California Courts Review

A FORUM FOR THE STATE JUDICIAL BRANCH

SPRING 2007

New Feature: Best Practices

—page 24

Growing Mediation in Our Courts

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- Prof. Charles Whitebread, USC School of Law

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CALIFORNIA COURTS REVIEW • SPRING 2007

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Contributors

SHEILA PURCELL
(*Growing Mediation in Our Courts,* page 12) is director of the Multi-Option Appropriate Dispute Resolution Project of the Superior Court of San Mateo County and has advised courts throughout the United States, Europe, and Asia on ADR programs.

CASEY LEE
(*The Real-World Benefits of JusticeCorps,* page 20) is a graduate of the 2005–2006 class of JusticeCorps and a member coordinator at California State University at Northridge. He plans to attend law school in the fall.

LYNN DURYEE
(*Improving Efficiency and Service in Family Courts,* page 24) is presiding judge of the Superior Court of Marin County, a judge since her appointment in 1993, and past president of the Marin County Bar Association.

CHARLES B. BURCH
(*Let's Reconsider Jury Instructions on Circumstantial Evidence,* page 29) is a judge of the Superior Court of Contra Costa County and was a federal prosecutor for 27 years, specializing in white-collar crime and public corruption cases.

ARTHUR GILBERT
(*The Untold Story Behind* Moncharsh, page 32) is presiding justice of the Court of Appeal, Second Appellate District, Division Six, in Ventura and a frequent commentator on the courts and the law.

SIMONE K. EASUM
(*Lost in Translation,* page 38) is a sole practitioner in Palm Desert and a veteran civil litigator.

California Courts Review

SPRING 2007

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Editorial and circulation:
455 Golden Gate Avenue
San Francisco, CA 94102-3688
415-865-7740
E-mail: pubinfo@jud.ca.gov

EDITORIAL STAFF

Office of Communications Manager/Executive Editor
Peter Allen

Managing Editor
Philip Carrizosa

Contributing Editor
Blaine Corren

Copy Editors
Lura Dymond
Fran Haselsteiner
Jill Whelchel

Design and Production
Suzanne Bean
Elaine Holland

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One of the most thrilling and encouraging things about observing the legal system over the past 40 years is seeing it develop, albeit agonizingly slowly at times.

When I was in law school more than 30 years ago, no one talked much about mediation, much less other forms of alternative dispute resolution. Instead, the focus was on learning to think like a lawyer and making the best possible arguments to prevail at trial or hearing. It was clearly a "winner takes all" approach to the law.

Our lead article and the accompanying sidebars show how mediation has become a viable method of resolving disputes without resorting to the traditional, adversarial line of attack. The author, Sheila Purcell, director of the Superior Court of San Mateo County's Multi-Option Appropriate Dispute Resolution Project, convincingly shows how mediation has worked in her court to resolve all types of disputes. The sidebars show how it can work even in criminal proceedings.

Another article, by Presiding Judge Lynn Duryee of the Superior Court of Marin County, shows how mediation helped her court eliminate a backlog of old family law cases. This article is also the first in a series of "best practices" that we hope to feature in every issue.

Perhaps the mediation practice will one day catch up with others. The American justice system is lagging behind many others, even those within our own borders. For example, the Navajos have practiced a form of mediation since time immemorial. Their mediators are called "peacemakers," and their role is to allow the participants to "talk out" their dispute.

Navajo peacemaking is one of the most renowned restorative justice programs in the world. Neither quite mediation nor alternative dispute resolution, it has been called a "horizontal system of justice" because all participants are treated as equals with the purpose of preserving ongoing relationships and restoring harmony among involved parties. In peacemaking there is no coercion, and there are no "sides." No one is labeled the offender or the victim, the plaintiff or the defendant.

The peacemaking program is an actual part of the Judicial Branch of the Navajo Nation and shows that we have much to learn from Native Americans.

—Philip Carrizosa
Managing Editor

On Court Facilities

Chief Justice Ronald M. George delivered these remarks as part of his State of the Judiciary address delivered to a joint session of the state Legislature in Sacramento on February 26, 2007.

When I stood before you last year, I described three major problems affecting the ability of our branch of state government to do its job. You and the Governor acted affirmatively on all three, and we are most appreciative. You created 50 desperately needed new judicial positions; you increased the compensation for judges—enhancing the state's ability to attract and retain well qualified and diverse individuals to a career on the bench; and you enacted legislation facilitating the transfer of court facilities from county to state ownership. This year, we are asking for your continued assistance. . . .

[One critical area] is the transfer of ownership and maintenance responsibility for California's courthouse facilities from the counties to the state. Five years ago the Legislature adopted a plan for the transfer of courthouses to state control. Last year you enacted a measure, Senate Bill 10, that will facilitate and expedite this process.

With funding of the court system now a state responsibility, and with the many competing demands upon county government, the lack of local interest and ability to allocate scarce resources to courthouses is understandable. But many decades of neglect have left the infrastructure of the court system in a very precarious condition.

In courthouse after courthouse, security is inadequate. Pursuant to your mandate, we have adopted minimum security standards. We are working closely and cooperatively with the sheriffs to create a proposal to bring each court up to those standards.

Many of California's courts occupy buildings that are seismically vulnerable or are plagued with dangerous fire or mold conditions. Many facilities are incapable of meeting the requirements

CAROL SONSTEIN PHOTOGRAPHY

of the Americans With Disabilities Act. In 40 percent of our court facilities, shackled prisoners are brought to criminal courtrooms through crowded public hallways.

The deficiencies in our court facilities threaten the thousands of Californians who each day enter our courthouses to pay a traffic ticket, obtain an official document, seek dissolution of a marriage, determine child custody, adjudicate other legal claims, testify as a witness, or serve as a juror. They also threaten the persons who work in the courts—judges, staff, and lawyers.

The facilities legislation that you adopted last year already has produced significant advances in court transfers to the state. We are actively negotiating with all 58 counties, and hope to complete the transfer to the state of up to 100 of California's 451 courthouse facilities by this summer with the goal of transferring an additional 200 facilities by July 2008. We also have begun to explore with your leadership a variety of approaches, such as leasebacks and multiple-use facilities, involving the participation of the private sector. We request your continued assistance in making progress toward our goal of providing safe and secure court facilities for all Californians.

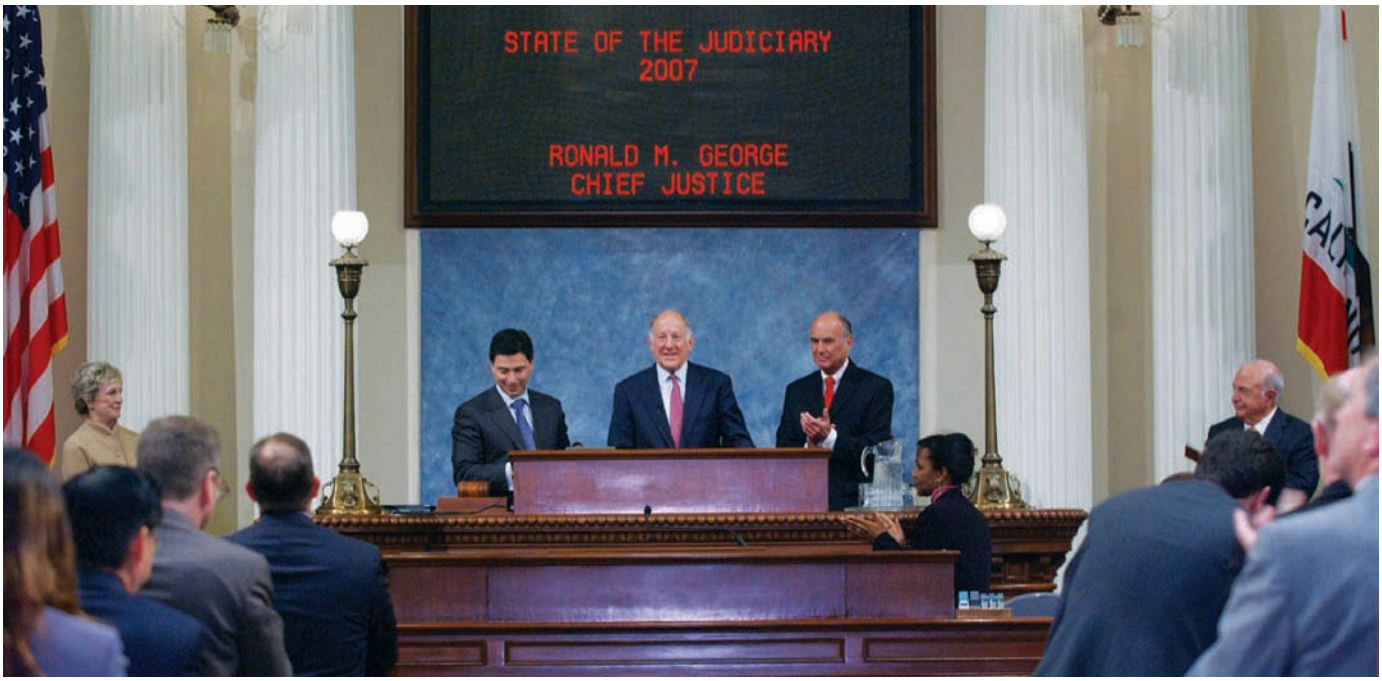
Governor Schwarzenegger has proposed a $2 billion bond issue for the construction and renovation of courthouses as part of this year's Strategic Growth Plan. Last year, courthouses were not included in the bond proposal that went to the voters. We hope this year will be different. We continue to push for this investment in justice because the alternative of life-endangering court facilities is unacceptable.

These measures will help provide better physical access to safe courts. And having a high quality bench helps ensure fair and objective treatment for all. But meaningful access for all Californians requires much more. You and the Governor have provided additional funding to improve equal access. I thank you—those funds already are at work, offering assistance to litigants unable to afford counsel on their own. The Judicial Council has shown its commitment by allocating an additional $3.7 million to support self-help services. These programs are expanding, and our goal is to install them in every court….

I and many others in our branch look forward to meeting with you over the coming year to discuss the court system, and to working with you to make it even better. It is a continuing privilege for me to lead the enormously talented and dedicated judges and staff who are the judicial branch. Thank you again for inviting me to speak with you today.

The deficiencies in our court facilities threaten the thousands of Californians who each day enter our courthouses to pay a traffic ticket, obtain an official document, seek dissolution of a marriage, determine child custody, adjudicate other legal claims, testify as a witness, or serve as a juror. They also threaten the persons who work in the courts—judges, staff, and lawyers.

Court Briefs



ERIKA JOHNSON

Chief Justice Asks Lawmakers for Judgeships, Courthouse Improvements

Chief Justice Ronald M. George—in his 12th annual State of the Judiciary address delivered February 26 at the State Capitol in Sacramento—thanked legislators for their broad support of the courts but noted that more needs to be done to ensure access to justice for all Californians. He discussed critical issues facing the California court system, including the need for more judgeships, increased judicial compensation, and new and improved court facilities.

Following his address, the Chief Justice, Bench-Bar Coalition members, and other judicial leaders attended the Judicial-Legislative-Executive Forum, an informational session and reception for legislators and legislative and executive branch staff. The next day, the coalition visited with individual legislators to further discuss issues facing the judicial branch.

Chief Justice Ronald M. George is flanked by Assembly Speaker Fabian Núñez and Senate Minority Leader Dick Ackerman as he prepares to give his State of the Judiciary address (top photo) and is escorted into the Assembly chamber by Senate Public Safety Committee Vice-Chair Dave Cogdill and Assembly Judiciary Committee Chair Dave Jones (photo at left).

Transcript of the State of the Judiciary Address

www.courtinfo.ca.gov/reference/soj022607.htm

Public, Experts Testify About the Foster-Care System

The California Blue Ribbon Commission on Children in Foster Care held a public hearing on March 22 at the State Capitol in Sacramento. Youth, parents, and caregivers provided testimony on their experiences in legal proceedings and what can be done to improve outcomes for foster youth. Judges and attorneys also spoke of the challenges they face and policy changes that are needed. Several legislators participated in the hearing, which was attended by more than 300 people.

Foster youth stressed the importance of timely notice of their hearings, meeting with their attorneys in advance of their hearings, and having a voice in court proceedings. Parents requested more notice about hearings and better coordination of services with other agencies.

Caregivers, foster parents, and adoptive parents advocated for an increased role in court proceedings and an opportunity to supply information about children to judges and attorneys.

Judges and attorneys testified about the need for reasonable caseloads, more training, and better information sharing between agencies that work with vulnerable children.

The Blue Ribbon Commission on Children in Foster Care heard suggestions for improvements in legal proceedings.

The commission was appointed by Chief Justice Ronald M. George in March 2006 to provide recommendations on how courts and their partners can improve foster-care outcomes. The commission focuses on three areas: improved court performance and accountability; improved collaboration among agencies that work with families; and the need for adequate and flexible funding. The commission meets quarterly and will present its final recommendations to the Judicial Council in spring 2008.

Task Force Mission, Meetings, Archived Audiocasts, Public Comments, Roster

www.courtinfo.ca.gov/jc/tflists/bluerib.htm

Contact

Carolynn Castaneda, AOC Center for Families, Children & the Courts, 415-865-7556, carolynn.castaneda@jud.ca.gov

Public Hearings Address Handling of Domestic Violence Cases

The Judicial Council's Domestic Violence Practice and Procedure Task Force held two public hearings—on March 14 in Los Angeles and March 21 in San Francisco—to receive comments on its draft guidelines and proposed practices for domestic violence cases. Judges, attorneys, advocacy groups, and other experts in the field discussed the importance of court and community leadership, restraining order proceedings, enforcement of orders for relinquishment of firearms, and handling misdemeanor cases. The task force also heard testimony from victims of domestic violence, who presented their personal stories and stressed the critical need to improve the system.

The Judicial Council's Domestic Violence Practice and Procedure Task Force took testimony in the Milton Marks Auditorium of the State Office Building in San Francisco.

Proposed Guidelines and Practices, Task Force Roster

www.courtinfo.ca.gov/jc/advisorycommittees.htm#dvpp

Contact

Penny Davis, AOC Center for Families, Children & the Courts, 415-865-8815, penny.davis@jud.ca.gov

Homelessness Conference Showcases Community-Court Partnerships

Judges, attorneys, service providers, and representatives from city and county governments came together at the Homelessness: Innovations Through Community-Court Partnerships conference, March 29 in Santa Monica. The conference examined the actions necessary to engage communities, showcased existing community courts and the partnerships that contribute to their success, and discussed the building blocks necessary to plan and implement a community court.

Contact

Kelly Parrish, AOC Center for Families, Children & the Courts, 415-865-8018, kelly.parrish@jud.ca.gov

A legislator panel brainstorms ways for the courts and local communities to address homelessness during a March 29 conference at the Rand Corporation headquarters in Santa Monica (top photo). Chief Justice Ronald M. George (bottom photo; second from right) delivered the welcoming address.

DIANE BALDWIN/RAND

Rural Courts Team Up to Help Grandparents

The Superior Courts of Butte, Glenn, and Tehama Counties are expanding their joint self-help assistance and referral program—also known as SHARP—to help individuals seeking guardianships of their grandchildren. A $15,000 grant from the Foundation of the State Bar is helping pay for videos, materials, and workshops specifically designed for grandparents, a growing population. The expanded program assists about 35 families per month with grandparent guardianships.

Contact

Tammy Grimm, Butte, Glenn, and Tehama County court program coordinator, 530-532-7188, tgrimm@glenncourt.ca.gov

Demographic Data on Justices and Judges

A report released in March by the Administrative Office of the Courts (AOC) details, by jurisdiction, aggregate data on the gender and ethnicity of California state court justices and judges. In addition to creating 50 new judgeships in fiscal year 2006–2007, Senate Bill 56 annually requires the AOC to collect and release demographic data on the state's judiciary by March 1. The Governor and the State Bar's Commission on Judicial Nominees Evaluation (JNE) are similarly required to collect and release aggregate data on the gender and ethnicity of judicial applicants.

2007 Demographic Report on California Justices and Judges

www.courtinfo.ca.gov/reference/4_38sb56.htm

Judicial Applicant Data Disclosed by the Governor's Office

http://gov.ca.gov/index.php?/press-release/5508

Judicial Applicant Data Supplied by the JNE Commission

www.calbar.ca.gov/calbar/pdfs/reports/2007_JNE-Demo-Report_2006.pdf

Los Angeles Court Holds Summit on Judicial Diversity

The Superior Court of Los Angeles County earlier this year invited members of regional and minority bar associations, justice system partners, judges, and students to a summit on how to increase the diversity of the bench. The first panel

COURTESY OF THE SUPERIOR COURT OF SAN MATEO COUNTY

at the summit addressed how to encourage more minorities to enter the legal pipeline. Panelists included representatives from law schools at UCLA, USC, Loyola Marymount University, and Southwestern University. They answered tough questions about increasing the diversity of their student body and commented on the controversial law school ranking system used by *U.S. News and World Report*.

The second panel offered observations about the judicial appointment process and the importance of mentoring. Panelists included former Governor Gray Davis; State Bar president Sheldon Sloan; and former state judicial appointment secretaries John Davies, Judge Burt Pines, and Timothy Simon.

Contact

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

Courts Educate Public Through Airwaves

Candace Goldman (right), family law facilitator from Alameda County, talks with attorney Chuck Finney (left) and answers legal questions on KALW, a local public radio station. Each week for more than 20 years, Finney has hosted an hourlong call-in radio program that lets listeners talk directly with accredited legal experts. About four times a year, family law facilitators from Bay Area superior courts—including Alameda, San Mateo, and Santa Clara—are Finney's featured guests, answering questions about family law.

Courts' Mediation Week Activities Educate Public

Many California courts celebrated Mediation Week, March 18–24, by promoting the important role that mediation plays in offering the public a way to resolve disputes other than going to trial. Several superior courts participated. Merced County provided an information booth, a speaker's panel, and a live demonstration of the mediation process. Stanislaus County displayed a county board of supervisors' resolution recognizing Mediation Week, distributed free promotional water bottles, made presentations to local civic organizations, and showed a slide presentation about the court's alternative dispute resolution (ADR) programs. Monterey County provided an informational table and court staff to answer the public's questions about court mediation services. Fresno County presented proclamations at city council meetings, and Los Angeles County held a volunteer recognition event for its mediators.

In addition, a new section on the California Courts Web site debuted in March. The new section makes it easier to find information about mediation and other ADR processes, including information specifically designed

Judicial Council Honors Assembly Speaker Núñez

Assembly Speaker Fabian Núñez was presented with a Judicial Council resolution in February recognizing his contributions to the administration of justice in California. Under his leadership, the Legislature authorized 50 new judgeships, passed legislation to help facilitate the transfer of court facilities from counties to the state, and approved a salary adjustment that is essential for recruiting and retaining judicial officers in California.

COURTESY OF THE OFFICE OF ASSEMBLY SPEAKER FABIAN NÚÑEZ

to help self-represented litigants. The section also has links to superior court Web pages that provide information about local ADR programs.

ADR Section on the California Courts Web Site

www.courtinfo.ca.gov/programs/adr

Contact

Alan Wiener, AOC Office of the General Counsel, 818-558-3051, alan.wiener@jud.ca.gov

AOC Attorney Appointed to International Tribunal

Joshua Weinstein, an attorney in the Administrative Office of the Courts, Office of the General Counsel, will be a visiting professional this summer at the International Criminal Court (ICC) at The Hague.

Based on a treaty joined by 104 countries, the ICC is an independent court that tries persons accused of the most serious crimes of international concern—namely genocide, crimes against humanity, and war crimes. Weinstein, who will be on unpaid leave from the AOC, will provide legal research for ICC Judge René Blattman, who is visiting from Bolivia.

Chief Justice George Honored by Trial Lawyers

The American College of Trial Lawyers presented Chief Justice Ronald M. George with its Samuel E. Gates Litigation Award at its spring meeting in La Quinta. Established in 1980, the award honors a lawyer or judge who has made a significant contribution to the improvement of the litigation process. Chief Justice George is the first California justice or judge to receive the award.

Judge Harbin-Forte Recognized by Women Lawyers

California Women Lawyers presented Judge Brenda Harbin-Forte, Superior Court of Alameda County, with its Rose Bird Memorial Award, named after the first female Chief Justice of the California Supreme Court. Judge Harbin-Forte was honored for her tireless advocacy of women and minorities and her fair treatment of less fortunate litigants and teens subject to sexual exploitation and human trafficking. Judge Harbin-Forte established Alameda County's annual adoption day, which coordinates mass adoptions of dependent children. She was also recognized for her work in judicial education, including her service as faculty and dean of the B. E. Witkin Judicial College of California.

Judge Brenda Harbin-Forte

Milestones

The Governor has announced the following judicial appointments.

Judge Mary Arand, Superior Court of Santa Clara County

Judge Irma Poole Asberry, Superior Court of Riverside County

Judge Kyle S. Brodie, Superior Court of San Bernardino County

Judge Gary M. Bubis, Superior Court of San Diego County

Judge Elena J. Duarte, Superior Court of Los Angeles County

Judge Paul M. Haakenson, Superior Court of Marin County

Judge Maureen F. Hallahan, Superior Court of San Diego County

Judge Alan B. Honeycutt, Superior Court of Los Angeles County

Judge Samantha P. Jessner, Superior Court of Los Angeles County

Judge Paul M. Marigonda, Superior Court of Santa Cruz County

Judge Edward B. Moreton, Jr., Superior Court of Los Angeles County

Justice Henry E. Needham, Jr., Court of Appeal, First Appellate District, Division Five

Judge Kimberly J. Nystrom-Geist, Superior Court of Fresno County

Judge Annemarie G. Pace, Superior Court of San Bernardino County

Judge Mark E. Petersen, Superior Court of Riverside County

Judge Harry L. Powazek, Superior Court of San Diego County

Judge James A. Steele, Superior Court of Los Angeles County

Judge Gregory S. Tavill, Superior Court of San Bernardino County

Judge Michael Villalobos, Superior Court of Los Angeles County

Judge Joel R. Wohlfeil, Superior Court of San Diego County

Judge Cory J. Woodward, Superior Court of Kern County

The following judges have left the bench.

Judge Rafael A. Arreola, Superior Court of San Diego County

Judge Stephen H. Ashworth, Superior Court of San Bernardino County

Judge B. J. Bjork, Superior Court of Riverside County

Judge Carl F. Bryan II, Superior Court of Nevada County

Judge Dolores A. Carr, Superior Court of Santa Clara County

Judge Chris R. Conway, Superior Court of Los Angeles County

Judge Charles J. Cory, Superior Court of Santa Clara County

Judge H. Ronald Domnitz, Superior Court of San Diego County

Judge Thomas N. Douglass, Jr., Superior Court of Riverside County

Judge Albert Perry Dover, Superior Court of Nevada County

Judge Raymond Edwards, Jr., Superior Court of San Diego County

Judge Ruffo Espinosa, Jr., Superior Court of Los Angeles County

Judge Robert Fairwell, Superior Court of Alameda County

Judge Diana R. Hall, Superior Court of Santa Barbara County

Judge Thomas C. Hendrix, Superior Court of San Diego County

Judge William J. Howatt, Jr., Superior Court of San Diego County

Judge Craig S. Kamansky, Superior Court of San Bernardino County

Judge Janet I. Kintner, Superior Court of San Diego County

Judge Larry S. Knupp, Superior Court of Los Angeles County

Judge Eric L. Labowitz, Superior Court of Mendocino County

Judge Ridgely L. Lazard, Superior Court of Lassen County

Judge Ronald T. Lisk, Superior Court of Santa Clara County

Judge Ronald Maciel, Superior Court of Kings County

Judge Dennis A. McConaghy, Superior Court of Riverside County

Judge Richard A. McEachen, Superior Court of Shasta County

Judge Perker L. Meeks, Jr., Superior Court of San Francisco County

Judge Judson W. Morris, Jr., Superior Court of Los Angeles County

Judge Garrett Olney, Superior Court of Plumas County

Judge Ralph L. Putnam, Superior Court of Fresno County

Judge John I. Quinlen, Superior Court of Kern County

Judge Ronald M. Sabraw, Superior Court of Alameda County

Judge David M. Schacter, Superior Court of Los Angeles County

Judge Vernon F. Smith, Superior Court of Marin County

Judge Donald B. Squires, Superior Court of Alameda County

Judge A. Rex Victor, Superior Court of San Bernardino County

Judge Robert B. Yonts, Jr., Superior Court of Santa Cruz County

Judge S. Charles Wickersham, Superior Court of San Diego County

The following judges have died recently.

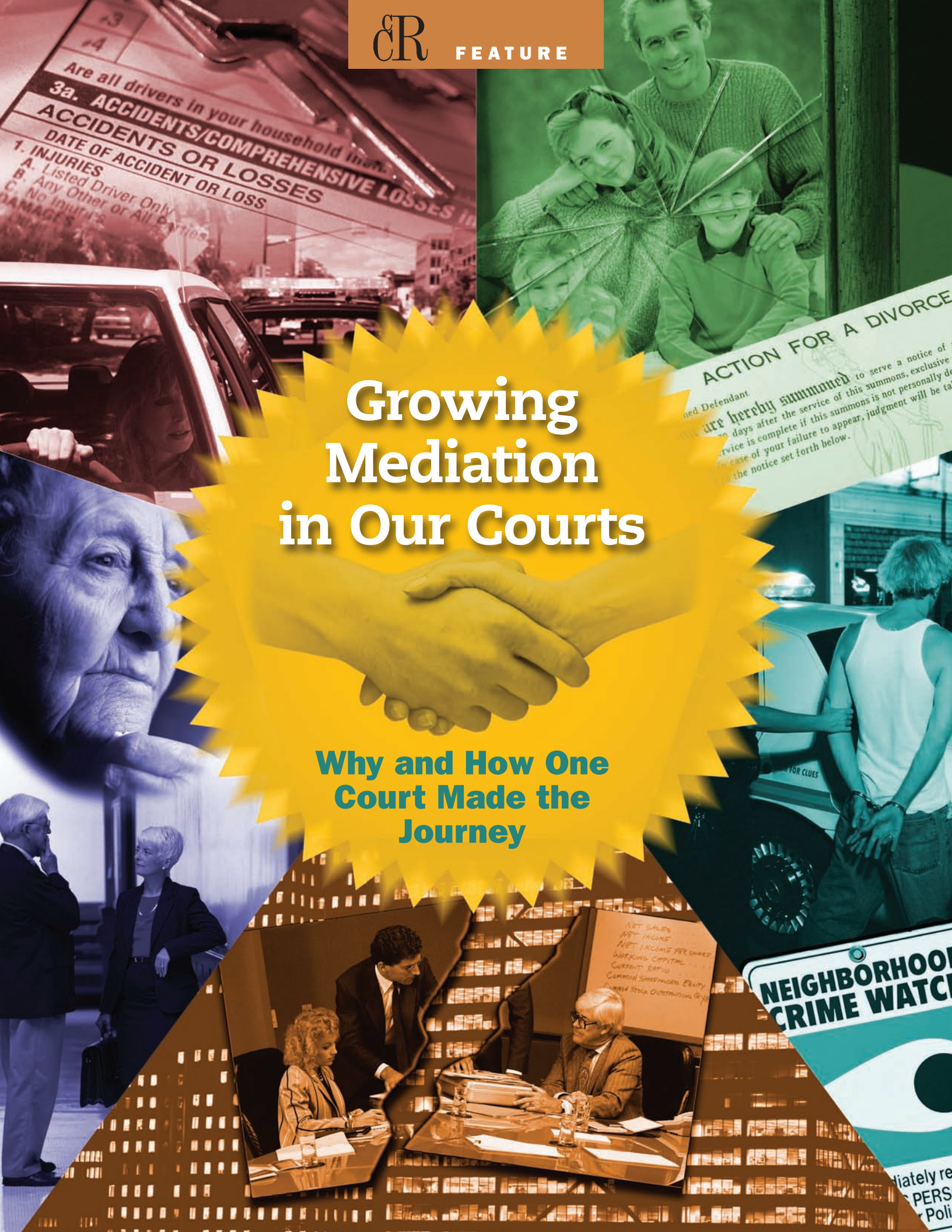
Judge J. Michael Bollman, Superior Court of San Diego County, died on February 6.

Judge Richard W. Van Dusen, Superior Court of Los Angeles County, died on March 9.

The following court executive officers have been appointed.

Deborah Norrie, Superior Court of Plumas County

Tania Ugrin-Capobianco, Superior Court of El Dorado County



Growing Mediation in Our Courts

Why and How One Court Made the Journey

By
Sheila Purcell

What do all of these situations have in common?

- **Drivers involved in an automobile accident disagree about who was at fault.**
- **Divorcing parents fight about their children's living arrangements.**
- **An adolescent breaks into a neighbor's car and steals a laptop.**
- **A complex multimillion-dollar contract between corporations goes sour.**
- **Adult children are in conflict over the division of their parents' estate.**

The answer is that all are examples of cases that have been and can be successfully resolved through court-connected mediation programs.

In the 11 years that I have served as director of the Superior Court of San Mateo County's Multi-Option Appropriate Dispute Resolution (ADR) Project (MAP), I have seen thousands of parties who came to our court for assistance with a wide variety of disputes use our court-connected mediation programs to craft their own resolutions without having to go to trial. Not every court case is best resolved through full-blown litigation and a trial. Through its mediation programs, our court, like many others across California and throughout the country, has been able to better serve litigants by meeting their need for a different dispute resolution option.

In mediation, a trained neutral person helps the parties communicate with each other and try to reach a mutually satisfactory resolution of their dispute. Unlike in a trial or arbitration, the neutral person does not decide how the dispute will be resolved; the parties themselves decide whether and on what terms to resolve their own dispute. The mediator's role is simply to facilitate the parties' negotiation process.

Reasons for ADR

Why would someone want to consider mediation? Here are just a few reasons:

Greater voice. In our court, many litigants prefer to use mediation because it gives them a chance to express their concerns and participate in the resolution of their dispute. Mediators are typically trained in active listening and other communication skills that may enhance

Mediation of Child Custody and Visitation Disputes

Under a 1981 legislative mandate, trial courts provide mediation in family court cases where child custody or visitation is in dispute. Child custody mediation helps parents develop a parenting plan that resolves custody and visitation issues and results in an agreement more than half of the time. This reduces the acrimony that often exists and can be very detrimental to children and parents when custody and visitation issues are adjudicated and allows a more efficient use of judicial resources.

Sam Mayo and his wife Leslee, early participants in child custody mediation at the Superior Court of Los Angeles County, describe their mediation experience:

> *"As it went on, we were able to unload feelings of anger, feelings of frustration, feelings of fear . . . and it became clear that these things don't need to happen. These custody battles are horrible . . . you're in a constant state of warfare. Somehow the mediator was able to sort of work magic, in getting something forged, to take us to the next step."*

Mayo provided testimony regarding mediation's benefits before a legislative committee, contributing to the passage of legislation that established child custody mediation throughout California courts.

Currently more than 400 court-connected family mediators provide mediation services to families and children in approximately 100,000 cases annually. In the latest survey, reported in 2004, 87 percent of the respondents reported that mediation is a good way to come up with a parenting plan and that they would recommend the process to a friend who has a custody or visitation problem.

JASON DOIY

the participants' "voice." Litigants responding to a recent survey conducted by our court appreciated the opportunity to be heard and to design their own outcome.[1] A plaintiff in a civil case addressed this, saying, "I am happy I was able to look at the defendant face to face and solve our problem."

Reduced hostility. Mediation can also lessen the conflict and hostility that often accompany a dispute. This can be especially important in cases involving family members or others who have a continuing relationship, such as in child custody, probate, and juvenile delinquency and dependency cases, where the parties can ill afford more conflict. This conflict-calming potential was one of the reasons that California mandates mediation of all child custody and visitation disputes in our courts.[2] We have taken family law mediation a step further and now provide a comprehensive program that handles all aspects of family law disputes beyond child custody and visitation.

Quicker resolution and reduced costs. In mediation, disputes can often be resolved more quickly—in a matter of weeks or months—than in the traditional litigation process. Because parties can share their concerns and needs directly with each other, the need for formal discovery and motions can be reduced. This and earlier settlements can, in turn, reduce parties' litigation costs. In a 2004 Judicial Council study of five mediation pilot programs for general civil cases, attorneys in cases that settled in mediation estimated that their clients saved almost $50 million in litigation costs over a two-year period.[3]

Increased satisfaction. Because of these and other benefits, participants in mediation typically express very high satisfaction with the mediation process. In that same 2004 study, parties and attorneys expressed high satisfaction with their mediation experience and with the performance of the mediators. They also strongly

agreed that the mediator and the mediation process were fair and that they would recommend both to others. These high satisfaction levels were echoed in our evaluation. As one user in our survey put it: "Easy and painless—better resolution for all concerned."

Why would a court want to devote staff time and budget to providing a mediation program? While time and cost savings for the court are often front and center in a court's hopes for a mediation program, many courts come to see that the most powerful reason for implementing such a program is improving the public's trust in and satisfaction with the courts.

Mediation embodies many of the elements essential to disputants' sense of procedural justice, such as providing parties with a voice and treating them fairly. As a recent Judicial Council study of public trust and confidence in the California courts found, procedural justice is the strongest predictor of whether members of the public approve of or have confidence in the courts.[4] Programs that promote a sense of procedural justice are thus the vehicles with the greatest potential to change how the public views the courts.

It is interesting to note that the 2004 pilot program study found that litigants who participated in the mediation programs were more satisfied with the service provided by the court than those who did not participate in mediation, regardless of whether their case resolved in mediation. It was access to the mediation process—not settlement—that was key to improving the parties' view of the court.

The 2004 study also found significant benefits to the courts in terms of fewer motions and reduced trial rates among cases that participated in the mediation programs. These reductions translated into significant savings of judge/days per year, freeing up judges to devote more time to those cases that most need their time and attention. In a time when many courts still face a critical shortage of judges, this could be an important reason for implementing or expanding court-connected mediation.

Developing an ADR Program

What does our court program offer and how did we develop it? The Superior Court of San Mateo County's Multi-Option ADR Project includes mediation programs for general civil, small claims, probate, family law, juvenile dependency, and juvenile delinquency cases. We also offer other dispute resolution processes, including court-connected ("judicial") arbitration, neutral evaluation, and settlement conferences.

While mediation can be a wonderfully effective and satisfying dispute resolution option, it may not be the best option in every dispute. Mediation cannot replace trials for interpreting the law, establishing precedent, and providing a forum for decisions by a jury of one's peers. As one party noted in his response to our court's survey, "Mediation is a very effective means of resolving cases in many instances. In this particular case, it had little or no effect." The Multi-Option ADR Project is designed around the premise that the court should try to provide litigants with the most appropriate dispute resolution option for their particular case, whether that is a trial, mediation, or some other dispute resolution process. We view mediation as just one option in the spectrum of appropriate dispute resolution processes available to litigants, and we see helping litigants identify and access the most appropriate option as the key to litigant satisfaction and program success.

MAP did not start out with all of these options. We started small—focusing at first on offering mediation in general civil cases through a partnership with the local county bar and our community mediation center, the Peninsula Conflict Resolution Center. In our civil program, judges can discuss ADR options with litigants in their initial case management process. They can also order parties to meet with the civil program staff to discuss these options. But participation in mediation or another ADR option is voluntary. Parties who decide, with the judge's or court staff's assistance, to participate in mediation or another ADR option select their neutral either from our carefully screened list of panelists or the world at large. The parties are responsible for paying the neutral for his or her services except when pro bono or modest-means assistance is needed. To provide this assistance, our staff screens based on income and works with our whole panel to make mediation and other ADR services fully accessible to all who use our court.

Expanding the Program

It was our initial success with this civil mediation program that enabled us to grow, bringing together and building on other existing programs within the court and the community over subsequent years. First we added other forms of ADR, such as neutral evaluation, to our civil program. After that, we were able to consolidate two preexisting court programs—small claims mediation and judicial arbitration—within our civil program. This consolidation has allowed us to integrate multiple ADR options into our civil case management process, giving civil litigants greater choice and, we believe, greater satisfaction. For example, unlike in some courts, our ADR survey showed very high levels of satisfaction across all program areas, including among participants in our judicial arbitration program (more than 90 percent). We believe that this stems from the fact that judicial arbitration now is one choice among many other ADR options, rather than the only option. This consolidation of appropriate dispute resolution programs also gave the court and community a place to look for consistent information on ADR and brought together staff with the expertise for future ADR planning.

Because of our existing partnership with the local bar and community mediation center, we were later able to bring juvenile dependency and

comprehensive family law mediation programs into the court. In the dependency area, we initially partnered with the community mediation center to hire a part-time coordinator to oversee volunteer mediators. With data about our program success in hand, we later sought and received state trial court funding for a program coordinator position at the court. Now families at all stages of the dependency process are provided with free mediation services to help clarify and resolve issues that will contribute to the well being of their children. In the family law area, our local county bar association originated a fledgling program. Pointing to our data on the success of the civil program, we were later able to provide court staff to build on and expand this program. Today we have a staff attorney-mediator available on site at the court, as well as a panel of private attorney mediators and arbitrators to which cases can be referred.

The most recent addition to our court's MAP programs, and an exciting development in the ADR field, is the use of mediation techniques in juvenile delinquency cases.[5] This program employs restorative justice concepts to bring together juveniles and the persons victimized by their behavior. In our program, volunteers trained by the community mediation center provide the mediation services, which are free to the parties, and court staff manages the program.

What Makes an ADR Program Successful?

What makes mediation or another ADR program successful? There is no paint-by-numbers way to develop a successful court-connected mediation or ADR program. But there are some common themes that made the growth and strengthening of our project possible:

Broad participation in development and implementation. Commitment and ongoing participation from the judges, the local bar, our community mediation center, and other community partners have been and continue to be critical to our program's success. The local county bar association and local judges worked together to plan and design our civil ADR program with the shared aim of helping set timely civil trials. This program began with a grant from the San Mateo County Bar Association. Early on we conducted a needs assessment, asking frequent users of our court and community leaders what areas they felt needed additional court attention. Now, each of our ADR programs has an advisory committee made up of participants in that program. For example, the juvenile mediation program draws together representatives from the district attorney and probation offices, delinquency and dependency bench officers, social workers and diversion staff, and court staff, who help us shape everything from safety protocols to case criteria. When bar and community members are involved, program staff receive advice tested by reality. Showing that the program has community support and that we have leveraged community resources also helps when making budget requests.

Professional staff. Having professional program staff has been essential to our success. The program director often holds the keys to the early success of the program. His or her expertise and ability to work well with a range of people (including judges, attorneys, and self-represented litigants) is critically important to securing the support needed for all aspects of program development. The quality of the ADR staff also has implications for how the program is viewed. The more professional and knowledgeable the staff is about ADR, the better. Some courts have begun by providing existing staff with ADR training, and others have hired new staff with ADR expertise.

Appropriate referrals. We found that making referrals to the appropriate dispute resolution process is a key element of a successful ADR program. If parties are sent to an ADR option that does not meet their needs, they are unlikely to be satisfied with either the program or the court. As the late Judge A. Leon Higginbotham of the Third Circuit Court of Appeals said at the 1976 Roscoe Pound Conference, "Our goal cannot be merely a 'reform' that seeks to ease the courts' caseload. . . . What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice?"[6]

Quality neutrals. To have MAP succeed, we knew we needed to provide high-quality neutrals. From the parties' perspective, the neutrals are representing the court. One horror story could undo all the good work of a program. We developed qualifications that are similar to those now found in many court programs, using a combination of training (at least 40 hours) and experience (at least five mediations) or other substantially equivalent background. These are minimums, and we frequently turn away applicants who have far more than this. We also require references and ask for the opportunity to observe the neutrals if we think it would be helpful. Many regions have excellent pools of trained mediators already in existence. Other areas, particularly rural areas, may have more limited pools and therefore find it helpful to work with neighboring courts to find the most qualified candidates for a shared panel.

Track success. Our ability to show, through collection and evaluation of program information, that our mediation programs were successful at meeting their goals has been essential to our growth. For example, in the first few years of our civil program we documented a 50 percent reduction in the number of court-provided settlement conferences, some of which was attributable to ADR. This meant that the court freed up the equivalent of one judgeship to focus on other court

Restoring Justice Through Victim Offender Mediation

BY SUZANNE NEUHAUS

As a peace officer for nearly 19 years for the California Department of Corrections and Rehabilitation's Division of Juvenile Justice (formerly the California Youth Authority), I have worn many hats—youth counselor, parole agent, delinquency prevention specialist, and victims' services specialist. I am a firm believer in our professional and ethical obligation to restore justice to the fullest extent possible in all cases and to create healing opportunities for the wounded in our midst, including crime victims and survivors, offenders, and the community.

In some cases, providing an opportunity for victims and offenders to meet and participate in a mediated dialogue with a trained facilitator is appropriate, either before or after adjudication. As a victim offender mediation facilitator, I have had the indescribable privilege of witnessing tremendous healing and restoring justice well beyond the inadequacies of the system. The voices of those whom I've worked with drive me to challenge the system beyond its comfort zone into a world of possibility.

Consider Darryl, whose daughter was killed in a drunken driving crash:

> *"I don't want to be a victim for the rest of my life. I don't want to be angry and bitter and filled with hatred and rage, but I think that's what the system wants for me. I deserve the right to heal and I have a right to confront him. He needs to know what he has taken away from me so he can make different choices when he gets out. I hope he does, but the odds are high he'll drink and drive again. Maybe I can make a difference in him. Who better than me? He deserves the opportunity to heal, too."*

Or Lois, whose sister was shot to death, caught in the crossfire of a gang-related dispute:

> *"When my sister died, my mother died right along with her. She could barely function, leaving me to care for her, as well as my younger siblings. Yet after finally meeting with the three boys responsible for her murder, I got my mother back. She needed to forgive them; we all did. Just look at her today [the day of Lois's wedding]—she's radiant, and there's joy in her heart. I could never have had this day without my mother."*

Or Elloise, whose nephew stabbed her teenage son, his cousin, while under the influence, leaving him in a permanent vegetative state:

> *"Why is it I'm no longer allowed to be his aunt? I loved him and cared for him when my own sister failed him. I am angry even still, and I have every right to be, but why can't I tell him I still love him. I may be "the victim," but I haven't stopped being his aunt. He will always be a part of me—he will always be a part of our tribe. I have begged to confront him in our native tongue; it's our language, but the system doesn't speak it. He has a responsibility to his family, and the system will not allow him the opportunity to fulfill it."*

Victim offender mediation is controversial. It is something that those not intimately connected to the crime may never understand, but perhaps we (the system) need to get out of the way and honor the humanness behind the crime. The "system" simply cannot replace people in restoring justice.

duties. Demonstrations of success such as this help justify a program's place in the court.

How Can You Start or Expand a Mediation Program?

Getting started may seem overwhelming, but when you start small and take it step-by-step, in my experience it is a manageable and worthwhile effort.

One of the biggest logistical barriers we faced, and I hear this from other courts as well, is the question: How do we fund an ADR program? You may need to start on a shoestring. You can initiate a modest program for a small number of cases using existing staff and then expand as you document your success. You may be able to obtain some start-up funding through a grant. As mentioned, we began with a grant from the local bar association. The Judicial Council currently offers grants for planning and implementing mediation programs for civil cases.

Other courts that have successful ADR programs can provide invaluable wisdom and technical assistance. Their support in the form of materials and ideas has helped many newer programs get started.

You should establish your program goals and a plan for meeting those goals. One of our early strategic plans laid out the guiding principles for expanding the program. It helped us keep our bearings.

An old saying captures it well: "Many a short cut to success turns out to be a trap door to failure." Start small, build slowly and steadily, and you will have time to consider and address the questions that naturally arise along the way.

Starting or expanding a mediation or ADR program may well be one of the most rewarding efforts you and your court can undertake. The public you serve will tell you that, with your program's help, they were able to voice their concerns and shape meaningful solutions to the problems they brought

to your court. Isn't this what our courts are all about?

Sheila Purcell is director of the Superior Court of San Mateo County's Multi-Option Appropriate Dispute Resolution Project.

Notes

1. Superior Court of California, County of San Mateo, *Multi-Option ADR Project Evaluation Report* (July 2003–July 2005) at *www.sanmateocourt.org/adr/evaluations/2003_2005_evaluation_report.pdf.*

2. See "Mediation of Child Custody and Visitation Disputes" on page 14.

3. See "The Early Mediation Pilot Program" on this page.

4. See *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys* at *www.courtinfo.ca.gov/reference/documents/4_37pubtrust1.pdf.*

5. See "Restoring Justice Through Victim Offender Mediation" on page 17.

6. A. Leo Levin and Russell R. Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (St. Paul: West Publishing Co., 1979), pp. 90–91.

The Early Mediation Pilot Program

The Early Mediation Pilot Program was a legislatively mandated study to assess the benefits of early mediation of civil cases. The Judicial Council conducted the study from 2000 through 2003 in five trial courts. The study examined the effect of the pilot programs on settlement rates, the timing of settlements, litigant satisfaction, and costs to the litigants and the courts. It found benefits in all of these areas.

Settlement rates—substantially improved

- 58 percent for unlimited cases
- 71 percent for limited cases

Court workload—reduced

- 24–30 percent reductions in trial rates in courts that had good control groups for comparison
- 30–65 percent fewer motions in cases that settled in mediation
- 18–48 percent fewer motions among all program cases in four courts

Disposition time—reduced

- Reductions shown in all courts
- Largest reductions in courts that started with longer times to disposition

Litigant costs—reduced

- In all programs, belief by attorneys in cases that settled at mediation that their clients saved money
- Savings estimated at almost $50 million, in all five programs over two years

Litigant satisfaction—increased

- Expression of high satisfaction by most attorneys and clients who participated in mediation, with strong agreement that the mediator and the process were fair
- More satisfaction with the court process by attorneys who participated in mediation, regardless of whether their cases settled

The full report, *Evaluation of the Early Mediation Pilot Programs*, published in February 2004, is available on the California Courts Web site at *www.courtinfo.ca.gov/reference/documents/empprept.pdf.*

The Real-World Benefits of JusticeCorps

By
Casey Lee

I was enticed to join JusticeCorps, a community service–oriented program sponsored through an AmeriCorps grant, mainly by the material rewards. In exchange for serving 300 hours at legal aid centers in the Los Angeles area assisting low-income and self-represented litigants, I would be rewarded with the chance to bolster my resume, obtain letters of recommendation from attorneys, and even earn a $1,000 education award.

As a political science major at California State University at Northridge on the verge of graduation, and contemplating the possibility of pursuing a legal career, I thought these benefits could only enhance my chances of going to law school.

That was fall 2005. Now, nearly a year after completing my service, my primarily self-interested thinking has definitely changed. And ironically, the value of the material rewards that prompted me to join JusticeCorps has become inconsequential compared to the personal growth I achieved because of the experience.

My service as a member of JusticeCorps helped me discover just how quickly letters of recommendation, fancy resumes, and the like lose their luster. Only minutes into my first day of service at a legal aid center, I began to focus less on what JusticeCorps could do for me and more on how my service would affect my community's most needy residents. As I arrived at the less-than-aesthetic trailer housing the legal aid clinic across the street from the Van Nuys Courthouse, the scene greeting me was nearly identical to the one described by the facilitators of the JusticeCorps orientation held the previous

A California State University at Dominguez Hills student (above) explains dissolution forms.

weekend. A long line of litigants snaked outside and around the building, many using the packets of blank legal forms they had been given to fan themselves in the heat of the September afternoon.

As I excused myself through to the front of the line and into the building, clad in a blue JusticeCorps dress shirt, with my official volunteer badge swinging from my neck, most litigants stared at me with curiosity, but some stared with desperation. Based on my dress and my entrance into the building, I'm sure they believed that I could help solve legal issues causing strife in their lives. Despite how handsome and professional my shirt may have made me appear, however, I was still just an undergraduate student with no formal legal background and possessing only the most basic training. Still, the curiosity with which some litigants looked at me as I walked by gave me confidence that things would go smoothly.

I was even more assured of this for two reasons. First, I had received extensive training at last weekend's JusticeCorps orientation. During this intensive two-day period, JusticeCorps members from the five local participating universities, including myself, studied a breadth of family and housing law issues and were given detailed instruction by attorneys and court administrators on how to use this knowledge to provide appropriate assistance to litigants. Secondly, arrangements had been made for me, along with the other JusticeCorps members assigned to the Van Nuys legal aid center, to merely observe seasoned volunteers during the first few weeks of service.

Like some things in life, though, unforeseen circumstances caused these plans to change. The two supervising legal aid attorneys on staff that day informed the pool of apprentices sitting before them that because of a scheduling problem and several unexpected illnesses,

no experienced volunteers would be coming. My eyes widened at the news, and any confidence I had while strolling into the center evaporated. Already used to the unpredictability of legal aid, the attorneys calmly continued, explaining that JusticeCorps members would be working directly with litigants beginning immediately. The on-site formal observation was necessarily postponed. I sat anxiously with other members while, one by one, we were assigned to provide assistance, exercising what knowledge we did have and learning the fine art of conveying confidence to litigants even when that confidence was sorely lacking. Though several attorneys and paralegals provided nearby supervision and support, my trepidation was unabated.

I still remember the face and the story of the first person I assisted (I'll call him Ted), not necessarily because he looked particularly unique or had such a rare case. Rather, I was struck by the dignity Ted displayed while I shuffled through the unlawful detainer complaint that had been served on him a few days earlier. As I hastily struggled to recall information I had received during orientation about how to proceed with this particular form, I simultaneously made a nervous and unrehearsed attempt to look like I knew what I was doing.

Meanwhile, Ted recounted his side of a story about unpaid rent. An illness had prevented him from working for several months, and the money his teenage children earned at their jobs was hardly enough to cover most of the family's other basic living expenses. Yes, the rent had not been paid, but, Ted reasoned, there were also problems with his apartment that the management had failed to fix, such as a broken heater and cracked windows. His explanation for not paying rent sounded legitimate to me, so I was surprised when the supervising attorney explained that Ted might still not have a proper defense.

Nonetheless, I provided Ted with the paperwork he would need to respond to the complaint, a relatively short form, and we worked through each question together. Frequently, I was forced to pause while I sought clarification or assistance from the supervising attorney. Compounded with the fact that the attorneys were answering questions from several inexperienced members, offering general guidance, and reviewing litigants' completed documents before release, the work was slow. On the verge of losing his family's home and having his credit tarnished, Ted never lost his patience or trust in my work as I did my best to recite legal information and give direction on how to complete his answer. Amazingly to me, he was actually grateful for the limited assistance I provided along with fellow JusticeCorps members and the legal aid staff.

I spent the entire afternoon with Ted, but we finally finished his answer and even did a fee waiver, and he was able to file before the clerk's office closed. I was exhausted as I left the center, but I couldn't help but reflect on my experience during my drive home. Hours earlier, and really for the first significant time in my life, I had been exposed to a disparity that exists in our society. My thoughts ran beyond the gap between parties engaged in civil litigation who can afford to hire an attorney and those who cannot. I realized, too, just how much I had taken for granted in my own life. Cocooned in a comfortable world with a strong circle of friends and family, a car and other possessions, and a secure home, I rarely paid attention to the struggles that others face just to survive. It was easy to flip past television commercials about starving children in Central America, quicken my pace and avoid eye contact while passing homeless people on the street, and otherwise retreat back into my comfortable lifestyle. But as I interacted with Ted, I became part of his reality for several hours. No matter how unpleasant his situation made me feel, it was impossible to change the channel or to walk away.

Until I sat with Ted for the first time, it was impossible for me to fully appreciate the power of the individual to effect positive change in the world.

Providing legal information, explaining court procedures, and assisting litigants with completing their legal forms became easier after several similar days at the center. Within a few weeks my confidence returned, largely because I was finally beginning to comprehend which documents served which purpose and the applicable legal terminology. Consequently, interacting with litigants was much less intimidating than it had been before. By the time I had satisfied about one-third of my service commitment, the job I performed at the center became fairly routine. The forms rarely changed nor did the information I gave to litigants, but the "Teds" did. Ted was a woman seeking help with fighting eviction from the home she shared with her estranged husband, a man who continually abused and raped her. Ted was a group of young struggling musicians whose late-night jam sessions had

strained the relationship they had with their landlord. And Ted was the father of an infant whose mother suddenly whisked the baby to the East Coast to meet a new fling she found on the Internet.

I continued to use the skills I developed while serving at the center and remained confident throughout the rest of my service commitment. By the time I logged my 300th service hour, I had assisted perhaps hundreds of Teds (men and women of all ages, colors, and ethnic backgrounds and with equally varied educational accomplishments). In each instance I was temporarily inserted into a life unlike my own, and each time I learned more about the condition of humanity in my community, and also about myself.

Until I sat with Ted for the first time, it was impossible for me to fully appreciate the power of the individual to effect positive change in the world. I had been under the mistaken impression that being a celebrity, professional athlete, business mogul, or politician was a requisite if one desired to address a critical need in society. I have since learned, however, that most projects, even those that depend on help from public personalities, simply could not exist without proportional contributions being made by individuals. In some respects I failed to appreciate my existing ability to contribute to a worthy cause and instead became distracted by a desire to improve my credentials. Luckily, that pursuit led me to JusticeCorps and to attaining a valuable real-world education that I sincerely believe could not be duplicated in a classroom.

In the summer of 2006 my term of service officially ended, but I remain actively involved with the JusticeCorps organization as the member coordinator at my alma mater. Working from the offices of the Center for Innovative and Engaged Learning Opportunities, I am responsible in part for mentoring JusticeCorps members serving in the 2006–2007 class of volunteers and increasing awareness on campus about the program and our efforts to instill the legal system with equality. Continuing to work closely with young people dedicated to serving the community is extremely rewarding, especially when I am able to see their sensitivity to the needs of others increase.

Likewise, I am proud when members pursue JusticeCorps-related activities outside of the legal aid centers and gain a great deal of satisfaction while doing so. For instance, our members generously participated in rehabilitation efforts at a Compton middle school, attended the Superior Court of Los Angeles County's 2007 Diversity Summit, and offered logistical assistance at the civil rights teach-in hosted at the First A.M.E. Zion Church, all to honor the legacy and teachings of Dr. Martin Luther King, Jr. Additionally, many of our members have embraced opportunities to learn about aspects of the law beyond family and housing issues and have volunteered their time to guide immigrants through the process of becoming naturalized citizens.

I consider myself truly lucky to have been given the opportunity to serve as a member of JusticeCorps and to continue to work with the organization today. I have grown so much personally within the past year, primarily because I have been placed in a unique environment and challenged to overcome self-doubt about my ability as an individual to champion for changes that are necessary in my neighborhood, my city, my nation, and my world.

The first and second JusticeCorps classes, in 2004–2005 and 2005–2006, were composed of 100 members each. The third class, in 2006–2007, was expanded by approximately 40 members who committed to serving in the San Francisco Bay Area, and it is anticipated that the fourth class, 2007–2008, will consist of almost 200 members. A significant number of individuals are now among us who have become more attuned to the needs of their communities and who are more civic-minded because of their service to litigants seeking relief at legal aid centers in Los Angeles and elsewhere. I'm confident that each one will continue to make noteworthy strides toward enhancing the lives of everyone in society. CR

Casey Lee is a graduate of the 2005–2006 class of JusticeCorps and continues to work with the program as the member coordinator at California State University at Northridge. He will be attending law school this fall.

The JusticeCorps program has expanded to the San Francisco Bay Area (above). Rosemary Nguyen (left page) was a member of the JusticeCorps inaugural class of 2004–2005.

IMPROVING EFFICIENCY AND SERVICE IN FAMILY COURTS

By
Lynn Duryee

Early in my tenure as the supervising family law judge, the court operations manager asked whether anything could be done about the growing inventory of old, unadjudicated family law files. Little did we know when we first discussed the problem that in less than a year we would stumble on a way to help self-represented litigants finalize their divorces and paternity actions. In the process, we would enlist and train volunteer attorneys and mediators, dispose of some 1,000 aging files, and set up a management system that would prevent future backlogs.

We accomplished this through a combination of trial and error, dumb luck, and a willingness to solve problems as they arose. What started off as a modest proposal gained momentum and scope with the assistance of a hard-working, enthusiastic team comprising a judge, court administration staff, and a family law facilitator, as well as a cross section of family law lawyers and mediators. The results yielded improved efficiencies for the court, better services for the litigants, and a high level of satisfaction for all participants.

How We Started

The court operations manager began by running a computer query for all active family law cases over two years old with no future dates. This produced 1,000 cases. She pulled each one from the shelf and checked for judgments, multiple filings, and contact information.

We agreed that a manageable first step was to set the cases for status conferences. We reserved two afternoons per month for hearings and set 75 cases per calendar. The family law facilitator agreed to attend the court hearings and offer forms and assistance. A notice of hearing was sent on each case, advising the parties that their case was still pending, that they were not yet divorced, and that they needed to come to court on the designated date to discuss their case with the judge. The notice gave the names and telephone numbers of two court clerks, so recipients could call a knowledgeable court representative to reschedule the hearing or ask questions. It also gave contact information for the Legal Self-Help Center of Marin.

Almost immediately, the phones started ringing. Counsel of record were embarrassed that judgments had never been entered on ancient cases—could they have time to contact opposing counsel, locate their clients, retrieve files from storage? Yes. Surprised parties called requesting dismissals—we reconciled years ago; we never meant to go through with it; we forgot all about this. So ordered. A few reported more permanent resolutions, expressed variously from, "She passed on last winter; I think of her every day" to "The bastard finally went to his great reward." Case closed. The most common calls, though, were from panicked, self-represented litigants who were shocked to find out they were not divorced. "But we filed that petition years ago!" they complained, not knowing that further action was required.

Hearing the Cases

The early calendars were varied and unpredictable. Participating in each hearing from the court side were the supervising judge, a courtroom clerk, and two attorneys employed by the court—the family law facilitator and the family law examiner.

We had little idea how many lawyers or litigants would show up for their status conference, much less what problems they would present or how we might approach a solution. So we lurched and we halted, and we hemmed and hawed, with the goal of resolving the case if we could at the time of the hearing or, if that were not feasible, at least moving it forward in some fashion. If litigants, for example, were unprepared to resolve their property disputes but hadn't lived together for years, we might bifurcate the property issues but dissolve the marriage. When a resolution was not possible on the day of the hearing, the parties left with a task to perform and a return date for compliance. The calendars took about 90 minutes to call. At the end of each one, we had a big stack of judgments and dismissals to show for our work.

One smart thing the court team did was to meet after each calendar to discuss what went right, what went wrong, and how we might approach the issue better in the future. The debriefing session helped each of us to understand

"I think this is a fabulous service."

"Helpful, professional process."

"Excellent help. An exceptional day in court!"

"Very impressed by court experience today and the assistance given."

"Thank you so much for your help. I was about to give up on finalizing the divorce. This is an excellent service!!"

"I was nervous about being here, but I felt put at ease by the whole process. The judge and everyone were very helpful."

"This is so helpful. It's very generous, and everyone is so nice. It makes us feel less in conflict to have cooperative help and saves us time and money and getting contentious, which would clog the system. It increases efficiency for everyone involved. A great idea! Thank you!"

REPRESENTATIVE SURVEY COMMENTS FROM LITIGANTS

what the process was like from other viewpoints. I learned how terrified and intimidated the parties feel when they come to court. As a result, I took steps to put the litigants at ease. For example, I started each session by greeting the litigants. I stood in front of them, rather than at the bench, and introduced myself. I made a point of smiling, thanked them for coming, and explained what they could expect to happen in court that day.

Many other useful ideas were generated at these meetings. Among those we implemented were the availability of a Spanish interpreter, courtroom access to a computer with online family law forms and support programs, a procedure for checking in with the clerk at the beginning of the calendar so that time was not used calling the no-shows, and preparation of judgments by the family law examiner (rather than by the parties) in certain types of cases.

In terms of numbers, about one-third of the cases went off calendar before the hearing because of judgments, dismissals, or continuances. On the day of the hearing, approximately one-third to one-half of the cases were no-shows. Of those appearing, perhaps half had at least one lawyer on the case. The remaining matters involved self-represented litigants.

"It is wonderful to work collaboratively with the courts and the private bar to develop a system that provides self-represented litigants real assistance to finalize their divorce or paternity cases. Most of these persons do not need to hire lawyers but are overwhelmed by the legal forms and procedures. As an attorney who works with low- and moderate-income litigants, I feel immensely satisfied that we are helping these people move on with their lives, while giving them a positive look at the court system."

KRISTINE CIRBY, ATTORNEY AT LAW; EXECUTIVE DIRECTOR, FAMILY AND CHILDREN'S LAW CENTER

Not Giving Up on No-Shows

The no-shows fell into three broad categories. The first, and easiest, category consisted of skinny old files where the summons had not been served within three years. These matters were dismissed under Code of Civil Procedure section 583.210.[1] The second category consisted of returned notices of hearing: "Unable to deliver. No longer at this address." We searched for current contact information using the State Bar membership rolls for lawyers and an Internet-based search service for parties. If we located a current address for at least one party, we renoticed the hearings. The third category of no-shows involved parties with Hispanic names. Figuring that at least some of the parties may not have understood the English notice, we translated the notice and sent this group a new one in Spanish.

The court's efforts to contact the no-shows resulted in significantly more parties receiving actual notice of the hearings as well as more parties participating in them.

Compliance Dates for Lawyers

The cases with lawyers were, predictably, the easiest for the court to process. Many lawyers came to court with a judgment, a dismissal, or a promise to secure one or the other in the near future. Compliance dates were given for all cases needing final documentation. The lawyers were given the time they needed to finalize their cases—the court's goal, after all, was to close files, not to torment lawyers. Some matters were set for settlement conference, where they later settled. A few cases resolved in the courtroom on the day of the status conference. Those agreements were placed on the record, and the parties were given a future date to track the submission of the judgment. It bears mentioning that not a single case went to trial.

The Scared, Worried, Self-Represented Litigant

The cases with self-represented litigants presented the greatest challenges for the court as well as the greatest opportunities and successes. Procedurally, these cases were all over the map. Some parties had never served the summons. Many were eligible for a default judgment. Some were engaged in ongoing mediation or collaborative efforts. Others had lost touch with their spouse years before and were stunned to discover they were still married. Some litigants had actually signed marital settlement agreements but had never submitted a judgment. A few parties had gone to the Legal Self-Help Center before coming to court and presented judgments for signature.

The status conference calendar was all rather lively and confusing, especially for someone new to the family law assignment. My big break came one afternoon when a sympathetic attorney, waiting for her case to be called, offered to assist a particularly helpless litigant with paperwork. Another attorney raised her hand with a similar offer. These two lawyers helped five appreciative litigants walk out of court that day with their judgments.[2] One husband, overcome with gratitude, announced on the record that he was off to buy a lottery ticket, and, if he won, he'd share the proceeds with the nice lawyer.

The two volunteer lawyers offered to come back for the next calendar and promised to recruit a few friends to assist as well. Thus, the idea of a pro per calendar was born—matching self-represented litigants needing help with volunteer lawyers offering it.

Implementing Case Management

As the court efficiently disposed of cases month after month, the age of the cases dropped from 8–10 years old to barely 2. It became evident that, with-

out some fundamental change, the court would continue to accrue old cases. With aging cases came avoidable difficulties for the parties and the court. It was time to face the root of the problem.

A blue-ribbon committee was assembled, comprising the supervising family law judge, the executive officer, the court operations manager, the family law facilitator, and a diverse group of smart lawyers, including litigators, mediators, a civil attorney familiar with case management, and the executive director of the nonprofit legal services agency.

Unlike the civil bar, the family law bar is not intimate with and enthusiastic about the concept of case management. The lawyers objected to the court's imposing time limits on the parties, believing the parties should be able to choose the pace of their dissolution proceeding. They worried that parties would feel pressured to follow through on their divorce filing if case management were imposed on them. They described the "emotional arc" that parties experience in the dissolution process and worried that time limits would force people to finalize their cases before the litigants were emotionally prepared.

On the other hand, the court's experience with setting old cases for hearing revealed that most parties wanted to finalize their filings but felt overwhelmed. They didn't know how to do it themselves, and they didn't have the money to pay someone to do it for them. Allowing these cases to languish did not contribute to a satisfactory resolution. And, while there are admittedly differences between civil and family law cases, the court had experienced great success in improved efficiencies and outcomes by using case management in civil matters.

The blue-ribbon committee ultimately recommended case management for all family law cases involving at least one self-represented party. A local rule was drafted and adopted that provided that, on the filing of a dissolution, parties would be given compliance dates for the service of the summons, filing of an answer or default, and service of the declaration of disclosure. The parties would also be required to attend a case management conference within 180 days after filing. The dates for compliance and case management would be set at the time of filing, and the petitioner would be given a cover sheet with the requirements for each court date.

The blue-ribbon committee decided that simplified information needed to be given to self-represented litigants before the case management conferences occurred. The committee prepared a "Petitioner's Road Map to Success" and a "Respondent's Road Map to Success." These road maps are written in plain English and break down the dissolution process into bite-size pieces of information. The color-coded road maps are given to the parties at filing. The committee also developed a resource sheet for the parties, giving information on the Legal Self-Help Center, the Lawyer Referral Service, the Family and Children's Law Center, the family law facilitator, and assistance that can be found on the Internet.

The rule implementing case management took into account that some parties are working outside of court to resolve their case in a nonadversarial fashion by using mediation or collaborative law. These parties are permitted under the rules to sign a stipulation continuing the status conference for a period of up to 120 days. No fee is collected for the filing of the continuance.

Team Building at a Conference on Case Management

As the blue-ribbon committee was working out the wrinkles in the then-proposed rule implementing case management, our court was invited to send a team to a conference titled "Developing Effective Practices in Family Caseflow Management," sponsored by the Administrative Office of the Courts. We signed up the entire committee. The conference could not have come at a better time for us. It was inspiring, informative, and practical. We learned many useful practices that we'd not thought of,[3] enjoyed the opportunity to discuss our court's problems in an educational setting away from "home," and gained encouragement that our proposals were in keeping with statewide best practices.

The conference was, ultimately, a valuable team-building experience for us. Committee members returned inspired to make the changes and spread the word about the benefits of case management.

Enlisting Assistance

The court needed volunteer lawyers and mediators to make its new case management system work. In compliance with the new rule, the court would be setting case management conferences twice a month, at the same time the court was disposing of its old family law cases. At these hearings, volunteer attorneys and mediators needed to be available in the courtroom to help resolve cases, answer questions, and assist with document completion.

With the cooperation of the family law section of the Marin County Bar Association, the court sent a group e-mail offering free training for volunteer

"Volunteer work for the court balances what we do as professionals in our private practices and brings more than a modicum of satisfaction. There is nothing more gratifying than unknotting a technical question that allows a pro per litigant to get the dissolution done there and then. This contrasts with the complicated legal issues and complicated legal personalities that we have to grapple with day in and day out in our private practices. I would do it every month for the court if it were possible. It keeps me sane!"

JUDITH H. B. COHEN, ATTORNEY AT LAW, FAMILY LAW SPECIALIST

"The individuals I helped had limited resources. They felt stuck and did not know what to do to move their case forward to a conclusion. They had been in limbo for years. The guidance and assistance that was offered at the pro per calendar provided them with the opportunity to resolve their case quickly and cost-efficiently. I know that the individuals I helped were left with a more positive impression of how the legal system operates. It was a gratifying experience."

SHARON F. MAH, ATTORNEY AT LAW,
FAMILY LAW SPECIALIST

mediators and lawyers. The family law judge conducted the training of the mediators. The judge also promoted and participated in the training of the lawyers. Sign-up sheets were available at the trainings. The court asked for two lawyers and one mediator per 90-minute session. Lawyers were generous in their offers of assistance: 30 lawyers completed the training, and the court filled its first six months of sign-up sheets at the completion of the training.

The family law judge continued to work closely with the volunteers, greeting them before court started and meeting with them afterward to thank them for their efforts and to solicit ideas for improvements. The court also acknowledged the lawyers by sending thank-you letters, issuing certificates of appreciation, and hosting a reception in their honor.

But Does It Work?

The amazing thing about case management is, it works! Our court has had it in effect for only one year, but already we have seen a noticeable increase in judgments. We have found that giving litigants compliance dates helps them take the needed actions to advance their cases. Very few parties show up at the early hearings for filing of proof of service, response or default, or declarations of disclosure simply because most of them have complied with the filing deadlines. At the case management conference, where parties are told they will receive help from the court, many litigants come to court with completed judgment packets, having already visited the Legal Self-Help Center, a lawyer, a paralegal, a mediator, or another legal service provider.

From the court's viewpoint, the "pro per calendar," as it is now designated, has been a satisfying, successful, and worthwhile undertaking. Not only did the court eliminate its backlog—it implemented an easy, doable solution to prevent the problem from recurring. We have had a number of courts come to observe our operations, and we feel a sense of pride for having put a good program in place. Several newspapers have written favorable articles about the program, and one litigant—we could just hug her!—wrote a beaming letter to the editor praising the court's services. Finally, we have enjoyed and appreciated the partnerships formed with court employees and with members of the bar.

From the litigants' viewpoint, the pro per calendar has been a resounding success. In surveys returned to the court, litigants have consistently rated the services received as "excellent."

The attorneys and mediators also speak highly of their volunteer experience. They report how rewarding and fun it is to help someone in need of a little guidance and how fulfilling it is to be so thoroughly appreciated. They like that the commitment does not last longer than 90 minutes and they are able to significantly assist three or four people in that time.

In less than one year, Marin County eliminated its backlog of unadjudicated family law cases and began a case management program for all family law matters involving at least one self-represented litigant. We accomplished this by forming a court team and enlisting the help of volunteer attorneys and mediators.

The 2005 study, *Trust and Confidence in the California Courts*, revealed that litigants in family, juvenile, and traffic court give California courts the lowest satisfaction ratings. The central complaint about family court is that cases take too long to complete and cost too much. The new program of Marin County's court squarely responds to the concerns of the public by reducing the time it takes to resolve family law cases and offering assistance at no cost to the parties.

When neighboring courts have come to visit our operations, they ask, "What advice do you have for us?" Our answer is: Get buy-in from as many participants as possible and then just do it. You can't anticipate all the problems that will come up, so expect to solve the problems as they arise. Be willing to make it up as you go along. Because we were working as a team and consistently received positive feedback from the litigants, we found the process to be both effective for the courts and rewarding for us professionally. It is perhaps the simplest of all solutions to put the people with problems in the same room as the people who can solve the problems. What better place to do that than in a family law court. CR

Lynn Duryee is the presiding judge of the Superior Court of Marin County and has served on the bench since 1993.

Notes

1. It bears noting that Code of Civil Procedure section 583.161 prohibits a court from dismissing a family law petition if an order for child support has been issued and the order has not been terminated by the court or by operation of law.

2. Alexandria Quam and Rachel Castrejon were the first two brave and generous lawyers to volunteer their services.

3. We learned, for example, how important it is for a court to secure long-term buy-in for any changes it makes in its operation. Following the conference, the committee added the incoming family law judge as a new member. We also learned how important it is to gather information, such as statistics and satisfaction surveys, to support the use of court resources. This was also implemented by the court.

Let's Reconsider Jury Instructions on Circumstantial Evidence

By
Charles B. Burch

In 1867, the California Supreme Court ruled in *People v. Dick* that a trial court had erred by failing to instruct a jury concerning its consideration of circumstantial evidence.[1] Specifically, the opinion criticized the trial judge for failing to advise the jury in an entirely circumstantial evidence case that it must not only find that all of the circumstances "concur" to show that the hypothesis of guilt is correct

but must also find that the circumstantial evidence excluded every hypothesis of innocence.[2] To justify this holding, the court did not engage in any reasoned discourse about the relative strengths and weaknesses of direct and circumstantial evidence. Rather, it simply cited three learned texts that left "no doubt" concerning the necessity of the instruction. This holding, as modified over the intervening 140 years, is embodied in California's official jury instructions on circumstantial evidence set forth in CALCRIM 224 and 225.

These instructions appear to be products of the long-held notion that something is particularly suspect or misleading about circumstantial evidence that distinguishes it from the much more trustworthy "direct evidence." Numerous studies in recent decades have strongly suggested the fallibility of the view that "direct" evidence is inherently stronger than its circumstantial counterpart. Much anecdotal information recounted in news articles about faulty eyewitness identifications leading to wrongful convictions supports the view that direct evidence in the form of eyewitness testimony may be significantly more unreliable than types of circumstantial evidence offered to prove the identity of the perpetrator.[3] Recently, the California Commission on the Fair Administration of Justice issued two separate reports, with more to follow, suggesting that law enforcement agencies should consider dealing with serious problems involving the reliability of both eyewitness testimony and confessions (the two primary forms of direct evidence) obtained without adequate investigatory safeguards.[4]

It is noteworthy that CALCRIM 223 states in part:

> 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.

This instruction is simple and states a legal principle generally accepted in all U.S. jurisdictions. Nevertheless, in many cases the

trial court also is required to give either CALCRIM 224 or 225. Each of these instructions contradicts and undermines CALCRIM 223 by establishing special rules for the consideration of circumstantial evidence that do not apply to direct evidence. These special rules make clear that, contrary to the declaration of CALCRIM 223, circumstantial evidence does not stand on an equal footing with direct evidence. In particular, these rules place a much higher burden of proof on the People in cases involving entirely or substantially circumstantial evidence.

The Problem With the Traditional Instruction

Even assuming that one can neatly categorize any particular piece of evidence as either direct or circumstantial, developments in the law and science cast significant doubt on the proposition that it is helpful, or necessary, to instruct a jury in a criminal case that circumstantial evidence is more suspect than direct evidence and is subject to special burdens of proof not applicable to direct evidence. Federal courts clearly have eschewed such a distinction. In *Holland v. United States,* the U.S. Supreme Court dealt with a claim that it was an error not to instruct the jury that circumstantial evidence admitted at a tax evasion trial had to exclude "every reasonable hypothesis of innocence."[5] It held that, as far as federal juries are concerned, such an instruction was not required and, in fact, would be "confusing and incorrect." It also declared that circumstantial evidence is intrinsically no different than testimonial (direct) evidence in that both may, in certain cases, point to an incorrect conclusion.[6] Implicit in *Holland* is the idea that direct and circumstantial evidence are co-equals, each enjoying no greater or lesser weight than the other.

Following *Holland*, all federal courts that have adopted model jury instructions for criminal cases recommend an instruction that defines direct and circumstantial evidence but makes no distinction between the relative reliability of each.[7] Many state courts followed the lead of *Holland* by abandoning jury instructions similar to those used in California.[8] A few other jurisdictions have adopted a compromise position between the federal and California rules. For example, the New York and Arizona courts require the trial judge to use a California-type instruction but only where the evidence in the case is entirely circumstantial.[9] This rule accepts the traditional California view that circumstantial evidence is less trustworthy but recognizes the reality that the traditional instruction has a great potential for confusing and misleading juries where the prosecution case rests also on direct evidence. Assuming that one subscribes to the debatable view that circumstantial evidence is weaker and more suspect than direct evidence, the New York/Arizona rule at least makes clear that the distinction between the two could and should make a difference to a deliberating jury only where the evidence is entirely circumstantial.

By contrast, California requires that the circumstantial evidence instruction (requiring the exclusion of every reasonable hypothesis of innocence) be given in any case where the prosecution relies entirely or "substantially" on circumstantial evidence.[10] Each trial judge is left to guess when the circumstantial evidence is substantial enough to trigger the requirement that the instruction be given. In a great number of criminal cases, the mental state to be proved by the prosecution must be shown by means of circumstantial evidence because there is no direct evidence, such as a confession, to prove the defendant's state of mind. Therefore, one of the two alternative circumstantial evidence instructions (CALCRIM 224 and 225) will be required in most criminal cases requiring proof of intent.[11]

Where the trial court has declined to give either of the approved circumstantial evidence instructions, appellate review has been quite deferential.[12] Even in cases where there has been an error in failing to give the applicable instruction, most often the reviewing court has found the error to be harmless.[13] However, there have been reversals of convictions where the trial court declined to give one of the circumstantial evidence instructions. [14]

Despite the deferential appellate review of decisions not to give such an instruction, either CALCRIM 224 or 225 probably are now given in many more cases than necessary. Trial judges are loathe to have otherwise valid verdicts reversed on appeal because they misjudged whether the circumstantial evidence was sufficiently "substantial" to mandate that the required instruction be given. The giving of such an instruction without a defense objection would never cause a reversal and is probably an impediment to a reasonable jury verdict in only some cases. It seems likely that trial judges would risk jury confusion in some cases rather than a reversal on appeal and the costs associated with a retrial. Additionally, trial judges will give the required instruction because they doubt whether juries would bother to parse the nuances of the instruction after having tackled the always mandatory discussion of the meaning of "reasonable doubt" as it applies to the evidence they are considering.

California Sticks to Its Guns

Despite the holding of the U.S. Supreme Court in *Holland* more than a half-century ago, with many state courts following suit, California has continued to adhere to the holding in *Dick, supra* ((1867) 32 Cal.213). The CALCRIM instructions have modified the old CALJIC language to make it more user-friendly but understandably have maintained intact the legal principles set forth in *Dick*. To add to the possible confusion, California courts later incorporated another confounding element to the already difficult instruction. Both CALCRIM 224 and 225 state in part as follows:

> 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.

This language is derived from *People v. Watson,* in which the California Supreme Court adopted the principle that the trial court must instruct that "each fact essential to a chain of circumstances" must be established beyond a reasonable doubt.[15] The current CALCRIM instructions have dropped the "chain of circumstances" language but maintain the overall gist of the legal principle. This additional language further reinforces the notion that circumstantial evidence is weaker and more suspect than direct evidence. It mandates that circumstantial evidence crucial to the case must be established beyond a reasonable doubt but provides no such requirement for direct evidence.

One wonders whether a group of learned judges, much less a group of jurors, could agree on the meaning of the concepts mentioned in CALCRIM 224 and 225. An analysis of the language of these instructions raises several legitimate questions about the value of the instructions to a deliberating jury. Is it realistic to expect that jurors will grasp whether any particular fact is both circumstantial and essential to proof of a fact upon which a conclusion of guilt depends? Are jurors going to be able to distinguish between important facts proved by direct evidence not established beyond a reasonable doubt and important facts proved by circumstantial evidence that must be proved beyond a reasonable doubt? If the material facts in any given case involve both direct and circumstantial evidence, will the jurors be expected to decide whether the evidence is sufficiently circumstantial to require them to decide beyond a reasonable doubt whether there are no reasonable hypotheses of innocence? If there is circumstantial evidence that is relevant proof but that does not prove a fact "necessary" to a conclusion of guilt, will the jury be able to distinguish that less important circumstantial evidence from the important circumstantial evidence that must be proved beyond a reasonable doubt?

It is doubtful that trial judges sitting in bench trials bother to consider, much less rigorously apply, the circumstantial evidence principles of CALCRIM 224 and 225. Trial judges probably most often do what most juries do—that is, benignly neglect the arcane language of CALCRIM 224 and 225 and simply make a thoughtful determination as to whether the evidence, in its entirety, proves guilt beyond a reasonable doubt. Should juries be asked to consider legal principles that judges probably disregard when presiding at bench trials? According to the *Holland* case, the U.S. Constitution has no such requirement.

Let's Reconsider the Instruction

The U.S. and California Constitutions mandate the giving of a reasonable doubt instruction.[16] However, California's CALCRIM 224 and 225 are not constitutionally or statutorily mandated. Rather, in 1867 the California Supreme Court mandated the use of a predecessor instruction as a helpful description of applicable legal principles derived from an accurate assessment of the relative strengths and weaknesses of direct and circumstantial evidence. Over the years, the California instruction has evolved and become more complex while most other U.S. courts, including the U.S. Supreme Court, have simplified the law by putting circumstantial and direct evidence on an equal footing. These changes in other jurisdictions reflect developments in empirical research that have strongly indicated that the traditional instruction was both incorrect and confusing to a deliberating jury. Yet California courts have continued to mandate the giving of the traditional instruction without any serious review of the continued need for such an instruction. The clear conflict between the law in California and the overwhelming majority of other U.S. courts raises the obvious question of why a particular circumstantial evidence instruction would be "confusing and incorrect" to juries in federal and most other state courts but clear and helpful to California juries. After all, standard jury instructions should be used only if they convey the essential legal principles necessary to a fair, logical determination of a case. Therefore, it seems clear that a critical, judicial review of the continuing usefulness of California's circumstantial evidence instructions (CALCRIM 224 and 225) is in order. CR

Charles B. Burch is a judge of the Superior Court of Contra Costa County and a former assistant U.S. attorney, focusing primarily on white-collar and public corruption cases.

Notes

1. 32 Cal. 213.

2. *Id.* at 215–16.

3. The California Commission on the Fair Administration of Justice refers to several of these studies in its *Report and Recommendations Regarding Eyewitness Identification Procedures* (Apr. 13, 2006).

4. Reports and information about the commission are available on its Web site: *www.ccfaj.org.*

5. (1954) 348 U.S. 121, 137–38.

6. *Ibid.*

7. These model jury instructions include those for the First, Seventh, Eighth, Ninth, and Eleventh Circuits.

8. See, e.g., *State v. Cherry* (2004) 361 S.C. 588 [606 S.E.2d 475] and *State v. Jenks* (1991) 61 Ohio St.3d 259 [574 N.E.2d 492].

9. *People v. Barnes* (1980) 50 N.Y.2d 375 [429 N.Y.S.2d 178]; see also *State v. Bloom* (1970) 105 Ariz. 332 [464 P.2d 615].

10. *People v. Brown* (2003) 31 Cal.4th 518, 561–562.

11. See, e.g., *People v. Salas* (1976) 58 Cal. App.3d 460 (reversible error not to give CALJIC 2.02 on defendant's intent to cause great bodily injury where evidence of intent was entirely circumstantial).

12. Before 2006, the pertinent instructions were CALJIC 2.01 and 2.02.

13. See, e.g., *People v. Torres* (2002) 98 Cal.App.4th 205, 216, review granted May 7, 2002, CO35827; *People v. McCullough* (1979) 100 Cal.App.3d 169.

14. *People v. Fuentes* (1986) 183 Cal.App.3d 444; *Salas, supra,* 58 Cal.App.3d at 460.

15. (1956) 46 Cal. 2d 818, 829–830.

16. See *People v. Freeman* (1994) 8 Cal.4th 450, 502.

The Untold Story Behind *Moncharsh*

By
Arthur Gilbert

If you have nothing better to do—no, forget that. With the suggestion I am about to make, you will always have something better to do.

But here's the suggestion anyway. Flip through the pages of any *Official Reports*. There you will see opinions that decide contested issues in a variety of fields. Randomly read some cases, and you will see how the law is shaped in California. In certain civil cases, for example, companies are allowed or not allowed to do certain things. Employers may or may not have to meet certain obligations to their employees. Employees may or may not have certain rights or privileges. Insurance companies may or may not have to provide certain benefits to their insureds.

These cases are likely to provide guidance for parties who become involved with similar issues in the future. Therefore, these cases give us a measure of predictability. Distinguishing factors usually exist in every new fact pattern involving similar issues, but, more often than not, people will discern how to conduct their affairs in compliance with the law. As a Court of Appeal justice, I am fortunate to be involved in such a heady enterprise, but I recognize that, in most cases, litigation should be pursued when all else fails. It may be years before issues are resolved on appeal, some opinions are wrongly decided and subject to legitimate criticism, and, for many, the costs are prohibitive.

But if no appellate cases were decided, the law would become exponentially indeterminate. It would be more difficult to gauge what conduct would be lawful. Business negotiations would still be possible but more problematic because the outcomes of future disputes would be nearly impossible to determine.

Assume an employer engages in practices that some of its employees think are unfair or unlawful. An employee and the employer can resolve the dispute in various ways. If negotiations or settlement discussions prove fruitless, the parties can file a court action, or they can . . . arbitrate. Arbitration. It sounds like and indeed may be a panacea, but it is an affordable and effective way to resolve disputes quickly.

Arbitration is much in use these days. Many doctors will not treat patients who do not sign an agreement to arbitrate any potential malpractice case concerning the doctor's treatment. Many employers condition employment on employees' agreeing to arbitrate employment disputes that may arise in the future. The courts have attempted to protect parties with unequal bargaining power by invalidating arbitration agreements that amount to unfair adhesion contracts.

How did arbitration come to be so prevalent? In 1992, the California Supreme Court issued its famous opinion in *Moncharsh v. Heily & Blase*, 3 Cal.4th 1. This is the decision that pumped steroids into arbitration and gave arbitrators Herculean powers. *Moncharsh* held that courts must affirm even arbitration awards that contain errors of law on the face of the award and are substantially unjust. For decades, I thought I was in the business of "doing" justice, and overnight I learn that courts must "confirm" substantially unjust awards. I doubt I will ever be reconciled to this principle.

When the opinion issued, I suffered a momentary identity crisis. After all, I am the judge who wrote the Court of Appeal opinion in *Moncharsh*. Most of us know that it is better not to know how two things in particular are made: sausages and legislation. The *Moncharsh* case prompts me to add a third item: Court of Appeal opinions. No, I take it back, not all Court of Appeal opinions, just one in particular, *Moncharsh v. Heily & Blase*. Now, after the passage of 15 years, I pull back the curtain of the inner sanctum in which the *Moncharsh* appellate decision came to fruition. I place in you, gentle reader, the trust that you will respect the confidential nature of my revelation. It would be disquieting to read about this on the Internet.

Philip Moncharsh, a lawyer, left the law firm in which he was employed and became involved in a dispute with the firm's partners over the allocation of fees on pending cases. The dispute was decided by an arbitrator selected by the lawyers under an arbitration clause in the lawyer's employment agreement. Moncharsh was not pleased with the arbitrator's award and opposed the law firm's motion in court to confirm the award.

The trial court confirmed the award and Moncharsh appealed. That's where I came in. I read over the briefs and . . . yawned, mentally that is. Not because I thought the case was unimportant, not because I did not have sympathy and compassion for the parties, not because I am indifferent to the law. No, I "yawned" because I recognized that there was no merit to the appeal. By relying on decades of precedent, I knew that an arbitrator's award must be confirmed unless it contained an error that appeared on the face of the award and the error caused a substantial injustice. That certainly was not the case in *Moncharsh v. Heily & Blase*. This would obviously be a pedestrian, nonpublished case.

I gave it to a research attorney to write a draft. He had it to me in no time. As I worked on the draft, one issue caused me a modicum of discomfort. A New York case held that fee splitting in instances similar to *Moncharsh* violated public policy. Mmmm. Interesting. Should we explore that issue? I read the case and found its reasoning persuasive—sort of. Maybe there was more to *Moncharsh* than I had originally thought. The research attorney and I talked it over. We argued the pros and cons. I ultimately decided that California law was fine just the way it had been for years and rejected the New York case. Yet, I felt a vague uneasiness. I brought up the issue with my colleagues at our conference that precedes oral argument.

They had read the briefs but did not think the New York case applied. We decided to affirm and let the New York case stay within the borders of the Empire State. *Moncharsh* appealed our decision to the California Supreme Court. In my opinion I pointed out in dicta, supported by more than three decades of precedent, that *Moncharsh* would have prevailed if the arbitrator had made an error appearing on the face of the award that would result in substantial injustice.

Shortly after we issued our opinion, the first astounding thing happened. The Supreme Court granted review. It what? How could this be? "Of course," I shouted and ranted up and down the usually quiet corridors adjoining my chambers. "I knew it. I should have given more serious thought to the New York case. Fee splitting. Bad policy. How could I have been so wrong?"

And then, after some time, the Supreme Court issued its opinion, and the second astounding thing happened. I was affirmed. I was right after all. So why did our high court take the *Moncharsh* case? To "reverse" my dicta. In a comprehensive review of arbitration dating from the 19th century, our high court concluded that California courts had misread the arbitration statute. With rare exceptions, arbitration awards are "final and conclusive" and not reviewable.

Arbitration has many obvious advantages. Generally, parties pick their arbitrator and have their dispute settled quickly at a fraction of the cost of litigation in court. So what can be wrong with it, providing the parties have relatively equal bargaining power?

As the number of arbitrations increases, the number of significant appellate opinions decreases. Maybe that's a good thing. But maybe not. Assume a large company, what some call an institutional party, engages in a practice that is questionable. The dispute over the use of that practice is arbitrated. Assume the arbitrator rules against the company. Putting aside the question of whether that particular arbitrator will ever get business from the law firm that represents that company (he or she won't), what is the effect of that decision? The dispute has been resolved, but there is no precedent that the company or other companies must follow. Indeed, the company may continue to engage in the same practice despite losing the case. Another arbitrator just might rule in the company's favor. The company may arbitrate the issue 100 times and win 50 times. Indeed, it may be economically advantageous to do so. And this can be an effective way to inhibit the development of the law. It is unlikely the press will know much about the case because arbitrations are seldom open to the public. Thus there may be little pressure for some litigants to change practices that the courts might well prohibit.

In 1992, the California Supreme Court issued its famous opinion in *Moncharsh v. Heily & Blase*, 3 Cal.4th 1. This is the decision that pumped steroids into arbitration and gave arbitrators Herculean powers.

Some arbitration agreements provide that the arbitrator must comply with certain laws. For example, the arbitration agreement may require the arbitrator to apply California partnership law or Delaware corporation law. Is an arbitration award that blatantly ignores this requirement reviewable? The California Supreme Court has granted review in some arbitration cases with similar issues. Dear reader, you and I could make a bet on how the court will rule. Let's draft an agreement that will provide a benefit to the winner and a burden to the loser. But is such an agreement enforceable? We can always take it to arbitration. AR

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


J. Richard Couzens


Tricia Ann Bigelow

Sentencing After *Cunningham* and Senate Bill 40

BY J. RICHARD COUZENS AND TRICIA ANN BIGELOW

"The sky is not completely falling in California after *Cunningham v. California*…changed life as we knew it under the determinate sentencing law (DSL)." (*People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1269.) Although a period of uncertainty immediately followed the issuance of the U.S. Supreme Court opinion in *Cunningham*, Senate Bill 40, signed into law on March 30, 2007, has returned California felony sentencing to more familiar territory.

The U.S. Supreme Court, in *Apprendi v. New Jersey* (2000) 530 U.S. 466, determined "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely v. Washington* (2004) 542 U.S. 296, the Supreme Court defined the "statutory maximum" to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 303.) In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856], the Supreme Court applied *Apprendi* and *Blakely* to California's determinate sentencing law and found that it violates a defendant's Sixth and Fourteenth Amendment rights to trial by jury, insofar that it gives the judge, not the jury, the authority to find the facts that expose a defendant to an upper term sentence by a preponderance of the evidence and not by proof beyond a reasonable doubt. The "statutory maximum" under the California system was the middle term.

As to how the problem could be fixed, the Supreme Court said "the ball…lies in [California's] court." California could either accord the defendant a jury trial on any aggravating factors, or it could allow judges to exercise discretion within a statutory range. (*Cunningham,* at p. 871.)

The California Legislature Responds

SB 40 amends Penal Code section 1170(b) to provide that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.…The court shall set forth on the record the reasons for imposing the term selected…." Rather than layering in a right to a jury trial on aggravating factors, the Legislature chose to make the selection of a prison term fully discretionary.

SB 40 amends Penal Code section 1170(b) to provide that "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court…."

Whether this interim legislation will be sufficient to address all constitutional concerns must be viewed against language from *Cunningham.* The Supreme Court noted that one solution to the problem is "to permit judges genuinely 'to exercise broad discretion…within a statutory range,' which, 'everyone agrees,' encounters no Sixth Amendment shoal." (*Cunningham,* at p. 871, citation omitted.) In rejecting the contention in *People v. Black* (2005) 35 Cal.4th 1238 that the California system resembled the federal system following *U.S. v. Booker* (2005) 543 U.S. 220, the court observed: "California's DSL does not resemble the advisory system the *Booker* Court had in view. Under California's system, judges are not free to exercise their 'discretion to select a specific sentence within a defined range.' [citation] California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. Her instruction was to select 12 years, nothing less and nothing more, unless she found facts allowing the imposition of a sentence of 6 or 16 years. Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." (*Cunningham,* at p. 870.)

While SB 40 might not do as much as the Supreme Court would like to see in terms of wide sentencing discretion, it probably is sufficient to provide the needed temporary solution to *Cunningham*. At least the legislation removes any element of a presumptive or mandated term and any required findings of fact by the court. Although the Supreme Court perhaps would rather see a full range of sentencing choices between the upper and lower terms, the fact that there are only three choices probably will not rise to a constitutional deficiency.

Practice Under the New Statute

By making the selection of the appropriate prison term entirely discretionary, the Legislature has eliminated most of the Sixth Amendment issues related to sentencing of the base term. There is no need for a jury or court trial on the aggravating facts, proof of the facts need not be beyond a reasonable doubt, the factors do not need to be referenced in the pleadings or served on the defendant, and the factors need not be proved at a preliminary hearing. If the imposition of the upper term is discretionary, there is no need to take *Blakely/Cunningham* waivers. There will be no reason why the court could not impose an upper term after a violation of probation. In short, except for the increased discretion of trial judges, felony sentencing essentially will continue as it existed before *Blakely* and *Cunningham*.

A number of differences, however, appear to exist between the traditional sentencing process and sentencing after the enactment of SB 40:

- The middle term is no longer the presumptive term; the court has full discretion to impose the upper, middle, or lower term of imprisonment.
- The court no longer will make express findings of mitigating or aggravating facts proved by a preponderance of the evidence; the court simply must state its reasons for imposing a particular term.
- Because there no longer is a presumptive term, the court must give reasons for imposing the middle term of imprisonment.
- The court no longer will be required to weigh the mitigating and aggravating factors and find that one outweighs the other before a mitigated or aggravated sentence can be imposed. Presumably judges will use the aggravating and mitigating factors in the California Rules of Court as a guide to the imposition of a sentence, but they will not be required to make express findings of fact if an aggravated or mitigated sentence is imposed. (The Judicial Council currently is reviewing the rules of court to make any changes necessary to conform the rules to the new statutory provisions.)

It is unclear how "dual use of facts" will now play into the sentencing system. Previously a court could not impose an upper term based on facts that also are elements of the crime or an enhancement that will be imposed. Since the court is no longer required to find specific facts to impose an upper term sentence, it is not clear that the statement of reasons required by SB 40 also will be subject to such restrictions. Until the issue is more fully resolved, courts should continue to avoid any use of factors that might be considered an improper dual use.

Ex Post Facto Concerns

Because SB 40 was enacted as an urgency measure, it became effective on March 30, 2007. Since the legislation does not change the punishment for any crime or enhancement, but merely the way the court selects the appropriate sentence, it would seem that the changes are fully applicable to all pending criminal proceedings. Nothing suggests that there are any ex post facto problems with the immediate and full implementation of the new sentencing procedure.

Drafting Error in the New Legislation

There appears to be a significant legislative oversight in drafting SB 40. The legislation clearly addresses the imposition of the base term of imprisonment. Selection of the appropriate term now rests "within the sound discretion of the court." However, the Legislature failed to address the process for imposing sentences for enhancements that have triads. Penal Code section 1170.1(d), for example, provides that "[i]f an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentence choice, other than the middle term, on the record

at the time of sentencing." Similarly, sections 12022.2(a) and 12022.3(b) state the "court shall order the middle term unless there are circumstances in aggravation or mitigation." It seems fairly clear that the judicial fact-finding required to impose the upper term for these kinds of enhancements would have all of the Sixth Amendment problems discussed in *Apprendi*, *Blakely*, and *Cunningham*.

If a court determines that the upper term of an enhancement should be imposed, the court first should determine whether there are any factors without Sixth Amendment implications that could be used as an aggravating circumstance, such as prior convictions or the defendant being on parole or probation when the crime was committed. Where such factors do not exist, however, the court has only three options: (1) conclude that there is no ability to impose the aggravated term on the enhancement, (2) conduct a jury trial on the aggravating factors related to the enhancement, or (3) treat the mandatory sentencing language related to the enhancements as discretionary; that is, "*Booker*ize" the code sections.

Assuming the first option is not acceptable and the second option is either impractical or unauthorized, the third option offers a viable alternative to the problem. Two reasons strongly support discretionary action by the court. First, the enactment of SB 40 clearly indicates the direction the Legislature has chosen to correct the constitutional problems with the determinate sentencing law: decisions would be made by judges exercising their discretion and juries would not be involved. It would be consistent with that direction that courts now treat the sentencing of enhancements with triads the same way as now required for base terms; the selection of the particular term of the triad for the enhancement would be within the sound discretion of the court, with the court giving a statement of reasons why a particular term was selected.

Second, in treating the sentencing of enhancements as discretionary, the court would do what the U.S. Supreme Court did in *Booker*. The issue in *Booker* was whether Congress, now faced with an unconstitutional statute, would have superimposed the right to a jury trial to preserve the mandatory nature of the Federal Sentencing Guidelines or would have made the guidelines discretionary to preserve the sentencing discretion for judges. "Several considerations convince us that, were the Court's constitutional requirement [of a jury trial] added onto the Sentencing Act as currently written, the requirement would so transform the scheme that Congress created that Congress likely would not have intended the Act as so modified to stand." (*Booker*, at p. 249.)

The issue in *Booker* was whether Congress, now faced with an unconstitutional statute, would have superimposed the right to a jury trial to preserve the mandatory nature of the Federal Sentencing Guidelines or would have made the guidelines discretionary to preserve the sentencing discretion for judges.

The court identified a number of reasons why the right to a jury trial should not be a part of the sentencing system. First, the original sentencing law contemplated that judges would make sentencing decisions, not judges working with juries. Second, involving juries in sentencing decisions would erode the intent of the sentencing law to diminish sentencing disparity. Third, the use of a jury would greatly increase the complexity of the sentencing process. Fourth, the court reasoned that Congress would not have wanted a system that made it more difficult to impose a higher sentence than a lower sentence. Based on these and other reasons, the court eliminated the mandatory aspects of the Federal Sentencing Guidelines and made them advisory. Particularly in light of the passage of SB 40, the logic of *Booker* applies with equal force to the sentencing of enhancements in California. 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.*

José Dimas

Federal Juvenile Justice Law Up for Reauthorization

BY JOSÉ DIMAS

Congress may soon consider the reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDPA). The major provisions of JJDPA are currently authorized through the end of fiscal year 2006–2007.

The act is the main law governing federal efforts to support effective juvenile justice and delinquency prevention activities. Importantly, states and their courts that receive funding under JJDPA must agree to follow a set of federal guidelines in dealing with delinquent youth.

In recent years, Congress has tended to focus on more punitive efforts to deal with offending youth, such as approving harsher penalties and reducing protections. While it may be a little early to gauge the new Congress, indications are that it will focus more on outcome-based programs for troubled youth, a change in strategy that includes early intervention, prevention programs, rehabilitative strategies, and alternatives to incarceration.

The last major revision to the JJDPA was in 2002 (Public Law 107–273), which consolidated most of the grant purpose areas under a larger Juvenile Justice and Delinquency Prevention Block Grant. In this last update to the act, state courts were required to incorporate child protective services records into juvenile case files and to ensure that child welfare records are available to the court.

As Congress considers reauthorizing the JJDPA, the focus of the state court community will be to protect and expand effective programs that serve delinquent youth and oppose efforts to take away state court jurisdiction. Programs that state courts have been able to access under JJDPA include an underage drinking law program, community-based gang intervention, juvenile research assistance, training for court personnel, a state challenge grant program, juvenile mentoring, and juvenile delinquency prevention formula funding.

Another popular program with state courts, the Juvenile Accountability Block Grant Program, will not be reauthorized with JJDPA. It was reauthorized two years ago and is not scheduled to expire until 2009.

Stripping State Court Jurisdiction

Efforts to remove the jurisdiction from state courts will be opposed. The current standard is that youth who come into contact with the juvenile system be prosecuted in state courts unless there is an overriding reason not to, for instance, if the state prosecutor does not have the ability, resources, or willingness to proceed. (18 U.S.C., § 5001.) As a response to several high-profile criminal incidents involving juveniles, there have been prior legislative efforts to "federalize" juvenile justice prosecution. Legislation introduced in the 109th Congress, for example, proposed that the decision of where to prosecute a juvenile case would be left up to the U.S. Attorney.

If Congress proposes stripping jurisdiction over juvenile cases, the state court community stands ready to make the case that local courts are better equipped to handle juvenile cases. They have the knowledge and expertise to adjudicate juvenile cases. In addition, juvenile courts frequently make appropriate referrals to community social services departments.

Strengthening Core Mandates

When Congress first passed the Juvenile Justice and Delinquency Prevention Act in 1974, the primary goal was to protect juvenile delinquents as they were being processed through state court systems. The original mandates of the law are:

- Status offenders: States must ensure that status offenders and nonoffenders are not placed in secure detention or secure correctional facilities.
- Jail removal: States must develop a plan that ensures that no juvenile shall be detained or confined in any adult jail or lockup.
- Sight and sound separation: States must develop a plan that ensures juveniles alleged to be or found to be delinquent and status offenders shall not have contact with adult inmates who are incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges.
- Disproportionate minority contact: States must address specific delinquency prevention and system improvement efforts designed to reduce the disproportionate number of juveniles of minority groups who come into contact with the justice system.

Numerous groups are lobbying Congress to strengthen these core mandates to better protect the rights of delinquent youth. CR

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

Lost in Translation

By
Simone K. Easum

In some California courts, general demurrers and special demurrers are being overused or even misused, with the result that justice is suffering. Such pleadings, by their very nature, are prone to cause unnecessary and inordinate delays and costly and time-consuming refilings of still more pleadings.

The corrective action may be radical surgery: dispense with demurrers altogether and require that the defects they were intended to address be raised in a motion for judgment on the pleadings, or some other pleading or motion, *after* an answer has been filed.

As we sit here today in 2007, anyone who practices civil litigation in California can tell you that overcoming the pleading stage has become unreasonably onerous and burdensome to plaintiffs. While the demurrer was originally intended to help clean up sloppy complaints and carve down the pleadings appropriately—and thereby assist with and actually ease the flow of justice—its current function appears to be just the opposite.

My focus is mainly on general demurrers. Special demurrers for small procedural defects do not raise the concerns that general demurrers do, in part because they can be raised by demurrer or in an answer. Answers are pleadings that can at least begin to put the case at issue and move the matter toward a resolution on the merits, rather than leaving it stuck in endless rounds of demurrers and amended complaints. I strongly suggest that more attorneys consider raising special demurrer grounds, if any, in answers rather than in demurrers.

Generally, demurrers are the more troublesome characters these days. They are usually nominally pled on the grounds of "failure to state a cause of action."

Paraphrasing the venerable Rutter Group's *Civil Procedure Before Trial*, "Demurrers," section 7.5, a demurrer can be defined as a pleading used to test the legal sufficiency of the other pleading and one that *raises issues of law, not of fact,* regarding the form or content of the opposing party's pleading.

As we sit here today in 2007, anyone who practices civil litigation in California can tell you that overcoming the pleading stage has become unreasonably onerous and burdensome to plaintiffs.

To put it another way, "A trial court's ruling sustaining demurrer is deemed erroneous where plaintiff has stated cause of action under any possible legal theory." (*Bush v. California Conservation Corps* (1982) 136 Cal.App.3d 194.)

How many times have we, as judges or attorneys, read these statements? Depending on your years of bar membership or on the civil bench, probably countless times. In fact, we've seen them so many times that the phrases may have begun to lose their meaning. They've gotten "lost in translation" from legal principle to practical application. When words begin to lose their meaning, especially for those of us who practice law, justice can suffer, because the words then become open to all kinds of interpretation.

Certainly, "open to interpretation" is not necessarily a bad thing. We know judges are charged with interpreting statutory law guided by precedent, if any, and are sometimes forced to make decisions on a case-by-case basis, where the facts are unique and the circumstances warrant such analysis.

However, in the area of demurrers, when that kind of case-by-case interpretation occurs from the bench, a precious right is being subverted: due process. This is because a wide-ranging interpretation, varying from judge to judge, of the function of the demurrer can result in litigants' having to amend and reamend complaints based on apparently arbitrary whims of the particular judge reviewing the complaint and the demurrer.

The demurrer was not intended to produce such results. It was actually intended to discourage such judicial interpretation of the factual pleadings in complaints and to encourage *uniformity* in legal pleading. The result is that well-meaning judges are allowing themselves to be drawn into arguments as to whether plaintiffs' *factual* elements can be proven at trial or are otherwise "sufficient" or "missing

something" or are "not quite the right causes of action to be pled for this case" or are simply "not true."

These are not relevant criteria for the purpose of ruling on a demurrer. For that purpose, the facts of the complaint (or petition or other initial pleading) are considered true. If a demurrer raises issues that are beyond the face of such pleading, then it is improper and should be summarily overruled.

Thus, in this context, it is very important to get back to another basic: in California, we have liberal pleading rules. Why? Because long ago, it was recognized that a plaintiff and his or her attorney cannot possibly know every single *factual* detail of a plaintiff's situation before filing a complaint. And statutes of limitations, like some criminals, are always on the run! Yet every potential litigant with a potentially valid claim should have access to our courts.

So, within the interplay of the attorney's requirement of a certificate of merit as to the substance of the claims, the statutory time limitations, and the general policy that everyone who has a valid claim should have access to the courts, liberal pleading rules allow plaintiffs to plead factual details somewhat generally, if necessary, in their complaint, as long as the legal elements of the causes of action are properly pled in relation to those facts.

In fact, many treatises and practice guides today suggest that the demurrer has justifiably fallen into disfavor due to such liberal pleading rules, not to mention overcrowded civil court calendars. However, certain litigants and courts seem bent on resurrecting the near-dead demurrer and doing so in such a way that the effort flies harmfully in the face of these liberal pleading standards.

To use a sports analogy, it is time to *move the chain*—that is, *get on with it,* to other hearings that truly seek to address the merits of the action.

The attorney who makes factual arguments in a demurrer is inviting the court to engage in a factual analysis. Yet, however tempting or tantalizing this offer may be, judges must politely but firmly decline it in favor of the narrower analysis: has the plaintiff pled the proper *legal* elements, in relation to those facts, of the cause of action according to the law? If the answer is yes, the demurrer must be overruled and the defendant ordered to answer.

Regardless, it may be time for the legal profession (that is, the Legislature) to consider dispensing altogether with the demurrer. If there is so much confusion and abuse of this legal procedure, then—regardless of its original intent or cries from the defense bar that it still has a useful function—it may be time to simply admit that it has outlived its usefulness. Instead, it may be time for the motion for judgment on the pleadings to rise up in its place because that motion is brought after an answer, which means the case has at least moved past the initial pleading stage.

Yes, this means that perhaps a grossly unmeritorious case may slip by a tad deeper through the system than it would have if a demurrer were sustained without leave to amend. Yet, we all know that sustaining a demurrer without leave to amend rarely happens in the first pleading round anyway.

More importantly, I submit that such grossly unmeritorious cases are few and far between and they are far outweighed by the majority of plaintiffs' cases with meritorious claims that are being excessively fought out at the demurrer stage all over this state. The ultimate goal, after all, is a hearing on the merits—not endless pleadings addressing what almost always amount to technical insufficiencies.

If the original advantages of demurrers are now outweighed by their numerous disadvantages, and the pleading itself has become so misused or misunderstood by judges and attorneys alike so as to block the undeniably admirable goal of adjudication on the merits, then it is time to get rid of it.

To use a sports analogy, it is time to *move the chain*—that is, *get on with it,* to other hearings that truly seek to address the merits of the action. At this point in the evolution of the American judicial system, the demurrer appears to merely churn—as opposed to turn—the wheels of justice and often to an unproductive end. As attorneys, let's all "step up to the plate" and reverse that trend, if we can.

Simone K. Easum is a sole practitioner in Palm Desert and has been practicing civil litigation for 12 years.

One Last Look

Postcard (above) showing the Los Angeles County courthouse and Hall of Records, circa 1910. Postcard images are from the vintage postcard collection of Craig Blackstone.

With its imposing clock tower and richly detailed Romanesque style, the "Red Sandstone Courthouse" was the fifth building to serve as the Los Angeles County courthouse. Built on Pound Cake Hill (Broadway and Temple Streets), it was completed in 1891 at a cost of $518,810. The structure was damaged beyond repair by the Long Beach earthquake of 1933 and demolished in 1936. It is now the site of the Clara Shortridge Foltz Criminal Justice Center, constructed in 1972.

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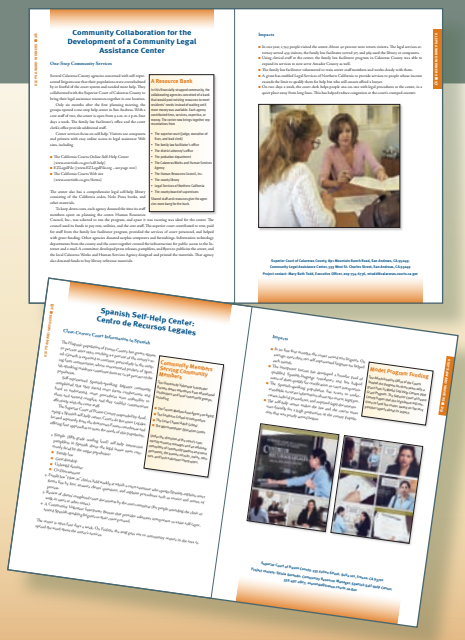

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