California Courts Review

A FORUM FOR THE STATE JUDICIAL BRANCH

FALL 2008

Civic Literacy in California's Schools
—page 7

Fixing California's Prison System

Congratulations 2008 Award Recipients

Judicial Council of California
Distinguished Service Awards

Presented annually by the Judicial Council, the awards honor those who demonstrate extraordinary leadership and make significant contributions to the administration of justice in California.

Jurist of the Year

Judge J. Richard Couzens (Ret.)
Superior Court of Placer County
Judge Couzens served as the co-leader of a special team of assigned judges that helped reduce the criminal case backlog in Riverside County in 2007 and 2008. Although he officially retired in 2005, he is actively involved in youth court, a movement that started in Placer County 20 years ago.

Supervising Judge David S. Wesley
Superior Court of Los Angeles County
Judge Wesley served as the co-leader of a special team of assigned judges that helped reduce the criminal case backlog in Riverside County. He is a statewide expert in criminal law and case management in high-volume courts and shepherds SHADES, a program designed to prevent hate crimes on high school campuses.

Jurist of the Year

Judicial Administration Award

Sharol Strickland
Executive Officer, Superior Court of Butte County
Ms. Strickland is well known for her leadership in improving the administration of justice in Butte County and statewide. During the past 13 years, the superior court has been recognized for court innovations and has received 10 Kleps Awards under her progressive guidance.

Kenneth W. Babcock
Executive Director and General Counsel, Public Law Center, Santa Ana
Mr. Babcock is active in efforts to improve access to justice for low-income residents of Orange County and throughout the state. As a member of the California Commission on Access to Justice, he chairs the commission's funding committee and serves on its executive committee and pro bono task force.

Bernard E. Witkin Amicus Curiæ Award

Supervising Judge Francisco F. Firmat
Superior Court of Orange County

Benjamin J. Aranda III
Access to Justice Award

Presented by the Judicial Council, State Bar, and California Judges Association, the award honors Judge Firmat for his 11 years on the bench in complex civil litigation, earning a reputation for successfully bringing people together in settlement. He now serves as supervising judge of the family law panel. In 2005, he organized a conference to educate the clergy about the role of the court system in solving difficult family dilemmas.

Chief Justice's Award for
Exemplary Service and Leadership

Judge Manley is recognized for his contributions in developing drug and mental health courts and improving the statewide administration of justice. A jurist for almost 30 years, Judge Manley is the supervising judge for all felony drug cases and mental health cases in the Santa Clara County court. He founded the local drug court in 1996 and the mental health court in 1997. He also developed a reentry court program designed to keep parolees, particularly those who are mentally ill, in the community.

Judge Stephen V. Manley
Superior Court of Santa Clara County

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A FORUM FOR THE STATE JUDICIAL BRANCH

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California Courts Review

FALL 2008

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It was not quite the best of times nor was it the worst of times.

The state's budget deficit, along with the delayed 2008–2009 State Budget, has affected all of us in the judicial branch. At the Governor's request, the branch voluntarily instituted numerous cost-saving measures, ranging from restrictions on hiring and promotions to freezes on various expenditures. Among those measures, we did not publish a summer edition of the *Review.*

Meanwhile, California's judiciary steadily continued its work of serving the public and furthering systemic improvement. This issue's cover story focuses on the role that the courts can play in solving one of California's most serious problems—its overcrowded prisons. At October's Summit of Judicial Leaders, officials from all branches of government and from across the country studied ways that the courts can contribute to solving the problem by reducing parolee recidivism. This is the start of a major effort by the judiciary, much like the effort to protect the courts from politicized elections that began at the 2006 summit.

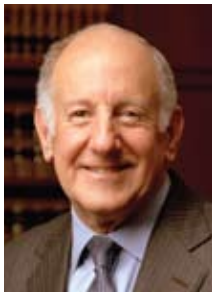
Also in this issue, we look at the way the Superior Court of Sacramento County applied the concept of CourTools to measuring the performance of its front-line staff.

Next, we examine the problem of ensuring the personal safety of California's judges. Gone are the days when judges' names were displayed on their courthouse parking spaces. A recent study highlights the problem's scope, and the article offers practical ways for judges to protect themselves.

Finally, we offer an article on how to manage the high-conflict litigant. Nearly every judge has come across a litigant who is simply a drain on the court's time and resources. Our authors reveal how to identify a common root in many such cases and offer strategies.

As always, we welcome your feedback and look forward to better days ahead.

—Philip Carrizosa
Managing Editor



JOCK MCDONALD

Addressing the Ethnic Media

The following are excerpts of remarks delivered by Chief Justice Ronald M. George on July 10, 2008, in San Francisco in a briefing for members of the ethnic media.

I am very pleased to be here today to discuss with you some of the ways in which California's judicial branch is working to improve its services to the diverse population that we serve. California's diversity is unparalleled, with no ethnic or racial group in the majority in our state. More than 200 languages are spoken in California, and more than 100 of them are translated every year in the courts of our state, literally ranging from *A* to *Z*, Albanian to Zapotec.

Every day, courts are involved in the most critical aspects of individuals' lives—child custody, civil rights, landlord/tenant disputes, criminal cases, business cases, tort claims, conservatorships, and probate. What happens in court may decide where an individual resides; who will have custody of his or her children; whether a person is sent to prison; or whether there will be redress for discrimination based on race, ethnicity, gender, disability, religion, or sexual orientation. With growing numbers of Californians coming to the courts not conversant in the English language, unfamiliar with the American system of justice, or unable to afford counsel, it has become increasingly apparent that our court system must reach out to those we serve to find out more about their needs and to respond to those needs when we can.

Courts traditionally conduct their proceedings in a way strange to the individuals who come before them to resolve a dispute. The judge appears in a black robe, seated at a bench raised above the level of the other seats in the courtroom. The public rises when the judge enters, and the judge, in the ultimate exercise of his or her authority, pronounces judgment. And, of course, the judge may flourish a gavel when appropriate. In the vision of court proceedings portrayed in literature, history, and television programs, there are lawyers, learned in the law and familiar with the particular language employed in the courts, who lead their clients through the process and act on their clients' behalf in interactions with the judge and other counsel.

That cozy picture of a smoothly operating courtroom, set as recently as the 1950s, probably would have featured white males in all the positions of authority—judge, lawyer, or bailiff. A woman might appear as a court reporter or court clerk but, like members of minority groups, rarely would be found in a position of authority.

California's changing demographic picture over the past 50 years has made a relic of that particular portrait of the courts. As society has changed, California's court system increasingly has focused on providing the necessary tools and services to an increasingly diverse population who bring a wide range of experience and expectations to the table. Our court system also has actively engaged in ensuring that individuals from every background can participate fully and fairly in all of the functions of the court.

California's judicial branch is a nationally recognized leader in taking stock of and responding to the many challenges facing the courts. More than 20 years ago, in 1987, California's Committee on Gender Bias in the Courts (in which I was active) began exploring issues encountered by women when appearing in the courts. This was one of the first such committees in the nation and, a few years later, a similar Race and Ethnic Bias Committee was appointed to examine court practices and to discern what needed to improve. Once again, our judicial system was a leader in focusing on the treatment of the varied population appearing in our courts. As a result of these and similar studies, fairness training became an integral part of ongoing staff and judicial education provided through the branch. Our judicial system's approach has been not just to provide separate classes on avoiding bias—and, equally importantly, avoiding even the appearance of bias—but instead to integrate this subject into the overall curriculum of our various judicial and court staff educational programs.

As various studies on gender, race, disability, and sexual preference have delivered their reports to the Judicial Council, it became clear that a permanent standing Committee on Access and Fairness was warranted. A quick look at the court system's Web site, located at *www.courtinfo.ca.gov*, reveals that this committee has engaged in projects addressing everything from training for implementing the Americans With Disabilities Act to roundtable discussions with Native Americans, programs looking at women of color and the justice system, and the development of fairness education in law schools. Issues relating to access and fairness for minorities and others are the subject of consideration in a host of settings, such as the influx of self-represented litigants, domestic relations matters, and the provision of court information, and often are the subject of action by several other advisory committees to the Judicial Council. Our emphasis is not on accumulating studies that merely gather dust on the shelves, but in coming up with practical solutions to problems—real and perceived.

We recognize that providing diversity in the clerk's office, among lawyers, and on the bench can send an important message to all those who come to the court—whether as litigants, witnesses, or jurors—that our courts are open to all and that justice is being administered by individuals who have experience and background similar to theirs. We operate with the understanding that there is more to administering justice than providing a fair adjudicator; the appearance of justice also plays an essential role in encouraging public confidence in our judicial system.

The Judicial Council is the constitutionally created entity charged with oversight of the statewide administration of justice and which, as Chief Justice, I chair. The Administrative Office of the Courts serves as the council's staff arm. In the early 1990s, the council undertook a formal planning process that continues to this day. From the start, a top priority of the council has been eliminating bias and improving access and fairness for all Californians, and over the years, the courts have been engaged in a continuing effort to achieve this goal.

The approaches we have taken have been varied and continue to develop as new issues and concerns arise. For example, self-help centers have been established in courts around the state to help individuals who cannot afford the assistance of counsel. In communities with large numbers of Spanish-speaking residents, there are centers dedicated to serving these individuals and to ensuring that they have an opportunity to pursue their rights effectively.

Self-represented litigants, many of whom are of lower income and often members of minority groups, also are served by the judicial branch's self-help Web site. The number of self-represented litigants has rapidly grown. In some locations, up to 80 percent of the litigants in family law and landlord/tenant proceedings lack counsel. The Web site gets millions of hits each year and provides forms and information on how to proceed in domestic violence, domestic relations cases, child custody issues, name changes, conservatorships, and many other matters.

The entire self-help Web site is translated into Spanish, and many sections are available in Chinese, Korean, and Vietnamese. The site offers a wide variety of additional information, including court locations and hours, resources available to the public, and links.

This is not to say that lawyers are an unnecessary luxury. As you are aware, litigants unable to afford counsel in criminal cases are provided counsel by the state. We have, for the past few years, been working to establish a pilot program that will provide legal representation to indigent litigants in civil matters in which fundamental rights are at stake. A measure to provide such assistance failed to be enacted last year, but similar proposals continue to be considered by the Legislature.

Legal aid services simply do not have the funding and staff to provide needed assistance. We are studying other ways that the judicial branch can assist those who cannot afford counsel. For example, each courthouse now has an individual available to assist individuals with child support problems. In addition, a Judicial Council Task Force on Self-Represented Litigants is exploring other means to provide limited representation and assistance

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Court Briefs

New Members Appointed to the Judicial Council

Chief Justice Ronald M. George announced in June the appointment of eight members to the Judicial Council: Justice Tani Gorre Cantil-Sakauye, Court of Appeal, Third Appellate District; Judge Lee Smalley Edmon, Superior Court of Los Angeles County; Judge Winifred Younge Smith, Superior Court of Alameda County; Commissioner Lon F. Hurwitz, Superior Court of Orange County; Mr. John Mendes, executive officer, Superior Court of Placer County; Mr. Joel S. Miliband, cochair of the Bench-Bar Coalition; and Mr. James N. Penrod, vice-president of the State Bar of California. Presiding Judge Dennis E. Murray, Superior Court of Tehama County, was reappointed. In addition, the new chair of the Trial Court Presiding Judges Advisory Committee is Presiding Judge Kenneth K. So, Superior Court of San Diego County. He will serve a one-year term.

Established by the state Constitution in 1926, the 27-member Judicial Council is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice in the nation's largest court system. The new appointees were named to three-year terms effective September 15, 2008.

Judge Chirlin Receives National Professionalism Award

The American Inns of Court's 2008 Professionalism Award for the Ninth Circuit was presented to Judge Judith C. Chirlin, Superior Court of Los Angeles County. The award was presented at the Ninth Circuit Judicial Conference in Sun Valley, Idaho, on July 28, 2008.

A 23-year veteran of the bench, Judge Chirlin is recognized for her work as a teacher, lecturer, and mentor in countries throughout Eastern Europe, Central America, South America, and the Middle East. Most recently, her international work has brought support for reestablishing the judiciary in Iraq.

The Ninth Circuit Professionalism Award is presented annually to honor a senior practicing lawyer or judge. Candidates are nominated through circuitwide open nominations and selected by a panel of representatives from both the circuit and the American Inns of Court Foundation.

JusticeCorps Members Begin Fall Service

This fall, self-help centers in San Diego, Los Angeles, and the Bay Area are getting some much-needed support from 250 college students participating in the JusticeCorps program. Funded in part by a generous AmeriCorps grant, JusticeCorps helps California courts meet the needs of self-represented litigants by training students to assist clients.

Most students in the program serve 300 hours during an academic year as self-help center interns, supporting court staff in areas such as family law, small claims, name changes, and guardianships. In return, students receive 40 hours of training and a $1,000 education award when they complete the program. A select group of students make a larger commitment, working full time to complete 1,700 hours of service, after which they receive an increased education award.

Since the program began in 2004, JusticeCorps members have assisted more than 75,000 litigants, filed 40,000 legal documents, and completed more than 250,000 hours of service.

Students in JusticeCorps say they also receive substantial personal benefits. "JusticeCorps has validated my decision to pursue law school after graduating from Berkeley. The program has also exposed me to a side of the legal system that is in dire need of attention. I feel that being exposed to this as an undergraduate has helped me immensely as a person and will help me even further as an attorney," said Ismael Chinchilla, a 2007 JusticeCorps member.

JusticeCorps is a collaborative project of the Administrative Office of the Courts; AmeriCorps; the Superior Courts of Alameda, Los Angeles, San Diego, San Francisco, and San Mateo Counties; select campuses of the University of California and California State University system; and many community-based service providers.

JusticeCorps Web Site

www.courtinfo.ca.gov/programs/justicecorps

Civic Literacy in Schools

Community outreach programs that connect the courtroom with the classroom aim to serve the civic literacy needs of students of all ages. Courts have begun to look at launching or expanding their own court-school partnerships for this school year. Highlighted below are examples of programs designed by courts throughout the state.

Ventura Thirty years ago, the Superior Court of Ventura County began a partnership with local schools by providing tours to students. Today, as many as 5,000 students visit the court annually, and the program has been expanded to include tours for seniors, special groups, and nonprofit organizations.

Kings Twice weekly, the Superior Court of Kings County offers two-hour tours to students in grades 6–12. Students begin their courthouse experience with a walk through security and a visit to a courtroom, where they learn the inner workings of the justice system. Each tour is limited to 30 students.

Solano The Superior Court of Solano County coordinates two-hour tours during the school year. By touring the courthouse and observing hearings and arraignments, students in grades 1–12 are given an overview of the justice system and a look at court careers. Tours serve a minimum of 20 and a maximum of 30 students.

Orange Law Advocate volunteers help the Superior Court of Orange County conduct tours of the Central Justice Center in Santa Ana for students in grades 8–12. Class instructors are encouraged to call the court directly when they would like to schedule a visit. Tours include an orientation on courtroom proceedings.

Contra Costa From October through May, two mornings a week, two docents from the Law League meet on the courthouse steps to conduct a two-hour guided tour for students in grades 5–8. In the first hour, students tour the courthouse and learn about the detention facility. The second hour is spent in a courtroom observing a court proceeding. In the final portion of the tour, students act as key players in a scripted mock trial, which includes a judge, a bailiff, a district attorney, witnesses, a defense attorney, and jurors who vote on the verdict.

San Joaquin Transportation can be an obstacle for some schools, but not in San Joaquin County. The superior court partnered with the County Office of Education for the use of science camp buses to shuttle school-age children to the court. Court tours are conducted on request and include participation by a judicial officer and courtroom staff. With these tours, the superior court plans to educate students about the justice system and career opportunities that students might otherwise not have considered.

Butte, Glenn, Napa, San Bernardino, Tulare A Web site created by the five superior courts, with grant support from the Judicial Council, is available to help promote civics education. The site contains a complete toolset for teaching core concepts of civics education to third-, fourth-, and fifth-graders, including lesson plans, activities, resource information, and supplemental materials. Courts will find the site useful for defining or refining their youth education programs. Visit *www.napa.courts.ca.gov/teacher/index.html*.

Glenn Finally, in Glenn County, the superior court offers educational tours to student and community groups. Participants meet and talk to a judge, observe court proceedings, and learn about the history of the courthouse. In addition, if teachers have a special curriculum they'd like the court to elaborate on, they may request extra time for coverage of that topic.

Contact

Catharine Price, AOC Executive Office Programs Division, 415-865-7783

Summer School for Teachers

This summer, 50 K–12 teachers spent their vacation time in the classroom to learn how to improve student attitudes about civics and the justice system.

The California on My Honor program invites teachers from across the state to attend a summer institute to strengthen their expertise in civics and learn ways to get students excited about the science of civil government. This year, the institute presented two sessions, one in June at California State University at San Marcos, and the second in July at the Administrative Office of the Courts in San Francisco. At an October follow-up session, the teachers shared the lesson plans they developed.

The idea for California on My Honor started in 1999 when Judge Richard G. Cline, Superior Court of San Diego County, developed some creative ways to reach out to a visiting class of fourth-graders. He scripted a scenario, including parts to be played by the kids and roles for the teachers. The response from the visitors was so positive that Judge Cline realized he might be on to something. The next year, he obtained official status for the program from the court and in 2003 enlisted the aid of San Diego's North County Bar Association (NCBA) to create a foundation to help fund the program.

Over the next couple of years the program grew to involve teachers and local universities. In 2005, CSU San Marcos, the NCBA, and the court collaborated to create the summer institute.

Since 2006, the Judicial Council has steadily increased its funding for the program, this year contributing more than $170,000 in a contract with California State University, San Marcos, and creating a Northern California institute.

In addition to bolstering civics teaching, the program is an opportunity to expose children to the justice system in a positive way, one that may inspire some students to consider law as a profession. Gregg Primeaux, who teaches civics and world history at Garden Grove High School in Orange County, sees this in his own classroom.

"Most kids have a very negative view of the court and the whole judicial system," he said. "This is a great way to educate students that courts are not just punitive entities. They can be beneficial to people."

More Information

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

Contact

Dr. Frances Chadwick, Program Director, California State University, San Marcos, fchadwic@csusm.edu

California Courts Honored for Benchguide on Self-Represented Litigants

The Administrative Office of the Courts has received the Howell Heflin Award from the State Justice Institute (SJI) for its *Benchguide for Judicial Officers on Handling Cases Involving Self-Represented Litigants*.

The award was presented at the August 15 Judicial Council meeting "in recognition of an innovative Institute-supported project that has a high likelihood of significantly improving the quality of justice in State courts across the nation," said SJI board member Keith McNamara.

Since its January 2007 release, the benchguide has been adapted as a national guide and is being used in at least eight other states, including New York, Arizona, and Oregon. It provides judicial officers with information on ethical issues involved in handling cases with self-represented litigants and explains practical skills such as handling evidence, communications, settlement strategies, courtroom management, and solutions for unintended bias.

The benchguide was produced with the support of an SJI grant. Project director Bonnie Hough, AOC Center for Families, Children & the Courts, credits the success of the guide to its many contributors, including small claims legal advisors, family law facilitators, family law judicial officers, court clerks, and self-help center directors who responded to surveys about working with self-represented litigants and participated in focus groups and interviews.

Milestones

The following justices and judges have left the bench.

Judge Julie M. Conger, Superior Court of Alameda County

Judge Michael M. Duggan, Superior Court of Los Angeles County

Judge Patricia C. Esgro, Superior Court of Sacramento County

Judge Irving S. Feffer, Superior Court of Los Angeles County

Judge Annie M. Gutierrez, Superior Court of Imperial County

Judge J. Thompson Hanks, Superior Court of Riverside County

Judge Curtis R. Hinman, Superior Court of Riverside County

Judge Michael R. Hoff, Superior Court of Los Angeles County

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

Judge Jack P. Hunt, Superior Court of Los Angeles County

Judge Leon S. Kaplan, Superior Court of Los Angeles County

Judge Robert F. Kaster, Superior Court of Siskiyou County

Judge Roger T. Kosel, Superior Court of Siskiyou County

Judge Xenophon F. Lang, Jr., Superior Court of Los Angeles County

Judge Jerald M. Lasarow, Superior Court of El Dorado County

Judge Charles C. Lee, Superior Court of Los Angeles County

Judge Janice M. McIntyre, Superior Court of Riverside County

Judge John A. Mendez, Superior Court of Sacramento County

Judge Sharon E. Mettler, Superior Court of Kern County

Judge Gary E. Meyer, Superior Court of Monterey County

Judge James R. Milliken, Superior Court of San Diego County

Judge Michael E. Nail, Superior Court of Solano County

Judge Gail D. Ohanesian, Superior Court of Sacramento County

Judge Suzanne E. Person, Superior Court of Los Angeles County

Judge Steven H. Rodda, Superior Court of Sacramento County

Judge Bonnie L. Sabraw, Superior Court of Alameda County

Judge Michael T. Sauer, Superior Court of Los Angeles County

Judge Susan P. Spear, Superior Court of Los Angeles County

Judge Robert G. Spitzer, Superior Court of Riverside County

Justice William D. Stein, Court of Appeal, First Appellate District

Judge Coleman A. Swart, Superior Court of Los Angeles County

Judge Barry A. Taylor, Superior Court of Los Angeles County

Judge Thomas N. Townsend, Superior Court of Los Angeles County

Justice Miriam A. Vogel, Court of Appeal, Second Appellate District

Judge James T. Warren, Superior Court of Riverside County

Judge Alexander H. Williams III, Superior Court of Los Angeles County

The following members of the bench passed away recently.

Judge Courtland D. Arne (Ret.), Superior Court of Alameda County, July 29, 2008

Judge Joseph G. Babich (Ret.), Superior Court of Sacramento County, April 27, 2008

Judge Morton R. Colvin (Ret.), Superior Court of San Francisco County, June 24, 2008

Judge Jesse W. Curtis (Ret.), Superior Court of San Bernardino County, August 5, 2008

Judge Robert Einstein (Ret.), Superior Court of Los Angeles County, June 1, 2008

Judge Warren J. Ferguson (Ret.), Superior Court of Orange County, June 25, 2008

Judge Richard C. Garner (Ret.), Superior Court of San Bernardino County, August 2, 2008

Judge Leonard Goldstein (Ret.), Superior Court of Orange County, April 12, 2008

Judge Harrison R. Hollywood (Ret.), Superior Court of San Diego County, May 5, 2008

Judge Charles E. Jones (Ret.), Superior Court of Los Angeles County, April 13, 2008

Judge Wayne M. Kanemoto (Ret.), Superior Court of Santa Clara County, May 24, 2008

Judge Edward L. Laird (Ret.), Superior Court of Orange County, June 6, 2008

Justice F. Douglas McDaniel (Ret.), Court of Appeal, Fourth Appellate District, April 17, 2008

Judge Gordon L. Minder (Ret.), Superior Court of Alameda County, May 30, 2008

Judge David Mintz (Ret.), Superior Court of Los Angeles County, May 12, 2008

Judge Franklin J. Mitchell, Jr., (Ret.), Superior Court of San Diego County, April 12, 2008

Judge John Otis (Ret.), Superior Court of Los Angeles County, July 30, 2008

Judge Martin H. Ryan (Ret.), Superior Court of Amador County, July 27, 2008

Judge John Sparrow (Ret.), Superior Court of Alameda County, May 30, 2008

Judge J. Kimball Walker (Ret.), Superior Court of Los Angeles County, April 17, 2008

Judge Roscoe Wilkey (Ret.), Superior Court of San Diego County, July 11, 2008

Judge Robert O. Young (Ret.), Superior Court of Los Angeles County, May 5, 2008

Fixing California's Prison System

Recidivism and Community Corrections

By
Michael Machado and
Roger K. Warren

California's prison system is broken. Our prison population is at an all-time high of 171,000 inmates, and the facilities they occupy are bursting at the seams. Prisoners are being double- and triple-bunked in prison gyms and day rooms, to the extent that there are currently 15,000 of these "ugly beds" in the system.

California's prison overcrowding is further aggravated by a 70 percent parolee recidivism rate, the highest in the nation.[1]

The state's prison system did not get here overnight. Decades of neglect have resulted in a prison system with many noteworthy flaws. Working conditions for correctional officers have become ever more dangerous. Too many prisoners are not receiving any vocational training or basic education, thus putting them on the path to repeating past criminal activities. And crime victims and all Californians are left to feel that the correctional system has failed them because it has not improved public safety.

Our prison system has consistently had a recidivism rate that is two to three times the average of the rest of the United States.[2] Very little rehabilitative programming is being provided, and many prison classrooms are dark 50 percent of the time because of persistent lockdowns. Only a small percentage of the inmate population has access to classrooms, even though the majority of inmates do not read above sixth-grade level.

During state Senate budget subcommittee hearings over the last several years, it was apparent that the system had run out of bed space, that without efforts to reduce recidivism California could not alleviate its overcrowding problem, and that the state could not build its way out of the problem.

For several years, the budget of the California Department of Corrections and Rehabilitation (CDCR) has been whipsawed—resources cut, new responsibilities added—in an attempt to bring about changes in the operations of California's prisons. However, many of these efforts were piecemeal and did not attempt real systemic change.

Two years ago, the Legislature appropriated $900,000 to contract with correctional experts who would comprehensively evaluate California's prison and parole programs and policies. What came out of this effort was a blueprint for the state to help reduce recidivism, reduce overcrowding in the prisons, and improve public safety. In June 2007, a comprehensive system for improving rehabilitation efforts in California's prisons—the California Logic Model—was put forward. CDCR has started to implement this effort, which, if fully implemented, will systematically change the way the prison system operates.[3]

The fiscal payoff for reducing recidivism is enormous. A 5 percent reduction in recidivism means 3,000 fewer beds, $500 million less in capital costs, and $120 million less in operating costs.[4] Rehabilitative programming can play a big role in achieving this type of benefit.

The programming reforms being implemented by CDCR will help reduce recidivism over time, but more needs to be done: we need to address other sentencing, parole, and corrections policies to get control of our growing prison population and improve public safety.

Repairing Current Sentencing and Corrections Policies

Underlying the problems of overcrowding and recidivism are sentencing and corrections policies that fail to address offender recidivism at the front end of the corrections system as well as a number of uniquely dysfunctional features of California's adult probation and community corrections systems.

California's current state sentencing policies focus almost exclusively on the objectives of punishment, deterrence, and incapacitation. Current corrections policies rely heavily on imprisonment and incarceration as the means to control crime. Both fail to properly address other important sentencing and corrections objectives, especially the objective of recidivism reduction—rehabilitation—in any meaningful way.[5] And the absence of any state incentives or support for efforts to reduce recidivism through early and effective response to adult criminal behaviors at the community level inevitably contributes to high recidivism rates and additional prison commitments.

The vast majority of California felony offenders are sentenced to jail and/or probation at the community level, not to state prison.[6] But because California lacks adequately funded probation and community corrections services, the recidivism rate among these offenders is very high, and many of them are ultimately committed to state prison.[7] Nationally, almost 60 percent of felony offenders appearing in state trial courts have at least one prior conviction.[8] California's parolee recidivism rates are even higher than the national average. Whereas nationally it is estimated that 57 percent of probationers successfully complete probation, in California only 44 percent successfully complete probation.[9] Compared to the national average, California prison inmates have more prior convictions at the time of their prison commitments and are also more likely to have been on probation or parole at the time of their committing offenses.[10]

California is the only state in the nation with neither a state-funded probation system nor any state system of community corrections.

California is the only state in the nation with neither a state-funded probation system nor any state system of community corrections. And calls for reform have long been ignored.

Ironically, California was one of the first states in the nation to promote the development and use of community corrections services when it adopted the Probation Subsidy Act in 1965. The act provided county probation departments with the funding required to deal at the community level with those adult and juvenile offenders who otherwise would have been committed to state institutions. The program operated successfully for more than a decade: it is estimated that the act was responsible for diverting more than 45,000 offenders from state institutions to

county probation and treatment programs.[11] By the time of Governor Ronald Reagan's State of the State address in 1972, California had reduced its prison population by 30 percent and closed eight prison facilities, and the parolee recidivism rate had dropped from 40 percent to 25 percent.[12] Under the Probation Subsidy Program virtually all nonviolent property offenders were handled locally.[13]

Inspired by California's experience, almost half of the states decided after 1972 to shift resources and responsibilities for major portions of state correctional services from state to local governments. Formal state community corrections acts now exist in at least 23 states.[14]

But California began to phase out its probation subsidy program in the late 1970s as local and state financial resources dwindled after voter adoption of Proposition 13, which cut property taxes, and of Proposition 4, which imposed spending limits.

Propositions 13 and 4 had a devastating impact on county probation departments, which historically relied almost entirely on county funding sources. Adult probation resources were reduced to a bare minimum in many counties as probation departments increasingly emphasized juvenile services. Over time, probation departments had to rely more and more on probationer fees and one-time state and federal grants primarily targeting juvenile offenders. By 2001, county general funds constituted less than half of the total budgets of many California probation departments.[15] Today, California is one of only two states in the nation in which the state provides no dedicated funding stream for adult probation services. The other state, Indiana, has a state community corrections program.

California is thus the only state in the nation that funds neither community corrections nor adult probation services, and, as a consequence, both local corrections and adult probation services in California are woefully underfunded. More than half of the 345,000 adults on probation in California, more than three-quarters of whom are felony offenders, today receive no active probation supervision.[16] The lack of state support for community corrections and adult probation contributes to the runaway costs of operating California's dangerously overcrowded prisons and to California's high recidivism rates while also undermining efforts to hold offenders accountable for their behavior and provide victims with reasonable measures of restitution and reconciliation.

More than half of the 345,000 adults on probation in California, more than three-quarters of whom are felony offenders, today receive no active probation supervision.

For almost 20 years California has ignored consistent calls to address its chronic and long-term prison overcrowding problem by resurrecting its early commitment to community corrections. In 1990, the Blue Ribbon Commission on Inmate Population Management recommended that California develop and expand a program of community-based sanctions for targeted offenders.[17] The California Legislature appeared to adopt the blue ribbon commission's recommendation several years later when it enacted the Community-Based Punishment Act of 1994.[18] The act called for the creation of state-local partnerships to effectively manage appropriate offenders in community-based programs of sanctions and services. Unfortunately, implementation of the act was contingent on funding, and the funding was never appropriated.

More recently, as the prison overcrowding problem again reached crisis proportions, several independent commissions again called for expanded utilization of community corrections programs. In 2004 the Corrections Independent Review Panel recommended the release of low-risk prison inmates to community supervision programs.[19] Last year, the well-regarded Little Hoover Commission released its most recent report and recommendations on California's corrections crisis. The report called upon the state to reallocate its resources to establish a continuum of community-based sanctions to which judges would have the authority, guided by validated offender risk and needs assessment tools, to sentence appropriate offenders who would otherwise be sentenced to prison as well as the responsibility to monitor offenders' progress in the assigned programs.[20]

There have also been recent calls for probation reform. After three years of study, the 2003 final report of the Judicial Council's Probation Services Task Force found a clear need to move away from the current "patchwork funding model." The task force called for a realignment of probation services with the state[21] and establishment of an adequate and stable funding base for probation "to protect the public and ensure offender accountability and rehabilitation."[22] The task force also called for establishing "a graduated continuum of services and sanctions to respond to the needs of each offender."[23]

Although California has failed to implement a program of community corrections or to fund adult probation services, it has addressed the analogous problem of overcrowding in state juvenile institutions by transferring significant responsibilities and resources to local government for the proper care of juvenile offenders. The "juvenile realignment" legislation suggests models for similar realignment legislation for adult offenders. The initial juvenile realignment legislation in 1996 created fiscal incentives to encourage the development of locally based placement and treatment alternatives for juveniles who commit less serious offenses.[24] Finding that local juvenile programs were better suited for juvenile offenders than state-operated programs, California recently enacted requirements and provided a funding stream to ensure that less serious juvenile offenders are supervised and treated in local, rather than state, settings.[25]

Restructuring a Fragmented Corrections System

California's existing probation and corrections systems are further weakened by systemic fragmentation. California is the only state in which adult probation services are administered as a local executive branch function while parole services are administered as a separate state-level executive branch function.[26] And California is the only state in which probation operates without any state-level governance, supervision, or oversight.

The vast majority of states—34—supervise or administer adult probation services through state-level executive branch boards or agencies. Thirteen states administer probation through state or local court systems. California's probation system is also unique in that it is funded primarily by the counties as local executive branch agencies and yet works most directly with and for the statewide judicial branch, whose judges, in most counties, have appointment and firing authority over chief probation officers.

The Probation Services Task Force noted that although none of the workload or cost drivers in the probation system are within county control, it is the county that has budgetary and programmatic responsibility over the department. The task force also noted that the split governance structure, historic levels of underfunding, and resulting variation in service levels and programs from county to county erode the departments' ability to provide a consistent and critical set of probation services. The task force concluded that the existing probation structure "functions poorly on many levels" and that a new statewide approach to probation governance "ultimately appears to be the most promising model for the future."[27]

A statewide approach to probation governance could finally provide what California now lacks: It is the only state without some form of administrative coordination between adult probation and parole supervision services, even though they are similar and provided to similar offender populations. In the vast majority of states (35), adult probation and parole services are administered or supervised by a single state-level executive branch agency or board. In four states, probation and parole supervision are administered by two separate but related state-level agencies or boards. In nine states, parole is administered by a state-level executive branch entity while adult probation is administered by state or local court systems.

California is the only state in which adult probation services are administered as a local executive branch function while parole services are administered as a separate state-level executive branch function.

Evidence-Based Practices to Reduce Recidivism

In California's pursuit of probation and community corrections reform the principal objective should be to promote public safety and reduce recidivism through implementation of more

effective sentencing and corrections practices in the community.

California's current sentencing and corrections systems were first created in the late 1970s at a time of widespread skepticism that corrections programs could really change criminal behavior. But today there is a voluminous body of rigorous scientific research demonstrating that carefully targeted intervention and treatment strategies can reduce offender recidivism by conservative estimates of 10 to 20 percent.[28]

Carefully targeted intervention and treatment strategies can reduce offender recidivism by . . . 10 to 20 percent.

Research over the past 20 years has identified a broad range of sentencing and corrections practices that appropriately punish offenders and hold them accountable while also reducing recidivism, lowering crime rates, and controlling corrections costs. The experiences of many other states confirm the practical utility of these "evidence-based" policies and practices.[29] In light of that research, three eminent researchers have concluded "that what is done [today] in corrections would be grounds for malpractice in medicine."[30]

Evidence-based practices (EBP) to reduce recidivism among parolees have already been embraced by CDCR and the Legislature. The California Logic Model described earlier is based directly on such principles. Principles of EBP are more frequently discussed, however, and even more likely to be effective when they are applied to the supervision of probationers at the front end of the criminal justice system. Many California probation departments are already seeking to realign their existing practices with EBP principles.

Continuing with business as usual in California will only ensure that we retain the dubious distinction of having the highest recidivism rates in the nation and that our prisons remain overcrowded and dangerous. And our primary goal, to improve public safety, will remain unmet. Our broken corrections system is not merely the Governor's problem or CDCR's problem or the Legislature's problem. It is California's problem, and it is time for every branch of government to step up—before the federal courts are required to step in—and implement reforms.

The Summit of Judicial Leaders

The judicial branch is working to bring all stakeholders to the table. In June 2007, the Administrative Office of the Courts sponsored a Judicial Symposium on Public Safety, Sentencing, and Corrections that brought together a cross-section of California judicial and criminal justice system representatives and experts from around the country to discuss EBP and other topics relevant to the current state of California's sentencing and corrections systems. Many of the judicial branch participants recommended that a follow-on program, focused on the roles of the courts in efforts to improve California's probation and sentencing systems, be convened for a much larger audience of judicial branch leaders.

To that end the Judicial Council of California convened the 2008 Summit of Judicial Leaders, October 13–15, 2008, in Monterey. The summit focused on ways in which the judicial branch can improve sentencing practices to reduce recidivism and promote public safety. Participants considered approaches that can be used by sentencing judges; by trial court leaders working in collaboration with leaders of probation, prosecution, defense, and other local criminal justice system partners; and by the Judicial Council working in collaboration with the Legislature, Governor, and other state criminal justice system partners.[31]

The 2008 summit provided a timely opportunity for the leaders of the judicial branch, working cooperatively with representatives of other branches and the broader criminal justice community, to step up and consider ways the courts can improve public safety through use of sentencing practices that more effectively reduce recidivism and hold offenders accountable for their actions.

Our actions today can begin to address the serious problems our criminal justice system now faces. And by repairing our corrections system we can hope to rebuild our communities. CTR

It is time for every branch of government to step up—before the federal courts are required to step in—and implement reforms.

State Senator Michael Machado represents the Fifth District, which covers parts of San Joaquin, Solano, Yolo, and Sacramento Counties. He chairs the state Senate Committee on Banking, Finance and Insurance. He was a member of the Assembly from 1994 to 2000.

Roger K. Warren, a 20-year veteran of California's trial courts and past president of the National Center for State Courts, is scholar-in-residence at the Administrative Office of the Courts in San Francisco.

Notes

1. Little Hoover Commission, *Solving California's Corrections Crisis: Time Is Running Out* (Jan. 2007), pp. ii, 22, *www.lhc.ca.gov/lhcdir/185/Report185.pdf.*

2. *Id.* at p. 22.

3. *Meeting the Challenges of Rehabilitation in California's Prison and Parole System, A Report From Governor Schwarzenegger's Rehabilitation Strike Team* (Dec. 2007), *www*

.cdcr.ca.gov/News/docs/GovRehabilitationStrikeTeamRpt_012308.pdf.

4. Legislative Analyst's Office, *Inmate Population Management* (Aug. 2006), *www.lao.ca.gov/handouts/crimjust/2006/population_management_081506.pdf.*

5. The failure to effectively address recidivism reduction (rehabilitation) objectives also undermines efforts to collect victim restitution and promote victim and community restoration.

6. Approximately 222,000 persons arrested for felony offenses are convicted annually in California. Over 80 percent are sentenced to local time: fine, jail, and/or probation. Criminal Justice Statistics Center, California Department of Justice, *Crime in California 2006,* p. 70, table 37, *http://ag.ca.gov/cjsc/publications/candd/cd06/Crime_In_CA_2006.pdf.*

7. New felony commitments from the courts constitute approximately 70 percent of California's annual prison commitments (in contrast to parole returns, which comprise about 30 percent). *Id.,* table 47.

8. Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, U.S. Department of Justice, *Felony Defendants in Large Urban Counties, 2002,* NCJ 210818 (2006), p. 12, *www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf.*

9. Lauren E. Glaze and Thomas P. Bonczar, Office of Justice Programs, U.S. Department of Justice, *Probation and Parole in the United States, 2006,* NCJ 220218 (Dec. 2007), p. 7, *www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf*; Criminal Justice Statistics Center, *supra* note 6, table 46.

10. Whereas the most recent national survey of state prison inmates by the Bureau of Justice Statistics indicates that 47 percent were on probation or parole at the time of their current offenses, in California 58 percent of state prison inmates are on probation or parole at the time of their current arrests. Nationally, 75 percent of prison inmates have served previous sentences, 43 percent have served 3 or more, 18 percent have served 6 or more, and 6 percent have served 11 or more. In California, 80 percent have served prior sentences, 54 percent have served 3 or more, 29 percent have served 6 or more, and 12 percent have served 11 or more. Compare Bureau of Justice Statistics, U.S. Department of Justice, *Correctional Populations in the United States, 1997,* NCJ 177613 (2000), p. 57, table 4.10, *www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf,* with Joan Petersilia, California Policy Research Center, University of California, *Understanding California Corrections* (2006), p. 58, *www.ucop.edu/cprc/documents/understand_ca_corrections.pdf.*

11. Marcus Nieto, *Community Correction Punishments: An Alternative to Incarceration for Nonviolent Offenders* (California Research Bureau, 1996).

12. Tim Findley, "Story Behind the Decision—Dramatic Prison Reform," *San Francisco Chronicle* (Jan. 7, 1972), pp. 1, 26.

13. *Id.*

14. States with community corrections acts include Alabama, Arizona, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, and Virginia.

15. Administrative Office of the Courts, Probation Services Task Force, *Final Report* (2003), appen. B, p. 7, *www2.courtinfo.ca.gov/probation/report.htm.*

16. Chief Probation Officers of California, *Probation Services in California* (Mar. 2006), *www.cpoc.org/Information/probation.pdf*; Criminal Justice Statistics Center, *supra* note 6, p. 82 and table 45.

17. Blue Ribbon Commission on Inmate Population Management, *Final Report* (Jan. 1990).

18. Pen. Code, §§ 8050–8092.

19. Corrections Independent Review Panel, *Reforming California's Youth and Adult Correctional System* (June 2004), p. 130.

20. Little Hoover Commission, *supra* note 1, at pp. 31–32. Specifically, the commission recommended that the state reallocate funding equal to one-half the cost of state incarceration to pay for expanded probation and other services at the local level. See also National Council on Crime and Delinquency, *Report of Task Force on California Prison Crowding* (Aug. 2006), *www.nccd-crc.org/nccd/pubs/2006_ca_taskforce.pdf.*

21. One of the principles upon which "realignment" was advocated was that "courts and counties should develop and implement partnerships to administer probation departments and work collaboratively to ensure appropriate levels of services, support, funding, and oversight." Administrative Office of the Courts, Principle No. 2, *supra* note 15, at p. 5.

22. *Id.*, Recommendation No. 1, at p. 8.

23. *Id.*, Recommendation No. 9, at p. 8.

24. Sen. Bill 681; Stats. 1996, ch. 6.

25. Juvenile Justice Realignment Legislation of 2007 (Sen. Bill 81; Stats. 2007, ch. 175, and Assem. Bill 191; Stats. 2007, ch. 257).

26. Most of the following information on the administration of probation and parole in other states is taken from American Probation and Parole Association, *Adult Probation and Parole Directory,* available on the APPA Web site at *www.appa-net.org/resources/directory*, and American Probation and Parole Association, *The Present Probation Picture: A Patchwork Design*, a report prepared for the Judicial Council's Probation Services Task Force and available at *www2.courtinfo.ca.gov/probation/documents/adult_part1.pdf.*

27. Administrative Office of the Courts, *supra* note 15, at p. 7.

28. See, e.g., Steve Aos, Marna Miller, and Elizabeth Drake, Washington State Institute for Public Policy, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (Jan. 2006), *www.wsipp.wa.gov/rptfiles/06-01-1201.pdf.*

29. For a more detailed discussion of the application of EBP to state sentencing practices, see Roger K. Warren, *Evidence-Based Practice to Reduce Recidivism: Implications for State Judiciaries* (2007), available on the National Institute of Corrections Web site at *http://nicic.org/Library/022843.*

30. Edward J. Latessa, Francis T. Cullen, and Paul Gendreau, "Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment" (Sept. 2002) *Federal Probation* 47, *www.uscourts.gov/fedprob/2002sepfp.pdf.*

31. Topics on the agenda of the 2008 summit included Community Corrections Programs That Work, Improving Presentence Reports, Use of Risk Assessment Tools, Effective Use of Probation Conditions, Promoting Offender Motivation, and Handling Violations of Probation.

Defining Operational Success

Measuring the Performance of a Court's Front-Line Staff

By Jake Chatters

Six years ago, the courts were facing a cyclical budget crisis similar to the one we face today. The Superior Court of Sacramento County chose to address that crisis, in part, by establishing a business process reengineering program. During the past several years I have been asked whether the program has been successful. I think the answer is yes, but for different reasons than I would have anticipated at the beginning.

While some concrete examples of hard savings and more intuitive processes arose directly from the reengineering projects, those are not the big changes. The major benefit of the reengineering program was to establish a culture willing to look for change. The program's ultimate goal was to find ways to be more efficient and to challenge those processes that "we've always done this way." Whether a manager implemented a specific change recommended by my team or found a new, perhaps better, solution on his or her own, the court benefited.

Having a culture in which managers and staff are willing to look for change does not guarantee that the culture accepts change. While there is a desire to improve and a drive to make a process easier for ourselves or the public, we, like most people, still fight the battle against aversion to change. But that desire to look and to question "what is" has proved invaluable over the past half-decade.

In 2007 we implemented the California Court Case Management System in civil law and probate while simultaneously transforming to a paper-on-demand environment. We have gone to paperless files in traffic cases and adopted Second Generation Electronic Filing Specifications (2GEFS) and 2GEFS-compliant e-filing for unlawful detainer actions. Most recently, severe county budget cuts forced us to quickly revamp our entire criminal pretrial release processes. These changes were not easy, but a culture supportive of change, even if individuals struggle with the specific change, was invaluable in making these transitions.

The Need to Measure Operational Performance

If a culture of change was the great side benefit of the last budget crisis, what might we hope to improve as a result of the one we now face? Each trial court, presiding judge, and executive officer may answer that question differently. What I hope is that we leave this crisis with an organization that understands the need for and embraces the use of operational performance measures.

First, a quick differentiation: The trial courts in California and across the country have a growing history of strong justice-based performance measures. Measures like age of pending caseload and clearance rates fall into this category. These measures tell us a great deal about how we are administering justice in our communities. These measures are expanding to include customer and employee satisfaction. The National Center for State Courts (NCSC) CourTools project is designed to standardize these measures nationwide so there is a common base by which to measure court performance. These measures describe our organizations and provide accountability to the public we serve. They are vital for management and planning purposes.

But while these measures are extremely valuable for judges, court executives, high-level court managers, the Administrative Office of the Courts, and the general public, they often provide little value to most staff, supervisors, and line managers. This budget crisis presents a great opportunity to develop operational-level performance measures that will be meaningful to this latter group.

What is an operational-level performance measure? A few examples may be the percentage of documents processed within a certain number of days, the percentage of minute orders returned for correction, and the number of "lost file" requests. These measures should focus on the timeliness and quality of the activities performed by line staff—whether a mediator, a courtroom clerk, or the staff at the front counter. Operational measures are extremely valuable to the front-line staff and supervisors for both motivational and measurement purposes.

Today in our court, the front lines generally report performance on "backlog reports." When backlogs are low, there is a perception of quality performance. As court leaders, we should not be satisfied with "backlog" as our default definition of operational performance. Our use of this measure highlights our need for a greater focus on front-line statistics.

First, the use of "backlog" as a performance measure has an inherent negativity. It says to our staff that we don't expect them to finish their work; that we acknowledge it isn't possible before they even begin. While certainly we need to know if we have a backlog and how big it is, using that as the primary measure hinders motivation.

Why try if everyone already knows they can't possibly succeed?

Second, measuring only what has not been done and staying silent on both what has been done and its quality fail to give credit and emphasis on the key role that all staff play in maintaining the public's trust. Our staff should be proud to work for the court, and we need to articulate why what they do is vital to our court system.

Third, as we enter another cyclical downturn in funding we need to determine where cuts can be made and at what price. But can we adequately answer that question? Eighteen months from now when positions have been held vacant and ancillary services have been reduced, will we be able to quantify the impact? Can we reasonably predict the outcomes? While we believe, or intuitively know, that reducing customer service staff *could* result in declining quality, we have no way to monitor this assumption or to mitigate impacts early. Instead, leadership can only react if problems create major complaints or impact the key justice measures. For example, as workload is spread over fewer staff, error rates may rise. Knowing early that, for example, minute order accuracy is declining may allow us to address the problem before it begins to impact future hearings or delays in formal orders after hearing.

The need for operational-level performance measures is not new. Certainly some courts in California have strong systems of measurement and reporting already in place. Others may recall the NCSC's Trial Court Performance Standards and Measurement System—the precursor to CourTools—which included many operational measures. But this system failed to become the norm for courts because of the sheer volume of measures required and the cost to collect and maintain the information.

The collection and use of operational-level performance measures are constrained by the inherent cost of measurement. The previous NCSC effort, and perhaps previous efforts in many courts, failed because of its size and complexity. How do you run a courtwide performance management effort in the midst of a budget crisis? When judges, management, and staff are working to deal with shortages, it is extremely difficult to divert organization-level attention to front-line statistics. On the other hand, a crisis presents a great opportunity for organizational culture change.

The Use of Measures to Celebrate Successes

There is no easy solution to this problem. A top-down approach to performance measurement may lead to concern that the measures will be used against those lower in the hierarchy. The key may be in how we look at defining the need for performance metrics. Do we want statistics so we can identify problems, or is the primary reason to identify and celebrate successes? If we truly support and embrace performance measurement as a way to highlight successful programs and efforts and not as a punishment tool, they may become less threatening.

As an example, at a recent meeting of upper-level managers in our court, an individual lamented that we place greater emphasis on completing projects on our operational plan than we do on our day-to-day work. This happens, simply, because we know how to measure a completed project. We can say it is done. It is implemented. But we have not adequately defined our operational success. In the absence of information, we cannot celebrate the great work our staff does every day.

How are we going to change the culture and instill the need for front-line performance measures? This past May we discussed this question with the management and supervisory teams in two of our major divisions. We focused on the need to collect operational performance measures and to do so with the following principles:

- "Justice" measures do not always serve us well, and there is a need for "operational" measures.
- There is a demonstrated need to define success and develop related measures.
- Measurement can be a motivational tool—not a "gotcha" but an "atta team."
- Start small. We have limited resources so we must focus on a small number of measures (three to five).
- Keep the measures balanced. Don't measure timeliness in the absence of quality.
- Good measures are quantifiable and meaningful and can be influenced by our actions.
- What we measure influences behavior.
- Accept that we may not be able to measure exactly what we would like to measure.

We hope to let the units decide what to measure and then let them measure it. The intent is to allow the staff, supervisor, and manager to informally discuss what they think would be useful. The best possible outcome is to have the units define what success is and to build comfort with performance-based measurement.

We will know the outcome of this effort in a year or two. Six years ago, we did not know if our business process improvement projects would be successful, but now our culture is more open to change. With some luck, perhaps the silver lining of the current budget downturn will be an acceptance of the benefit of front-line performance measurement. CR

Jake Chatters has been deputy executive officer of the Superior Court of Sacramento County since 2006; he previously directed the court's research and analytical projects, including its business process reengineering program.

Ensuring the Personal Security of Judges

By
Malcolm Franklin

In February 2005, the judicial branch was rocked by the murder of the husband and mother of Judge Joan H. Lefkow, a United States District Court judge for the Northern District of Illinois. The murder apparently was perpetrated by a man who was upset with her ruling in a medical malpractice lawsuit. He later committed suicide during a routine traffic stop.

Closer to home, H. George Taylor, Commissioner of the Superior Court of Los Angeles County, and his wife were fatally shot outside their Rancho Cucamonga home in March 1999. The case remains unsolved.

Personal threats against judicial officers and their families happen all too often. The visible role that judges play in trials makes them a target. With threats to federal judges on the rise and constant threats and assaults against judicial officers in California, we must take swift action to assess threats and manage threat data properly. A mandated and clearly understood system for reporting and tracking threats is vital to providing an effective level of personal security for California's judicial officers.

In 2005, the Administrative Office of the Courts (AOC) formed the Emergency Response and Security (ERS) unit. The unit's initial mission was to draft emergency planning tools for the branch and, in particular, the trial courts as they prepared to transfer facilities to state ownership. By 2006, it was clear that security had become a major concern across the court system, both nationally and in California.

Safe, secure courthouses and effective response to threats are fundamental to ensuring the operation of the justice system. As Chief Justice Ronald M. George has said, "Courthouses must be a safe harbor to which members of the public come to resolve disputes that often are volatile."

Efforts to Ensure Court Security

Court security has several objectives: (1) allocating funding for salaries, benefits, retirement, and equipment for all security providers, sheriffs, marshals, private security staff, and civilian court personnel; (2) operating, managing, and improving trial and appellate court facilities and security measures; and (3) securing the personal security of judicial officers.

A great deal of progress has been made toward the first two objectives. The Judicial Council formed the Working Group on Court Security to investigate and recommend financial standards and compensation for security providers. The AOC made weapons screening a priority after its 2005 survey of trial courts showed that 97 court facilities lacked entrance screening stations. In 2006 money was appropriated and equipment purchased for these sites.

At that time, little statewide work had been done to ensure the personal security of judicial officers. The need was evident. However, through discussions with individual judges, the California Judges Association (CJA), and other groups, it became apparent that the response to individual threats was varied and differed vastly from county to county. Later in 2006 the Personal Security Ad Hoc Advisory Group, composed of judges, law enforcement personnel, and court executives and staffed by ERS, was formed to review the issues related to the personal security of judicial officers in California. From its initial meetings a number of specific issues surfaced:

- Lack of a unified and all-inclusive threat reporting system for state trial court judges—little or no knowledge existed on the number of threats received by judicial officers in the state;

- Lack of educational information on personal security, travel security, and security for judicial officers' families; and
- A general lack of understanding about judicial officers' personal security and courthouse security programs, along with a compartmentalizing of security matters county by county.

Penal Code section 76(b) mandates that any threat made to any member of the judiciary be reported to the California Highway Patrol (CHP). The advisory group's initial investigation discovered that few sheriffs knew of this requirement and that fewer still complied with it. The process for the trial courts to report threats is not clearly defined, and the information is rarely transmitted to the CHP. As a result, the judiciary lacks information and statistics on the types, severity, and frequency of threats made to our judicial officers. While the CHP does keep a database in Sacramento on threats to elected officials and appellate court justices, this information is generally not shared with the rest of the branch. According to the CHP, current staffing does not allow investigation of threats outside its primary mission.

During the course of the investigation, it also became apparent that, outside of the larger sheriffs' departments, little in the way of personal security was addressed by court security providers. The ERS unit began to receive more reports from smaller courts that threats had not been dealt with to their judicial officers' satisfaction. The ERS unit worked with local sheriffs, district attorneys, and other agencies in response to several incidents to ensure that information was shared and a full investigation conducted at the local level. This process allowed the ERS unit to obtain investigative updates from law enforcement personnel and keep the individual under threat advised of any safety- and security-related developments.

The ad hoc group discussed the need for a comprehensive survey on the personal security perceptions of judicial officers. It was unclear whether a survey of this nature had ever been conducted in the state, but the need for raw data for future planning was of paramount importance. In January 2007, ERS conducted a statewide survey of justices and judges to obtain information about threats received between December 2005 and December 2006 and to determine the current levels of judicial officers' confidence in their safety inside and outside the courts. The survey, designed to keep respondents' identities anonymous, was conducted via the Internet and announced to justices and judges via e-mail, newsletter, and the Serranus Web site. It reached a total of 1,609 active justices and judges and achieved an overall response rate of approximately 53 percent with 855 completed questionnaires. At least one response was received from almost every court, and a total of 296 threats were reported.

The survey results were striking:

- Of the 296 threats reported, 72 were described as imminent (about to happen or threatening to happen).
- 75 percent of the threats were against a specific judge, justice, commissioner, referee, employee, or family member. Most of these threats were received in the courtroom or court chambers through oral or written communication.
- 69 percent of the threats were classified as general rather than imminent. When threats were related to a case, those cases were predominantly criminal, followed by family law cases. In more than half of all the threats, the plaintiff or defendant in the case was the person making the threat.
- 80 percent of the threats were reported, most often to the sheriff. The most common precaution taken was to notify courthouse security or staff.
- 85 percent of the justices and judges said the threat had been investigated to their satisfaction, and 79 percent reported that they received feedback about the investigation from the person to whom the threats were reported.

Ways to Protect Yourself

As a judicial officer, what can you do to protect yourself against threats? Many of the steps are simple. Here's a checklist:

1. Find out if your court security provider or local law enforcement agency will conduct a security review of your home.
2. Install a home alarm system in your primary residence and use it regularly. The alarm should be monitored by the alarm company or by local law enforcement. Find out if law enforcement responds to all alarms.
3. Make sure all doors and windows to your home, including your garage door, are locked when not in use. Do not leave keys to your home anywhere outside the house, such as under doormats, over doors, in mail slots, or in any other obvious place.
4. Do not put your name or title on the outside of your residence or mailbox.
5. Do not use your home address on any public records or publicly accessible records. Consider holding title to your property in trust.
6. Change your mailing address to your work address and use a post office box or business address telephone number on your personal checks.
7. Apply for confidentiality on driver's licenses and vehicle registrations owned or leased by you, your spouse, and your children from the state Department of Motor Vehicles. Forms can be obtained from your local security provider or the CHP.
8. Make sure your telephone number is unpublished and unlisted.
9. Do not give out identifying information such as home address or telephone number unless absolutely necessary or required for governmental purposes.

10. Ensure that your home address and telephone numbers are not listed on Web sites other than those secured by government agencies. The AOC has created a Judicial Privacy Protection Opt-Out Program to help new justices, judges, commissioners, and referees remove personal information such as home addresses and telephone numbers from Web sites. ERS staff handles the initial opt-out request for participating judicial officers and is collaborating on educational materials with the Court Security Education Committee (which is appointed by the Judicial Council's Governing Committee of the Center for Judicial Education and Research).

Threats to judges may come in many different forms: in writing, by telephone, verbally through an informant or a third party, or through suspicious activity. Threats and inappropriate communications can be anything that harasses or makes ominous or unsettling overtures of an improper nature and can include inappropriate pictures or drawings. Any received threats should be reported immediately, even if they appear minor or inconsequential. Your security provider will determine whether a threat is credible and warrants investigation. Here are some tips to keep in mind:

- If you feel you may be in imminent danger, call 911 immediately.
- If the threat is not imminent, inform your court security provider as soon as possible.
- Ensure that your local investigating agency reports the threat to the CHP Dignitary Protection Section, Threat Assessment Unit, at 916-327-5451.

The survey clearly has shown the need for a statewide system to report threats, process threat information, and share that information with agencies that need it. In order for that to be accomplished, law enforcement agencies must come together to agree on a single format, a repository agency, and the information that can and should be shared.

In 2006, the ERS unit applied for funding through the Homeland Security Grant Program to develop software and obtain staffing for an initial test of a statewide system. The funding request was denied. In the long term, legislation is needed to develop a statewide system. However, it is critical that courts and their security providers work together on an agreement that would benefit the entire branch.

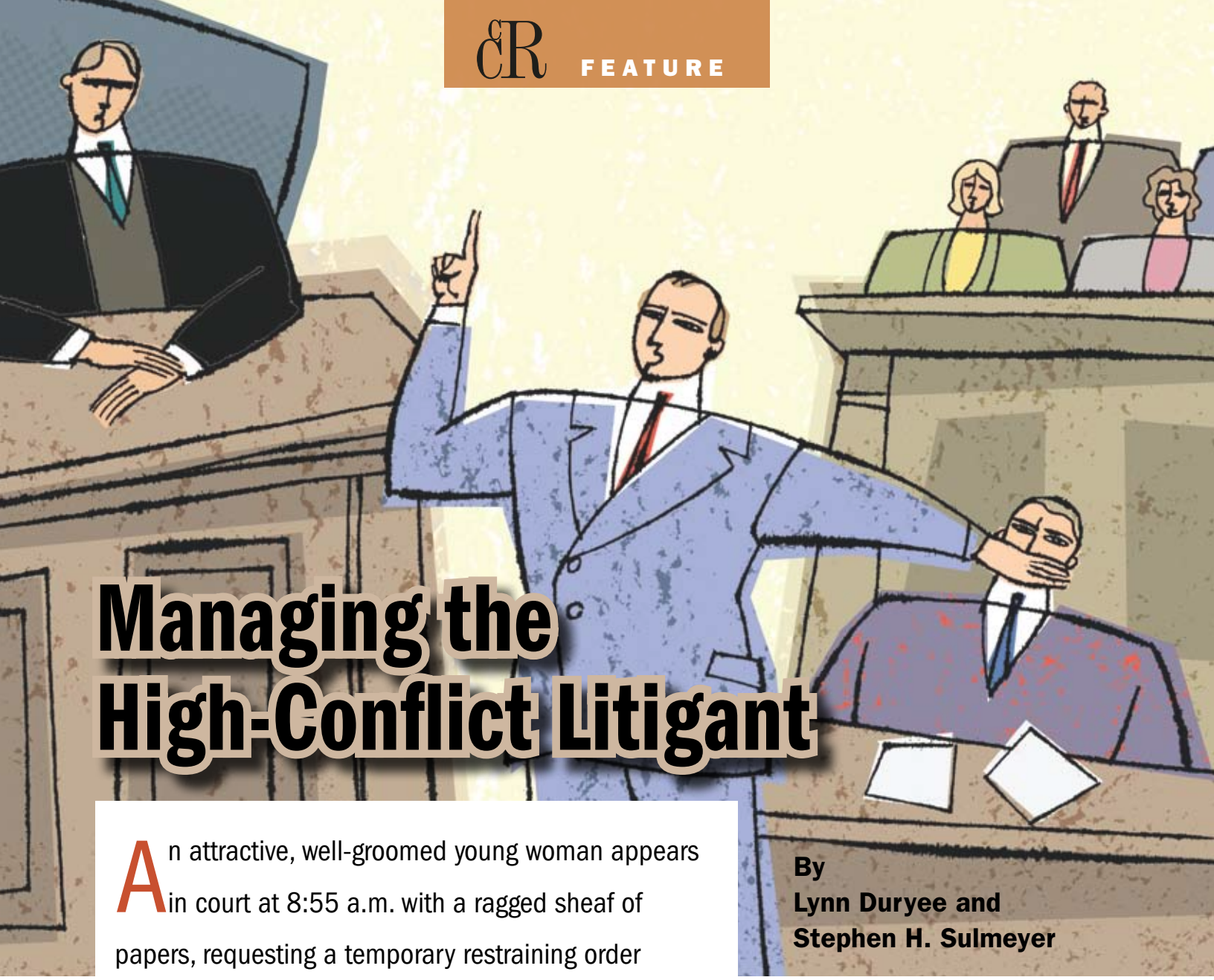
In 2008, the ERS unit will bring together the California State Sheriffs' Association, the CHP, and the CJA to discuss how to proceed on this issue. In the interim, the ERS unit has delivered to courts across the state a number of training programs dealing with personal security, emergency planning, and courthouse security. Additional educational materials on travel security, pandemic preparedness, and radiation protection are now available, and the Court Security Education Committee is developing further personal security training materials.

As Judge Lefkow eloquently stated in her testimony to the United States Senate Committee on the Judiciary on May 18, 2005:

> Our system is the role model for the world. Without fearless judges, where are we as a nation? I have no doubt that each of you is equally committed to this idea. Your voices as elected officials are magnified. Judges, by contrast, speak most often through their decisions. We need your leadership in this area, and the stakes are profound.

The branch has come a long way in a short time, but personal security is a team effort, and we must bring together sheriffs, marshals, the CHP, and judicial officers statewide if we are to succeed in creating a solid prevention-based program. Judicial officers' support of and participation in information-gathering initiatives are important facets of the process and are greatly appreciated. CR

Malcolm Franklin is senior manager of the Emergency Response and Security unit of the Administrative Office of the Courts and was previously state director of emergency management in Kentucky.



Managing the High-Conflict Litigant

By
Lynn Duryee and
Stephen H. Sulmeyer

An attractive, well-groomed young woman appears in court at 8:55 a.m. with a ragged sheaf of papers, requesting a temporary restraining order against her landlord. Her declaration states that she rented a room in a sketchy part of town and that the landlord broke in the night before and sexually assaulted her. She suspects he's been spying on her for months. She is sick with anxiety and requests an immediate order preventing him from entering her portion of the premises. Accompanying her are volunteers from her church and the local women's shelter. The landlord stumbles in red-faced and stunned. He looks like he's coming off a 10-day bender, having spent the final night in a ditch.

What is a judge to do? With time pressures and limited resources, the judge simply wants to preserve the status quo until the hearing on the merits. At the same time, the judge is concerned about protecting the victim and ensuring that no further harm occurs while the case is pending. Under these circumstances, with two minutes to decide between a compelling young woman and a disheveled dullard, the young woman is quite likely to prevail. On an ex parte calendar, the judge does not have time to test the truth of her allegations. The risk of harm appears great, the young woman is persuasive, and what is the downside in granting a temporary restraining order?

Plenty, as judges who have been fooled by this type of litigant can attest. In the family law

context, the wreckage caused by similar litigants is legendary, including unwarranted arrests, groundless sex abuse investigations, the loss of child custody, and years of ruinous litigation. It may take multiple hearings, many lawyers, enormous expense, and a diligent judge—one willing to review the entire history of the case—to undo the damage caused by even a temporary order obtained by a high-conflict litigant.

High-conflict litigants are a staple in every courthouse. Mention their names and judges shudder. Everyone has a story to tell: "I handled her divorce—what a nightmare!" "He burned through four lawyers in his personal injury case and finally represented himself." "Wasn't she finally declared a vexatious litigant?" "After 10 years of his crazy cases, I finally had to recuse myself—I couldn't take him any more." This frequent filer is on a first-name basis with clerks, bailiffs, and newspaper reporters. He can recite by rote the contact information for the Commission on Judicial Performance. She's an expert in ex parte communications, a diva of discovery disputes, and a thorn in your side.

Mental Illness May Be Involved

Did you know that a high-conflict litigant may be suffering from a serious mental illness? The usual suspects include anything from paranoid personality disorder to full-blown schizophrenia, but the most likely culprit is one of four so-called Cluster B personality disorders: antisocial, histrionic, narcissistic, and borderline. These disorders are characterized by distortions in thinking, feeling, perceiving, and relating, and they are woven into the very fabric of a person's sense of self. A common descriptive term of Cluster B personalities is "persuasive blamer"—these people are never wrong, it's never their fault, and theirs is the biggest outrage ever. Their presentation is persuasive and urgent.

Of the four types, the one most likely to appear in court and send shivers down the spines of judges is the borderline personality disorder. The term "borderline" is misleading; it does not mean "sort of okay, sort of not." It originally designated unspecified mental illnesses on the "borderline" between neurosis and psychosis. It remains a serious diagnosis. The lives of people with borderline personality disorder are characterized by crises and catastrophes. They often have a history of stormy relationships and have experienced a litany of wrongs and injustices. Borderlines suffer from an unconscious compulsion to constantly re-create misery and unhappiness for themselves. On the inside, the borderline feels as if he or she is being assaulted by a maelstrom of terrifying feelings and thoughts. The sense of self is fragile and unstable, resulting in wild fluctuations between loving idealizations one moment and rageful rejection the next. The borderline seems to fight a perpetual losing battle against shame and emptiness, and anyone crossing the path of one can become the target of turmoil.

When it comes to conflict, borderlines are pros. In psychological terms, their conflict results from the projection onto others of their own hostility, shame, and fears. Borderlines externalize their problems and see their difficulties as the fault of others. They rarely see their own contributions to the conflict. For example, in an action for partition between adult siblings, the borderline sister complained incessantly of her brother's inability to sell their jointly owned property. Yet it was she who would not agree to a realtor or a list price, who argued about the real estate commission, and who refused to sign the listing.

What Judges Can Expect From High-Conflict Litigants

If a psychological report is generated during the case, the judge may obtain concrete evidence of a litigant's personality disorder. This information can greatly assist the judge in managing the lawsuit. For starters, the judge can adjust his or her expectation and anticipate that this case will not proceed like a "normal" one. With a high-conflict litigant, the *issues* do not drive the case; the *personality* does. With boundless conflict there are boundless issues, and no amount of reasoned rulings will satisfy this litigant. The judge, then, will not be surprised to see multiple ex parte applications, discovery disputes, motions to reconsider adverse rulings, and inappropriate attempts to communicate with the court by fax, phone, or e-mail—nor, when all else fails, to be himself or herself the subject of vicious attack.

Given that borderlines have a poor sense of boundaries, the judge might take special care to craft clear orders prohibiting improper conduct

during litigation, with consequences described in the order. For example, for parties prone to ex parte contact, the court may issue this order: "The parties may not send letters to the judge about their case. These letters will be returned without being considered by the judge. A violation of this order may be punishable by contempt."

The judge will know to keep an open mind and exercise caution when making decisions on hot-button allegations like domestic violence or sex abuse, ensuring that rulings are based on the evidence and the law rather than on sweeping allegations and emotional intensity. Because these litigants do not play by the rules, it is especially important that the rules be followed, proper procedures be observed, and violations of rules have appropriate consequences, such as attorney fees and sanctions. Finally, the judge must take steps to avoid becoming embroiled and to protect himself or herself, since these litigants have an uncanny ability to get under one's skin.

In most cases, however, a judge will not know the parties' psychological profiles and neither can nor should attempt a diagnosis. It is all too easy to engage in pathology, and there may be other factors responsible for difficult behaviors. It is also important to remember that, within the chaos of a personality disorder, there often are pockets of health. Borderlines can be low functioning in one area of their life—for example, with a spouse—and high functioning in others—perhaps on the job or with their children.

Learning About Personality Disorders Is Useful

Nevertheless, it is useful to learn about personality disorders because people with these characteristics appear regularly in court and demand a disproportionate share of time and resources. This litigant's high level of urgency and emotion makes it hard to find out the true facts and easy to make flawed rulings. Some of the techniques judges use for a self-represented or difficult litigant—such as allotting the litigant generous amounts of time or bending the rules to accommodate the litigant—may do more harm than good with a high-conflict litigant. These cases can be very draining on the judge.

In the case of the attractive tenant seeking the temporary restraining order, a quick-thinking courtroom clerk recognized the names of the parties and located a pending unlawful detainer case between them. The landlord was represented by counsel in the pending case, so the judge continued the matter one day to notify counsel and summon the file. With both counsel and the court file present the following day, the full story emerged: After the tenant failed to pay rent for five months, she offered to exchange sexual favors for rent, and the landlord accepted. The order was denied, and the tenant did not appear for the trial on the merits. Whether this tenant had a personality disorder is unknown. However, her case had all the markings of one—an urgent proceeding, a compelling story, a persuasive presen-

Strategies for Dealing With the High-Conflict Litigant

Here are some tips to keep in mind when faced with a high-conflict litigant:

- **Avoid** embroilment! Do not take the attacks personally, even when the litigant is challenging your authority, accusing you of bias, and ignoring previous rulings. Instead, rule and move on. Know your triggers.
- **Educate** yourself on the subject of personality disorders. When you understand the thought process of those with personality disorders, you will stop expecting the person before you to behave reasonably. You will see that the litigant's proclivity to blame others, refusal to take responsibility, and emotional escalation are both typical and predictable.
- **Set** clear limits. The difficult litigant can be a resource hog, constantly filing ex parte applications, motions, and complaint letters and consuming undue time in hearings with arguments on irrelevant material. The court must impose fair and clear limits on time and issues. Insist that proper procedures are followed.
- **Ensure** that rulings are based on facts and law, not on emotional intensity. The high-conflict litigant frequently appears in an ex parte setting, where time is short and emotions run high. Take extra care in these cases to slow down and find out the facts.
- **Search** for the grain of truth in what high-conflict litigants say. They have an intense need to feel liked and respected exactly as they are. If you can let them know that their arguments have been heard and taken seriously, it may help defuse their emotion.
- **Monitor** your own internal response. If you find your heart is pounding, you feel anxious, and your fight-or-flight reflex is about to engage, recognize that you will not be your most effective self. Consider taking a break, consulting a colleague, breathing deeply, sitting quietly, feeling both feet on the ground, organizing your thoughts, or rescheduling the matter.
- **Try** to identify a high-conflict case early. Before a case spins out of control, see if you can move the case off the litigation track to develop a plan and help the parties stick with it. "Face time" with the judge in an informal setting, such as a settlement conference, may help.

Learn More About Personality Disorders

These resources will help shine a light on the characteristics of people with these disorders.

Printed Resources

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV),* 4th ed. (Washington, D.C.: American Psychiatric Association, 2000). Available in every library, this is the primary reference work for mental health professionals. It lists the diagnostic criteria for each personality disorder.

Eddy, William A., *High Conflict Personalities: Understanding and Resolving Their Costly Disputes* (San Diego: William A. Eddy, 2003). The author of this self-published book is an attorney, a mediator, and a social worker, so many of his examples of personality disorders are drawn from actual court cases, including some from published appellate cases. This useful resource for learning about personality disorders contains helpful guidelines for recognizing and responding to litigants with high-conflict personalities.

Mason, Paul, and Randi Kreger, *Stop Walking on Eggshells: Taking Your Life Back When Someone You Care About Has Borderline Personality Disorder* (Oakland: New Harbinger Publications, 1998). Written by therapists, this book focuses on the borderline personality, which is perhaps the most common personality disorder of the high-conflict litigant. It explains the cognitive distortions of the borderline and offers guidance on understanding and interacting with people who exhibit this disorder.

Internet Resources

Mental Health Association, Sydney, Australia, "Personality Disorders," *www.mentalhealth.asn.au/resources/personality_disorders.htm*. Fact sheet with characteristics of various personality disorders.

Merck & Company, "Personality Disorders," from *The Merck Manual of Medical Information,* 2d home ed., *www.merck.com/mmhe/print/sec07/ch105/ch105a.html.*

National Institute of Mental Health, "Borderline Personality Disorder," *www.nimh.nih.gov/publicat/bpd.cfm.* Description and symptoms of borderline personality disorder.

tation, well-meaning support people, and a grain of truth to the allegations.

It pays for judges to be watchful for and knowledgeable of the high-conflict litigant. One is certain to appear in your courtroom at some point—and then again and again and again—and will leave a wake of chaos and acrimony. The high-conflict litigant will call on the judge's ability to uphold appropriate legal procedures, employ effective courtroom management skills, and practice careful discernment of the facts. It will test the limits of the judge's patience, compassion, and inner fortitude. It may be small comfort to remember that the litigant's intense and emotional attacks are symptomatic of a disorder and not personal to the players; that while the litigant is causing everyone to feel distressed and agitated, he or she feels much worse. But as any judge who has presided over a high-conflict case may report, small comfort is preferable to none at all. CR

Lynn Duryee has been a judge of the Superior Court of Marin County since 1993. Her recent book, Trial & Error—Further Reflections on the Judging Life *(2007) is available through the California Judges Association.*

Stephen H. Sulmeyer is a clinical psychologist with a doctorate in psychology from the Institute of Transpersonal Psychology in Palo Alto and a law degree from Stanford University.

Catharsis but Not Real Life

By
Arthur Gilbert

It is the mid-1960s and you are the Attorney General arguing for the State of Arizona in the *Miranda* case before the U.S. Supreme Court. (*Miranda v. Arizona* (1966) 384 U.S. 436.) You begin your argument by telling the justices, "Ernesto Miranda is a cold-blooded rapist and—"

Before you can get another word out, Justice Douglas interrupts you. "What does that have to do with it?"

You begin, "Everything—," but you are interrupted again, this time by Justice Black, who says, "The Constitution protects everyone, even the most reviled and despicable in our society."

You reply, "But certainly you don't believe the police have some responsibility to educate a miscreant on constitutional niceties?"

"Indeed they do," chimes in Chief Justice Warren.

You have had just about enough. You cannot control yourself. The dam is about to burst. Co-counsel sitting to your right sees it coming and gently tugs your sleeve. You pull your arm away as the breach occurs and the words pour out: "This court just might take a moment to reflect on the rights of law-abiding citizens instead of callous, cold-blooded criminals. I will acknowledge that Justice Douglas has academic credentials, but you would hardly know it from the recent opinions this court has decided. Too bad Justice Frankfurter was not around for this case. The rest of you—Black, Fortas, and Warren, in particular—are political hacks. Did you even go to law school, Justice Black? Is this outpouring of love for criminals an attempt to even things out because you were once a member of the Ku Klux Klan? This court is a joke, setting itself up as a super, unelected legislature, distorting the Constitution to find meanings that are nowhere even implicit in its literal language."

A similar argument did in fact take place, not before the real Supreme Court but on the television series *Boston Legal* last April. Actor James Spader, as lawyer Alan Shore, argued a death penalty case before a Supreme Court of assembled actors, many of whom look remarkably like their counterparts on the real court. The actors portraying the justices look so like the real justices that you think, maybe . . . no, forget it.

The argument was about as unreal as it could get, only, unlike my fictional argument before the Warren court (I didn't mean a word of it; I had my fingers crossed as I typed—not an easy feat), Shore's ire was directed at the Roberts court.

Shore argued that the death penalty imposed on his client, who had been convicted of child rape, was unconstitutional. Days after the show aired, the real high court ruled in a 5–4 decision that the death penalty in such a case was unconstitutional. Had the fictional Shore known how the case would turn out, perhaps he might have been more restrained in his argument.

Shore began by reminding the court that 3,300 persons are on death row and that his client was one of two who were about to be executed for a crime where the victim had not been killed. No sooner had the last word left his lips than the pseudo Justice Scalia interrupted with, "We don't need a box score," in a tone both patronizing and contemptuous.

Things went downhill from there. As Shore got peppered with snide remarks (there were not that many questions), his anger boiled over into barely controlled rage. Soon he was condemning the court for its decisions in a host of other cases. He accused the high court of turning back the clock on civil rights, taking a pro-business posture that ignored plaintiffs' rights, and fabricating an indefensible activist position in *Bush v. Gore*.

He called the judges hypocrites for their evasive answers during their confirmation hearings. And when Justice Scalia reminded Shore to keep his politics out of it, Shore retorted with the admonition that Justice Scalia do the same. Shore even interrupted his tirade to demand that Justice Thomas put down the magazine he was reading. Talk about crossing the line. (At a symposium I attended at Pepperdine Law School, Justice Alito pointed out that Justice Thomas is consistently engaged and "forceful" at the court's conferences.)

Whatever Shore thought about the court, he did not have to be all that upset with Justice Scalia's pointed remarks. In *Boumediene v. Bush* (2008) 128 S.Ct. 2229, the majority held that detainees at Guantanamo were

entitled to habeas corpus relief. Justice Scalia wrote a scathing dissent. It was reasoned, forceful, and passionate, but his accusation that the majority aided terrorists just might be carrying that passion too far. In comparison to the majority, Shore got off easy.

Putting aside for a moment that Shore and I would have been carried bodily out of the courtroom had we even attempted the arguments set forth here, I was struck by the public's response to the episode. In blogs and responses to newspaper articles, I sensed some genuinely felt contempt and disrespect for the court.

The *Boston Legal* episode brought to mind the scene in the movie *As Good As It Gets,* starring Jack Nicholson and Helen Hunt. Unable to get medical care for her sick son, Ms. Hunt's character lashes out at the health insurance industry and HMOs in particular. I could not hear the dialogue in the movie for the next five minutes because the audience was cheering and yelling its approval.

Shore's argument prompted a lawyer to say he would gladly give up his bar card to make an argument like that before the Supreme Court. Some people said that the Supreme Court is all about politics and cited *Bush v. Gore* as the prime example. But one blogger criticized actor Spader, as though *he* had written the lines he delivered. Quite a tribute to his acting ability. No doubt the blogger would have reviled Laurence Olivier for being Richard III. More enlightened viewers saw the program as entertainment and Shore's argument more as a reflection of the show's creators and writers than an accurate reflection of the court itself. Some said it was a good catharsis, but not "real life."

The entertainment media has carte blanche in portraying or misportraying the courts. And many judges are concerned about the effect the television medium's message has on the courts. But most judges offer a powerful refutation to the negative stereotypes manufactured by the entertainment industry. They treat litigants and attorneys with civility and respect. I see examples over and over again in the transcripts I review on appeal. And increasing numbers of judges participate in outreach programs that enlighten the public on the judiciary.

Of course the argument that occurred on *Boson Legal* would never happen in a real court. And that program and others like it rarely change anything, though at times some think it might be salutary if it did. I am not sure Helen Hunt's fusillade at HMOs changed much in the insurance industry. And if it did, so much the better for consumers and for free expression in a democracy.

Despite the sanguine feelings I have expressed here about the future of the courts vis-à-vis the entertainment industry, I have always had this uneasy feeling about Judge Judy, until recently, when she displayed her own vulnerability. To explain, let me take you back many years to when I was a lawyer. I was trying a case before a highly respected superior court judge. An elderly witness cracked under my incisive cross-examination. Actually, I needled her. The witness suddenly exploded and began berating me, the other witnesses, and the court system in general.

The trial judge quieted the witness down and took a recess to give her the opportunity to collect herself. He reminded her of where she was and said that he expected her to conduct herself accordingly. When the judge resumed the bench, the witness was contrite and conducted herself appropriately. I was deeply impressed with the manner in which the judge handled the situation.

I have never seen Judge Judy take a recess for the benefit of a witness. And I never thought I would see her leave the courtroom in the middle of one of her mini-trials in which she is skewering and humiliating the hapless litigants. I was convinced that nothing could get her off the bench. I was wrong. When a 5.4-magnitude earthquake rocked parts of Southern California on July 29, she was in the middle of taping a show. The studio began shaking, this time from a higher power than the formidable judge presiding. Even before the panicked studio audience crowded out of the studio, Judge Judy had made a beeline for the exit. The bewildered litigants were left clutching their lecterns, perhaps in awe of the effect of their earth-shattering arguments.

Whenever I feel concern about the effect Judge Judy has on our courts, I think back to how the judge in my case handled the obstreperous witness, and my concerns fade. And those who have similar concerns about the *Boston Legal* program should not worry.

The rancor that some have expressed over the Warren court decisions may have paved part of the road that has taken us to the Roberts court. And now the current Supreme Court must endure its share of rancor. Sometime after the election, there may be new appointments to the court and new judicial perspectives. But however the election turns out, I think the republic and the Supreme Court will survive and endure. And this has nothing to do with an unflattering characterization of the Roberts court on a television series. CR

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


J. Richard Couzens


Tricia Ann Bigelow

California Adopts a New Tool for Assessing Sex Offenders

BY J. RICHARD COUZENS AND TRICIA ANN BIGELOW

In 2006 the Legislature and the public enacted several significant changes to the laws governing the prosecution and sentencing of sex offenders. One of the new laws requires that all persons who have been convicted of a crime registerable under Penal Code section 290 be assessed for the risk of reoffending. The assessment is called the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) and is to be administered under the provisions of Penal Code sections 290.04–290.07.

Effective July 1, 2008, the assessment must be administered by the following department and to the following persons convicted of a section 290 offense.

► *By the probation department for all persons convicted of a felony where a probation report is prepared under section 1203. (Pen. Code, § 290.06(a)(4).)*

On its face, section 1203 requires a probation report only when the defendant is eligible for probation. It is not clear whether the requirement directly applies to defendants who are not eligible for probation or to those who are sentenced without a probation report under a stipulation to waive the report under section 1203(b)(4). Although section 290.06(a)(4) may not require the assessment, section 290.06 (a)(5), discussed below, appears to require the assessment if the probation department supervises the defendant.

The evaluation also must be included with the limited probation report prepared under section 1203c. (Pen. Code, § 1203c(a)(1)–(2).) Even if the defendant avoids the evaluation at the presentence stage, it is likely that the California Department of Corrections and Rehabilitation will be required to conduct the assessment under section 290.06(a)(1), discussed below.

► *By the probation department for all misdemeanor violations registerable under section 290. (Pen. Code, § 1203(d).)*

The court generally has the discretion to summarily sentence misdemeanor violations without a probation report. However, for any misdemeanor violation of section 290, section 1203(d) appears to mandate referral to the probation department for the assessment.

► *By the probation department for all persons who are currently supervised by probation for a registerable sex offense before the termination of probation. (Pen. Code, § 290.06(a)(5).)*

► *By the California Department of Corrections and Rehabilitation for all persons who are committed to the department before release on parole. (Pen. Code, § 290.06(a)(1).)*

► *By the Department of Corrections and Rehabilitation for all persons who are on parole, before its expiration. (Pen. Code, § 290.06(a)(2).)*

► *By the California Department of Mental Health for all persons committed to the department for treatment for an offense registerable under section 290. (Pen. Code, § 290.06(a)(3).)*

For adult males, the approved assessment tool is the STATIC-99 risk assessment scale. The scale was developed in England and Canada after a review of the criminal case histories of more than 33,000 adult male sex offenders. The tool draws its data from the history of the defendant—"static" factors that do not change. The evaluator must look at 10 specific factors: the defendant's age, whether the defendant ever lived with another person longer than two years (excluding cellmates), whether the defendant has any current convictions for nonsexual crimes of violence, whether the defendant has any prior convictions for nonsexual crimes of violence, the number of prior sex offenses, the number of prior sentencing dates, the number of convictions for noncontact sex offenses (such as being a "peeping tom"), any nonrelated victims, any stranger victims, or any male victims. A numerical score is constructed from these variables: 0–1 point indicates a low risk of

Although the number of past sexual offenses probably is the most obvious predictor of future criminal sexual conduct, how this factor is scored is likely to raise considerable controversy.

committing a new sexual offense, 2–5 points indicates a moderate risk, and 6 or more points indicates a high risk of reoffending.

The court will consider the [defendant's total] score in deciding whether to grant probation and in setting any jail or prison term.

Although the number of past sexual offenses probably is the most obvious predictor of future criminal sexual conduct, how this factor is scored is likely to raise considerable controversy. The evaluator is instructed to segregate the defendant's record into two categories: convictions and charges. The category that produces the highest point value is used in the assessment. Arrests are counted as charges, even if there is no conviction. Charges that go to court count as charges, even though there is no conviction. Penal Code section 654 is not considered in counting the number of convictions. Convictions include violations of probation based on sexual misconduct. It is not difficult to see that the charging practices of a district attorney can drastically affect the defendant's score. If the defendant has six or more charges, or four or more convictions, he receives three points for this factor alone—half the points necessary to be rated as a high-risk offender.

As noted previously, the STATIC-99 considers only fixed factors from the defendant's past. The assessment does not consider "dynamic" or changing factors, such as current mental status or past or current treatment. The STATIC-99 and other risk assessment tools have been used for some time in the evaluation of persons who might come within the provisions of the Sexually Violent Predator Act (Welf. & Inst. Code, § 6600 et seq.). Use of these tools as a predictor of future violent sex crimes, however, has only been upheld if the assessment is coupled with a clinical evaluation of the dynamic aspects of the defendant's life. (*People v. Poe* (1999) 74 Cal.App.4th 826, 831–832; *People v. Therrian* (2003) 113 Cal. App.4th 609, 611.)

The failure to use both the risk assessment tool and a clinical evaluation may mean that certain offenders who should be considered high risk will not be, and certain offenders labeled high risk because of the STATIC-99 score should not be.

The defendant's total score is used in a number of circumstances. The court will consider the score in deciding whether to grant probation and in setting any jail or prison term. If probation is granted, a high-risk defendant must be on continuous electronic monitoring for the period of probation, using the latest technology, unless in a specific case the court determines that such monitoring is unnecessary. (Pen. Code, § 1202.8(b).) The defendant must also be placed "on intensive and specialized probation supervision." (Pen. Code, § 1203f.) Similarly, any person released on parole for an offense registerable under section 290 who has a high-risk score must be placed "on intensive and specialized parole supervision." (Pen. Code, 3008(a).) CR

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Celebrate Court Adoption and Permanency Month

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

For creative examples of how local courts celebrate the event, see the Court Adoption and Permanency Resource Guide and other materials at ***www.courtinfo.ca.gov/programs/cfcc/programs/description/AdoptionandPermanency.htm***

For more information, contact the AOC Center for Families, Children & the Courts at 415-865-7739 or cfcc@jud.ca.gov.

"Sisters" by Vanessa, age nine. Courtesy of Superior Court of Riverside County

JENNIFER CHEEK PANTALEON

Rex S. Heinke

Tips and Pointers From Scalia and Garner

BY REX S. HEINKE

Supreme Court Justice Antonin Scalia and well-known legal-writing instructor Bryan A. Garner have written a comprehensive book on how to write briefs and argue motions and appeals. As the authors acknowledge, much of their book is not new, but they have brought together advice from many sources, added some of their own suggestions, and adapted historical methods to modern American litigation. The book, *Making Your Case: The Art of Persuading Judges,* is divided into four sections: Legal Argument, Legal Reasoning, Briefing, and Oral Argument. Each is written in a direct and forceful style—just the way they recommend that you write a brief.

In many sections, insets have been added, setting out often amusing quotes from others to drive home the authors' points. Thus, one inset (at page 193) recommends that at oral argument you should always admit that you do not know the answer to a question unless you like "giving the court the opportunity to bat you around like a cat playing with a ball of yarn."

Here are some examples of the authors' wise advice:

- Trial briefs can rarely be used as appellate briefs because trial judges focus on individual cases while appellate judges focus on what rule they should adopt and its implications for other cases (page 7);
- Senior partners should never argue appeals unless they are prepared to really learn the record (page 147); and
- Never divide your oral argument—well, almost never (you will have to read the book at pages 148–149 to find out what the exception is).

Sometimes their advice relates to small points, but even then something can be learned. For example, they advise that you not refer to a company by an acronym, e.g., AA for American Airlines. Better to call your client "American" or your opponent "the company."

The book offers insights not readily available in other places. The U.S. Supreme Court gives little or no explanation of why it grants or denies certiorari. Although some treatises discuss the issue, here we have a justice of the Supreme Court explaining how to argue for and against such review (at pages 75–80). Priceless.

Equally valuable are the authors' thoughts on how to respond to amicus briefs (pages 102–106); e.g., they advise that you can often undermine the increasingly popular amicus briefs written by groups of law professors by checking the signers' previous writings, because you frequently find that they have taken the opposite position at other times. The authors state rather cheekily that "by noting this, you'll help both the court and the academy."

Other insights into the judicial process are sprinkled throughout the book. "Many" judges and their clerks read briefs in reverse order, starting with the reply brief (pages 73–74). Others find the summary of the argument to be the most important part of the brief (page 80) or are more likely to read all of a true "brief" than they are one that still needs several more rounds of editing (page 81). Neither of these points are new, but they provide good reminders, even for the experienced lawyer.

Often the authors make their points with language that will stay with you. Besides urging lawyers to avoid Latin and legalisms such as "hereinbefore," they warn that "the key is to avoid words that would cause people to look at you funny if you used them at a party." Words to live by.

Sometimes the authors disagree: Garner likes contractions; Scalia does not; Garner hates substantive footnotes; Scalia believes that if they are good enough for the Solicitor General, then they have their place; and Garner is on a campaign to put citations in footnotes, while Scalia disapproves of this novel suggestion, in part because it *is* novel.

The authors agree, however, that oral argument is important, contrary to the belief of some lawyers, because it can be decisive if the judges have not made up their minds. As to how to succeed at it, they recommend that you know the precise theory of your case so that you can deal with hypothetical questions (page 155); you never argue an appeal without having had a moot court—it helps remind you that your side has weaknesses also and prepares you to meet them (page 159); you have your short opening statement down pat—it may be your only chance to coherently state your position (page 167); and you always reserve time for rebuttal if you are the appellant—it helps keep your opponent honest (page 167). And questions are your friends, because they tell you what the judges are thinking and give you a chance to answer their concern (page 18). Finally, never, ever, tell judges you will get to their questions later—*never* (page 192).

Interestingly, Justice Scalia also comments on his own judicial philosophy and recognizes that many other judges do not agree with it. Therefore, he is careful to recommend how lawyers should present their arguments to judges of different philosophies. After calling "legislative history . . . the last surviving legal fiction in American law" and saying that the idea that members of Congress know what is in committee reports is "absurd," the book advises (at pages 48–51) how to use legislative history to bolster your case.

This is a fun and worthwhile book to read. Any lawyer who writes briefs or appears in court will want to keep this little gem nearby for easy review and reference. CR

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Have you read a new book that you want to call to readers' attention? *California Courts Review* welcomes book reviews on subjects related to the judicial branch. Contact Managing Editor Philip Carrizosa at philip.carrizosa@jud.ca.gov or 415-865-8044.

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for individuals without a lawyer. The entire judicial branch also has actively encouraged pro bono contributions from lawyers in every type of practice and in every part of the state.

In addition, each year, at the State Bar convention, I am honored to present awards for pro bono service. And at that same convention, I regularly am invited to speak at the Diversity Awards, recognizing the efforts of individuals who have made a difference in improving diversity on the bench and in the legal community in general.

Personal efforts are only part of the picture, of course. The State Bar of California has taken a leadership role in creating strategies to reach out to students at every level of education, as well as to minority attorneys. Focusing on increasing diversity starting the day after the bar examination results are announced is far too late. The bar, through its Council on Access and Fairness and its Diversity Pipeline Task Force, has gathered data on the status on ethnic and racial groups represented on the bench, the bar, and in law school. It helps to provide mentoring, scholarships, and other tools to enhance the ability of minority students to enter the legal profession, to succeed in the law, and to apply for appointment to the bench.

Increasing diversity on the bench has been a key area of focus for all three branches of government. The legislative and executive branches have responded favorably to requests from the judicial branch to provide 150 badly needed new judgeships over a three-year period.

The creation of these new judicial positions has heightened legislative interest in the demographic makeup of the more than 1,700 judges in our state. Most judges are appointed by the Governor. Some are elected, if another candidate contests their position or if there is a vacancy at the time of the election. On the appellate bench, justices stand for retention elections after appointment and at the end of their terms. The Legislature made clear in creating the new judicial positions that it considered increasing diversity on the bench to be a vital policy goal.

To that end, the Administrative Office of the Courts now collects data on the gender and ethnicity of California's judges, by jurisdiction, and submits this information annually to the Legislature. The bar's demographics do not reflect the mix of the state's population, and our branch's focus on encouraging ethnic and racial minorities to aim toward a judicial position begins with education even as early as grade school, making students aware that the option of a legal career is open to them. I have mentioned some of the State Bar's efforts. In addition, many individual courts, as well as local and specialty bar associations, have hosted events for potential judicial applicants from the bar.

Pay and retirement benefits remain a bar to recruiting many individuals, and for highly qualified and often highly sought after minority candidates, the financial sacrifice simply may be too great. Although compensation for service on the bench is generous compared with the income of many individuals in our society, it still lags behind not only the amounts paid to first-year associates at major law firms, but also behind the salaries of senior attorneys in local city attorney, district attorney, public defender, and county counsel offices. In addition, the retirement system now in place for judges joining the bench is one of the worst public retirement systems in the state—if not the worst. I have been told repeatedly by public defenders and district attorneys alike that individuals in their offices have decided not to seek a position on the bench because of the limited retirement benefits and the resulting potential impact on their families.

I want to mention one additional area in which the Judicial Council is committed to expanding services to members of the minority community. As I noted at the outset, the people of our state speak a mix of languages from across the globe. In 1993, the Judicial Council assumed responsibility for certifying and registering court interpreters and for developing a comprehensive program to ensure a pool of qualified, competent interpreters. At present, interpreters can be certified in 13 languages. California courts currently are experiencing a significant shortage of both certified and registered court interpreters. We have launched an outreach and recruitment program to increase the number of qualified interpreters.

Why is it important to have qualified interpreters? Why is a friend or a family member not sufficient to perform this service? There are several important reasons. First, the law is a discipline in which language and exactitude are very important. Second, interpreting is a complex skill. For example, a proper interpreter does not "report" what one party has said to the other, but instead repeats verbatim what that party has said. And third, and most important, access to justice is meaningless if you cannot understand the proceedings in which you are involved.

Your assistance in encouraging more individuals to pursue a career as an interpreter in the courts would be very valuable to us. My own sister-in-law has found this to be an extremely worthwhile career. One of the Judicial Council's priorities is to provide a qualified interpreter for all those who need one, and you can help make that goal a reality.

Whether it is making forms available in several languages, hiring diverse workforces so that the clerk's office—often the first contact for members of the public—better reflects the community's makeup, offering programs in different languages to assist self-represented litigants, or meeting with local groups and individuals to find out more about their views of the courts and how the courts can better serve them, California's court system, the largest in the world, has taken unprecedented steps to examine itself, to consult with the public, and to make the changes necessary to improve fairness and accessibility for all.

There is still more to be done, of course. And as members of the media that perform a vital role in your communities, I hope that you will let us know what needs to be improved or changed.

BEYOND THE BENCH XIX

COMMUNICATING AND COLLABORATING

This statewide conference will cover issues relevant to all aspects of the juvenile court, such as:

- **Child abuse and neglect**
- **Dependency and delinquency law update**
- **Education**
- **Indian Child Welfare Act**
- **Immigration**
- **Juvenile justice**
- **Mental health**
- **Permanency planning**
- **Substance abuse**
- **Youth and the Internet**

December 11–12, 2008
San Francisco

For more information, visit
www.courtinfo.ca.gov/programs/cfcc

Questions?
E-mail cfcc@jud.ca.gov

ADMINISTRATIVE OFFICE OF THE COURTS
CENTER FOR FAMILIES, CHILDREN & THE COURTS

CALIFORNIA BLUE RIBBON COMMISSION ON CHILDREN IN FOSTER CARE

STATEWIDE SUMMIT

Change at the Local Level

Wednesday, December 10, 2008
San Francisco Marriott

This one-day summit will bring together commission members, presiding judges of the superior courts, presiding judges of the juvenile courts, county directors of human services, and other local stakeholders in the child welfare and foster-care systems.

Organized into county teams, summit participants will discuss key areas of local concern, focusing on how to bring about systemic change at the local level.

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For more information about the commission, please visit
www.courtinfo.ca.gov/blueribbon

Youth and Elders Art and Poetry Contest

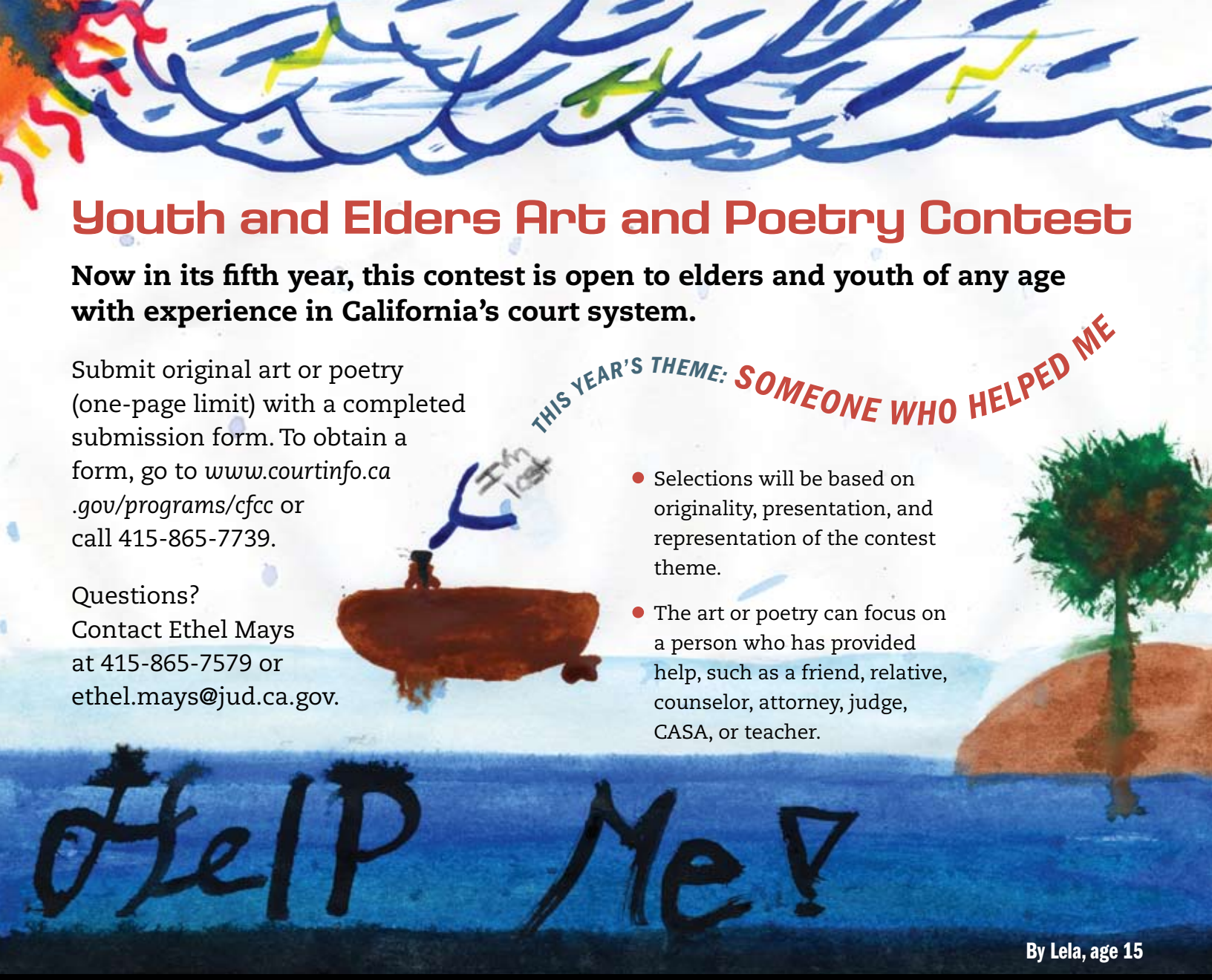
Now in its fifth year, this contest is open to elders and youth of any age with experience in California's court system.

Submit original art or poetry (one-page limit) with a completed submission form. To obtain a form, go to *www.courtinfo.ca.gov/programs/cfcc* or call 415-865-7739.

Questions?
Contact Ethel Mays
at 415-865-7579 or
ethel.mays@jud.ca.gov.

THIS YEAR'S THEME: **SOMEONE WHO HELPED ME**

- Selections will be based on originality, presentation, and representation of the contest theme.
- The art or poetry can focus on a person who has provided help, such as a friend, relative, counselor, attorney, judge, CASA, or teacher.



By Lela, age 15

Submit your entry now! Deadline is Friday, November 21

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