summerlin* (2004) 542 U.S. 348, 352.) The *Gomez* court noted that other appellate divisions and the Ninth Circuit Court of Appeals have determined that *Blakely* is neither a substantive rule nor a watershed rule of criminal procedure. "It follows that the rule in *Cunningham,* too, is neither substantive nor a watershed rule." (*In re Gomez*, *supra*, ___ Cal.App.4th ___ [2007 WL 2247213, at *2].)

The question whether *Cunningham* applies to cases that became final between *Blakely* and the filing date of *Cunningham* on January 22, 2007, seems a bit less certain because the U.S. Supreme Court indicated in *Cunningham* that the application of *Blakely* to California sentencing should have been clear from its discussion in *Blakely*. Thus, courts could conclude that *Cunningham* did not establish a new rule but merely applied the existing standard set by *Blakely*. If such is the case, the *Cunningham* decision may be retroactive to cases that were not yet final as of the filing of *Blakely* on June 24, 2004. The court in *Gomez,* however, determined that *Cunningham* was a new rule because its dictates were not "apparent to all reasonable jurists." (*In re Gomez*, *supra,* ___ Cal.App.4th ___ [2007 WL 2247213, at *3].)

If *Cunningham* is found to apply to a particular sentencing issue, the court must also determine whether a failure to raise a Sixth Amendment objection in the trial court waives or forfeits consideration of the alleged sentencing error. The date of the sentencing hearing in context with the varying court decisions is crucial to the analysis. In *Black II,* the court determined that defendants who were sentenced before the Supreme Court's decision in *Blakely* did not forfeit their Sixth Amendment right by failing to object to the sentencing procedure in the trial court. The court recognized that *Blakely* marked a significant change in the sentencing law and that counsel was not required to anticipate its holding.

The court recognized that *Blakely* marked a significant change in the sentencing law and that counsel was not required to anticipate its holding.

In *Sandoval,* sentencing took place after the decision in *Black I,* 35 Cal.4th 1238 [29 Cal.Rptr.3d 740], which upheld the constitutionality of Penal Code section 1170, but just prior to *Cunningham*. The defendant's failure to object was excused under the futility doctrine because the trial court would have been obligated to overrule any objection based on the binding authority of *Black I*. *People v. Baughman* (2007) 149 Cal.App.4th 22 addressed a sentencing that occurred between *Blakely* and *Black I*. *Baughman* held that failure to object during this time period did waive the issue on appeal.

Assuming these procedural hurdles are no bar to reviewing the substantive issues, the California Supreme Court outlined a thorough framework for analyzing whether a sentencing error has occurred and, if so, how to determine if it was harmless. In *Black II* the court held that the upper term is appropriately imposed within the context of the Sixth Amendment as long as "a single aggravating factor" has been established by a jury finding, a fact admitted by the defendant, or a prior conviction. Once a single aggravating factor is constitutionally established, the trial court retains its traditional discretion to sentence within the statutory range and, in doing so, may take into account aggravating factors that were not found by the jury, admitted by the defendant, or based on recidivism. "The court's factual findings regarding the existence of additional aggravating circumstances may increase the likelihood that it actually will impose the upper term sentence, but these findings do not themselves further raise the authorized sentence beyond the upper term. No matter how many additional aggravating factors are found by the trial court, the upper term remains the maximum that may be imposed. Accordingly, judicial fact finding on

those additional aggravating circumstances is not unconstitutional." (*Black II, supra,* ___ Cal.4th ___ [2007 WL 2050875, at *581].)

Black II held that the trial court constitutionally imposed the upper term because (1) the jury expressly found true a probation ineligibility allegation that the defendant used "force, violence, duress, menace, and fear of immediate and unlawful bodily injury" (*Black II, supra,* ___ Cal.4th ___ [2007 WL 2050875, at *573]); and (2) defendant had suffered prior convictions. Either circumstance would authorize the court to impose the upper term. The court emphasized that recidivism is a traditional judicial sentencing consideration that need not be tried to the jury under the Sixth Amendment, and it is broadly defined in *Black II* to include the number of prior convictions, whether multiple prior convictions are of increasing seriousness, and whether the defendant served a prior prison term.

Even if a defendant overcomes the procedural hurdles of retroactivity, waiver, and the absence of Sixth Amendment factors, the defendant still must establish that the sentencing error was not harmless. In *Sandoval* the reasons cited by the trial court in imposing the upper term were (1) the crime involved a great amount of violence, (2) the conduct of the defendant was particularly callous, (3) the victims were particularly vulnerable, and (4) the crimes showed planning and premeditation. None of the aggravating circumstances was found true by the jury, they were not admitted by the defendant, and there were no recidivism factors. *Sandoval* held that the Sixth Amendment violation was subject to the harmless-error test of *Chapman v. California* (1967) 386 U.S. 18. If the reviewing court concludes beyond a reasonable doubt that the jury, "applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless." (*Sandoval, supra,* ___ Cal.4th ___ [2007 WL 2050897, at *598].) After a lengthy analysis, the court found the error in *Sandoval* not to be harmless.

Even if a defendant overcomes the procedural hurdles of retroactivity, waiver, and the absence of Sixth Amendment factors, the defendant still must establish that the sentencing error was not harmless.

Some of the fog created by *Blakely* and *Cunningham* has lifted, and it appears that the task of sentencing remains guided by many of the same principles that existed prior to those landmark decisions. Thanks to timely and clearly written decisions from the California Supreme Court in *Sandoval* and *Black II,* and the intervention of the Legislature with the enactment of SB 40, most of the lingering sentencing issues post-*Blakely* and -*Cunningham* have been resolved. CR

J. Richard Couzens is a retired judge of the Superior Court of Placer County. Tricia Ann Bigelow is a judge of the Superior Court of Los Angeles County. They co-author California Three Strikes Sentencing *and frequently teach felony sentencing at programs of the Administrative Office of the Courts' Education Division/Center for Judicial Education and Research.*

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Presented by the Judicial Council of California, the award honors individuals from federal, state, or local government for significant contributions to advancing equal access to fair and consistent justice in California. Before his appointment to the Court of Appeal in 2001, Justice Boland served for 20 years on the Superior Court of Los Angeles County, where he handled civil, criminal, family, and juvenile assignments.

TOP LEFT: JENNIFER CHEEK PANTALEON; CENTER LEFT: DANE PENLAND, SMITHSONIAN INSTITUTION, COURTESY OF U.S. SUPREME COURT; BOTTOM LEFT: FOTO-GRAFIA


Elwood M. Rich

The Compelling Need for a Civil Master Trial Calendar System

By Elwood M. Rich

For over 50 years, all of the large superior courts of California used a civil master trial calendar system to handle the trials of their civil cases. Law-and-motion matters were handled in departments dedicated exclusively to that function, and judges developed considerable expertise in the law.

In the 1980s, the Superior Court of Riverside County was one of those courts. All the civil cases were set for trial each Monday at 8:30 a.m. on the master trial calendar, which was handled by the master calendar judge (MC judge) in the courtroom designated for that purpose. The MC judge called the calendar, inquiring whether counsel were ready for trial, and ruled on any motions for continuance. The MC judge always knew which trial departments did not have any trials in progress and thus were available for assignment. In general, unless there were cases with a statutory preference, the MC judge first assigned to the trial departments those cases that had been on the trial calendar the longest.

After the MC judge had filled the trial departments with assigned cases, she or he gave all the remaining unassigned cases new trial dates within the next three to six months and notified counsel and the parties that they were subject to being called back if a trial department became available on a Tuesday or Wednesday. The cases awaiting scheduling on the master trial calendar were always numerous enough that every week some unassigned cases would remain. After the MC judge completed the assigning of cases, she or he kept a case for trial in her or his own courtroom if one was not already in progress there.

When a case was assigned to a department, the assigned judge commenced with it immediately because there was no morning law-and-motion calendar to handle.

Some judges would offer to participate in a last-ditch settlement conference in which the judge talked separately with counsel provided they agreed, on or off the record, that there would be no objection to having that same judge preside at trial if no settlement was reached. Attorneys always agreed to this. If the case settled, the judge notified the MC judge, who then sent another case or, if counsel on the remaining cases had departed, had the court attendant call back a particular case by telephone.

The Civil Delay Reduction Program . . . was a laudable goal, but the individual calendar system implemented to support the goal brought its own problems.

This system worked superbly in Riverside well into the 1980s. The only time that a trial department was without a trial in progress was on the rare occasion when a judge would request no assignments for a certain period of time in order to work on decisions in cases not submitted to a jury.

The only courts where a master civil trial calendar did not work as well were those that allowed cases to trail for weeks and months and then tried to call in those cases for trial. This was always difficult because often counsel were involved in another trial or away on vacation, or expert witnesses were not available, or parties or witnesses were on vacation or unavailable for myriad reasons. No case should be maintained on the calendar for longer than three days beyond the set trial date. Any case on the calendar for longer than that should be given a new trial date.

Drawbacks of the Civil Individual Calendar System

With the advent of fast-tracking in the court system, almost all of the large courts, including Riverside County, shifted to a civil individual calendar system. The purpose of fast-tracking was to reduce the delay in disposing of civil cases, particularly because many civil cases were taking up to five years to get to trial. The Civil Delay Reduction Program set firm trial dates that reduced the time from filing to disposition of civil cases and helped eliminate case backlogs. This was a laudable goal, but the individual calendar system implemented to support the goal brought its own problems.

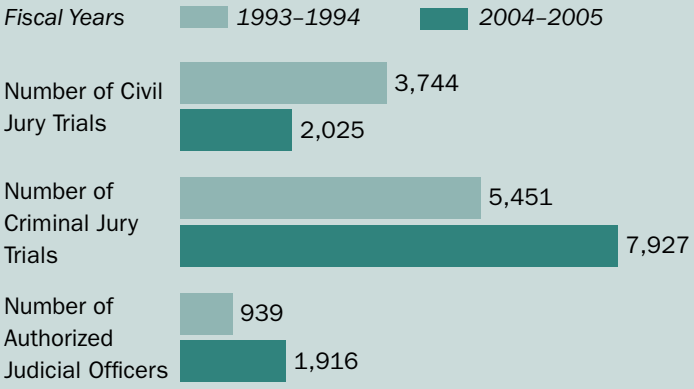
Now when a civil action is filed, the case is assigned to a particular judge on a random basis for all purposes, including trial. While it is possible to have a civil master trial calendar system and still have the departments handle their own law and motion, this is not effective for a number of reasons.

When a trial judge handles a law-and-motion session each morning before starting the trial, one to one and a half hours of trial time is lost each day. This causes trials to take more days, which results in more attorney fees, jury fees, and court reporter fees. It also delays the return of jurors to their regular employment.

Although judges have research attorneys, they still are often hurried, trying to find time to do their law-and-motion work. Some judges do not want a civil department assignment simply because of this burden. The shortening of the length of trials alone is adequate recompense for having specialized law-and-motion departments. This individual calendar system has proved to be an inefficient and unproductive system.

In the individual calendar system, each judge is independent of all others and is his or her own boss. In the Superior Court of Los Angeles County's Central District, for example, there are 60 civil judges; therefore there are 60 individual bosses and 60 small pools of cases. Each judge determines how many cases in his or her department are set for trial on Monday of each week, without regard for the number the other judges set for themselves.

Statewide Productivity of Jury Trials in the 58 Superior Courts



Yet enough trials need to be set so that after the attrition of settlements, continuances, and the like, at least one case remains for each judge to hear. Some judges set fewer cases than others. Those who set the least number for trial frequently are left with no case to try because settlements have wiped out whatever trials the judges had set for that week.

About half of the judges are without trials to hear each week because they did not set enough cases for trial. Anyone can walk down the corridors of the civil trial departments in Los Angeles Central—and in the Superior Courts of Orange and San Diego Counties—and observe this. It is unfair to the civil litigants who are continually clamoring for trials and to the taxpaying public.

Increased Efficiency of the Civil Master Calendar System

The MC judge, in contrast, serves as manager for the team of judges. On a daily basis assignments are made and the workload is distributed. Time is not wasted on individual law-and-motion calendaring. Trials begin promptly each morning—a prospect that should be welcomed by all parties and especially by judges who see their role as working for the better of the team and the system. But most importantly, the current system that has resulted in empty courtrooms would be changed. Instead of having each judge manage his or her own small supply of cases, the civil master calendar system distributes cases out of a large, bottomless pool, and judges never run out of cases available for trial. This perpetual supply provides far better judicial service to the public.

While the increased emphasis on mediation has produced more settlements, this only reduces the large backlog of cases, not the large quantity of cases currently seeking a trial each week. And the demands of the current caseload for trials will not be met as long as judges are free to set as few cases as they wish.

Declining Productivity

Because not enough cases are set for trial under the civil individual calendar system, there has been a large decrease in the productivity of civil jury trials in the superior courts. Compare the numbers from fiscal year 1993–1994 with those from fiscal year 2004–2005 in the accompanying chart. Compared to 11 years earlier, the productivity of civil jury trials in the superior courts decreased significantly in 2004–2005.

Note that the number of civil jury trials declined by almost 50 percent despite the doubling of the number of judicial officers and despite the large number of civil litigants continually wanting trials that they are not getting.

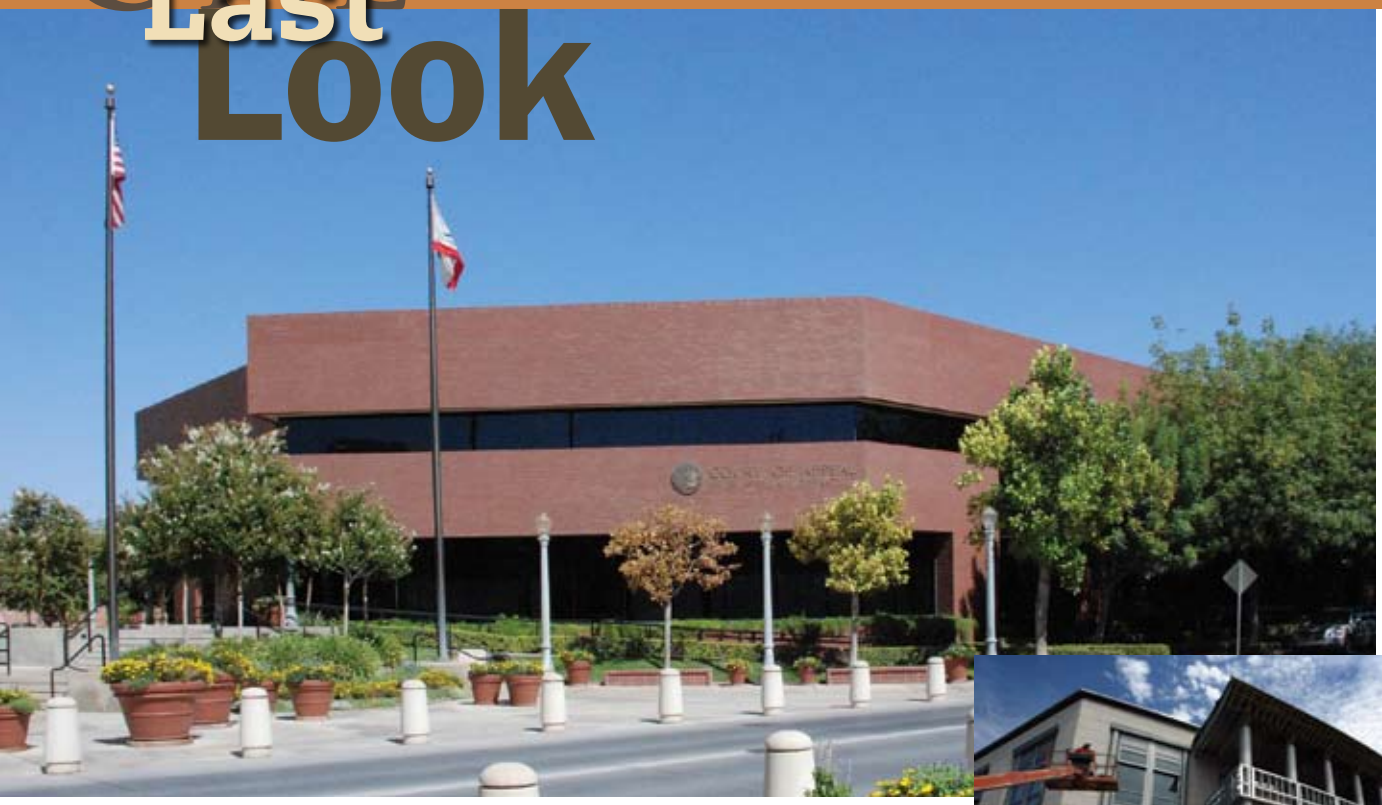
Many other reasons have been cited for the decline in civil jury trials, such as the emergence of various forms of alternative dispute resolution, the expense of going to trial, and substantive and procedural changes in the law. But none of these explanations is valid.

The only reasonable explanation is the shift to the inefficient civil individual calendar system. Many civil trial judges, because they are their own bosses, are spending much more time in chambers because they prefer to, not because they need to. This results in much less time in the courtroom, which, in turn, results in a much lower productivity of jury trials. This would not be possible under the management of a master calendar judge. There is a dire need to return to the civil master trial calendar system managed by the master calendar judge.

The civil individual calendar system is an utter failure that needs to be replaced. CR

Elwood M. Rich was a Riverside County judge for 28 years until his retirement in 1980 and still presides over mandatory settlement conferences two days a week for the Superior Court of Riverside County.

One Last Look



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The new appellate courthouse in Fresno (right) offers a striking, modern building and more space for justices and staff.

The Court of Appeal for the Fifth Appellate District in Fresno moved into its new home in late September after several years in a serviceable—but fairly nondescript—leased office building (above, left). It was the court's third move since 1961, dictated by the need to accommodate growth in the court's business.

While both buildings are in downtown Fresno, the new three-story George N. Zenovich Courthouse (above, right) provides chambers for 11 justices; offices for attorneys, clerks, and administrative staff; and a settlement conference suite. The single courtroom is bordered by landscaped courtyards and allows natural light, increasing the building's energy efficiency.

The new facility is named after Zenovich, a former member of the California Senate and Assembly and a former justice of the Fifth Appellate District who championed the cause of physically, mentally, and neurologically handicapped children.

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Submit your entry now! Deadline is Friday, October 26.

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