



Celebrating 40 Years of  
Strengthening Appellate Courts



## NCACC Fortieth Annual Meeting

Seattle, Washington

August 3 - August 9, 2013

[www.appellatecourtclerks.org](http://www.appellatecourtclerks.org)



# National Conference of Appellate Court Clerks

SECRETARIAT: NATIONAL CENTER FOR STATE COURTS, 300 NEWPORT AVE., WILLIAMSBURG, VA 23185

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**Polly Brock**  
Deputy Clerk  
Colorado Court of Appeals

## 40<sup>th</sup> ANNUAL MEETING AGENDA

Seattle, Washington  
August 4 & August 8, 2013

### Sunday, August 4, 1:00 pm — Business Meeting

#### **Call to Order**

#### **Roll Call of the States and Provinces — Sherry Williamson (TX)**

#### **Introduction of New Members, First Time Attendees, and Retired Members**

#### **Approval of the 2012 Annual Meeting Minutes** (Previously published in *The Docket*)

#### **President's Report — Rory Perry (WV)**

#### **Hosts' Report — Tom Hall (FL)** Marilyn May (AK) Vickie VanLith (FL)

#### **Committee Reports**

Awards — Mike Yerly (CA)  
By-Laws — Christine Crow (LA)  
Convention Assistance — Kevin Smith (IN)  
Contracts — Christine Crow (LA)  
Educational Fund — Irene Bizzoso (PA)  
Finance & Investment — Irene Bizzoso (PA)  
Membership — Donna Humpal (IA)  
Nominating — Ed Smith (MT)  
Past Presidents — Marilyn May (AK)  
Pictorial Directory — Kelly McNeely (LA)  
Program — Amy Reitz (OH)  
Publications — Les Steen (AR)  
Public Relations — Kevin Lane (CA)  
Scholarship — Ruth Willingham (AZ)  
Site Selection — Sandra Skinner (MO)  
Strategic Planning — John Olivier (LA)  
Technology — John Moyer (PA)

#### **Other Business**

### Thursday, August 8, 11:45 am — Business Meeting, Continued

#### **Committee Reports**

Nominating Committee — Voting  
Resolutions & Memorials — Eydie Gaiser (WV)

#### **Adjourn**

<b>1</b>	<b>Full Conference Schedule/ Education Schedule</b>	
<b>2</b>	<b>Legal Ethics Go To the Movies</b> Sunday, August 4, 2013 2:30 pm - 4:00 pm	Federal/ Superior
<b>3</b>	<b>Thomas Jefferson on The Constitution and The Courts</b> Monday, August 5, 2013 8:30 am - 10:30 am	Federal/ Superior
<b>4</b>	<b>Civility - Pay It Forward</b> Monday, August 5, 2013 10:45 am - 12:00 pm	Federal/ Superior
<b>5</b>	<b>What's Bugging You?</b> Monday, August 5, 2013 1:15 pm - 2:45 pm	Federal/ Superior
<b>6</b>	<b>Contemporary Threats to the Judicial Process: Keeping your Court and Judges Safe</b> Monday, August 5, 2013 3:00 pm - 4:30 pm	Federal/ Superior
<b>7</b>	<b>Clerk's Office Drama: Hiring and Discipline</b> Tuesday, August 6, 2013 8:30 am - 10:00 am	Federal/ Superior
<b>8</b>	<b>ADA Chemical Sensitivity</b> Tuesday, August 6, 2013 10:15 am - 11:45 am	Federal/ Superior
<b>9</b>	<b>iPads: Better than Paper?</b> Wednesday, August 7, 2013 8:30 am - 9:30 am	Federal/ Superior
<b>10</b>	<b>Technology and Ethics</b> Wednesday, August 7, 2013 1:45 pm - 3:00 pm	Federal/ Superior
<b>11</b>	<b>Managing Technology in Courts</b> Wednesday, August 7, 2013 3:00 pm - 4:00 pm	Federal/ Superior
<b>12</b>	<b>Human Trafficking in the United States: An Introduction</b> Thursday, August 8, 2013 8:30 am - 10:00 am	Federal/ Superior
<b>13</b>	<b>Civics Education: Reviving an Appreciation for the Three Branches of American Gov't</b> Thursday, August 8, 2013 10:15 am - 11:30 am	Federal/ Superior



Seattle

August 4 - August 9, 2013



## Saturday, August 3, 2013

8:00 a.m. – 12:00 p.m.	<b>Executive Committee Meeting</b>	Seneca Room
12:00 p.m. – 5:00 p.m.	<b>Registration</b>	Courtyard Foyer

## Sunday, August 4, 2013

9:30 a.m. – 12:00 p.m.	<b>Registration</b>	Courtyard Foyer
12:15 p.m. – 5:00 p.m.	<b>Education Fund Silent Auction</b>	Madison Ballroom
12:15 p.m. – 12:45 p.m.	<b>Family Orientation/First Time Members</b>	Federal/Superior Rooms
BREAK: 15 MINUTES		
1:00 p.m. – 2:15 p.m.	<b>Conference Welcome, Roll Call of the States &amp; Business Meeting</b>	Federal/Superior Rooms
BREAK: 15 MINUTES		
-90- 2:30 p.m. – 4:00 p.m.	<b>Legal Ethics Go To the Movies</b> - Families/Guests Welcome - Paul Bergman, author <i>Reel Justice: The Courtroom Goes to the Movies</i> and Professor of Law Emeritus <i>UCLA School of Law</i>	Federal/Superior Rooms
4:15 p.m. – 5:15 p.m.	<b>Reception</b> <i>(Hosted by Bloomberg BNA)</i>	Madison Ballroom
5:15 p.m. – 7:00 p.m.	<b>Education Fund Silent Auction &amp; Morgan Thomas Slideshow</b>	Madison Ballroom
9:00 p.m. – 12:00 a.m.	<b>Hospitality Room Opening Night</b>	Presidential Suite

## Monday, August 5, 2013

7:30 a.m. – 8:30 a.m.	<b>Continental Breakfast</b> (Members Only)	Courtyard Foyer
[ ] -120- 8:30 a.m. – 10:30 a.m.	<b>Thomas Jefferson on The Constitution and The Courts</b> - Families/Guests Welcome - Clay Jenkinson, <i>American Humanities Scholar, Author, Educator</i> <i>Director, Dakota Institute, Fort Mandan Foundation</i> <i>Creator and Jefferson Scholar at the Thomas Jefferson Hour</i>	Federal/Superior Rooms
BREAK: 15 MINUTES		
-75- 10:45 a.m. – 12:00 p.m.	<b>Civility – Pay It Forward</b> David S. Maring, Civil Trial Specialist <i>Maring Williams Law Office, P.C.</i>	Federal/Superior Rooms

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## Monday, August 5, 2013 (continued)



LUNCH ON YOUR OWN: 1 HOUR 15 MINUTES			
-90-	1:15 p.m. – 2:45 p.m.	<b>What's Bugging You?</b> (Members Only) Moderator: Polly Brock, Deputy Clerk of Court <i>Colorado Court of Appeals,</i> and Moderator: Christie Cameron Roeder, Clerk of Court <i>North Carolina Supreme Court</i>	Federal/Superior Rooms
BREAK: 15 MINUTES			
-90-	3:00 p.m. – 4:30 p.m.	<b>Contemporary Threats to the Judicial Process: Keeping your Court and Judges Safe</b> Raymond Fleck, Supervisory Deputy <i>United States Marshals Service, Western District of Washington</i>	Federal/Superior Rooms
	5:45 p.m. – 11:00 p.m.	<b>Edgewater Hotel</b> <i>(Hosted by LexisNexis)</i>	Meet in hotel lobby
	10:00 p.m. – 12:00 a.m.	<b>Hospitality Room</b>	Presidential Suite

## Tuesday, August 6, 2013

	7:30 a.m. – 8:30 a.m.	<b>Past Presidents' Breakfast</b>	North Room
	7:30 a.m. – 8:30 a.m.	<b>Continental Breakfast</b> (Members Only)	Courtyard Foyer
-90-	8:30 a.m. – 10:00 a.m.	<b>Clerk's Office Drama: Hiring and Discipline</b> Christie Cameron Roeder, Clerk of Court <i>North Carolina Supreme Court,</i> and Polly Brock, Deputy Clerk of Court <i>Colorado Court of Appeals</i>	Federal/Superior Rooms
BREAK: 15 MINUTES			
-90-	10:15 a.m. – 11:45 a.m.	<b>ADA Chemical Sensitivity</b> Linda McCulloh, Senior Attorney, ADA Resources Coordinator <i>California Judicial Branch</i>	Federal/Superior Rooms
	1:00 p.m. – 5:00 p.m.	<b>Golf Tournament</b>	
	9:00 p.m. – 12:00 a.m.	<b>Hospitality Room</b>	Presidential Suite

## Wednesday, August 7, 2013


	7:30 a.m. – 8:30 a.m.	<b>Continental Breakfast</b> (Members Only)	Courtyard Foyer
-90- 	8:30 a.m. – 9:30 a.m.	<b>iPads: Better than Paper</b> Jenny Kitchings, Clerk of Court <i>South Carolina Court of Appeals,</i> and John Reynolds, Dynamic Solutions Coordinator <i>South Carolina Judicial Department</i>	Federal/Superior Rooms
BREAK: 10 MINUTES			
	9:40 a.m. – 10:00 a.m.	<b>Vendor Introductions &amp; Opening of Vendor Show</b> Blake Hawthorne, Clerk <i>Supreme Court of Texas</i>	Federal/Superior Rooms

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# Wednesday, August 7, 2013 (continued)

	10:00 a.m. – 5:00 p.m.	<b>Vendor Show</b>	Courtyard Foyer
	10:00 a.m. – 10:30 a.m.	<b>Vendor Showcase I</b>	
	1	LT Court Tech, a Thompson Reuters business North Room	2 Brief-Lynx South Room
	10:30 a.m. – 11:00 a.m.	<b>Vendor Showcase II</b>	
	1	LT Court Tech, a Thompson Reuters business North Room	2 File & ServeXpress, Inc. South Room
		BREAK: 10 MINUTES	
	11:10 a.m. – 11:40 a.m.	<b>Vendor Showcase III</b>	
	1	West, a Thompson Reuters business North Room	2 File & ServeXpress, Inc. South Room
		BREAK: 10 MINUTES	
		11:50 a.m. – 12:50 p.m.	<b>Vendor Lunch</b>
		BREAK: 10 MINUTES	
	1:00 p.m. – 1:30 p.m.	<b>Vendor Showcase IV</b>	
	1	Tyler Technologies North Room	2 LexisNexis South Room
		BREAK: 15 MINUTES	
-75-	1:45 p.m. – 3:00 p.m.	<b>Technology and Ethics</b> Eric J. Magnuson, Former Chief Justice <i>Minnesota Supreme Court</i>	Federal/Superior Rooms
-60-	3:00 p.m. – 4:00 p.m.	<b>Managing Technology in Courts</b> Rich Johnson, Court Administrator/Clerk <i>Washington Court of Appeals, Division I</i>	Federal/Superior Rooms
		4:00 p.m. – 5:00 p.m.	<b>Vendor Happy Hour</b>
		5:30 p.m. – 11:00 p.m.	<b>Museum of Flight</b> (Hosted by Thomson Reuters/LT Court Tech)
		6:00 p.m. – 6:15 p.m.	<b>NCACC Group Photo</b>
		10:00 p.m. – 12:00 a.m.	<b>Hospitality Room</b>

# Thursday, August 8, 2013

	6:30 a.m. – 8:00 a.m.	<b>Fun Run/Walk</b>	Meet in hotel lobby
		7:30 a.m. – 8:30 a.m.	<b>Continental Breakfast</b> (Members Only)
-90-	8:30 a.m. – 10:00 a.m.	<b>Human Trafficking in the United States: An Introduction</b> Dr. Dana Raigrodski, Assistant Director Asian Law Center, University of Washington School of Law, Dr. Sutapa Basu, Executive Director and co-chair of the Human Trafficking Task Force <i>University of Washington Women's Center,</i> Anita Ramasastry, D. Wayne and Anne Gittinger Professor of Law <i>University of Washington Law School,</i> Velma Veloria, co-chair of the Human Trafficking Task Force <i>University of Washington Women's Center</i> and Mike Garske, Detective <i>King County Sheriff's Office</i>	Federal/Superior Rooms



BREAK: 15 MINUTES

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Thursday, August 8, 2013 *(continued)*

-75-	10:15 a.m. – 11:30 a.m.	<b>Civics Education: Reviving an Appreciation for the Three Branches of American Government</b> Hon. Andrea Hoch, Associate Justice <i>California Third District Court of Appeal,</i> and Frank McGuire, Court Administrator and Clerk <i>Supreme Court of California</i>	Federal/Superior Rooms
	BREAK: 15 MINUTES		
	11:45 a.m. – 12:45 p.m.	<b>Business Meeting (Session II)</b>	Federal/Superior Rooms
	12:45 p.m. – 1:00 p.m.	<b>Executive Committee Meeting</b>	Federal/Superior Rooms
	1:00 p.m. – 2:00 p.m.	<b>Conference Checkout</b> Please return nametags, binders, and supplies to be recycled for next year's meeting	
	6:00 p.m. – 7:00 p.m.	<b>Cocktails</b> <i>(Hosted by jAVS)</i>	Madison Ballroom
	7:00 p.m. – 9:00 p.m.	<b>Annual Banquet</b>	Madison Ballroom
	9:00 p.m. – 12:00 a.m.	<b>Hospitality Room Awards Night</b>	Presidential Suite

## Friday, August 9, 2013

	8:30 a.m. – 10:00 a.m.	<b>Critique Breakfast</b>	North Room
	10:00 a.m. – 11:00 a.m.	<b>Conference Checkout</b> Please return nametags, binders, and supplies to be recycled for next year's meeting	



Educational Session



Business Meeting (Members Only)



Vendor Show



Event/Activity



Filmed Session



Seattle

August 4 - August 9, 2013



## Saturday, August 3, 2013

	8:00 a.m. – 12:00 p.m.	<b>Executive Committee Meeting</b>	Seneca Room
	12:00 p.m. – 5:00 p.m.	<b>Registration</b>	Courtyard Foyer

## Sunday, August 4, 2013

	9:30 a.m. – 12:00 p.m.	<b>Registration</b>	Courtyard Foyer
	12:15 p.m. – 12:45 p.m.	<b>Family Orientation/First Time Members</b>	Federal/Superior Rooms
	1:00 p.m. – 2:15 p.m.	<b>Conference Welcome , Roll Call of the States &amp; Business Meeting</b>	Federal/Superior Rooms
	BREAK: 15 MINUTES		
-90-	2:30 p.m. – 4:00 p.m.	<b>Legal Ethics Go To the Movies</b> - <i>Families/Guests Welcome</i> - Paul Bergman, author <i>Reel Justice: The Courtroom Goes to the Movies</i> and Professor of Law Emeritus <i>UCLA School of Law</i>	Federal/Superior Rooms

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[ ] -120-	8:30 a.m. – 10:30 a.m.		Federal/Superior Rooms
	BREAK: 15 MINUTES		
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## Monday, August 5, 2013 (continued)

	BREAK: 15 MINUTES		
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-90-	3:00 p.m. – 4:30 p.m.	<b>Contemporary Threats to the Judicial Process: Keeping your Court and Judges Safe</b> Raymond Fleck, Supervisory Deputy <i>United States Marshals Service, Western District of Washington</i>	Federal/Superior Rooms
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	BREAK: 15 MINUTES		
-90-	10:15 a.m. – 11:45 a.m.	<b>ADA Chemical Sensitivity</b> Linda McCulloh, Senior Attorney, ADA Resources Coordinator <i>California Judicial Branch</i>	Federal/Superior Rooms

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	11:10 a.m. – 11:40 a.m.	<b>Vendor Showcase III</b>	
	1	West, a Thompson Reuters business North Room	2 File & ServeXpress South Room
	BREAK: 10 MINUTES		
	11:50 a.m. – 12:50 p.m.	<b>Vendor Lunch</b>	Municipal Room
	BREAK: 10 MINUTES		
	1:00 p.m. – 1:30 p.m.	<b>Vendor Showcase IV</b>	
	1	Tyler Technologies North Room	2 LexisNexis South Room
	BREAK: 15 MINUTES		

Educational Session

Business Meeting (Members Only)

Vendor Show




Filmed Session



Wednesday, August 7, 2013 (*continued*)

-75-	1:45 p.m. – 3:00 p.m.	<b>Technology and Ethics</b> Eric J. Magnuson, Former Chief Justice <i>Minnesota Supreme Court</i>	Federal/Superior Rooms
-60-	3:00 p.m. – 4:00 p.m.	<b>Managing Technology in Courts</b> Rich Johnson, Court Administrator/Clerk <i>Washington Court of Appeals, Division I</i>	Federal/Superior Rooms

## Thursday, August 8, 2013

	7:30 a.m. – 8:30 a.m.	<b>Continental Breakfast</b> (Members Only)	Courtyard Foyer
-90-	8:30 a.m. – 10:00 a.m.	<b>Human Trafficking in the United States: An Introduction</b> Dr. Dana Raigrodski, Assistant Director Asian Law Center, University of Washington School of Law, Dr. Sutapa Basu, Executive Director and co-chair of the Human Trafficking Task Force <i>University of Washington Women's Center,</i> Anita Ramasastry, D. Wayne and Anne Gittinger Professor of Law <i>University of Washington Law School,</i> Velma Veloria, co-chair of the Human Trafficking Task Force <i>University of Washington Women's Center</i> and Mike Garske, Detective <i>King County Sheriff's Office</i>	Federal/Superior Rooms
	BREAK: 15 MINUTES		
-75-	10:15 a.m. – 11:30 a.m.	<b>Civics Education: Reviving an Appreciation for the Three Branches of American Government</b> Hon. Andrea Hoch, Associate Justice <i>California Third District Court of Appeal,</i> and Frank McGuire, Court Administrator and Clerk <i>Supreme Court of California</i>	Federal/Superior Rooms
	BREAK: 15 MINUTES		
	11:45 a.m. – 12:45 p.m.	<b>Business Meeting</b> (Session II)	Federal/Superior Rooms
	12:45 p.m. – 1:00 p.m.	<b>Executive Committee Meeting</b>	Federal/Superior Rooms

## Friday, August 9, 2013

	8:30 a.m. – 10:00 a.m.	<b>Critique Breakfast</b>	North Room
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# Legal Ethics Go To the Movies

Sunday, August 4, 2013

2:30 p.m. – 4:00 p.m.

Federal/Superior Rooms

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**Speaker:** Paul Bergman, Author and Professor  
UCLA School of Law

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## Paul Bergman, Author and Professor

Paul Bergman is a Professor of Law Emeritus at the UCLA School of Law. Paul received his J.D. from UC Berkeley (Boalt Hall). Paul clerked on the 9<sup>th</sup> Circuit Court of Appeals and before entering law teaching was briefly an associate at Mitchell Silberberg & Knupp in Los Angeles. Paul has received a number of teaching awards, including a University Distinguished Teaching award. Books that Paul has authored or co-authored include of *Reel Justice: The Courtroom Goes to the Movies* (2d ed 2006); *Cracking the Case Method: An Insider's Guide to Law School Success* (2012); *Depositions in a Nutshell* (2010); *Trial Advocacy in a Nutshell* (5<sup>th</sup> ed 2013); *Lawyers as Counselors* (3d ed, 2012), *Evidence Law and Practice* (5<sup>th</sup> ed 2012), four Nolo Press books including *Represent Yourself in Court* (8<sup>th</sup> ed 2013) and *The Criminal Law Handbook* (12<sup>th</sup> ed 2011), and *Criminal Law- A Desk Reference* (2012). Paul has written more than 30 law review articles and book chapters. In recent popular culture-related articles, Paul has discussed the lawyering of Horace Rumpole, the crusty barrister featured in the classic British TV series *Rumpole of the Bailey*. Paul's most recent article is entitled "A Third Rapist? Television Portrayals of Rape Evidence Rules," in *Law and Justice on the Small Screen* (Robson & Silbey eds, 2012). Paul has given film clip-based presentations to groups of lawyers and judges all over the country, and has appeared on numerous radio and TV shows.

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## *Reel Justice: Legal Ethics Go to the Movies*

By Paul Bergman

UCLA Professor of Law Emeritus

*Reel Justice: The Courtroom Goes to the Movies* (Bergman and Asimow, 2d ed 2006) describes and analyzes over 200 films. The book also summarizes the actual events on which many films are based, and highlights the often-powerful specific images and dialogues through which courtroom films convey messages about the legal system to audiences.

Courtroom films are not merely a form of story-telling. For many people, these films (along with law-related TV shows) provide the bulk of their information about law, lawyers and the legal system. It behooves judges and lawyers to think about these important forms of popular legal culture in the same way that archaeologists use remnants of tools and utensils to gain insight into past cultures. Courtroom films *reflect* and often *reinforce* widely-held cultural attitudes about the legal system. Moreover, the images in popular legal culture may lead viewers to *revise* their beliefs about legal issues, and those beliefs may ultimately be reflected back into the formal legal system.

For example, many prosecutors currently talk about the "CSI Effect." Their claim is that jurors who regularly watch the CSI TV shows tend to expect prosecutors to routinely offer cutting-edge forensic evidence, and that such jurors tend to de-value cases that don't incorporate such evidence. And the decreasing popularity of the death penalty may be somewhat tied to films' nearly-universal anti-capital punishment story lines.

*Cultivation theory* helps to explain how courtroom films can influence popular attitudes about law and lawyers. The theory is based on psychological studies showing that people absorb popular culture's messages, and that when they have reason to call up those messages they do not "source discount." That is, *when people recall the substance of messages they tend not to recall their source*. So people may remember the content of a film's "lesson" about a rule of law or the behavior of judges and lawyers but not recall that the source was a film rather than an authoritative text.

Courtroom films often translate important debates into dramatic *mano a mano* exchanges between judges, lawyers and witnesses. For example, *Inherit the Wind* packages debates about evolution into a tussle between a defense lawyer trying to protect a teacher's right to teach evolution and a prosecutor's insistence on the supremacy of the Biblical account of creation. And *Compulsion* tries to persuade audiences to abandon capital punishment with an abbreviated version of Clarence Darrow's closing argument in the Leopold and Loeb case.

To achieve their dramatic or comedic goals, screenwriters often run roughshod over procedural realities and ethical constraints. Here in no particular order is a Top Ten list of wonderful courtroom films that present interesting issues of legal ethics, plus a bonus extra.

*The Letter* (1940; starring Bette Davis). A woman charged with murder asks a lawyer to get rid of an incriminating letter. One complication: the defendant is married to the lawyer's best friend. The film is based on the classic Somerset Maugham novel.

*My Cousin Vinny* (1992; starring Joe Pesci, Marisa Tomei and Fred Gwynne). A brash New York lawyer has to lie about his background to a small town judge in order to represent two defendants charged with murder. The wonderful film is the courtroom equivalent of a basketball game between the Harlem Globetrotters and the Washington Generals. The judge and the prosecutor are the Generals, trying to conduct a proper trial. Vinny is the Globetrotters; his antics constantly turn the trial into farce. But at the end of the day, just as the Globies knew how to play ball, Vinny knows how to try a case.

*And Justice for All* (1979; starring Al Pacino). Arthur Kirkland's emotionally-charged opening statement denouncing both his client and the criminal justice system may make him the Greatest Unethical Lawyer Hero of them all.

*The Verdict* (1982; starring Paul Newman and James Mason). In a medical malpractice case, the alcoholic plaintiff's lawyer trolls for clients at funerals, turns down a settlement offer without checking with his clients, has an ex parte meeting with the trial judge, breaks into a mailbox, and presents a closing argument that ignores the evidence. And he's the good guy.

*Let Him Have It* (1991; starring Christopher Eccleston). A trial judge does whatever it takes to make sure that a mentally impaired defendant goes to the gallows.

*Chicago* (2002; starring Richard Gere and Rene Zellweger). Lawyer Billy Flynn charms a jury with a phony self-defense story. The character of Billy Flynn is based on William Fallon, the early 20<sup>th</sup> century New York “mouthpiece for the mob.” Chicago’s non-musical ancestor is the wonderful comedy *Roxie Hart*, starring Ginger Rogers and Adolphe Menjou as an equally unethical Billy Flynn.

*Suspect* (1987; starring Cher and Dennis Quaid). A public defender teams with her crack investigator to solve a murder and exculpate her client. OK, so the investigator is one of the trial jurors.

*They Won’t Forget* (1937; starring Claude Rains). A Southern prosecutor sees a chance to ride a murder trial all the way to the Governorship by pinning a murder on a hated northerner. (The story is based on the 1915 trial of Leo Frank.)

*Class Action* (1991; starring Gene Hackman). Slimy big-firm defense lawyers destroy and conceal documents in a lawsuit alleging that a car’s defective design was explosive.

*The Rainmaker* (1997; starring Matt Damon, Danny DeVito and Jon Voight). A battle over insurance coverage turns into a context of unethical one-upsmanship.

*Counsellor At Law* (1932; starring John Barrymore). No courtroom scenes; the entire film takes place in a law office. The film deserves inclusion in this list because decades after it was written by Elmer Rice, the story remains one of the best depictions of an array of ethical challenges that lawyers often face.



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# Thomas Jefferson on The Constitution and The Courts

Monday, August 5, 2013

8:30 a.m. – 10:30 a.m.

Federal/Superior Rooms

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**Speaker:** Clay Jenkinson, Author, Cultural Commentator, First Person Interpreter  
*Dakota Sky Education*

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## **Clay Jenkinson, Author, Cultural Commentator, First Person Interpreter**

Clay Jenkinson is a humanities scholar, author and social commentator who has devoted most of his professional career to public humanities programs and is considered one of the most entertaining public speakers in the United States. His performances are always humorous, educational, thought provoking and enlightening, while maintaining a steady focus on ideas. Jenkinson is widely regarded as one of the most articulate public speakers in the country and he brings a humanities perspective --partly learned as a Rhodes Scholar at Oxford University-- to everything he does.

Clay is also one of the nation's leading interpreters of Thomas Jefferson. He has lectured about and portrayed Jefferson in forty-nine states over a period of fifteen years. Clay also portrays Meriwether Lewis, John Wesley Powell, J. Robert Oppenheimer and Theodore Roosevelt. He has performed before Supreme Court justices, presidents, eighteen state legislatures, and countless public, corporate and student audiences as well as appearing on *The Today Show*, *Politically Incorrect*, *The Colbert Report* and *CNN*.

He is the recipient of one of the first five Charles Frankel Prizes, the National Endowment for the Humanities' highest award (now called the National Humanities Medal), from President George H Bush. He was the first public humanities scholar to present a program at a White House sponsored event when he presented Thomas Jefferson for a gathering hosted by President and Mrs. Clinton. When award-winning humanities documentary producer Ken Burns turned his attention to Thomas Jefferson, he asked Clay to be the major humanities commentator on that film and others that followed.

Clay has dedicated the better part of his life to researching the historical characters that he portrays and to bringing back and defining the "living theatre" of Chautauqua, which also emphasizes education with audience participation to enhance the learning and entertainment experience. While Clay is currently traveling the country and bringing his unique style of living history to college campuses, and corporate venues across the United States, he has also mentored others in the Chautauqua style of performing through his past position as artistic director of the Nevada Humanities annual Great Basin Chautauqua Festival.

Clay is also the host of the nationally syndicated radio program *The Thomas Jefferson Hour* and the author of such books as *The Character of Meriwether Lewis- Explorer in the Wilderness*, *A Free and Hardy Life – Theodore Roosevelt's Sojourn in the American West*, and *Becoming Jefferson's People: Re-Inventing the American Republic in the Twenty-First Century*. He is the Director of the Dakota Institute through the Fort Mandan Foundation in Washburn, ND, as well as the president of Dakota Sky Education, Inc., the founder and Chief Consultant for the Theodore Roosevelt Center through Dickinson State University, and Bismarck State College Distinguished Scholar of the Humanities. He lives and writes in Bismarck, North Dakota.

### **Clay Jenkinson portrays:**

Thomas Jefferson

Theodore Roosevelt

John Wesley Powell

Meriwether Lewis

J. Robert Oppenheimer

John Steinbeck

[www.jeffersonhour.com](http://www.jeffersonhour.com)

[www.dakotaskyeduction.com](http://www.dakotaskyeduction.com)

[www.fortmandan.com](http://www.fortmandan.com)

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## Introduction for Clay Jenkinson/Thomas Jefferson

Today you will meet two men. In a few minutes you will have the chance to meet the Third President of the United States, Thomas Jefferson. But let me say a few words about the scholar behind Mr. Jefferson, Clay Jenkinson. Clay is the nation's leading first person interpreter of Thomas Jefferson.

He is a native of North Dakota and a man of many talents, much like the men he has chosen to portray. Writer, scholar, teacher, historian and **cultural commentator**, Clay has devoted most of his professional career to public humanities programs.

He is the author of *"Becoming Jefferson's People – Reinventing the American Republic in the Twenty-First Century"* among other works, and the host of the weekly NPR program *"The Thomas Jefferson Hour"*  
(pause)

Thomas Jefferson was one of the most remarkable men of American history. He was part scholar, writer, scientist, geographer, musician, philosopher, sociologist, and politician.

He wrote the Declaration of Independence, the Virginia Statute for Religious Liberty, the Plan for the Government of the Western Territories, and an important book, *Notes on the State of Virginia*.

Thomas Jefferson was a revolutionary and a nation builder.

Ladies and Gentlemen, it gives me great pleasure to introduce to you Thomas Jefferson, the Third President of the United States.

## A Tale of Two Virginians and the Constitution

For some reason Thomas Jefferson (1743-1826) couldn't abide John Marshall, and Marshall (1755-1835) didn't find much to admire in Jefferson either. They were fellow Virginians, both tall, cerebral, disheveled planter-citizens, different from the typical tobacco grandees who constituted the ruling class of the commonwealth. They were both exceptionally clear writers. Each gathered about him a group of ardent supporters, almost disciples. But they could never find a way to be friends, or even cordial colleagues, and each came to regard the other as a threat to the future of America.

Jefferson's principal objection to Marshall seems to have been that he was a Federalist and that that was somehow a betrayal of Virginia. Jefferson believed that all reasonable people were committed to limited and decentralized government, strict construction of the Constitution, and cultural and economic emancipation from England; and that if the benighted residents of Connecticut and Massachusetts did not yet grasp these self-evident truths, at least all Virginians did. Jefferson might have tolerated Marshall as a Pennsylvanian or New Yorker, but he could not stomach apostasy to true republicanism from a fellow Virginian.

Marshall's objection to Jefferson was that he was a states rightest, an advocate of a weak national government, a theoretician who was not sufficiently grounded in the pragmatics of the new nation; and that Jefferson unnecessarily personalized the debate for the soul of America. Marshall understood that the voice of Jefferson, the author of the Declaration of Independence and the nation's leading advocate of limited government, was likely to carry more weight than his arguments perhaps deserved. "His influence is so great that many, very many will adopt his opinions, however unsound they may be," Marshall wrote in a private letter.

Jefferson's closest friend James Madison, the fourth president, was able to get along with Marshall. Jefferson's friend and protégé James Monroe, the fifth president, not only got along with Marshall but became his close friend. Both Madison and Monroe understood that republican political ideals, however desirable, were going to have to yield to the needs of nation building: stability, the reliability of contract, and sensible clarification of the Constitutional balance between the nation and its constituent states.

Marshall stated his theory of the United States unequivocally in the famous *Cohens v. Virginia* (February 1821), "The constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire" (my emphasis). In the words of historian James F. Simon, the actual dispute in the *Cohens* case was trivial, but it "presented the Marshall court with another irresistible opportunity to expand the authority of the

federal government over the states.”

Jefferson saw it just the other way around. The states were primary, sovereign, and in most cases absolute, and the national government was their collective instrument of foreign policy and a few enumerated truly national tasks. Jefferson’s anxiety about judicial review was that it gave far too much power to a small number of unelected, life-tenured, effectively unimpeachable individuals. If the people are truly sovereign, and they express their will through representatives freely chosen by themselves at frequent intervals, why should appointees serving for life be able to trump that will? The farther government is removed from the direct will of the people, in Jefferson’s universe, the less republican it becomes.

Jefferson’s core concern was that Marshall was lending his great mind and resourcefulness to the consolidation of the nation as a single entity, that he was quietly transforming the United States from a voluntary confederation of sovereign states into a centralized nation-state. “The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric,” Jefferson wrote. “An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous. . . . A judiciary independent of a king or executive alone, is a good thing, but independent of the will of the nation is a solecism, at least in a republican government.” Jefferson employed the “sappers and miners” metaphor to reinforce his argument about judicial stealth. While the principle of public elections guarantees that questions of national importance get debated as candidates stand for the presidency or seats in Congress, the judiciary, on the contrary, because it is appointed not elected, because it speaks through legal jargon not everyday language, and because it is the least visible branch of government, has the power to transform the nation without the broad citizenry being aware of its actions. In twentieth-century metaphor, because the judiciary operates under the radar of public consciousness, it is especially dangerous, according to Jefferson.

Jefferson’s constitutional theory is usually regarded as unworkable, even contemptible, but it is not as zany as it seems. If it had prevailed, we might well look upon it as the most logical reading of the federalist provisions of the constitutional settlement of 1787. Jefferson believed America is a republic to the extent that the people are truly sovereign. Because the people cannot be expected to gather in the public square to debate every public issue, they elect representatives to serve as their agents. Those agents have, in Jefferson’s political theory, the same function that a proxy agent has at an auction—to do the patron’s bidding without deviation. Of the three branches of the national government, the legislative is supreme, because it is the branch closest to the will of the people. The House of Representatives is more republican than the Senate, because it is elected directly, and at short intervals. (Senators, in Jefferson’s era, were appointed by state legislatures.) The House of

Representatives is therefore the final authority on questions of war and taxation. The Senate exists to balance the House, but it must not become an impediment to the people's business. The executive is the second most republican branch of the national government, and the judiciary is a distant and problematic third. After all, justices of the federal courts are neither elected nor required to submit to votes of confidence from time to time. They are, therefore, once appointed by the president and confirmed by the Senate, effectively independent of the will of the people. Given that complete independence, it would be dangerous to grant them the power of final arbitration on the meaning of the Constitution or the constitutionality of Congressional legislation.

To put it in starkest Jeffersonian terms, why should nine unelected, unaccountable, and effectively unimpeachable beings determine the destiny of 300,000,000 sovereign Americans?

Jefferson's idea was that the Supreme Court would serve as an advisory body that reviewed legislation and made recommendations about constitutional questions, but that its pronouncements would have no binding authority. The Court would advise Congress to rethink constitutionally problematic legislation, and Congress—in the spirit of national harmony—would agree to review the targeted laws. Meanwhile, the executive branch would also have modest powers of judicial review, just as authoritative as those of the courts, and the state governments would be encouraged to be a part of the constitutional conversation too. In short, the nation would engage in a continual multi-party dialogue about the meaning of the Constitution. Such a dialogue would serve as a kind of ongoing civics lesson for the entire nation. In the rare event of an impasse, a new constitutional convention would be called to enable the people to decide the fundamental doctrine of the nation. No one branch of the national government would be supreme, and the national government would not be regarded as supreme in disputes with the sovereign states that had created it. In fact, just the opposite: where nation and states collided, states would be regarded as supreme, because they were closer to the people.

Needless to say, Marshall regarded this as completely worthless as a practical method of constructing the nation. In theory, he saw Jefferson's point about popular sovereignty and the accountability of public officers, but he knew that an ideologically pure system would be so inefficient, with so many centrifugal forces tugging it apart, that it would arrest America's development.

Jefferson and Marshall crossed swords four times in the course of their overlapping careers.

In *Marbury v. Madison* (February 24, 1803), Marshall developed the essential principle of the national judiciary. The Supreme Court would be the final arbiter of what is or is not constitutional. The judiciary would be the weakest and least active branch of government, but from time to time it would protect the Constitution from the



excesses of the legislative branch and encroachments by states like Virginia. The principle of judicial review was not written into the U.S. Constitution in 1787, but it had roots in English law and the nationalist Alexander Hamilton had outlined its usefulness in Federalist Paper 78. In Marbury, Marshall exhibited great ingenuity in avoiding a direct confrontation with the popular president and his administration. William Marbury had been appointed to be a justice of the peace in the District of Columbia in the last hours of the Adams administration. Because the commission had not been physically delivered to Marbury before Adams skulked away from Washington at dawn on March 4, 1801, Jefferson decided to discard the commission and deny Marbury his post.

The hapless Marbury filed a writ of mandamus (hand it over!) to compel the Jefferson administration to give him his commission. Chief Justice Marshall's challenge was to find a way to get the best of Jefferson and champion the rule of law, without either unnecessarily politicizing the Supreme Court or getting into a head-to-head confrontation with Jefferson, a contest he was sure to lose. Marshall's decision, considered one of the greatest masterpieces in the history of the U.S. Supreme Court, tiptoed through this mine field in an exceedingly clever and consequential way. Instead of demanding that William Marbury be given his commission (a demand that Jefferson would almost certainly have ignored), Marshall ruled that Marbury ought to have been given the commission, but that the court could provide no relief because the provision of the 1789 Judiciary Act that Marbury was invoking was unconstitutional. In other words, Marshall lectured the Jefferson administration and implied that it had exhibited bad faith and violated the rule of law, at the same time that the court asserted, for the first time, that it was the final arbiter of constitutional questions. Marshall's decision was so adroitly crafted that Jefferson did not realize that while scoring a puny victory in denying the non-entity Marbury his political appointment, he had let Marshall plant the seed of judicial review to blossom for the rest of American history, beginning with the Dred Scott decision in 1857. Marbury was just a man; judicial review was a doctrine that revolutionized American life.

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Jefferson believed that his election in 1800 constituted the "second American Revolution," a restoration of the principles of '76 after twelve years of an increasingly monarchical Federalist interregnum. Beginning in 1801, Jefferson was president and the Congress was comfortably Republican, but the judiciary had become the last refuge of Federalism, particularly after the discredited president John Adams packed the courts with known enemies of Jefferson in the last days of his administration. Jefferson regarded the Judiciary Act of 1801 (February 1801), which among other things increased the number of federal judgeships, as a deliberate attempt by the Federalists to derail the revolution that he embodied.

On March 8, 1802, the Jefferson-dominated Republican Congress dutifully repealed the Judiciary Act of 1801, reducing the size of the national judiciary and requiring justices of the Supreme Court to resume riding circuit around the geographically splayed nation. The Federalists cried foul, and moderate constitutional thinkers wondered whether life-tenured justices could legally be legislated out of their robes, but there was nothing the minority party could do about it, and the courts dared not engage in a direct confrontation with the immensely popular Jefferson. Through all of this, though high Federalists panicked and plotted revenge, the even-tempered Marshall maintained his equilibrium and counseled his colleagues to avoid over-dramatizing the Jeffersonian ascendancy.

Then, to reign in the judiciary still further, Congress began to impeach federal judges. John Pickering of New Hampshire was first, though everyone, including his family, acknowledged that he was mentally and alcoholically impaired. Pickering was impeached on March 2, 1803, and convicted by the Senate on March 12, 1804. Thus emboldened, Congress, with Jefferson pulling the strings behind the curtain, impeached Supreme Court justice Samuel Chase, who had unprofessionally politicized his court during the national crisis of the Quasi-War with France: browbeating attorneys, refusing to let the accused be adequately represented in his courtroom, instructing juries to return guilty verdicts, and preaching anti-Jeffersonianism from the bench. By any rational standard, Chase was an irresponsible bully who had misused his judicial office, but he had not committed any “high crimes and misdemeanors,” which is the Constitutional standard for impeachment of federal officers. Chase was acquitted of all charges on March 1, 1805.

The Chase impeachment trial was presided over by Aaron Burr, the vice president of the United States and the president of the Senate. Burr had killed Alexander Hamilton in a duel on July 11, 1804. Wits in Congress said there had been a historic reversal. It was common for judges to preside over the trial of a murderer; in this case the murderer presided over the trial of the judge. After the Chase debacle, even Jefferson privately admitted that political impeachment was a “a mere scarecrow.” The Jefferson administration’s purge of the judiciary desisted.

Historians have speculated that if Chase had been convicted, the Jefferson administration might well have targeted other federal judges, including Marshall himself, for removal from the bench. The failure of the Chase impeachment is regarded by some as having saved the independence of the judiciary and arguably the Constitution itself.

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In the Aaron Burr treason trial in 1807, Marshall construed the treason clause of the Constitution so narrowly that Burr’s acquittal was inevitable. The trial was a species of political theater, one of the great social spectacles of the early national period in American

history, and both sides behaved irresponsibly from a purely jurisprudential point of view. Jefferson prejudiced the case by declaring to Congress that Burr's guilt was "beyond question," and Marshall used the trial to embarrass Jefferson. In the course of the proceedings, Jefferson invoked the doctrine of executive privilege, to avoid handing over papers subpoenaed by Marshall. This, more than Burr's doubtful innocence, was the true legacy of the trial, over which Marshall, riding circuit per the Republicans' legislative insistence, presided.

\* \* \*

The New Orleans batture case (*Livingston v. Jefferson*, December 1811) was of small importance in the development of American law, but it involved Jefferson personally, and therefore it deepened his enmity towards Marshall. Edward Livingston, formerly a Republican member of the House of Representatives, now a New Orleans attorney, had developed a piece of riverfront property on the Mississippi River that had formed as a temporary sandbar adjacent to the banks of the river. Local business interests were outraged at his appropriation of what was considered public property, but a territorial court upheld his claim. The Jefferson administration refused to honor the claim, in spite of the territorial court's ruling, and it authorized Livingston's eviction by U.S. authorities, if necessary.

Livingston had tried on several occasions either to meet with President Jefferson or submit to arbitration. Jefferson had simply ignored him. In 1810 Livingston sued former president Jefferson for trespass and sought damages of \$100,000. This got Jefferson's attention. He devoted weeks to a painstaking research of the law of riverfront property, tracing riparian and shoreline rights all the way back to the Roman republic. The resulting legal memo was 99 pages long. Eventually (1812) Jefferson had it printed under the title *The Proceedings of the Government of the United States in Maintaining the Public Right to the Beach of the Mississippi*.

Jefferson's on-again friend John Adams declared the batture pamphlet a legal tour de force, "a very learned and ingenious pamphlet . . . that cannot fail to be of great Use to your Country." Jefferson's biographer Merrill Peterson has called the pamphlet "a dazzling piece of erudition." Adams rightly barked, "Good God! Is a President of the U.S. to be Subject to a private Action of every Individual! This will soon introduce the Axiom that a President can do no wrong; or another equally curious that a President can do no right."

In the end, the Marshall ruled that a case involving a property dispute in New Orleans had no standing in the federal courts. In other words, Jefferson won on a technicality. His already desperate private finances were spared a fatal setback. An important precedent was established of presidential immunity from personal lawsuits relating to their official duties while in office. Marshall confessed that Livingston had a "clear right without a remedy." The Chief Justice's

sympathies were solidly with Livingston, but he could find no legal maneuver to recompense Livingston without betraying a British-American common law tradition that had an important legal foundation.

\* \* \*

In the early twenty-first century, we live in John Marshall's America, not Thomas Jefferson's. In spite of their angst over specific court decisions and "activist judges," the American people accept, even take for granted the concept of judicial review, even though it is nowhere articulated in the U.S. Constitution. Most Americans understand that the national government must be supreme in cases where state and national authority collide. Most Americans prize the sanctity of contract and prefer uniformity of commercial protocols to a haphazard system in which each state sets the rules of commercial engagement within its boundaries. Most Americans want the United States to possess a single national identity, at least in questions of international relations and America's role in the world. Most Americans accept—not without grumbling—that the courts are better final arbiters of the meaning of the Constitution than the legislative or executive branches.

To the extent that it is still known at all, Jefferson's constitutional theory is regarded by his advocates as a lovely but unworkable system, a faint echo of a republic that might have been, and by his detractors as just the sort of knuckle-headed doctrine that one would expect from an airy dreamer like the Sage of Monticello. Jefferson and Marshall personalized their ideological disagreements in a way that is still hard to understand 200 years later, but it has to be admitted that Marshall was the more civil, gentlemanly, responsible (not to mention influential) of the two; and that Jefferson's antagonism (bordering on hatred) towards John Marshall places the author of the Declaration of Independence in a rather un-admirable light.

Clay S. Jenkinson

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# **The Paradox of Thomas Jefferson**

He was the foremost advocate of liberty and equality that America has produced.

He owned more than 200 of his fellow human beings: Negro slaves.

He formulated a utopian vision of a reclusive agrarian paradise, a pastoral republic of mild-mannered, fiercely independent, farmer-citizens who labored in the earth by day and at night read Homer in the original Greek. Yet he bought from Napoleon a territory so vast that American empire became an inevitability. His Virgilian farmers, meanwhile, were slashing and burning every acre of the West they could get their hands on, and killing or expelling the indigenous peoples as fast as possible.

He admired American Indians, studied their languages, excavated their burial mounds, celebrated their anarchic political arrangements, and famously commiserated their plight, but as a statesman he lost no opportunity to dispossess Indian tribes of their lands.

He advocated strict interpretation of the U.S. Constitution as "our peculiar security" against despotism, yet he made an uneasy peace with broad construction to make the Louisiana Purchase and to incorporate the new territory into the existing union.

He feared executive authority and accused Alexander Hamilton and others of being "monocrats" and "Anglomen," yet as president he enforced his pet economic embargo and went after the unscrupulous Aaron Burr with a ruthlessness that bordered at times on mania. In doing so he accumulated more executive power than any American president until Abraham Lincoln.

He was a harmony-obsessive who intoned the language of pacifism, yet he repeatedly threatened war against Spain, and one of the first acts of his presidency was to



send an expeditionary force to bloody the nose of the Islamic pirates of the North African states.

He was America's greatest champion of freedom of expression, yet as president he encouraged a "few wholesome prosecutions" of the partisan Federalist press at the state level. He said, "truth is great and will prevail if left to itself," yet as the founder of the University of Virginia he insisted upon a bowdlerized edition of David Hume's Tory history of Great Britain, lest the minds of young Virginians be prejudiced against republicanism. Late in life he appears to have doctored his correspondence to convince posterity that he had been less naive about the French Revolution than he actually was in the 1790s.

He was a profound, almost a knee-jerk Anglophobe, yet he insisted that the three greatest thinkers who ever lived were Francis Bacon, Isaac Newton, and John Locke. His beloved mentor William Small was British, and scholars as distinct as Garry Wills and Gilbert Chinard have shown that Jefferson was much more indebted to the British than the French Enlightenment.

He found political disputes distasteful and he longed unendingly for the harmony and quiet of family and fields at Monticello as a counterweight to the "the disagreeable world of politics," yet he spent most of his adult life in the public arena, and he sometimes exhibited a capacity for political aggression and duplicity that can only be called Machiavellian.

\* \* \*

The central paradox of Jefferson's life can be stated in one sentence. He knew slavery was a violation of the natural rights of humankind, and he was cautiously willing to eliminate the institution in the United States, but he could not stomach the idea that free blacks would be permitted to share the American dream with their former oppressors. Once freed, African-Americans must be deported or sequestered. Unless legal separation of the races were enshrined in American law, he preferred to keep blacks enslaved. He could imagine general emancipation, but he could not with equanimity envision a biracial republic.

## **The Quality of Thomas Jefferson's Soul**

What is so mysterious about Thomas Jefferson? Even his best twentieth century biographer has called Jefferson "impenetrable." Virtually everyone who writes about Jefferson pays lip service to his elusiveness as a biographical subject. The fact is, however, that there is nothing particularly hard to understand in Jefferson's character and achievement.

He was an enormously organized man, who refused to waste time. All of his life he exhibited an indefatigable industry in his work and in his many projects. His mind was more diffuse than it was penetrating. Both James Madison and Alexander Hamilton had better minds than his. He was an intensively private man, who exhibited a predilection for indirection and

even secrecy. He was extraordinarily curious. He was a prodigious reader and collector of books. He had a slightly errant sexuality. He was relatively humorless. He was a collector of proteges. He was a wilful optimist, almost a pollyanna. He was a rationalist radical who reasoned himself into startlingly free social and political principles. He was apprehensive of strong government and particularly of men of ambition, less so when he was president than at other times. He prided himself on being a step or two ahead of the people. In spite of his commitment to reason, he had a poetic romance with "the people," "the rights of man," democracy," "American Indians," and particularly the agrarian way of life. He was, in spite of his better principles, a racist, and an apartheidist. He seems genuinely to have detested slavery, but more for what it did to the character and reputation of white southerners than for its effects on black people. He had strong opinions about law, constitutional interpretation, and individual, state, and nation rights, which he expressed with such clarity and force that it makes his own pragmatism and flexibility, particularly when in power, seem like hypocrisy.

He shrank from conflict and suffered migraine headaches and other physical indispositions in times of stress and controversy. He had a great need for unqualified friendship and love, particularly in the circle of his family. He lived beyond his means all of his life. On the question of revolution he was a bit of a true believer. He defended rebellion and even bloody revolution when it was politically unpopular to do so. He had a propensity to describe terrorism by way of gardening metaphors. He loved building projects. There was a streak of righteousness in him. His behavior was, on the whole, exemplary for its virtue, but he was capable at times of inconsistency, duplicity, vindictiveness, and even demagoguery and hypocrisy. He may or may not have fathered slave children. On religious questions he was bold and skeptical, but he kept his religious views private and he exhibited great tolerance for what he called the errors of others. He was in theory anticlerical. As he grew older his religious sensibilities moved slightly towards protestant orthodoxy. He was a totally non-violent man, except apparently toward horses, and in theory he was a pacifist.

The key to understanding Jefferson is to realize that his expression--of ideals, principles, political opinions, and his vision of American republicanism--is always bolder than the thoroughgoing pragmatism that characterized his actions. He was a gadgeteer, and an enthusiast for technological innovations even though they would, in aggregate, threaten his equalitarian pastoral republic. He had an enormous desire to please others, which made him extravagantly generous, and led him sometimes to shape his epistolary prose to make it more agreeable to his reader. At one time or another over a long life he said or did something that violated virtually every one of his previously articulated ideals. In his later years, Jefferson suffered from a slight hardening of his political arteries. There is a certain evasiveness in Jefferson's character. In spite of genuine love of Indian culture, Jefferson was an ardent expansionist and he never once let Indian sovereignty get in the way of his thirst for an Anglo-American "empire for liberty." Jefferson was an intellectual amateur, sometimes almost a dilettante, never a pure scientist or a systematic political philosopher. He was able to convince some others, and apparently even himself, that his motives were more pure than they sometimes really were. He seems actually to have envisioned his own happiness more in science, literature, gardening, and the domestic world of Monticello, than in the "splendid misery" of public life.

It is true, as Henry Adams famously put it, that Jefferson's character "could be painted only touch by touch, with a fine pencil, and the perfection of the likeness depended upon the shifting and uncertain flicker of its semi-transparent shadows." But this is not so much a statement of the complexity of Jefferson as of the fastidiousness, almost the effeminacy, of his interests. His perfectionism, his mental sensuousness, and the riot of his projects make Jefferson a challenge to any scholar. If genius is "an infinite capacity for taking pains," Jefferson was indeed a genius. But if the definition of genius requires a mental profundity, a touch of the divine, a kind of poetic inspiration, Jefferson must be judged as a prosaic man.

Is Jefferson in the final analysis unknowable? Not at all. There are perplexities that we may never resolve, thanks to his fastidious self-editing, but there is nothing essentially intractable in Jefferson's character. Compared to George Washington and Alexander Hamilton he may, of course, seem impenetrable. But compared to Lincoln, Emily Dickinson, Melville, John Donne, Samuel Johnson, St. Paul, Elizabeth I, or even Theodore Roosevelt, Jefferson appears to be a man of relatively straightforward character. He was, in William James' terms, a once-born rather than a twice-born man.

The trope that Jefferson was somehow impenetrable is a misreading of Henry Adams, whose influence on subsequent Jefferson studies has been incalculable, and not altogether healthy. It is by now mostly the byproduct of Jefferson's reputation as America's one Renaissance man, the shadow of the daunting mountain of document he has left us to examine. In many ways Jefferson was more a continentalist than a son of Britain in his culture. This is a perspective most of his biographers have not brought to their work. He was a serious classicist. Most of his students have not shared that discipline. He was more bookish than any of his biographers with the possible exception of Henry Adams. And he was truly an agrarian in a way that has not been realized by most scholars, creatures of the library.

My view is that it is mostly what might crudely be called his effeminacy that has made Jefferson elusive to scholars. Jefferson brought to interior decoration, to cookery, to penmanship, to book collecting, to parenting, to gardening, to his gadgets and his inventions, to his friendships, to the study of languages, to his anthropology and his archaeology, and to his rage for order a quality of attentiveness that makes him slightly sybaritic. Biographers, particularly those who are attracted to the smell of gunpowder and the felling of forests, have been more comfortable with more manly men like Washington, Hamilton, Patrick Henry, and John Adams. Jefferson, and to a certain extent his mentor George Wythe, are not quite sufficiently virile to meet the heroic paradigm. To my mind, John Adams is vastly more difficult to understand than Jefferson, but his complexities do not lurk around gender boundaries, and therefore nobody has called him impenetrable. If Jefferson had spent less time designing triple-sash windows and writing instruments, and had buckled armor to his back during the Revolution, I doubt very much if he would today be locked in the cliché of mysteriousness.

Clay Jenkinson

November 1995

## Thomas Jefferson: The Briefest Life

Thomas Jefferson was born on April 13, 1743. He died on July 4, 1826, at the age of 83, on the fiftieth anniversary of the adoption of his Declaration of Independence. His life was composed of three elements: **He was a Virginia agriculturist.** His soul was always with his family, his farms, his garden, and his beloved Monticello, though his time was usually spent elsewhere. **He was an amateur scientist.** He considered himself a member of an international

republic of letters, which consisted of scientists, inventors, reformers, philosophes, encyclopediasts, and men of letters. Jefferson took enormous pride in this part of his life, though he was modest about his literary achievements. **He was a politician.** Jefferson was one of America's greatest statesmen and legislators. This was the least agreeable part of his existence, but surely the most important. He advocated responsive, frugal government, states rights, and representative democracy. He believed average men were capable of governing themselves by majority rule.

Jefferson held almost every major office available to a statesman in the early republic. He was a member of the Virginia House of Burgesses (later the House of Delegates). He was a member of the Second Continental Congress. He was the wartime Governor of Virginia. He was a Virginia congressman. He was the American minister to France. He was the first American Secretary of State. He was the Vice President of the United States. Twice he was President of the United States. All this was "splendid misery," though Jefferson was a superb administrator with a masterful capacity for hard work and attention to detail.

Jefferson's income came chiefly from inheritance of land and slaves. He was a man of wealth and social privilege, though he was always cash poor and, for the second half of his life, poised on the brink of insolvency. He died more than \$100,000 in debt. Although he attempted to make Monticello a profit-making plantation, Jefferson was gone too much, and too much attracted to ingenious but uneconomical notions to pry much gain from the soils of Albemarle County or from the backs of his 200 slaves.

Jefferson was an epicurean, who loved wine, books, horses, trees, cuisine, gadgets, conversation, correspondence, scientific instruments, and music. He made important amateur contributions in the arena of his enthusiasms, chiefly in architecture, paleontology, and agriculture.

Jefferson was married just once, from 1772 to 1782, to Martha Wayles Skelton, a frail, intelligent, handsome woman. She bore six children in the ten years of her marriage to Jefferson. Four of the six died in infancy. Of the two girls who lived to adulthood, only Martha, the eldest, survived Jefferson. Jefferson's wife died on September 6, 1782 from complications of her last pregnancy. She was 33. Jefferson was 39. He never remarried, and as far as we know, was celibate for the last four decades of his life.

Jefferson was a temperamentally moderate and optimistic man. He had one of the sunniest personalities in human history. He was indefatigably active. He cultivated friendship, community, and--above all--harmony. Nevertheless, he was capable of startling, even incendiary radicalism when he believed human rights were at stake. Whatever spiritual life he had was projected entirely onto nature, love, and friendship. Jefferson was happiest as a dreamer and a gadgeteer, least happy in the throes of difficult political decisions.

He wrote 22,000 letters, a range of important state papers, and one book, Notes on the State of Virginia. He collected three libraries, the second of which became the germ of the great national Library of Congress. He spent about a third of every day reading or writing. His manners were graceful but unpretentious. In dress he inclined towards dishevelry. He was 6 feet 2 inches tall, red haired, freckled, hazel eyed, and slightly gangly. His conversation was desultory and informed rather than brilliant or incisive.

His closest friend was James Madison. His greatest enemy was Alexander Hamilton. He had hundreds of friends and only a handful of enemies. He collected proteges. A political adversary said, no man can know Mr. Jefferson personally and be his enemy.

He wanted to be remembered chiefly for three things: for writing the Declaration of Independence and the Virginia Statute for Religious Liberty, and for creating the University of Virginia at Charlottesville.

### Liberty v. Security

**A Jeffersonian believes that liberty is more important than security and freedom more important than order.** A Jeffersonian world is somewhat disorderly, because the people are tearing up their constitution from time to time, and surging into the public square with their pitchforks every time government exhibits the habits of tyranny. In a letter to his closest confidante James Madison, Jefferson cited the Latin maxim, Malo periculosam libertatem quam quietem servitutem [I prefer a dangerous liberty to quiet servitude]. Jefferson alone of the Founding Fathers was an apologist for rebellion, revolution, even the French Reign of Terror. He was fond of organic metaphors that likened violent revolution to the routine events of the garden. Most famously, he wrote, "The tree of liberty must be refreshed, from time to time, with the blood of patriots and tyrants. It is its natural manure." It would be impossible to sound more serene about the possibility of mayhem in the streets.

Jefferson cheerfully accepted that liberty is a messy business, that a volatile public, a certain amount of chaos, and even some tyranny of the majority are important (if somewhat inconvenient) signs of the health of a

republic. When most of the national establishment was alarmed and offended by Shay's rebellion in western Massachusetts, Jefferson blithely asked his friend William Stephens Smith, "What signify a few lives lost in a century or two?" To his closest friend Madison, he wrote, "God forbid we should ever be 20 years without such a rebellion... What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?" And to his protégé William Short he declared, "The liberty of the whole earth was depending on the issue of the contest [the French Revolution], and was ever such a prize won with so little innocent blood? . . . rather than it should have failed, I would have seen half the earth desolated. Were there but an Adam and an Eve left in every country, and left free, it would be better than it now is."

Jefferson believed that government must be kept on the defensive at all times, that the people not only have a natural right to withdraw consent from their social compact, but that they should shake up government from time to time just to remind their governors that they serve at the pleasure of the people and not otherwise. In other words, for the Jeffersonians, liberty is the quintessence of life, and government is a necessary evil.

Jeffersonians should never be more afraid than when government offers to provide increased security by way of increased authority. He surely approved of the adage attributed to Benjamin Franklin: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Jefferson's attitude would be that national survival and national security are the highest good, of course, but that they must be preserved with the profoundest respect for the Bill of Rights, constitutional legitimacy, and the natural law principle that government should intrude upon our liberties as minimally and as humbly as possible. The Jeffersonian's attitude toward the security state is "prove it." "Prove to me that my well being depends upon my yielding more of my liberty to the state. Prove to me that there is no less onerous way to survive." Jefferson was aware that government almost never relinquishes powers it has once gained. He was willing to live in a more volatile, more dangerous, more chaotic world if he could remain free rather than to seek security and order at the cost of his independence and the panoply of his freedoms. The Jeffersonian must insist that any security measure be candidly explained to the American people, that it be robustly debated, that it be subject to the most unrelenting court review, that dissent be cherished, that any such measure be temporary, and that the government that undertakes it exhibit profound reluctance rather than zeal and satisfaction in the face of such increased authority.

The twenty-first century opens with unprecedented anxiety about the future of the Enlightenment's legacy of freedom. The cheapening and democratization of violence and terror have led millions of otherwise rational people to want their governments to do *whatever it will take* to provide for their basic security and standard of living. Such people would prefer not to relinquish any of their freedoms—just the opposite—but given the choice between maintenance of their access to security and the fruits of life, on the one hand, and the enjoyment of the full complement of their liberties in a rather more dangerous world, on the other, they quietly vote for their material rather than their spiritual well-being.

The plain truth is that it is not at all clear that the principles of the Enlightenment can survive in a world where the technologies of terror are more widely and inexpensively accessible than at any previous time in human history, and when one act of spasmodic violence can shatter the lives not merely of a handful of citizens, but of hundreds of thousands or millions of people. The twenty-first century will call the bluff of the principles of the Enlightenment in ways that would astonish Voltaire, Condorcet, Rousseau, or Thomas Jefferson. All those universalist statements about human aspiration voiced by the great minds of the eighteenth century may turn out to have been contingent on a certain technological, demographic, and geographic moment in human history. That would be a tragedy for western civilization, but it cannot be ruled out.

Even so, the Jeffersonians will not succumb to pessimism and they will resist loudly—but with unclouded eyes—the siren song of security, order, and the status quo.

## **A Handful of Books To Read on Jefferson and His world**

Merrill Peterson. *Thomas Jefferson and the New Nation*.

Dumas Malone. *Thomas Jefferson and His Times*. 6 vols.

Joseph Ellis: *American Sphinx: The Character of Thomas Jefferson*.

Joseph Ellis: *Passionate Sage: The Character and Legacy of John Adams*.  
Annette Gordon-Reed. *Thomas Jefferson and Sally Hemings: An American Controversy*.  
Alan Pell Crawford. *Twilight at Monticello: The Final Years of Thomas Jefferson*.  
David N. Mayer. *The Constitutional Thought of Thomas Jefferson*.  
James Simon. *What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States*.  
Jack McLaughlin. *Jefferson and Monticello: Biography of a Builder*.  
Donald Jackson. *Jefferson and the Stony Mountains: Exploring the West from Monticello*.  
Alf Mapp, jr. *Thomas Jefferson: A Strange Case of Mistaken Identity*.  
Damon Lee Fowler. *Dining at Monticello: In Good Taste and Abundance*.  
David McCullough. *John Adams*.  
Robert Miller. *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*.

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# Clay S. Jenkinson -Humanities Scholar –

## Thoughts on Thomas Jefferson

### What was Jefferson's concept of Leadership?

Jefferson was a reluctant leader. He was naturally shy and private, and he was committed to a society in which equality mattered more than the usual social hierarchies...

Without too much oversimplification, it is possible to discern six Jeffersonian principles of leadership.

1. **Work by indirection.** Jefferson felt no need to call attention to himself. In fact, he much preferred to plant the seeds of his ideas in the minds of others, encourage them from the sidelines, and let them take credit for the results....
2. **Master the arts of generous communication.** Jefferson was one of the great letter writers of all time. He had the ability to tailor his letters to the sensibilities of their recipients without betraying the integrity of his views. Jefferson's motto was "never use two words where one will serve." It is not clear whether he mastered this principle by practice and discipline, or that he was simply born lucid.
3. **Never attempt more than the people can bear.** He sought always to be a step or two ahead of the people, but he knew too that leadership consists in leading the people to happiness, not dictating terms to them....
4. **Take the long view.** Jefferson always believed that time was on the side of enlightened ideas. When one of his cherished reforms failed to win approval in Virginia or the United States, he seldom found fault with the people. He was more likely to turn his indefatigable energy in another direction, and wait for a ripper moment to renew his efforts...
5. **Do your homework.** Between the ages of ten and 30, Jefferson spent between ten and twelve hours per day reading. By the time the moment came, in the early summer of 1776, he had read and digested virtually the entire corpus of the Enlightenment.... Hard work and discipline compensate for a lack of natural gifts. Happiness is a very busy enterprise for Thomas Jefferson.
6. **Pierce through the local to the universal.** Jefferson knew that the immediate crisis always dissipates, but the perennial concerns of civilization live on. He tried on every occasion to avoid getting bogged down on the particular, and to keep a steady focus on natural law principles that govern a variety of circumstances, not just the issues immediately before him. Thus the Declaration of Independence not only indicts George III but declares the right of any people to govern themselves without outside interference. Thus the Virginia Statute for Religious Liberty not only disestablishes the Anglican Church in Virginia, but articulates the principle of absolute freedom of conscience, irrespective of time and place. Jefferson must have sensed that the particular issues of the American Revolution would come and go, and that he would only be remembered as one of the great Legislators of history if he formulated principles that had timeless validity.

### Jefferson's Decalogue of Canons for observation in practical life

1. Never put off till to-morrow what you can do to-day.
2. Never trouble another for what you can do yourself.
3. Never spend your money before you have it.
4. Never buy what you do not want, because it is cheap; it will be dear to you.
5. Pride costs us more than hunger, thirst, and cold.
6. We never repent of having eaten too little.
7. Nothing is troublesome that we do willingly.
8. How much pain have cost us the evils which have never happened.
9. Take things always by their smooth handle.
10. When angry, count ten, before you speak; if very angry, a hundred.

—Thomas Jefferson to Thomas Jefferson Smith, February 21, 1825

### Recommended Reading List for Jefferson (Order of Preference) Secondary Books

Merrill Peterson. *Thomas Jefferson and the New Nation: A Biography*. 1970.

Albert Jay Nock. *Mr. Jefferson*. 1926.

Joseph J. Ellis. *American Sphinx: The Character of Thomas Jefferson*. 1997.

### About Clay Jenkinson

Clay Jenkinson is a humanities scholar, author and social commentator who has devoted most of his professional career to public humanities programs and is considered one of the most entertaining public speakers in the United States. His performances are always humorous, educational, thought provoking and enlightening, while maintaining a steady focus on ideas

Clay is also one of the nation's leading interpreters of Thomas Jefferson. He has lectured about and portrayed Jefferson in forty-nine states over a period of fifteen years. Clay also portrays Meriwether Lewis, John Wesley Powell, J. Robert Oppenheimer and Theodore Roosevelt.

As the host of the nationally syndicated radio program *The Thomas Jefferson Hour* and the author of such books as, *Becoming Jefferson's People: Re-Inventing the American Republic in the Twenty-First Century* and *Theodore Roosevelt In The Dakota Badlands*, Clay is nationally known for his work. He is also the Director of *The Dakota Institute* through the Lewis & Clark Fort Mandan Foundation in Washburn, ND; president of Dakota Sky Education, Inc; the founder and Chief Consultant for the Theodore Roosevelt Center at Dickinson State University, and Bismarck State College Distinguished Scholar of the Humanities. He lives and writes in Bismarck, North Dakota.

Select Books and DVD's- available on [www.fortmandan.com](http://www.fortmandan.com)

*Character of Meriwether Lewis- Explorer in the Wilderness-* 2011

*Theodore Roosevelt- A Free and Hardy Life-* 2011

*Theodore Roosevelt in The Dakota Badlands-* 2006

*Becoming Jefferson's People- re-inventing the American Republic in the Twenty-first Century-* 2004

*Message on the Wind-*2002

*Thomas Jefferson The Private Man—The Public Figure* 1+ hour video/DVD

*Hamilton with a Twist of Jefferson* 1+ hour video/DVD

*The Lewis & Clark Expedition* 1+ hour video/DVD

*That Damned Cowboy- Theodore Roosevelt-* DVD

**[www.jeffersonhour.com](http://www.jeffersonhour.com)      1-888-828-2853      [www.dakotaskyeducation.com](http://www.dakotaskyeducation.com)**

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# Civility- Pay It Forward

Monday, August 5, 2013

10:45 a.m. – 12:00 p.m.

Federal/Superior Rooms

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**Speaker:** David S. Maring, Civil Trial Specialist  
*Maring Williams Law Office, P.C.*

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## **David S. Maring, Civil Trial Specialist**

David S. Maring attended the University of North Dakota School of Law and graduated, with distinction, in 1974. While in Law School, Dave served as the Note Editor for the North Dakota Law Review. After law school, he clerked for United States District Judge Donald D. Alsop in St. Paul, Minnesota.

Dave has been certified as a Civil Trial Specialist by the National Board of Trial Advocacy (less than 25 certified in North Dakota) and by the Minnesota State Bar Association since 1988. He has also been selected as a Leading Litigation Attorney by Chambers USA, Benchmark, Best Lawyers, and other organizations that rank litigation attorneys.

### *Chambers USA says:*

David Maring is a 'litigation machine,' commended by competitors for his formidable presence in a courtroom. His understanding of personal injury litigation, both on the plaintiff and defendant side, is respected.

### *Benchmark reports:*

Sources unanimously agreed that, if in trouble, they would turn to experienced partner David Maring, who enjoys a well-deserved place at the top of the State's litigation market for his prosecution and defense of personal injury claims.

Dave is licensed to practice in all state and federal courts in North Dakota and Minnesota, and his litigation practice areas include personal injury, wrongful death, brain injury, construction accidents, business/commercial disputes, and professional liability claims.

Dave served six years as the Eighth Circuit Representative to the United States Supreme Court Federal Rules of Evidence Advisory Committee. He is the Chair of the North Dakota Federal Practice Committee and spent six years as a member of the North Dakota Supreme Court Disciplinary Committee. By invitation, Dave has become a member of the International Society of Barristers (less than ten members in North Dakota) and the American College of Trial Lawyers (less than fifteen members in North Dakota).

Like the other lawyers in Maring Williams, Dave has been active in the North Dakota Bar Association serving four terms on the Board of Governors and as President of the Association. Dave has also been active in the Minnesota Bar Association having served as co-chair of the Professionalism Committee and as a Governor on the Civil Litigation Governing Council. More recently, Dave served as the President of the Western States Bar Conference, a bar association comprised of 16 states in the western United States.

Dave is married to Mary Muehlen Maring, a justice on the North Dakota Supreme Court. They live in Mandan, North Dakota and have two adult sons who reside in San Jose, California and Brooklyn, New York.

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# NCACC 40<sup>TH</sup> ANNUAL CONFERENCE

Seattle, WA  
08/05/13

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## CIVILITY – PAY IT FORWARD

- The Tipping Point – Malcolm Gladwell, author.
  - The “one dramatic moment in a [movement] when everything can change all at once.”
- Hush Puppy shoes.
  - 1994 – Wolverine sold 30,000.
    - Manhattan hipsters – clubs/bars.
    - Two designers – fashion shows.
  - 1995 – Wolverine sold 430,000.
  - 1996 – Wolverine sold over 1.5 million.
- Civility near a tipping point.
  - Still a lot of civility practiced.
  - Growing movement of incivility.
  - Our job – tip it the right direction.
- Need to pay it forward.
  - Hold the door.
  - Turnsies.
  - Extend courtesies.

- Permission to be courteous.
  - Forum article – Kindness Takes On Viral Nature.
- What is Civility?
  - The Golden Rule.
  - Bill Smith, San Francisco, CA, Trial Attorney.
    - “Civility is an attitude that lawyers will treat everyone (opponents, witnesses and judges) with dignity and respect. We ... are expected to fight the good fight but we must always remember that our individual and collective reputations and the viability of the legal system are more important than any disputed issue or case.”
  - Honorable Joseph Giarruss, Jr. (Retired) New Orleans – The Five “Cs.”
    - Character – “conscious decision to hold ourselves to a ... more demanding code of conduct.”
    - Candor – “consistency between what we say and what we do.”
    - Courtesy – being aware, considerate, and gracious – having manners.
      - Edmund Burke – “Manners are far more important than laws. Upon them, and in great measure the laws depend .... Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform insensible operation, like the air we breathe in.”
    - Communication – ability to be a respectful listener and a skillful speaker.
    - Community – modeling civility in our legal and local communities: paying it forward.
- Is there a problem with civility?
  - Civility Commission Report – U.S. Court of Appeals, Seventh Circuit.
    - “Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism, and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil.”
  - Civility in society?

- US News and World Report – 88% think incivility increasing.
  - NY Survey firm – 80% think diminishing courtesy “serious national problem.”
  - ABC News – 85% improve society with “please” and “thank you.”
- Examples of Incivility – Law Practice.
  - E-mails.
    - More emotion, less thought.
    - Almost instantaneous.
    - Sample.
  - Depositions.
    - Heat of the moment.
    - Sample.
  - Late Friday subpoenas/motions/correspondence.
  - Impartial judging.
    - Sample.
  - It’s not me.
- Examples of Incivility – Appellate Practice.
  - Telephone contacts.
  - In person contacts.
- Dos and Don’ts – Appellate Practice.
  - Know the rules.
  - Timeliness.
  - Telephone manners.
- What causes incivility by lawyers?
  - Increased competition for business.
  - Decreased sense of collegiality among lawyers.
  - Pressure of accumulating billable hours.

- Increasing adversarial nature of litigation.
- Access to technology that lets you communicate before you think.
- Pressure from clients for a bulldog attorney.
- Decreasing number of role models for law students and new lawyers.
- Reaction of legal community.
  - Greater emphasis on professionalism in law school.
  - Mentorship programs for law students/new attorneys.
  - Seminars/articles.
  - ABOTA Program – Civility Matters.
  - Civility/professionalism codes.
- Civility/professionalism codes.
  - American College of Trial Lawyers – 1956.
  - Approximately 40 states.
    - State Bar Association and/or State Supreme Court adoption.
  - Over 100 other codes – city/county bar associations and attorney groups.
    - ABOTA/ACTL.
  - Pros and Cons.
    - Pros:
      - Increase professionalism.
      - Decrease acrimony.
      - Educate clients/public.
      - Respect for legal system.
    - Cons:
      - More rules.
      - Politeness police.
      - Interfere with zealous advocacy.
      - No teeth in rules.
- What is in the codes?
  - Courtesy, professionalism, and commonsense.
    - Examples.

- Lawyer to client.
  - Lawyer to lawyer.
  - Lawyer to court.
    - Examples.
  - Lawyer to community.
- Difference between ethics rules and civility codes.
  - We all need a personal code.
    - George Washington's Rules of Civility – Book by John T. Phillips, II.
  - Comparisons.
    - George Washington Rule #1 – **“Every action done in company ought to be with same sign of respect to those that are present.”**
      - North Dakota Aspirations of Professionalism and Civility (Aspirations of Civility) – Preamble – **“The conduct of lawyers should be characterized, at all times, by personal courtesy and professional integrity in the fullest sense of those terms.”**
    - George Washington Rule #19 – **“Let your countenance be pleasant, but in serious matters somewhat grave.”**
      - Aspirations of Civility, Rule II.A.2. – **“We will treat other counsel, parties and witnesses in a civil and courteous manner ....”**
    - George Washington Rule #42 – **“Let your ceremonies in courtesy be proper to the dignity of the place and person with whom you converse.”**
      - Aspirations of Civility, Rule II.A.1. – **“We will exhibit courtesy, candor, and cooperation to all participating in the legal system.”**
    - George Washington Rule #47 – **“Mock not, nor jest at anything of importance. Break no jests that are sharp or biting....”**
      - Aspirations of Civility, Rule II.B.1. – **“We will avoid hostile, demeaning or humiliating words in communications with other parties, their lawyers or the court.”**
    - George Washington Rule #89 – **“Speak not evil of those who are absent, for it is unjust.”**



- Aspirations of Civility, Rule II.B.2. – **“We will not unfairly attribute, argue, or infer that other counsel has taken a position or made a claim which is not true.”**
- Why Civility Codes are Important.
  - Tool to teach law students.
  - Guidance for new lawyers.
  - Reminder to seasoned lawyers of the aspirations of our noble profession.
  - Explain to clients our cooperative approach.
  - Earn respect of clients and the public.
  - Promote professional satisfaction.
  - Reduce sleepless nights/anxiety.
  - Promote collegiality.
- Our Reputation is our Badge.
  - A badge of honor or dishonor.
  - “Reputation, reputation, reputation! O! I lost my reputation. I have lost the immortal part of myself and what remains is bestial.” Shakespeare – Othello (Act II – Scene 3).
  - Good name in man and woman, dear my lord. Is the immediate jewel of their souls. Who steals my purse steals trash. .... But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed. Shakespeare – Othello (Act III – Scene 3).
- Civility is at a crossroads.
  - Each of us plays a major role.
  - Civility can be contagious.
- **PAY IT FORWARD.**

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# What's Bugging You?

Monday, August 5, 2013

1:15 p.m. – 2:45 p.m.

Federal/Superior Rooms

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**Moderators:** Christie Cameron Roeder, Clerk of Court  
*North Carolina Supreme Court*  
Polly Brock, Chief Deputy Clerk of Court  
*Colorado Court of Appeals*

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## **Christie Cameron Roeder, Clerk of Court (Moderator)**

Christie has been the Clerk of Court for the Supreme Court of North Carolina for 22 years, and she has been a member of the NCACC for the same amount of time. During her tenure, she has served the NCACC as President, Vice President, Member of the Executive Committee, Host for the 2003 Conference, Committee Chair for over 10 Committees, and a regular speaker at our Conferences. She has also served as the NCACC representative to the National Center for State Courts, Court Services Division, and she has represented the Conference at meetings of other Court -related organizations. Christie has served as President of the 10<sup>th</sup> Judicial District Bar and the Wake County Bar Association in North Carolina, chaired various charitable organizations in North Carolina, and is currently Vice Chair of the Board of Directors of the North Carolina Railroad.

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## **Polly Brock, Chief Deputy Clerk of Court (Moderator)**

Pauline (Polly) Brock has been with the Colorado Court of Appeals since 1996 and is currently the Chief Deputy Clerk of Court. Polly graduated from the University of Colorado School of Law in 1992. Before her current position, Polly was a staff attorney for the Colorado Court of Appeals specializing in motions and jurisdiction for over 10 years.

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# Contemporary Threats to the Judicial Process: Keeping your Court and Judges Safe

Monday, August 5, 2013

3:00 p.m. – 4:30 p.m.

Federal/Superior Rooms

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**Speaker:** Raymond Fleck, Supervisory Deputy  
*United States Marshall Service, Western District of Washington*

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## **Raymond Fleck, Supervisory Deputy**

Raymond Fleck is Supervisory Deputy with the United States Marshals Service (USMS), Western District of Washington, and supervises the Judicial Security Section. Since coming to Western Washington in 2009, he has created the district's Threat Management Program, which has successfully investigated, mitigated, and managed more the 200 protective investigations, one of the highest in the country. At the heart of the USMS' mission is protecting the federal judicial process and those who support it. Fulfilling this mission requires a collaborative approach, necessitating strong interagency relationships between law enforcement and the courts.

Prior to 2009 Ray was assigned to the USMS Tactical Operations Division and Office of Emergency Management, where he served as a subject matter expert on deploying, protecting, and assessing risk to national assets during times of crisis. He is a veteran of local, regional and national level exercises and disaster response, including Hurricanes Georges and Katrina.

Ray has specialized on the "sovereign citizen" movement in the Pacific Northwest. He has spoken to numerous groups and developed training materials to help court and law enforcement officials to better understand the movement's origins and recognize warning signs.

In the area of physical security and protective investigations, Ray has worked with federal and state courts to identify vulnerabilities, increase awareness, and respond appropriately and confidently to judicial security issues.

Ray holds a Masters Degree in Safety and Security Leadership from the George Washington University and a Bachelor of Arts degree and Minor in Psychology from Central Washington University. Ray is a member of the Association of Threat Assessment Professionals, the National Emergency Management Association, and the International Association of Emergency Managers.

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# Clerk's Office Drama: Hiring and Discipline

Tuesday, August 6, 2013

8:30 a.m. – 10:00 a.m.

Federal/Superior Rooms

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**Moderators:** Christie Cameron Roeder, Clerk of Court  
*North Carolina Supreme Court*  
Polly Brock, Chief Deputy Clerk of Court  
*Colorado Court of Appeals*

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## **Christie Cameron Roeder, Clerk of Court (Moderator)**

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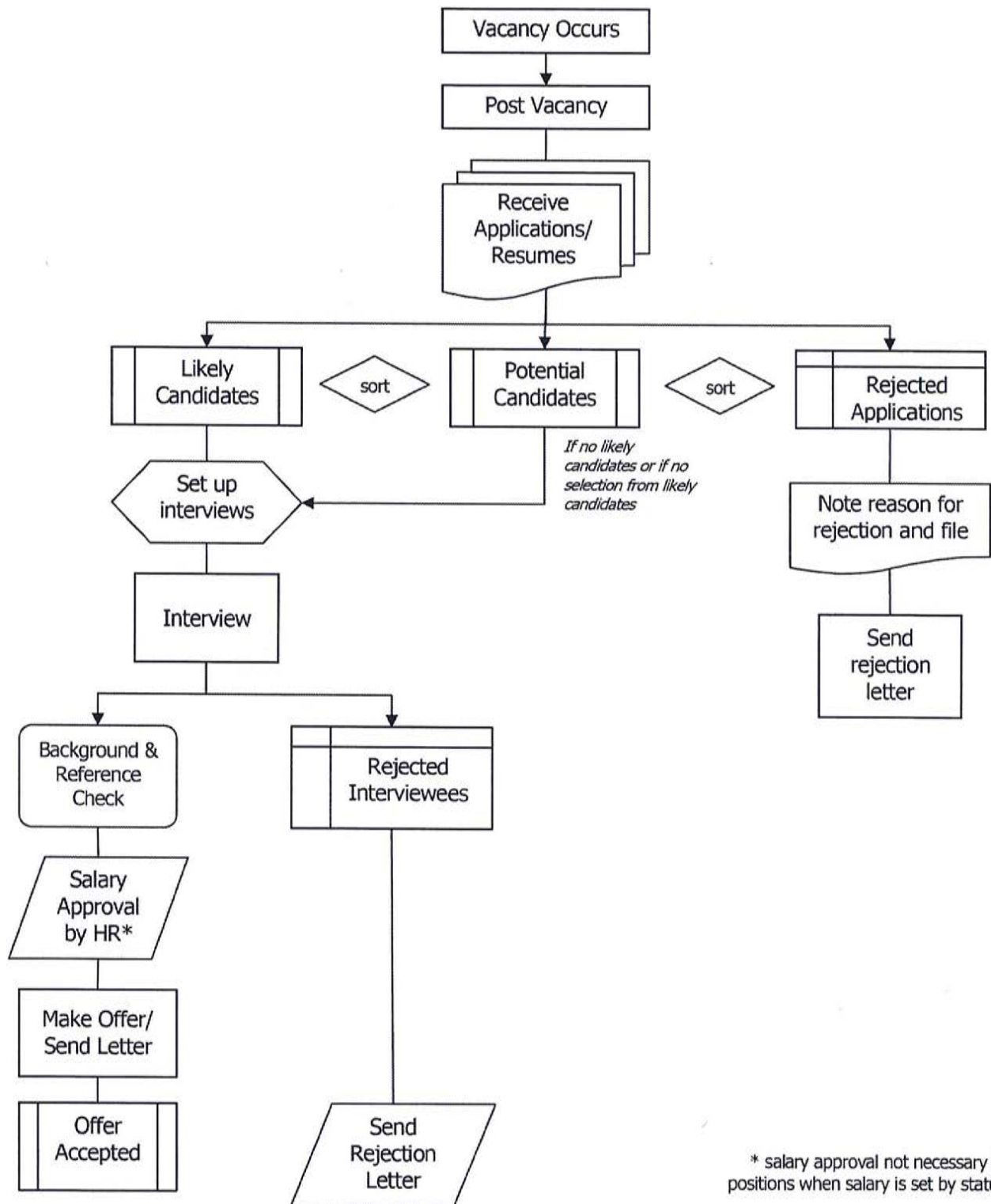
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# Effectively Hiring an Employee

Materials Blatantly Copied  
(with permission)

N. C. Administrative Office of the Courts  
Colorado Judicial Human Resources Department

## Hiring Process Flow Chart



\* salary approval not necessary for positions when salary is set by statute





## Legal Considerations

### Every Part of the Hiring Process Requires Staying Within the Law

There are several federal and state laws and Judicial Branch policies of which you should be aware when creating a job posting, selecting interview candidates, crafting interview questions, and conducting an interview. In short, every aspect of the hiring process requires legal compliance.

The following list highlights aspects of the laws, policies, and definitions relevant to the hiring process. The definitions are adapted from the agency charged with compliance. This information is not comprehensive and is not intended as legal advice. If you have any questions about the appropriateness of any actions or questions related to the interview process, please contact the NC AOC Equal Employment Opportunity Officer at (919) 890-1121.

### Unlawful Workplace Harassment Policy

**Responsible Agency:** NC Administrative Office of the Courts

This policy applies to all employees within the Judicial Branch by establishing standards that apply to all Judicial Branch hiring authorities, managers, and supervisors and creating remedies that are available to all employees of a hiring authority.

All employees are guaranteed the right to work in an environment free from:

- unlawful workplace harassment, and
- retaliation against employees who oppose unlawful workplace harassment.

Unlawful workplace harassment is unwelcome or unsolicited speech or conduct based upon race, sex, creed, religion, national origin, age, color, or disabling condition (as defined by GS §168A-3) that creates a hostile work environment or circumstances involving *quid pro quo*. (Latin meaning “this for that”) Harassment in the workplace includes all forms of harassment and abuse of authority.

### Employment at Will

**Responsible Agency:** NC Administrative Office of the Courts

All employment in the Judicial Branch in the areas covered by the Judicial Branch of Government Human Resources Management Manual falls within the legal doctrine of “employment-at-will.” Within the Judicial Branch, this means that individuals are employed by



a hiring authority and serve at the pleasure of that hiring authority. The employment relationship may be terminated with or without cause and/or advance notice by either the employer or employee.

Employment-at-will, however, is subject to statutory restraints. Although employment-at-will provides broad discretion in all matters of employment, termination of an employee may not violate rights, including State and Federal laws that apply to the employee.

### **Political Affiliation**

Conditioning employment upon political affiliation, candidacy for public office, or other related activity is forbidden.

### **Independent Hiring Authorities**

A person employed by an independent hiring authority within the Judicial Branch of Government, such as a judge, clerk of superior court, district attorney, or public defender, serves at the pleasure of that official. Such employment may be terminated by that official without cause or notice. Neither the judicial official nor those whom they hire are employees of the Administrative Office of the Courts, and the Administrative Office of the Courts has no authority over the hiring decisions or other employment practices of the judicial official.

## **Title VII of the Civil Rights Act of 1964**

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the bases of race and color, national origin, sex, and religion. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

### **Race and Color**

Equal employment opportunity cannot be denied any person because of his/her racial group or perceived racial group, his/her race-linked characteristics (e.g., hair texture, color, facial features), or because of his/her marriage to or association with someone of a particular race or color. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.

It is unlawful to discriminate against any individual in regard to recruiting, hiring and promotion, transfer, work assignments, performance measurements, the work environment, job training, discipline and discharge, wages and benefits, or any other term, condition, or privilege of employment. Title VII prohibits not only intentional discrimination, but also neutral job policies that disproportionately affect persons of a certain race or color and that are not related to the job and the needs of the business. Employers should adopt "best practices" to reduce the likelihood of discrimination and to address impediments to equal employment opportunity.



## National Origin

National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background. National origin discrimination also means treating someone less favorably at work because of marriage or other association with someone of a particular nationality. National origin discrimination prohibits discrimination in employment practices (including recruitment, hiring and firing or layoffs), harassment, and language (accent, English fluency, English-only rules unless there is a bona fide qualification or a business necessity).

## Sex / Gender

### ■ Sexual Harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

A form of sexual harassment known as *quid pro quo* (Latin meaning "this for that") prohibits a supervisor or hiring authority from undertaking a tangible employment action on a discriminatory basis; for example, offering a job or tangible benefits in exchange for sexual favors.

### ■ Pregnancy-Based Discrimination

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which covers employers with 15 or more employees, including state and local governments. Title VII also applies to employment agencies and to labor organizations, as well as to the federal government. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

Title VII's pregnancy-related protections include hiring, pregnancy and maternity leave, health insurance, and fringe benefits.

## Religion

- Employers may not treat employees or applicants more or less favorably because of their religious beliefs or practices – except to the extent a religious accommodation is warranted. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or different work requirements on an employee because of that employee's religious beliefs or practices.
- Employees cannot be forced to participate – or not participate – in a religious activity as a condition of employment.



- Employers must reasonably accommodate employees' sincerely held religious practices unless doing so would impose an undue hardship on the employer. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his/her religion. An employer might accommodate an employee's religious beliefs or practices by allowing: flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers, modification of grooming requirements and other workplace practices, policies and/or procedures.
- An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business interests. An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.
- Employers must permit employees to engage in religious expression, unless the religious expression would impose an undue hardship on the employer. Generally, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency.
- Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct.

## Civil Rights Act of 1991

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

Among other things, this act provides compensatory and punitive monetary damages in cases of intentional employment discrimination. It applies to all employers regardless of size.

## Age Discrimination in Employment Act of 1967 (ADEA)

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

The ADEA protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.



The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government.

## **Americans With Disabilities Act of 1990 (ADA)**

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

The following terms are critical to understanding the ADA:

- **Individual with a Disability** – is a person who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such impairment.
- **Qualified Applicant** – is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.
- **Reasonable Accommodation** – may include but is not limited to (1) making existing facilities used by employees readily accessible to and usable by persons with disabilities; (2) job restructuring, modifying work schedules, reassignment to a vacant position; and (3) acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.
- **Undue Hardship** – is an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation. An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business.

Title I of the ADA also covers:

- **Medical Examinations and Inquiries**

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

- **Drug and Alcohol Abuse**

Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.



**\*NOTE\*** In NC, "person with a disability" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. The term 'major life activities' means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working (NCGS § 168A-3).

## Equal Pay Act of 1963

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides:

Employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment.

## Retaliation

**Responsible Agency:** U.S. Equal Employment Opportunity Commission

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

## Family Medical Leave Act (FMLA)

**Responsible Agency:** U.S. Department of Labor

The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces the Family and Medical Leave Act (FMLA) for all private, state and local government employees, and some federal employees.

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.



Spouses employed by the same employer are jointly entitled to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

## **Immigration Reform and Control Act (IRCA)**

**Responsible Agency:** U.S. Department of Justice

The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for an employer to hire any person who is not legally authorized to work in the United States, and it requires employers to verify the employment eligibility of all new employees. IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII) and on citizenship status. IRCA's anti-discrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants. IRCA's anti-discrimination provisions apply to employers with between 4 and 14 employees (who would not be covered by Title VII). IRCA is enforced by the U.S. Department of Justice.

## **Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA)**

**Responsible Agency:** U.S. Department of Labor

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects service members' reemployment rights when returning from a period of service in the uniformed services, including those called up from the reserves or National Guard. It prohibits employer discrimination based on military service or obligation. The U.S. Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) administers USERRA. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training. USERRA covers nearly all employees, including part-time and probationary employees. USERRA applies to virtually all U.S. employers, regardless of size.

## Effective Job Posting

### The Foundation of an Effective Hiring Process

The job posting is the foundation of the recruitment and selection process. Wording of the posting and how a job is posted affects the target pool of applicants, the résumés and applications you receive, which candidates you will choose to interview, and the interview questions you will ask. A well-written job posting can attract the best candidates for your position.

Several interlinked components create an accurate and effective job posting:

- 1) determining essential and non-essential tasks;
- 2) identifying characteristics for success in the position;
- 3) selecting posting strategies; and
- 4) meeting legal requirements.

Careful attention to each of these four components will help you create a job posting that delivers qualified candidates. (A **Job Posting Request Form** is included at the end of this chapter.)

One way to ensure you include all four components in your job posting is to summarize the position's major functions, critical skills, and working conditions. It should include not only the position title (**who**), does **what** work (action verb), **where**, **when** (how often), **why** (the purpose or impact of the work), and **how** it is accomplished.<sup>14</sup>

For example: The Court Coordinator (*who*) establishes (*action verb*) a job resource center (*what*) within the courthouse (*where*) and provides regular (*when*) updates to the Court to quickly fill open positions (*why*) by posting vacancies in both paper and electronic formats (*how*).

The Job Posting Request might then detail the skills needed to accomplish the **function** and the level of **competency** required somewhere in the description of the work. Using the above example, it might say, "must be proficient (*competency*) with creating complex Excel spreadsheets (*function*), and possess a working knowledge (*competency*) of broadcast email protocols (*function*)."

### Essential and Non-Essential Tasks

The Americans With Disabilities Act (ADA) has an impact on job descriptions and postings. The ADA distinguishes which tasks are essential to the position and which are non-essential



for the purpose of determining who is a qualified applicant (see the **definition of the ADA** in **Chapter 3**). Qualified applicants (and employees) meet the basic requirements of the position and can perform the essential tasks with or without accommodation.

It is important to note that “an employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.”<sup>15</sup>

## **Essential Functions**

Essential skills or tasks are the reason a position exists. Naturally, these will vary by position. There are several considerations to assist in determining which functions, skills, and tasks are essential.

- The consequences if the function is not performed;
- There are a limited number of employees available to perform particular job functions;
- The function is so highly specialized the applicant must have certain expertise to perform it;
- The amount of time spent performing the function;
- Past or current employees' experience in the position; and
- The experience of workers in similar positions.

It is important to determine essential functions and list them on the job posting because the EEOC considers a written job description and posting evidence of what the employer considers the essential functions of the position.

## **Non-Essential Functions**

The non-essential functions, skills, or tasks are those that may be nice for a candidate to possess but are not critical to job performance. In determining non-essential functions, consider:

- Removing the task does not materially alter the job description;
- The task may be performed by others;
- There are workers in the same or similar positions who do not perform the function;
- The task is not historically part of the job description and there has been no formal change to the job requirements of current workers;
- The function does not represent significant time spent in the position.

For example, the job description of a file clerk includes the ability to file and retrieve documents and answer the telephone. The primary reason the position exists is to file and retrieve documents. Answering the telephone is a minor part of the job and may be performed by others. So if a hearing impaired person applies for this job and meets the basic requirements for the position, then his/her hearing impairment may not be used to deny employment. You could provide this applicant with an accommodation or remove the task without changing the nature of the position.

Take care when assessing the *time spent* factor. An Administrative Assistant may be required to provide back up to the receptionist and manage the switchboard even if this task does not represent a significant percentage of the time spent in the job. Or a GAL Program Supervisor may be required to attend after-hours community meetings to recruit volunteers a few times during the year.

The worksheet and instructions on the following three pages may be used to assist in determining essential and non-essential functions for any position.





## Determining Essential Job Functions

The Americans With Disabilities Act of 1990 (ADA) prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.

The ADA draws a distinction between essential and non-essential job functions. Job functions must be determined on a case-by-case basis by examining a number of factors. Generally, the ADA gives consideration to an employer's judgment as to what job functions are essential. And written job descriptions may be considered evidence of the essential functions of the job. It is critical for agencies to make these distinctions carefully as improperly designating a job function as essential may also lead to litigation. The determination of essential and non-essential (or marginal) job functions is key to the consideration of accommodating qualified individuals with disabilities. The ADA defines a "qualified individual with a disability," as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires."

This worksheet is designed to help you analyze essential and non-essential job functions. The EEOC looks at the following factors to make a determination:

### Essential

1. the performance of the function is the reason the position exists;
2. the degree of skill or expertise required to perform the specific function;
3. there are a limited number of people to perform particular job functions;
4. the consequences if the function is not performed;
5. the amount of time spent performing the function;
6. past workers' experience in the job.

### Non-Essential

1. removing the task does not materially change the job description;
2. the task can be performed by others;
3. the function does not represent significant time in the position;
4. the function is not historically part of the job description and there has been no formal change to the requirements of current workers;
5. there are workers in the same or similar positions who do not perform the function.

In some cases, the EEOC may also consider the experience of workers in similar jobs.

To begin this assessment you will need the job posting listing the description of the work, competencies (knowledge, skills, and abilities), the minimum training and experience requirements, and management preferences. If the posting does not contain all of this information, or the information is inaccurate, you may want to review the job description.

Next list the functions outlined in the job posting on the attached worksheet. Each function is assessed on the factors listed above and analyzed cumulatively to determine if the function is essential or non-essential. Repeat this process for each task. Generally, you want to consider the task result rather than the way it has been traditionally performed. For example, "lift 50 lbs. and carry it at least 15 yards" describes how the job is done. Looking at results, the description might read "relocate 50 lbs." This leaves room to provide for an accommodation such as winch or a dolly.



## Factors to Consider:

1. **Does the position exist to perform this task?** Consider the overall purpose of the job. For example, a Staff Court Interpreter is hired to provide interpretation between English and Spanish both verbally and in writing. If a candidate can speak both languages fluently but cannot write fluently in Spanish, they do not have an essential skill necessary to the reason the position exists.
2. **Does the duty require a high degree of skill or expertise?** Some positions may require certain licenses or registrations. For example, an Official Court Reporter is required to possess current certification from one of two certifying bodies. Other tasks may require a certain number of years of experience to attain a level of proficiency necessary to produce the desired results. For example, an IT position requires five years experience with a particular application. The agency has determined that employees with less than five years of experience do not possess the intricate knowledge of the application necessary to successfully produce the desired results.
3. **How many other employees are available to perform this function?** Small agencies and departments generally need to perform several tasks, whereas larger departments are better able to redistribute work with less impact. For example, a File Clerk position may include tasks such as filing and retrieving documents and answering the telephone. Filing and retrieving documents are the primary tasks (the reason the position exists). Answering the telephone may be a secondary (marginal or non-essential) task if there are others who can perform this function.
4. **Would removing this task fundamentally alter the position?** Consider what would happen if the function were removed from the job. For example, a Court Coordinator position includes such tasks as program development, administration, report preparation and budget management. If budget management is removed, this has an affect on other aspects of the position which fundamentally alters the position.
5. **What percentage of time is spent on the function?** Generally, tasks that comprise a significant percentage of a job's time are considered essential. For example, a Receptionist position includes 75% of the work day answering telephones. So answering telephones is an essential task. However, even duties that are performed infrequently may be considered essential if not performing would result in serious consequences. For example, an Administrative Assistant may only occasionally have to provide relief to the receptionist and manage the switchboard but being able to perform this function would be essential to the Administrative Assistant's job.
6. **Do current or did previous employees perform this task?** One of the first considerations in assessing essential functions is to determine what current employees are doing. If the task has always been performed by employees in that position, it may be an essential function. If the duty has not traditionally been part of the position, a re-assignment of duties should apply to all employees in that position. For example, an Audio/Visual Assistant position includes the ability to set up a certain kind of camera. Previously, this was not part of the job responsibilities. In order for the task to be considered essential, a formal change of duties would be required of all Audio/Visual Assistants.



## Essential Job Functions Analysis

Office / Work Unit:	Position Title:
Position Number:	Working Title:

Tasks		Factors						Assessment					
List tasks associated with this position.	1. Does the position exist to perform this task?	Yes / No	2. Does the duty require a high degree of skill or expertise?	Yes / No	3. How many others are available to perform this function?	Number	4. Would removing this task fundamentally alter the position?	Yes / No	5. What percentage of time is spent on this task?	Time %	6. Do current employees perform this function?	Yes / No	Is this task essential or non-essential?
													Essential / Non-Essential



## Characteristics

The traits, behaviors, and characteristics necessary to be successful in the position should also be listed in the job posting. For example, a successful file clerk needs to be detail-oriented. Being able to work independently is a key trait of a high-performing investigator. Customer service associates are more productive if they enjoy a lot of public interaction.

To determine which characteristics contribute to success in a position, consider:

- which workers in the same position are highly rated and why;
- which workers or previous employees are/were rated poorly and why; and
- which workers are happy in the position and why.

The natural characteristics of high performing, happy workers generally match the qualities required by the job.

For example, if successful legal assistants are detail-oriented and generally work independently, then a candidate who likes to work alone and insists on accuracy will likely be a good match for the position. However, a candidate who prefers to see the big picture and work mostly as a team member may not have the basic traits necessary to be successful and content in the position.

## Performance Management Program

The performance appraisal form used to evaluate current workers in the position may be useful in determining which functions are essential and non-essential and for assessing which traits contribute to success. Essential job duties may be similar to previously defined performance objectives and standards listed on performance appraisal forms.

The performance management program may also be useful when drafting questions for the interview, particularly with regard to competency of necessary skills. Let's say, for example, typing 80 words per minute is preferred. Someone who types only 60 words per minute would need to improve but someone who types 120 words per minute would be rated highly proficient in this category.

## Posting Strategies

Where you post the vacancy announcement will determine the responses you receive. There are three general posting options, two of which are internal posting options and one external posting option:

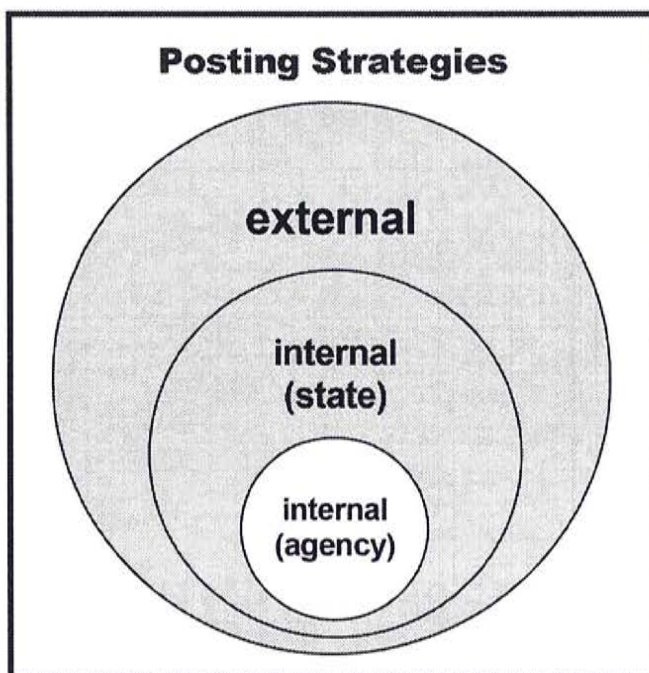
- 1) internal – candidates currently working within the Judicial Branch;
- 2) internal – candidates currently working within state government; and
- 3) external – all potential candidates.

Consider your target applicant population. What kind of candidates are you trying to attract?

## Internal

Internal postings recruit applicants from within the work unit or state government generally. The benefits of an internal posting strategy include:

- hiring and promoting from within gives current employees the opportunity to grow and advance sending a strong signal to employees about providing opportunities for promotion, upward and lateral advancement;
- it gives current employees some information about hiring needs so they may offer their own suggestions on potential candidates and make referrals; and
- there may be less of a learning curve because someone who works in your unit will not need the same level of orientation and training regarding agency policies, procedures, systems, organization, technology and cultural fit.



## External

External postings may recruit candidates from other state government agencies, private organizations, the general public, and niche markets. This is an effective strategy when your goal is:

- to expand the pool of available candidates;
- to increase diversity of the current workforce;
- to attract external candidates who often bring creativity to their work because they are unfamiliar with how things are done; and
- in niche markets, appeal to candidates with particular expertise.



In limited circumstances it may be appropriate to list the position on job boards such as careerbuilder.com or monster.com or to post the vacancy in newsletters or on job boards in niche markets. Educational institutions often have internal job posting websites for students and alumnae.

For example, if an agency is adopting new technology that has not been used by anyone in state government, it may be appropriate to advertise the position in that technology's trade journal or certifying organization in order to attract experienced candidates. Contact the HR Recruiting Specialist if you feel your position needs to be posted somewhere other than the Office of State Personnel job board.

## **Application or Résumé?**

The How to Apply section of the **Job Posting Request Form** instructs applicants to complete the **Judicial Department Application for Employment**, to send a résumé or both. Each has advantages and disadvantages. Résumés have a looser format and allow an applicant to include information that may not fit on an application. It's easier to get a sense of an applicant's personal style and written presentation skill from a résumé. However, because résumés are as individual as the people who create them, gleaned information may take more effort from a reader. Dates of employment and core responsibilities are likely to be organized differently on each résumé. And with numerous résumé development firms available on the internet, you can't always be sure the résumé was actually written by the candidate.

Employment applications organize information in a consistent manner that allows for easy review and collects information not typically contained on a résumé. Date of birth, gender, ethnic identity, supervisors' names, and salary information, for example, usually do not appear on résumés.

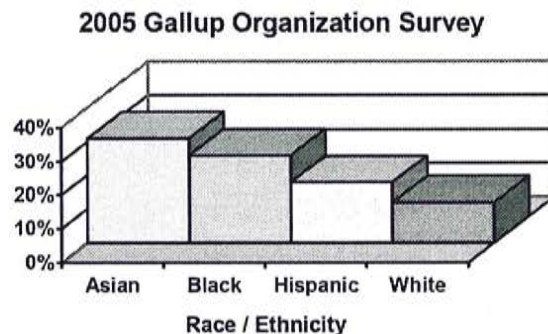
Consider your target population to determine what information you need. Workers in professional positions generally prefer to submit résumés that allow them to express their accomplishments in a unique style which is its own source of information for hiring managers. For positions that place more emphasis on functions rather than education or achievement, an application might provide the necessary information more readily.

For some positions, it may be appropriate to first ask for résumés and later ask only finalists to complete an application. Regardless of the information asked initially from applicants, the employment application, signed by the applicant, must be collected prior to the job offer stage of hiring. The signed employment application provides authorization to the hiring manager to verify work history, education, certifications, and any other information listed on the employment application.

## Discrimination and Candidate Selection

### Eliminating Bias from the Hiring Process

The potential for discrimination exists at every stage of the hiring process. In 2005, a Gallup poll found 15% of workers reported some form of harassment and discrimination. The poll cited sex, race and age discrimination as the most frequent forms of discrimination and harassment encountered in the workplace.<sup>16</sup>



The EEOC noted there is a difference between people's perception of bias and the number of complaints actually filed. For example, although Asians reported the most workplace discrimination in the survey (31%), they account for only 3% of race-based filings for FY 2005.<sup>17</sup>

Since 2005, the EEOC's own record of filings indicates that while there is a general reduction in some sex-based forms of discrimination, other forms continue to increase.

#### EEOC Charge Statistics

	2006	2007	% Change	
Age	16,548	19,103	15%	
ADA	15,575	17,734	14%	
Equal Pay	861	818	-5%	decrease every year since 2002
National Origin	8,327	9,396	13%	most in 10 years (incl. since 9/11)
Pregnancy	4,901	5,587	14%	most in 10 years
Race	27,238	30,510	12%	most in 10 years
Religion	2,541	2,880	13%	most in 10 years
Sex-Based	23,247	24,826	7%	
Sexual Harassment	12,025	12,510	4%	decrease every year since 2000



Interviewing is only one method of evaluating candidates. Hiring managers also base evaluations on a candidate's application or résumé, certifications, licenses, skills, knowledge, experience, background and reference checks. Although the interview itself is one of the most biased processes for candidate selection, there are a number of ways to reduce and eliminate bias in the recruiting and selection process.

- Establish the hiring criteria before recruiting begins;
- Use the same job description and list of qualifications for each candidate;
- Block off or remove an applicant's personal information from their résumé or application (information such as name, graduation date, and any affiliations that indicate age, race, gender, national origin, or political affiliation);
- Use the same interview questions for each candidate
- Use more than one person to conduct the interview (best if diversity is represented in the interview team); and
- Use common, objective measurements for each candidate.

We're not always aware of our biases. Biases can exist in personal, social, and institutional frameworks. To compete for the best qualified candidates and achieve a diverse workforce, it is critical to eliminate bias from the hiring process.

## Bias Expression

### Halo Effect

We all know first impressions are formed within seconds of an encounter. Predispositions are difficult to alter. It's human nature to prefer people who resemble us. And not just in a physical way – preferences for resemblances include education, economic status, style of dress, place of origin, social status, etc.

A preference for those who "look" like us is known as the **halo effect**. A positive emotional response to a candidate may cause an interviewer to ignore or discount negative information, to ask easier questions, or to begin selling the position or the organization by highlighting its favorable attributes.

### Horn Effect

It's also human nature to perceive differences as weaknesses. This is known as the **horn effect**. A negative emotional response to a candidate may cause an interviewer to ignore positive information, ask more difficult questions, highlight weaknesses, and get bored and stop listening.

Group or team interviews help to mitigate individual biases. Each interviewer should be accountable for his/her candidate evaluations. Interviewers should be able to articulate why a candidate is or is not a good fit. Each member of the interview team should learn to recognize emotionally-biased comments whether they are favorable or unfavorable. Saying, "I like her" does not speak to a candidate's skills and may be more a reflection of the interviewer's personal biases.<sup>18</sup>



## Recency Effect

The **recency effect** describes the tendency of interviewers to focus on the most recent interview candidate, forgetting or not adequately recalling earlier interview candidates.

There are a couple of ways to mitigate the recency effect. One is to schedule all candidate interviews close together so there is minimal time between interviews. Another is to take detailed notes of the interview for later review. And another method is to discuss the candidate's attributes shortly after the interview to reinforce the interview experience.

## Cultural Fit

Organizational culture is the personality of an organization. It is comprised of assumptions, attitudes, norms, and values, as well as tangible signs such as what people wear, use of space, style and arrangement of furniture, and the posting of achievements and awards. Organizational culture controls the way people interact with each other internally and how they interact with external stakeholders. Organizational culture is evidenced by:<sup>19</sup>

- Work style – the way things are done, people vs. task orientation;
- Team orientation – hierarchical, flat, egalitarian;
- Management style – commanding, collaborative, laissez-faire;
- Political style – importance of what you know vs. who you know;
- Attitudes – towards time, technology, change; and
- Values – high achievement, team orientation, cost-conscious

Cultural values and norms tend to be long-lasting and difficult to change. It can be challenging to select candidates who are a good cultural fit and increase or maintain diversity. Diversity is more than skin deep – it's not just about race. Rather, diversity is reflected in all the many aspects of individual characteristics not just membership in protected classes.

Cultural “fit” may be defined two ways:

- 1) **job fit** is the degree to which a candidate is suited for the position; and
- 2) **organizational fit** is a candidate's compatibility with the organization's values and modes of operation.<sup>20</sup>

In large organizations, organizational culture may be layered – that is a department or division may have overlapping, different, or even competing cultural values.

Typically, a strong match between an individual's and the organization's values is indicative of job satisfaction and high productivity. And employees who are satisfied with their work environment tend to demonstrate a high level of commitment and stay longer.

However, hiring managers should take care that a determination of cultural fit isn't really a decision based on a “like me” bias. Generally, people tend to experience higher comfort levels in working relationships with people like themselves. However, the EEOC warns that,

consciously or unconsciously, hiring decisions based on a “like me” bias may be a factor in using impermissible features (such as race, color, gender, religion, etc.).<sup>21</sup>

To mitigate any one person’s individual biases from influencing hiring decisions, use an interview team approach. A diverse team is less likely to be accused of using either a “like me” or “not like me” bias. Another method is to define your work unit’s organizational culture. Name the values and norms necessary for a new hire to be successful in your agency and determine criteria for measurement. Identifying these traits will also help to create valuable interview questions. For example, if a work unit has a strong hierarchical structure, then it would be useful to know a candidate’s organizational preferences and experiences in working in a similar environment.

Another method for keeping bias from influencing hiring decisions is to give consideration to differences including experience, perspective, and style and to ask what the candidate brings that the work unit doesn’t already have.<sup>22</sup>

Hiring decisions expressly may not be based on a candidate’s membership in a protected class (race, color, gender, national origin, religion, age, disability, etc.). This includes giving a “plus” or greater weight to diversity factors absent the demonstrated need to remedy past discrimination or to address a “manifest imbalance” in the workplace.<sup>23</sup> Rather, what hiring managers may do is to give greater weight to factors that align with meeting the needs of serving a diverse customer base. For example, say a Court Improvement Project Director job description includes “the ability to interact with diverse populations and various professionals.” A candidate with demonstrated ability in this regard, established contacts with diverse populations, or membership in various, diverse professional associations might be given greater weight than a candidate who has less demonstrated ability and contacts regardless of the candidate’s own race or gender.



## Selecting Interview Candidates

### Choosing Which Candidates to Interview and Which to Reject

Selecting appropriate candidates to interview requires close reading of the documents you request applicants send. Be prepared to spend the time necessary to carefully review each applicant. Your hiring decision has both short- and long-term effects. Your time is better invested in selecting appropriate candidates than in managing the problems a poor hiring decision may generate.

There are six factors to consider when reviewing applications and résumés for potential interview candidates:

- 1) basic qualifications;
- 2) education / licenses;
- 3) experience;
- 4) essential skills;
- 5) non-essential skills;
- 6) appearance.

Review the applications and résumés as they are received and then sort them into three piles – one for those that do not meet the factors outlined above (rejected applicants), one for those that do (potential interview candidates), and one for those who have exceptional qualifications (likely interview candidates).

#### Basic Qualifications

Selecting applicants to interview begins with assessing a candidate's ability to meet the basic qualifications or requirements of the position. Basic qualifications list the baseline or threshold training, knowledge or abilities for consideration. These threshold requirements appear on the Job Posting Request in the section addressing Knowledge, Skills, and Abilities (KSAs) and the Minimum Training and Experience sections. For example, if the a position requires four years of experience in computer network management, then candidates who have less than four years of such experience do not meet the threshold requirement and should not be considered.

If a candidate exceeds the basic qualifications, this may be weighted favorably. In the above example, if a candidate had seven years of experience, this may be a plus for that position or that particular candidate. That does not mean, however, that a candidate with the most experience is necessarily the best person for the job. Sometimes people who have been

doing something for a long time get stuck in doing things their way and aren't open to doing what needs to be done and how it gets done in your work unit.

Be aware of your own assumptions. It may be tempting to reject a candidate who made a lot more money in her/his previous position than you are offering. You might think s/he would be unhappy with significantly less pay and would soon leave. However, it may be that a candidate is willing to work for less because her/his last job required too much travel, too many hours, a crazy commute, or was just a miserable place to work.

If a candidate meets the basic qualifications for the position as outlined in the Job Posting Request, move their application to the potential interview pile. If they do not, move their application to the rejected pile.

## **Education / Licenses**

Some positions require a certain level of education or focus in a particular area of study or some sort of license or certification demonstrating a specific skill or ability. These qualifications should be listed on the Training and Experience section of the Job Posting Request.

The requirements for licenses or certifications should be directly related to the position. For example, a court reporter position requires certification by one of two certifying bodies. Applicants who do not possess certification from one of the listed certifying bodies should not be considered.

Sometimes general educational requirements may be supplemented or replaced by experience. This allows a candidate to meet the threshold in two different ways. Say a position requires a two-year associate degree in financial accounting or five years experience in budget planning. A candidate, who lacks the education but has the experience, meets the basic requirements.

As with other basic qualifications, exceeding the minimum requirements may be considered a plus for the position or a particular candidate. And again, having the most education is not necessarily indicative of the best person for the job.

## **Experience**

Evaluating a candidate's experience may involve more inspection than simply checking an applicant's work history. Here it is helpful to look at the kind of experience an applicant possesses and the relevance of previous job experience to the vacant position.

For example, a staff court interpreter position requires two years of simultaneous interpretation and the ability to use specialized legal vocabulary. An applicant does not have experience as a court interpreter; however, her work history includes three years as a paralegal in a law firm specializing in providing services to the non-English language population. This may be highly relevant experience.

The experience required as a basic threshold should directly address the needs of the position. Requiring a legal assistant to possess computer network experience may be useful in an overall sense but it does not address the key skills and responsibilities of the position.



Be sure there is a direct correlation between the experience required and the duties of the position.

### **Essential Skills**

Essential skills or tasks are the reason a position exists (see **Chapter 4**). There are important ADA considerations with regard to essential skills that should be clearly outlined on the vacancy posting. When reviewing a candidate's application or résumé, look for some indication s/he can perform those essential skills.

If, for example, an Instructional Designer position requires skills in group facilitation and teaching, examine the information on the candidate's application or résumé that indicates s/he is capable of performing this task. Previous experience as community college instructor or something similar may be highly relevant.

If a candidate gives no indication s/he can perform the essential skills, with or without accommodation, this may not be a suitable candidate to bring in for interviewing because the candidate did not address the needs of the position. This may be an indication of a lack of ability or a lack of interest.

### **Non-Essential Skills**

You may remember from **Chapter 4** that these are the skills it would be nice for a candidate to have but are not absolutely necessary to successful performance in the position. These are the skills or traits that may make one candidate stand out from all the others.

For example, a deputy clerk position states "proficiency in Spanish preferred." Assuming a candidate meets all the other basic requirements, extra weight or consideration might be given to a candidate who is fluent in Spanish.

Non-essential skills should not, however, replace essential skills. If a deputy clerk is fluent in Spanish but does not have the required experience of handling and receipting money, s/he should not be considered. Receipting money is an essential task for the position and it is the reason the position exists – speaking Spanish is not.

### **Appearance**

Consider the overall appearance of the application or résumé. This document is essentially the first work product a candidate submits and may be an indication of the quality of her/his work. It demonstrates how applicants manage documents, the quality of their work product, the ability to follow instructions, how they represent themselves and how they might represent your office.

Applications that are messy, stained, or illegible do not compare well with those that are neat and complete. Applications submitted late, missing key pieces of information or requested attachments may indicate a lack of attention or interest or an inability to follow directions.

If your work unit requires that all applications be typed or completed online, this information must be included in the job posting. Be aware that many people do not have home computers and may be unable to complete an application online at their present place of



employment. Consideration should be given to such circumstances by either allowing a hand-written application or providing an opportunity for the candidate to use a computer in your office to complete the application prior to or just after an interview.

Review applications or résumés for the quality of their overall appearance and to make sure all requested information is included.

## **Cover Letters**

Many job postings include a requirement for applicants to supply a cover letter with their application or résumé. If this is a requirement, not just a suggestion, then applications and résumés submitted without a cover letter may be indicative of a candidate who cannot follow directions, misses key information, does not follow through, or lacks motivation.

Cover letters help to distinguish candidates. Similar to a résumé, it is essentially a demonstration of a candidate's work product. Cover letters give applicants an opportunity to provide details and highlight information that may not be readily apparent from their application or résumé.

If the request for a cover letter includes a request for specific information to be included, such as most recent accomplishments or why the applicant wants that position, make sure that information is included. Again, failing to include requested information may be indicative of a candidate who cannot follow directions, misses key information, does not follow through, or lacks motivation.

Because cover letters use language differently from a résumé or application, you can get some sense of an applicant's personality. Cover letters that stand out are customized to the vacant position by addressing the particular qualifications sought. These take more time to create and may be an indication of a high level of interest by the applicant.

## **Reference Letters**

The use of professional and/or personal letters of reference is controversial. Reference letters are always positive, however, they may not be an accurate reflection of a candidate or his/her work product.

If you accept reference letters, it is important to look beyond what is said about a candidate and read between the lines to assess what is not said. A reference letter may say glowing things about a candidate's personality and not address his/her skills, quality of work, or judgment.

Similarly, a reference letter may positively reference a candidate's skills and abilities but be silent about his/her attitude, demeanor, and ability to get along with others.

Consider what you want a reference letter to do in helping to assess a candidate's qualifications for a position. Some candidates may have difficulty getting three professional references if they are new to the job market or are beginning a new career path. Candidates with long employment histories may have reference letters dating back several years which do not necessarily speak to the candidate's current level of experience or skill.



While it may be helpful to know what previous employers or co-workers think about a particular candidate, a better way to get this information might be a current reference check. See **Chapter 9** for information regarding reference checks. If you want to use letters of reference to help make a decision, it may be helpful to ask this only of candidates you interview instead of the entire applicant pool.

## Accepted Applications

Interviewing is time-consuming and it can be difficult to get an interview team and candidates to coordinate their schedules. Ideally, an interview is reserved for the top three to five most qualified candidates.

From the pile of applications that meet all the basic criteria, select those with exceptional qualifications. Keep in mind the needs of the position – exceptional qualifications may be in terms of experience, skills, knowledge or whichever factor is most pertinent to success in the position.

Once you have winnowed the pile to the top tier candidates, call the selected candidates to be sure they are still interested in the position and available to interview. Move the applications that were not selected but might still be considered to another pile. If you do not fill the vacancy from your original interview group, you may want to return to the candidates you previously set aside before rejecting them.

## Rejected Applications

NCAOC policy is to keep rejected applications on file for a period of three years. It's good practice to note on each application or résumé the reason for declining to call the candidate for an interview. Simple, specific notes like "does not meet educational requirements," or "lacks sufficient experience," are better than no notes at all.

In a recent case, *EEOC v. Target Corporation* (Dec 2007), Target was required to pay \$515,000 in a race discrimination claim. A group of African American applicants claimed they were turned down for jobs at the retailer because of their race. None of the applicants actually interviewed with the company and Target claimed it had no way of knowing their race. Expert testimony to the effect that Target may have racially identified the applicants as African American on the basis of their names or accents heard during telephone conversations was considered by the court to discredit the employer's claim.

Weighing heavily against Target was that the company did not document the reason applicants were rejected. The résumés were marked "not qualified" without explanation. In the court's view, the candidates may have been rejected for perfectly legitimate reasons but without documentation, there was no way to be certain.<sup>24</sup>

Mark your notes on the application or résumé. It's also good practice to send a letter to the applicant letting them know you received their application, appreciate their interest, and they were not selected for an interview. See the sample rejection letters at the end of this chapter (**Applicant Rejection Letter, Not Qualified Rejection Letter, Late Application Letter**) for ideas on how to communicate this information. Then file the application or résumé with your notes and the rejection letter.



## EMPLOYMENT INTERVIEWS – WHAT NOT TO ASK

Some interview questions are potentially discriminatory or could be construed as discriminatory. For that reason, they should be avoided. For topics that are a common source of discrimination, here is a guide to interview questions you can ask and those you should avoid.

SUBJECT	AVOID ASKING...	YOU MAY ASK...
Age	Date of birth or any other inquiry for the purpose of excluding persons 40 and above.	"Are you over the age of 18?" This question is permissible since most jobs in the Judicial Branch of government require an applicant to be 18 as set by law.
Disability	General questions about disability conditions that would tend to divulge disabilities or health conditions which do not relate reasonably to fitness to perform the job.	Whether the applicant can carry out the assignments of the job. "Is there anything which would interfere with your ability to perform the job for which you have applied?"
Race / Color	Questions that attempt to identify race or color for the purpose of discrimination.	Nothing.
Birthplace	Ancestry, descent, citizenship, or national origin.	Whether the applicant is legally eligible to work in the United States.
Religion	Denomination or religious affiliation.	Whether the applicant can meet the work schedule with reasonable accommodation by the employer.
Military Service	Type of discharge.	Military experience and education. Type of education and experience acquired in service as it relates to a particular job.
Sex / Gender	Any Inquiry which could indicate sex/gender is not permissible. Also, gender cannot be used as a factor for determining whether or not an applicant will be satisfied in a particular job.	Nothing.
Credit Rating	Questions about charge accounts, loans, etc., that do not relate to the job.	Usually nothing unless it is job related.
Height or Weight	Any questions unless job related.	Same.
Family Information	Number and age of children, marital status, childcare arrangements, pregnancy, or any other related questions.	Questions about the applicant's ability to meet work schedules.



# **Colorado Judicial Department**

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## **Interviewing Questions Database**

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### **Ambition**

- How ambitious are you? Why do you think you are ambitious?
- Do you believe this organization is ambitious? If so, why?
- Do you have any past heroes? Who?
- What important goals have you achieved in the past year?
- Describe a time when you made a suggestion to improve the work in your organization.
- Give an example of an important goal that you set in the past. Tell about your success in reaching it.
- Give two examples of actions you've taken in previous jobs that demonstrate your willingness to work hard.
- How many hours a day do you put into your work?
- Tell me about a time when you had to go above and beyond the call of duty in order to get a job done.
- Tell about a time when a job had to be completed and you were able to focus your attention and efforts to get it done.
- Tell about a time when you were particularly effective on prioritizing tasks and completing a project on schedule.
- Tell about the last time that you undertook a project that demanded a lot of initiative.
- Tell how you keep your job knowledge current with the on going changes in the industry.
- There are times when we work without close supervision or support to get the job done. Tell me about a time when you found yourself in such a situation and how things turned out.
- What impact did you have in your last job?
- What is the most competitive work situation you have experienced? How did you handle it? What was the result?
- What is the riskiest decision you have made? What was the situation and result?
- What kinds of challenges did you face on your last job? Give an example of how you handled them.
- What projects have you begun on your own recently? What prompted you to get started?
- Describe a project of idea that was implemented primarily because of your efforts. What was your role? What was the outcome?
- What sorts of things have you done to become better qualified for your career?
- What has been the best idea that you discovered and implemented in your career?
- When you disagree with your manager, what do you do? Give an example.
- When you have a lot of work to do, how do you get it all done? Give an example. (Find out if it was poor planning that caused the backlog.)

### **Analytical Skills**

- Can you tell me about a time when you discovered a more efficient way to complete a work task?
- Tell me about a task that really tested your analytical abilities?
- Tell me about a tricky situation for which you found a very simple solution?
- Tell me about an assignment you worked on in which you had to amass a huge amount of data, and then analyze it?
- Can you tell me about a situation where your analysis of a problem was deemed to be incorrect? What would you have done differently?
- Describe the project or situation which best demonstrates your analytical abilities. What was your role?
- Developing and using a detailed procedure is often very important in a job. Tell about a time when you needed to develop and use a detailed procedure to successfully complete a project.
- Give me a specific example of a time when you used good judgment and logic in solving a problem.
- Give me an example of when you took a risk to achieve a goal. What was the outcome?
- How did you go about making the changes (step by step)? Answer in depth or detail such as "What were you thinking at that point?" or "Tell me more about meeting with that person", or "Lead me through your decision process".
- Tell about a job or setting where great precision to detail was required to complete a task. How did you handle that situation?
- Tell about a time when you had to analyze information and make a recommendation. What kind of thought process did you go through? What was your reasoning behind your decision?
- Tell about your experience in past jobs that required you to be especially alert to details while doing the task involved.



### **Assertiveness**

- Have you ever been in a situation, at work, when you have been motivated to question an ethical issue?
- If a clash of personalities were to occur with a colleague, what steps would you take to make the working relationship operate smoothly?
- Can you explain an occasion when you have had to motivate and boost the morale of your colleagues.
- Describe an occasion when you had to give an explanation of what you could realistically deliver, and why was this issue important?
- What steps will you take to clarify unclear information or instructions with regard to your work?

### **Behavioral**

- Describe what you would say if asked to talk about yourself in a group of 15 people.
- If someone told you that you had made an error, describe how you would react and what you would say in your defense.
- If someone asked you for assistance with a matter that is outside the parameters of your job description, what would you do?
- You are a committee member and disagree with a point or decision. How will you respond?
- Describe what you would classify as a crisis.
- You are angry about an unfair decision. How do you react?
- Suppose you are in a situation where deadlines and priorities change frequently and rapidly. How would you handle it?
- How do you know when you are stressed? What do you do to de-stress?
- Tell me about a time when you were a part of a great team. What was your part in making the team effective?
- Give me an example of a time when you were forced to deal with a difficult co-worker. How did you handle the situation?
- How do you think your co-workers would respond if you were absent from work?
- Can you tell me about a time during your previous employment when you suggested a better way to perform a process?
- Tell me about a personal or career goal that you have accomplished and why that was important to you.
- Give an example of a time when you were trying to meet a deadline, you were interrupted, and did not make the deadline. How did you respond?
- What strengths did you rely on in your last position to make you successful in your work?
- What do you do when you know you are right and your boss disagrees with you? Give me an example of when this has happened in your career.
- Tell me about a situation you wish that you had handled differently based on the outcome. What was the situation? What would you change (or will you change) when faced with a similar situation?
- What was the most creative action taken during your last job?
- What is your interpretation of "success?"
- Describe an ideal work environment of "the perfect job."
- In what way(s) do you express your personality in the workplace?

### **Career Goals**

- What are your career goals, both short-term and long-term?
- Where do you see yourself five years from now?
- There are thousands of possible careers. Why do you want to follow this particular career?
- Five years ago how would you have answered the Interview Question: "Where do you see yourself five years from now?" Do you think you have achieved what you wanted to?

### **Coaching Ability**

- What procedures do you use to evaluate the ability of your co-workers? What do you do to help your colleagues perform to the best of their abilities?
- Give me an example in which you gave some on-the-job training to your subordinates. Please be as specific as possible.



- Do you think it is important for your colleagues to constantly update their skills? If so, what have you done to help in this matter?
- What do you think are the main factors that normally boost the morale of your fellow workers? How would you incorporate these factors into this organization?
- Describe a time when you helped a co-worker enhance their social skills.
- As a team leader, how can you motivate a colleague who is not interested in working? What can be done to get him/her to contribute to the organization? Give an example if you have done something similar in the past.
- Tell me about a time when you gave coaching sessions, yet the participants had difficulty in understanding the topics you were covering. What did you do?

### **Communication**

- Tell me about a time when you had to be very careful in communicating delicate information. What was the possible risk involved and how did you go about it?
- Describe a time when you took extra effort to make sure the person with whom you were communicating with had really understood your point. How did you do this?
- What steps do you take to establish a rapport with others?
- Give me an example when you had to present complex information in a simplified manner in order to explain it to someone.
- Give me an example when you had to present complex information in a simplified manner in order to explain it to someone.
- How do you explain a complex technical issue to someone who has less technical knowledge than you?
- Give me an example of a time when you had to put your point across in a meeting to which most of the people were reluctant to hear.
- Tell me about a work situation you had that required excellent communication skills.
- Do you prefer to speak directly with someone or send a memo?
- How would you grade your ability to communicate with upper level management, customers, and peers?
- What was more important on your job, written or oral communication?
- Describe a situation in which you were able to effectively "read" another person and guide your actions by your understanding of their individual needs or values.
- Describe a situation when you were able to strengthen a relationship by communicating effectively. What made your communication effective?
- Describe a situation where you felt you had not communicated well. How did you correct the situation?
- Describe a time when you were able to effectively communicate a difficult or unpleasant idea to a superior.
- Describe the most significant written document, report or presentation which you had to complete.
- Give me an example of a time when you were able to successfully communicate with another person, even when that individual may not have personally liked you, or vice versa.
- Give me an example of a time when you were able to successfully communicate with another person, even when that individual may not have personally liked you.
- Have you ever had to "sell" an idea to your co-workers or group? How did you do it? Did they "buy" it?
- Have you had to "sell" an idea to your co-workers, classmates or group? How did you do it? Did they "buy" it?
- How do you keep subordinates informed about information that affects their jobs?
- How do you keep your manager informed about what is being done in your work area?
- How do you go about explaining a complex technical problem to a person who does not understand technical jargon?
- What approach do you take in communicating with people?
- What kinds of communication situations cause you difficulty? Give an example.
- Tell about a recent successful experience in making a speech or presentation. How did you prepare? What obstacles did you face? How did you handle them?
- Tell about a time when you and your current/previous supervisor disagreed but you still found a way to get your point across.
- Tell about a time when you had to present complex information. How did you ensure that the other person understood?
- Tell about a time when you had to use your verbal communication skills in order to get a point across that was important to you.



- Tell about a time when you were particularly effective in a talk you gave or a seminar you taught.
- Tell about an experience in which you had to speak up in order to be sure that other people knew what you thought or felt.
- Tell me about a situation when you had to speak up (be assertive) in order to get a point across that was important to you.
- Tell me about a time in which you had to use your written communication skills in order to get an important point across.
- What challenges have occurred while you were coordinating work with other units, departments, and/or divisions?
- What have you done to improve your verbal communication skills?
- How have you persuaded people through a document you prepared?
- What are the most challenging documents you have done? What kinds of proposals have you written?
- What kinds of writing have you completed? How do you prepare written communications?

### **Confidence**

- How would you define self-confidence?
- How confident are you?
- Tell me about a situation or situations that might demonstrate your confidence to do this job?
- Would your friends describe you as a confident person?
- Do you think there is a difference between confidence and arrogance? If so, what is it?

### **Conflict**

- Tell me about a situation when you were given job instructions and you were unable to comprehend the instructions. How did you go about completing the task?
- How do you manage to work with people whom you are not comfortable with? What do you do in such situations?
- Tell me about a time when you helped to successfully mediate in a conflict? How did you feel?
- Tell me about a situation where you were aware of a serious mistake made by a colleague and what did you do about it?
- Describe a time when you had a disagreement with a colleague at work. How did you manage to resolve the conflict?
- Tell me about a time when you had to work through some negativity to get work accomplished.
- Describe a time when everyone in the meeting was opposing your ideas. How did you manage to resolve the opposition?
- How would you handle a conflict between you and higher management?

### **Cooperation Skills**

- Some people believe life is all about "The survival of the fittest". Today, others are suggesting, from new biological evidence, that life is in fact all about the "The survival of the most cooperative". What do you think about these ideas?
- Give me an example of a situation where you helped your colleague perform a particular task in which you had better knowledge on the subject?
- Can you tell me about a time when you backed off in a meeting because you felt someone else should speak or have an opportunity?
- Tell me about a time when you acted as a mediator to help colleagues resolve their differences.
- How would you show co-workers the importance of cooperation?
- Give me an example of a time when you tried your best to work with someone, but the problems still remained. What did you learn from that situation?
- Give an example of a time when you assisted a co-worker to enhance their work skills?
- Tell me about a time when you had to help a co-worker who had made a bad mistake. What did you do?

### **Creative Thinking**

- How often do you discuss and work with colleagues to create new systems and styles of working?
- Have you ever tried a new way of completing tasks? Did you succeed?
- Tell me about one case when you tried to solve a problem with a totally different approach than is normally used. What was the result?
- Can you tell me about a situation in which you tried to solve a problem with ideas and methods that had not been tried previously?
- What is the best book you've read in the past year? Please take a minute and tell us why you enjoyed it.
- What are some typical decisions that you make and how do you make them? Please provide some examples.
- What do you think you would do for this organization that someone else would not?
- Where do you see yourself in 5 years?
- Describe for me your ideal organization.

### **Customer Service**

- How do you handle negative feedback from very angry clients? How do you respond to them?
- Can you tell me about a time when you did something extra, which was not part of the routine activities assigned to you, but you did it for the benefit of the customer?
- Explain with an example, how would you handle a situation where a customer is asking for something, which is not in the interest of the company or which would violate a policy of the company?
- Have you ever felt, during course of your work, that the existing systems and solutions are not sufficient to meet the needs of customers properly and/or that they need to be changed? If so, tell me more.
- Can you explain how you contact or initiate communications with customers?
- If you had to turn down a request from a valued client, what would you do?
- What do you like about working in Customer Service? What do you find is the most difficult part of working in Customer Service?
- Tell me about a time when you went out of your way to give great service to a customer.
- Describe a process or system that you improved so customers would be better served.
- Tell me about a time when you asked for feedback on your customer service skills from your manager or co-worker and then used that response to improve your work.
- Tell me about a time when you knew that your customer might not get what he or she needed on time. How did you handle this?
- Tell me about a time when you had to say "No" to a customer because it was against organizational policy.
- Tell me about a time when you had trouble working with a difficult or demanding customer. How did you handle this?
- Tell me about a situation in which you "lost it" or did not do your best with a customer. What did you do about this?

### **Decision Making**

- Explain an occasion where you had to make a decision on your own? Were you happy with your decision-making process?
- How do you react in a situation where you need to make an immediate decision? What process will you follow for decision-making in such a critical situation?
- Have you ever faced a situation when you had to make a decision, which did not fall within in your area of responsibility? What decision did you make and how?
- Have you ever tried to delay any decision-making? What were the consequences of this on both your organization and customers?
- Do you always make decisions on your own and without the help of others? In which situations do you seek other's help for decision-making?

### **Determination**

- How do you prioritize your work? Give me an example.
- Would you describe yourself as resilient? If so, please give some recent examples.
- Describe a time when you took on additional work to help your team meet a crucial work goal?



- Give me an example when you spoke out about something you didn't feel was right.
- Give me an example when you had to face and overcome strong opposition against you in a meeting.

### **Diplomacy Skills**

- Have you ever felt irritated or frustrated while dealing with a customer? How do you respond when customers become demanding beyond an acceptable level?
- How do you respond when you receive negative feedback from a customer about you personally? What approach would you take to deal with such a customer?
- How would you respond if one of your colleagues came to you and asked you something, which you could not reveal to him, because you were bound by confidentiality?
- Have you faced any situation when you needed to act very skillfully and discreetly? How did you manage?
- What kind of customer queries have you been handling? How do you manage to meet their requirements and how do you respond to them?

### **Delegation**

- Provide us with an example of your ability to delegate work.
- Is there a difference between assignment and delegation? If so, what is the difference?
- What is the purpose of delegation?
- What are the steps to successful delegation?
- Under what circumstances may a person decide to delegate upward to their supervisor?
- What are the benefits for the subordinate when a supervisor delegates?
- What benefits does a supervisor receive from delegating work to employees?
- What types of tasks can be delegated?
- What types of tasks cannot be delegated?
- Tell us about a task that you unsuccessfully delegated. What did you learn from this experience?
- Tell us about the last major assignment that you delegated and why you delegated?
- How do you decide what assignments to delegate to your staff?
- Do you think delegation is a way to dump failure on the shoulders of a subordinate or as a dynamic tool for motivating and training your team to realize their full potential?
- What type of instructions would you give your staff if you decided to delegate?
- What steps do you take to ensure that the work you delegate is successful?
- What do you think are the most common excuses team leaders use to not delegate?
- What should you assume about your co-workers if you want to delegate successfully?
- Do you consider yourself a macro or micro manager? How do you delegate?
- How do you make the decision to delegate work?
- Tell me how you go about delegating work?
- What was the biggest mistake you have had when delegating work? The biggest success?

### **Detail-Oriented**

- Describe a situation where you had the option to leave the details to others or you could take care of them yourself.
- Do you prefer to work with the "big picture" or the "details" of a situation? Provide for me an example of an experience that illustrates your preference.
- Have the jobs you held in the past required little attention, moderate attention, or a great deal of attention to detail? Give me an example of a situation that illustrates this requirement.
- Tell me about a difficult experience you had in working with details.
- Tell me about a situation where attention to detail was either important or unimportant in accomplishing an assigned task.

### **Diversity**

- What do you see as the most challenging aspect of a diverse working environment? What steps have you taken to meet this challenge?



- What kinds of experiences have you had working with others with different backgrounds than your own?
- Tell me about a time you had to alter your work style to meet a diversity need or challenge?
- How have you handled a situation when a colleague was not accepting of others' diversity?
- What does it mean to have a commitment to diversity and how would you develop and apply your commitment at this organization?
- What was/is the diversity value at your current/former employer? What impact did you make on this value?
- What efforts have you made, or been involved with, to foster diversity competence and understanding?
- What have you done to further your knowledge about diversity? Have you included diversity in your professional development? How have you demonstrated what you have learned?
- What kind of leadership efforts would you make to ensure a commitment to the diversity initiative or value?
- What strategies have you used to address diversity challenges? What were the positives and negatives?
- Give a specific example of how you have helped create an environment where differences are valued, encouraged and supported.
- Tell about a time that you successfully adapted to a culturally different environment.
- Tell about a time when you had to adapt to a wide variety of people by accepting/understanding their perspective.
- Tell about a time when you made an intentional effort to get to know someone from another culture.
- What have you done to further your knowledge/understanding about diversity? How have you demonstrated your learning?
- What measures have you taken to make someone feel comfortable in an environment that was obviously uncomfortable with his or her presence?

### **Ethics**

- Tell me about a time when you had to make an uncertain decision, and there was a possibility of an adverse public reaction. How did you manage the situation?
- Have you ever tried to raise issues and methodologies that you thought may have been unlawful or not in accordance with professional principles?
- Have you ever faced a situation when you had to take a longer way of completing something in order to adhere to proper professional standards? Tell me more about it?
- How would you manage a situation where you believed that something was not in compliance with professional ethics? Have you ever faced such situation? If so, please describe.
- What would you do if you saw a valued customer behaving in an unethical manner?

### **Flexibility**

- Tell me about the last change which occurred in your workplace. How did you handle it?
- I'm interested in hearing about the last time you took a risk. What was it and in retrospect, was it the right decision?
- How important is communication and interaction with others on your job? How many departments did you deal with? What problems occurred?
- Tell me about a time when a work emergency caused you to reschedule your work/projects.
- Give me an example of the last time you went above and beyond the call of duty to get the job done.
- In what areas do you typically have the least amount of patience at work?
- Have you ever had a subordinate whose performance was consistently marginal? What did you do?
- How have you adjusted your style when it was not meeting the objectives and/or people were not responding correctly?
- What do you do when you are faced with an obstacle to an important project? Give an example.
- When you have difficulty persuading someone to your point of view, what do you do? Give an example.

### **General**

- Could you share with us a recent accomplishment of which you are most proud?
- What would you have liked to do more of in your last position? What held you back?
- Tell us a bit about your work background, and then give us a description of how you think it relates to our current opening.



- What are your qualifications in your area of expertise, i.e., what skills do you have that make you the best candidate for this position? Include any special training you have had (on-the-job, college, continuing education, seminars, reading, etc.) and related work experience.
- Why did you apply for this position?
- What skill set do you think you would bring to this position?
- Tell me about your present or last job. Why did you choose it? Why did you/do you want to leave?
- What was your primary contribution/achievement? Biggest challenge?
- What are your short-term and long-term goals?
- In what areas would you like to develop further? What are your plans to do that?
- What are some positive aspects of your last employment/employer? What are some negative aspects?
- What do you think about SOPs (Standard Operating Procedures)?
- What are your career path interests?
- What do you know about our organization?
- Why should we hire YOU?
- If the position required it, would you be willing to travel?
- If the position required it, would you be willing to relocate?
- If you were offered this position, when would you be available to start?
- After learning about this opportunity, what made you take the next step and apply for the job?
- If you are the successful applicant, how would you expect to be different after a year in this position?
- Now that you have learned about our organization and the position you are applying for, what hesitation or reluctance would you have in accepting this job if we offer it to you?
- Tell me anything else you would like us to know about you that will aid us in making our decision.

#### **Information Technology**

- In your experience, what are the essential elements of an IT disaster recovery plan?
- Describe the types of network security features you have implemented or maintained in the past.
- When you have several users experiencing computer problems, how do you determine which users get help first?
- Describe your decision-making process when selecting which IT certifications to pursue.
- Of your certifications, which one(s) have you found most helpful when you encounter technical problems on the job?
- In your opinion, how does managing a staff of technical workers differ from managing other kinds of workers?
- What brands of hardware do you feel most comfortable dealing with?
- What software have you had the most success supporting?
- What characteristics do you feel are necessary for success as a technical support writer?
- Describe a past situation in which you provided excellent customer service to a user.

#### **Imagination**

- Do like doing things in a new way? Do you think it is worth it?
- How many things (like systems, methodologies, standards etc.) were changed at your last job because of your suggestions? How did it benefit the organization?
- What are some things that you may change in the near future about your style of working? Why?
- What are the methods and systems you think should be changed in your current organization to achieve higher efficiency at work? How? Why?
- Do you think that technology can help to achieve better efficiency at work? And can you give me an example to explain your thinking?
- How do you use customer feedback? How do you develop a new system or work process while always keeping the customer's response well in mind?
- Can you tell me about a situation where you used your imaginative skills to solve a very difficult problem?

#### **Initiative**

- Tell me about a time that you undertook a course of study, on your own initiative, in order to improve your work performance?



- Tell me about initiatives you have taken to improve procedures at work? Were you successful? Would you do anything different now?
- Tell me about a time you succeeded in overcoming a major obstacle. How did it make you feel?
- Tell me about a time when you found a better way of doing something, which proved to be an improvement on the existing system.
- Has your supervisor ever come to you and pointed out that you had not met some of your tasks at work? How frequently does it happen?

### **Innovation**

- Can you think of a situation where innovation was required at work? What did you do in this situation?
- Describe a situation when you demonstrated initiative and took action without waiting for direction. What was the outcome?
- Describe a time when you came up with a creative solution/idea/project/report to a problem in your past work.
- Describe something that you have implemented at work. What were the steps used to implement this?
- Describe the most creative work-related project which you have carried out.
- Give me an example of when you took a risk to achieve a goal. What was the outcome?
- Sometimes it is essential that we break out of the routine, standardized way of doing things in order to complete the task. Give an example of when you were able to successfully develop such a new approach.
- Tell about a problem that you solved in a unique or unusual way. What was the outcome? Were you satisfied with it?
- Tell about a suggestion you made to improve the way job processes/operations worked. What was the result?
- There are many jobs in which well-established methods are typically followed. Give a specific example of a time when you tried some other method to complete the job.
- There are many jobs that require creative or innovative thinking. Give an example of when you had such a job and how you handled it.
- What have been some of your most creative ideas?
- What innovative procedures have you developed? How did you develop them? Who was involved? Where did the ideas come from?
- What new or unusual ideas have you developed on your job? How did you develop them? What was the result? Did you implement them?
- When was the last time that you thought "outside of the box" and how did you do it?

### **Integrity**

- Describe a time when you were asked to keep information confidential.
- Give examples of how you have acted with integrity in your job/work relationship.
- If you can, tell about a time when your trustworthiness was challenged. How did you react/respond?
- On occasion we are confronted by dishonesty in the workplace. Tell about such an occurrence and how you handled it.
- Tell about a specific time when you had to handle a tough problem which challenged fairness or ethical issues.
- Trust requires personal accountability. Can you tell about a time when you chose to trust someone? What was the outcome?

### **Interpersonal Skills**

- Do you think it is important to promote team building among employees in the organization? What steps do you take to ensure this?
- Tell me about a time when a colleague strongly disagreed with your views, ideas, or way of working? What kind of relationship can you develop with such a person?
- Do you like people?
- How frequently do you add contacts to your address book? Do you think it is worth building network of contacts?

- Describe how you get on with your work colleagues? How frequently do you seek each other's support? How frequently do others seek and ask for support from you?
- What, in your view, makes a person likeable?
- Do you think it is worthwhile to establish new relationships? What are the consequences of building new relationships in your professional and personal life?
- How will you initiate a new relationship with a potential client? Do you think it is necessary?
- What are your strengths?
- What would your last boss say about you?
- Describe how you like to be managed, and the best relationship you've had with a previous boss.
- If I asked your previous/current co-workers about you what would they say?
- Describe what you see as your strengths related to this job/position. Describe what you see as your weaknesses related to this job/position.
- Explain the phrase "work ethic" and describe yours.
- What kind of people do you find it most difficult to work with? For example, assume you are in a situation where you have to deal with a person very different from yourself and you find it difficult. What would you do?
- What methods do you use to make decisions? When do you find it most difficult to make a decision?
- Describe a difficult time you have had dealing with an employee, customer, or co-worker. Why was it difficult? How did you handle it? What was the outcome?
- How would your co-workers describe your work style/habits?
- What do you do when others resist or reject your ideas or actions?
- What do you think are the best and worst parts of working in a team environment? How do you handle it?
- Under what kinds of conditions do you learn best?
- How would your past employers describe your response to hectic or stressful situations?
- How would your co-workers describe your work style or work habits?
- If I asked several of your co-workers about your greatest strength as a team member, what would they tell me?
- To you, which is more desirable: An organization that is operated in an efficient business-like manner OR a business that is run in a personal and friendly way?

### **Introductory**

- What five adjectives describe you best?
- Why should I consider you for this position?
- Why are you the best candidate for this position?
- Tell me about the one thing in your life of which you're the proudest.
- You've changed jobs frequently. What makes you think that this position will be different?
- What qualities do you think are necessary to make a success of this job?
- Describe your ideal job.
- How did you learn about this job?
- What do you know about the job?
- What do you know about this department/organization?
- Is there anything that will prevent you from getting to work on time?
- Is there anything that will prevent you from working the job's regular hours?
- What kinds of work interest you the most?
- What interests you most about this position?

### **Inventiveness**

- When you need to create an order of job tasks that need to be completed, how do you decide which task has priority?
- What steps do you take when you have to make an immediate decision and you do not feel you have all the relevant or necessary information?



- If you are given a specific problem to solve, how do you decide what information is necessary to come up with a good solution?
- You need information, and access to it is being denied to you. What steps do you take to acquire the information?
- When was the last time you used an inventive method to draw out company resources beyond a level that is usually met?
- When you are working, how often do you think of innovations that will improve your work performance?
- What if there was a person you intensely disliked within your work team, yet you sense that this person is going to be the most creative in bringing the assignment to an effective conclusion. What steps do you take to nurture their contribution and demonstrate that you value their input?

### **Job Knowledge**

- In which areas do you consider yourself to be a specialist, and how do you envision being able to utilize your expertise within our organization?
- In what specific areas do you need to expand your knowledge to become more proficient at this job?
- In which areas of your job do you feel capable and in which areas do you feel more comfortable utilizing other people's experience?
- When did you last volunteer to take a work project simply because it allowed you to expand your personal knowledge of the internal structure within your company?
- Describe a recent occasion when you used your knowledge of the internal structure, within your company, to answer complex questions about the organization?
- Can you suggest methods to utilize your knowledge of the organization's structure to improve relationships with our customers and clients?

### **Judgment**

- When you observe a curious pattern in data, how do you analyze it?
- When a logical approach to a problem is ineffective, how do you create a solution?
- What steps do you take when a customer claims that part of his consignment has not been delivered?
- What do you do when someone else's errors are adversely affecting your project?
- When was the last occasion that you had to make an instant character judgment of a person to create a solution to a problem?

### **Leadership**

- Describe one experience when you had to lead a team.
- How do you keep each member of the team involved and motivated, while keeping morale high? What steps do you need to take to achieve this?
- In what situations do you prefer to use your leadership skills? Can you give me some examples?
- Do you like to praise team members in public? How do you express your appreciation of them?
- Have you ever tried to act as a mentor to a colleague? Was it worth it from a professional point of view?
- Have you ever tried to do a job for which you were unqualified? How did you react at that time? Were you able to accomplish your task?
- Give an example of a time in which you felt you were able to build motivation in your co-workers or subordinates at work.
- Give an example of your ability to build motivation in your co-workers, classmates, and even if on a volunteer committee.
- Have you ever had difficulty getting others to accept your ideas? What was your approach? Did it work?
- Have you ever been a member of a group where two of the members did not work well together? What did you do to get them to do so?
- What is the toughest group that you have had to get cooperation from? Describe how you handled it. What was the outcome?



### **Learning Skills**

- Explain a recent mistake. What did you learn from it and in what areas can you utilize that knowledge in the future?
- When was the last time that you volunteered to expand your knowledge at work, as opposed to being directed to do so?
- When did you last acquire effective knowledge in your own time and how can you apply this towards your career?
- What was the last seminar you attended? How did you apply this new-found knowledge towards your work?
- In which specific areas of your work are you really interested in expanding your knowledge? How do you intend to achieve this?
- When was the last occasion you asked for direct feedback from a superior or a customer? How did you then use this knowledge to improve your personal performance?
- What is personally fascinating about the areas of your job in which you wish to expand your knowledge?

### **Listening Skills**

- Are you capable of getting to the bottom of a situation, when someone is incapable of communicating what he really means? If so how do you achieve this?
- Relate an occasion when you withheld your own opinion and tried to obtain the opinion of others. Why was this action important?
- Describe an incident when you had to listen attentively in order to act quickly enough to meet a deadline.
- Give an example of a time when you had to ask direct questions to bring out diverse opinions on a central issue.
- How do you deal with situations when others are finding it hard to communicate effectively with you?
- What do you do when someone is deliberately giving you vague, dissembling, or even obstructive information, which hinders your ability to complete a task?

### **Manage Change**

- Tell me about a time when you experienced a major change to your normal work practices. How did you handle it?
- During your career, you must have experienced some difficult times. If so, how did you maintain a positive attitude?
- Describe a time when there was a fundamental change in the way things were done in your workplace. What was your response towards it?
- Describe how you felt when there were some recent changes at work.
- Tell me about a time when you were very much opposed to a change that affected your work practices. How did you get through it?
- Describe a time when you wanted some change in the working style of the team, but others were reluctant to do so. How did you go about it?

### **Management Ability**

- With reference to a day's work, what steps do you take to organize and prioritize your tasks?
- How do you decide which tasks take priority when organizing a complete project?
- How do you perform when others need your guidance in a business crisis?
- Has there been an occasion when you refused to bow to a customer's pressure to "bend the rules"?
- What do you do when you discover you are in a compromising situation?
- Describe a specific instance, in a group situation, where you made your views known about an issue important to yourself. What was the issue, and why was it crucial?
- Your whole team has proposed a course of action, but you believe that the stance is unethical, how do you react?

### **Managerial**

- Define professional behavior and/or conduct appropriate in the workplace.
- Why do you think a team of people – sports team, work team – may not work well together?
- Tell us about your management style – people, teamwork, direction?
- Describe an ideal supervisor.
- What is your own philosophy of management?
- How have you participated in planning processes?
- Is it more important to be a detail-oriented person, or a big-picture person? Explain.
- What was the most challenging personnel issue you've had to deal with and how did you handle it?
- Describe for me a time when you have come across questionable business practices; how did you handle the situation?
- A new policy is to be implemented organization-wide. You do not agree with this new policy. How do you discuss this policy with your staff?
- Describe for me a decision you made which would normally have been made by your supervisor? What was the outcome?
- Discuss and differentiate between remediation, corrective action, and discipline.
- Explain, step by step, how you have handled an employee who had performance problems.
- Why should employees seek to improve their knowledge and skill base? How would you motivate them to do so?
- What coaching or mentoring experience have you had? With groups or one-on-one? How did you determine the appropriate way to coach/mentor and what were the results?
- Management requires both good writing and verbal skills for good communication. When it comes to giving information to employees that can be done either way, do you prefer to write a memo OR talk to the employee?
- When making a decision to terminate an employee's employment, do you find it easy because of the organization's needs OR difficult because of the employee's needs?
- Managing requires motivating employees as well as accomplishing tasks. Do you find it more natural to point out what's wrong so employees can accomplish tasks competently OR to praise employees for their work and then point out what may need correcting?
- Managers need good information and managers need to make good decisions. Do you tend to gather information up to a deadline in order to make a better-informed decision OR gather just enough information to make a good decision quickly?
- What is the largest number of employees you have supervised and what were their job functions?
- Are you best at dealing with details and day-to-day operations OR with concepts, envisioning and future planning? Give me an example.

### **Manageability**

- What do you do when you're having trouble with a boss?
- If your boss knew you were interviewing, what would he say?
- What do you feel an employer owes an employee?
- Your supervisor tells you do to something in a way you know is dead wrong. What do you do?
- If your supervisor unfairly criticized you, what would you do?
- Would you like to have your boss' job? Why or why not?
- Tell me about a time when your manager was in a rush and didn't give you enough attention.
- What are some of the things about which you and your boss disagree?
- What are some of the things your boss did that you disliked?
- In what areas could your boss have done a better job?
- I would be interested to hear about an occasion when your work or an idea was criticized, what was criticized, who criticized you, and how did you handle it?
- Describe the best manager you ever had. The worst. What qualities did each have?



### **Mental Attitude**

- How do you handle a situation where the workload is beginning to be too much and your emotions start to be involved in the situation?
- How do you handle yourself when you feel the world is against you?
- Have you ever had an occasion when you discovered a strong point in your character that you didn't know you had? Then think of the same occasion, but with a personal limitation.
- Is it useful to be able to quickly and accurately appraise another person's temperament?
- When was the last time you had a project that really energized you.
- What is your general attitude towards life?
- Do you attempt to predict how others will react to a given situation or a suggestion?
- How do you react when asked to do something beyond your capabilities?
- Would you describe yourself as an optimist or a pessimist?

### **Motivation**

- Describe a project you were involved in that really excited you? How long did that feeling last?
- Tell me about a time when you willingly volunteered for a task. Also, why were you so interested in this specific task?
- Tell me about a hurdle which got in the way of achieving an ambitious goal. How did you go about overcoming it?
- Tell me about a goal you achieved which at some point seemed hopeless? Why did you keep going?
- Describe a work related goal that you have set for yourself.
- Can you tell me at least three things that you have done in the past year to improve yourself, both business-wise and competency wise?
- Tell me about a time when you and your whole team were demoralized for some reason. What do you do to raise spirits?
- Would you regard yourself as a self-starter? Can you give me a recent example where you displayed this quality?
- How do you feel about your present workload?
- What motivates you to do your best work?
- How can we best help you get your job done?
- Tell me about a time you went "out on a limb" to get the job done?
- What are the disadvantages of this line of work?
- What do you find most frustrating at work?
- Tell me about a project about which you were really excited.
- How do you define doing a good job?
- What makes a job enjoyable for you?
- Under what conditions do you work best?
- What is your greatest strength/weakness or deficiency?
- Tell me about a work task you enjoy.

### **Negotiation Skills**

- When was the last occasion that you had to use your negotiating skills to bring about a resolution that was in everyone's best interest?
- Do you need to make your attitude more positive when marketing yourself and your ideas to others?
- What skills do you use when you need to influence the way other people think?
- When was the last occasion that you were given an assignment to develop your mediating skills, and what was the conclusion?
- Have you had an experience where you realized that you had to be more positive and persuasive when selling you ideas to others? What did you learn from this experience?
- When your credibility is compromised, what steps do you take to rectify the situation?
- Describe the most challenging negotiation in which you were involved. What did you do? What were the results for you? What were the results for the other party?



- Have you ever been in a situation where you had to bargain with someone? How did you feel about this? What did you do? Give an example. How did you prepare for it? How did you present your position?
- Tell me about the last time you had to negotiate with someone. What was the most difficult part?

### **Organizational Skills**

- When it is your responsibility to organize and plan a project, what steps do you take?
- How do you accommodate last minute changes that have to be incorporated into your work?
- How do you prioritize the tasks to be completed in one complete work project?
- Illustrate how you prioritize each day's tasks?
- What do you do when a project is not coming to fruition as expected because of inefficient planning?
- What steps do you take when the work of a colleague threatens the completion of a project?
- Describe a time when you had to make a difficult choice between your personal and professional life.
- Give me an example of a project that best describes your organizational skills.
- How do you decide what gets top priority when scheduling your time?
- What do you do when your schedule is suddenly interrupted? Give an example.

### **Patience**

- Are you a patient person? Why?
- Most people find it very hard to be patient? How do you manage it?
- Can you tell me about a situation that really tested your patience?
- "Genius is infinite attention to detail." Would you agree with this definition?

### **Personality Traits**

- How do you cope when unexpected obstacles hinder your work?
- With reference to a recent teamwork project, what went smoothly and in what areas could the work performance have been improved?
- When has personal audacity improved your work performance?
- At certain times everyone has to work with a person where there is a serious clash of personalities. How do you handle a situation where there is mutual dislike?
- Tell me about a situation where you had an experience that caused you to grow in an unexpected and new direction.
- What are your current career objectives and what steps will you take to achieve them?
- What steps do you personally take when work tasks are falling behind schedule?

### **Pressure**

- Illustrate an occasion when something visibly shocked you, but you had to appear composed?
- How do you handle circumstances at work that make you feel temperamental or cynical?
- During a significant setback, who were the people you could depend on?
- What steps do you take to reduce your personal stress levels when there are stressful occasions at work?
- What steps do you take to accommodate sudden and immediate changes that occur within your organization?
- When you last had a conversation with your manager's manager, what did you discuss and how did you feel?
- Have you ever been overlooked for a promotion which you felt you deserved? How did you react?

### **Probation**

- Please provide an example of an experience in any previous position where organizational skills were important and how you organized your work.
- Describe to me your knowledge and prior experiences working within the scope of 'criminal justice.'
- What attracts you to the probation profession?



- Have you ever been required to address a situation where the circumstances challenged your value system? If so, please describe.
- Probation officers deal with difficult and sometimes dangerous people. Tell me about a previous work experience where you felt threatened and how did you respond?
- What other profession do you see to be most similar to probation?
- As a Probation Officer how do you define the nature of the relationship between you and your clients?
- Provide for me an example of two previous clients/offenders with very similar situations but for whom you were required to take very different approaches to achieve success. What was there about each situation and circumstances what made your responses different?
- In your opinion, what population is the hardest to supervise? Interview?
- Probation Officers at the Judicial Branch must be proficient at managing their workload with their time constraints. How have you successfully managed your time previously?
- How do you prioritize your work?
- In several cases Probation Officers must review a large amount of information and arrive at a conclusion or recommendation for a client. How would you proceed in analyzing the information? Please provide a past example.
- Please describe to me your project management and supervisory skills and any relevant experience.
- What is your experience with communicating critical information to all involved parties in a given situation? (writing, speaking, interviewing, etc.)
- What kind of interviewing experience do you have in regards to working with clients and extracting critical information about their case? OR Provide an example where you were required to collect important information by interviewing another person.

#### **Problem Solving Abilities**

- Please give me a specific example of how you obtained information to solve a problem? What was the problem and how did you decide what information you required?
- What steps did you take on the last occasion that you detected the cause of a company operating error?
- When you handle a project that requires systematic data acquisition and accurate analysis, what steps do you take?
- What is your approach to managing important projects?
- When faced with a work-related problem, what steps do you take to address the issue?
- On the last occasion that you went out of your way to analyze the cause of a problem, how did you proceed?
- What steps do you take when a colleague is impeding your progress at work?
- Describe the most difficult problem you had to solve. What was the situation and what did you do? Would you do anything different next time?
- In general, how do you handle conflict?
- Describe a creative solution that you have developed to solve a problem.
- What solution are you the most proud of implementing?
- Describe a time when you had to use fact-finding skills.
- What has been your most important work-related idea?
- Who or what caused you the most trouble in implementing your ideas?
- What kinds of problems do you normally experience in a day?
- Tell me about a situation that got out of control. How did you handle it?
- Describe the best/worst co-worker you've ever had.
- Tell me about something you achieved as a group member.
- How would you define a good working environment?
- Tell me about a time you came up with a new idea. Were you able to get it approved? If so, how did you go about it?
- Can you think of a time an idea of yours was rejected? Tell me about it.
- Tell me about a time an idea or task of yours was criticized.
- Tell me about a time you had to work according to a policy you disagreed with.
- How do you go about making important decisions?
- Tell me about the last time you made a good decision and describe what it was and what the results were.

- Tell me about an important decision or judgment call you've had to make on the job.
- Describe the worst decision you ever made and how you corrected it.

### **Project Management**

- Tell about a time when you influenced the outcome of a project by taking a leadership role.
- Using a specific example of a project, tell how you kept those involved informed of the project progress.

### **References**

- What references will your current employer give you?
- Have any of your employers ever refused to give you a reference? If so, please explain.
- Can we check your references?

### **Reliability**

- How many days of attendance at work should be considered satisfactory? What has been your record of attendance at work?
- Tell me about a time when you were accountable for a mistake you made. Did you accept responsibility?
- Have any of your colleagues been regularly late at work? What was the reaction to this in your team?
- What is your approach towards your personal and professional goals? How do you prioritize them? Give me some examples?
- Do you regularly keep in touch with customers? How do you tell customers about new products and updates?
- Tell me about a time you handled a situation in the wrong way? Did you admit your mistake? If so, to whom? How did you handle situation?

### **Resignation**

- Have you ever been asked to resign?
- Have you ever been fired from a position?
- How would you resign from an organization if you had decided upon that option?

### **Resourcefulness**

- When deciding how to organize your work, how do you assess what tasks need to be given priority?
- Describe a time when you made your resources stretch beyond the point that you or others thought was realistic.
- What steps do you take when there is an immediate decision to be made, but without having all the data available?
- When there is too much work to be completed in one day how do you prioritize your tasks?
- When was the last time that you tried a new idea to improve your work performance?
- If you were confronted about an error, for which you were not personally responsible, how would you explain yourself?

### **Responsibility**

- Tell me about a time when you asked for extra responsibility in any of your previous jobs.
- Tell me about a specific task you undertook which was a challenge for you?
- How do you manage your time in a project when the project has a tight deadline? Give an example to prove your point.
- Describe to me in detail a time when you took the initiative in a major project.
- Describe a situation in where you had a task that was quite demanding and what was the result of it?
- Tell me about a time you were totally fed up on the job. What did you do after that?
- What is your first reaction when your senior manager assigns a task that you think is impossible?



### **Riddles**

- Why is a manhole cover round?
- How many cars are there in the USA? (A popular variant is "How many gas stations are there in the USA?")
- How many manhole covers are there in the USA?
- You've got someone working for you for seven days and a gold bar to pay them. The gold bar is segmented into seven connected pieces. You must give them a piece of gold at the end of every day. If you are only allowed to make two breaks in the gold bar, how do you pay your worker?
- Imagine an analog clock set to 12 o'clock. Note that the hour and minute hands overlap. How many times each day do both the hour and minute hands overlap? How would you determine the exact times of the day that this occurs?
- You have two jars, 50 red marbles and 50 blue marbles. A jar will be picked at random, and *then* a marble will be picked from the jar. Placing all of the marbles in the jars, how can you maximize the chances of a red marble being picked? What are the exact odds of getting a red marble using your scheme?
- There is a room with a door (closed) and three light bulbs. Outside the room there are three switches, connected to the bulbs. You may manipulate the switches as you wish, but once you open the door you can't change them. Identify each switch with its bulb.
- Suppose you had 8 billiard balls, and one of them was slightly heavier, but the only way to tell was by putting it on a scale against another. What's the fewest number of times you'd have to use the scale to find the heavier ball?
- Imagine you are standing in front of a mirror, facing it. Raise your left hand. Raise your right hand. Look at your reflection. When you raise your left hand your reflection raises what appears to be his right hand. But when you tilt your head up, your reflection does too, and does not appear to tilt his/her head down. Why is it that the mirror appears to reverse left and right, but not up and down?
- You have 4 jars of pills. Each pill is a certain weight, except for contaminated pills contained in one jar, where each pill is weight + 1. How could you tell which jar had the contaminated pills in just one measurement?
- There are 4 women who want to cross a bridge. They all begin on the same side. You have 17 minutes to get all of them across to the other side. It is night. There is one flashlight. A maximum of two people can cross at one time. Any party who crosses, either 1 or 2 people, must have the flashlight with them. The flashlight must be walked back and forth, it cannot be thrown, etc. Each woman walks at a different speed. A pair must walk together at the rate of the slower woman's pace.

Woman 1: 1 minute to cross

Woman 2: 2 minutes to cross

Woman 3: 5 minutes to cross

Woman 4: 10 minutes to cross

For example if Woman 1 and Woman 4 walk across first, 10 minutes have elapsed when they get to the other side of the bridge. If Woman 4 then returns with the flashlight, a total of 20 minutes have passed and you have failed the mission. What is the order required to get all women across in 17 minutes? Now, what's the other way?

- If you had an infinite supply of water and a 5 quart and 3 quart pail, how would you measure exactly 4 quarts?
- You have a bucket of jelly beans. Some are red, some are blue, and some green. With your eyes closed, pick out 2 of a like color. How many do you have to grab to be sure you have 2 of the same?

### **Risk Taking**

- Have you ever used a new idea without being certain of the outcome? What did you do and was it a good decision?
- What was the outcome of a time where you created an advantage for your company, even though you were not in possession of all the data?
- When was the last occasion that you took a risk in the workplace, by saying or doing something that could have had adverse repercussions on you but did not? Was the outcome in the long term favorable?
- When you are unsure of the outcome when trying a new idea, how do you react?
- When all the conditions are variable in a project, how do you determine how to proceed?



- When changes occur in the company organization that you think will make your workload unreasonably heavier in the long term, what is your reaction?

### **Safety Skills**

- Has there been an occasion when to proceed with a project you have had to use specialist safety equipment?
- When was the last occasion you had to make an instant decision to prevent a dangerous situation from becoming a crisis?
- When was the last occasion when others benefited from your description of personal experiences regarding safety hazards?
- How regularly do you change your computer access code or password? Why do you make the change and what could be the result if you neglected to do so?
- When you have been given a physically demanding task or assignment how do you handle the situation?
- Has there been a situation at home or within the work place where you have observed a potential safety risk that no one else seemed to consider? If so, how did you rectify the situation?
- You are aware that your current workplace does not have the most modern or effective safety equipment available. Does this bother you and/or how do you handle this situation?

### **Strategic Thinking**

- How would you describe the term 'strategic thinking'?
- Outline in very broad terms how you would create a strategy for a public interest campaign, for example.
- As part of the above strategic campaign, why should you carry out a SWOT analysis?
- How should you go about identifying allies as part of any good business or organizational strategy plan?
- As you develop a strategic vision for your organization what are the five key criteria that you should focus on?
- What are the three most common reasons why change in management fails in most organizations?
- Describe what steps/methods you have used to define/identify a vision for your unit/position.
- How do you see your job relating to the overall goals of the organization?
- In your current or former position, what were your long- and short-term goals?
- Tell about a time when you anticipated the future and made changes to current responsibilities/operations to meet future needs.

### **Stress**

- Tell me about a deadline you had to meet. How much advance notice did you have?
- You have worked in a fast paced environment. How did you like the environment?
- What kinds of decisions are most difficult for you?
- What is the most difficult work situation you have faced?
- What types of jobs do you have the most difficulty with?
- What do you do when you're having trouble with your job?
- What do you do when you have a great deal of work to accomplish in a short period of time?
- How did you react when faced with constant time pressure? Give an example.
- People react differently when job demands are constantly changing; how do you react?
- What kind of events cause you stress on the job?
- Professionally, what was the most stressful situation you have encountered? How did you deal with it?

### **Supervisor**

- You have supervised employees in the past. What were their titles and what type of supervision did you provide them?
- How do you create an environment where people are motivated?
- Have you ever fired anyone? What were the circumstances?
- Have you ever hired anyone? Why did you choose them?
- What do you do when you're having trouble with an employee?



- What type of supervisory training have you completed in the last two years?
- How did you communicate bad news to your staff?
- What makes someone a good supervisor?
- Who reports to you? What are their job functions?
- What is the employee turnover rate in your area?
- What do you think is the reason for this rate?
- What programs have you put in place to build morale?
- How do you plan your day?
- Describe your management style.
- How do you measure success as a supervisor?
- How do you decide who needs what training?
- How do you measure success in training?
- If you are hired, what will you do in your first 30 days?
- Describe one change you made in your last job that was very beneficial.
- Describe a time when you and your supervisor disagreed on how to accomplish a goal.
- Describe a change you made in your job that you feel is innovative or of which you are very proud.
- How do you handle unpopular management decisions?
- How do you proceed when you need to make a decision and no policy exists?
- How would you define "leadership"?
- Describe a time when you were able to influence an outcome in a positive way.
- What have you done to become more effective in your job?
- How do you orient new employees to your department?
- How do you plan an interview?
- What do you look for on resumes and applications?
- What criteria do you use for making decisions on hiring?

### **Teamwork**

- Have you ever had a role in a team project where your role was not clearly defined? How do you handle this?
- When your team encounters a problem, such as irritation with another co-worker, how do you reach a good resolution?
- When you receive positive feedback about the completion of a project do you give your team any credit?
- When you are part of a team that is working exceptionally well, what do you think the reasons are for its success?
- When you have worked on a team, and your role was crucial, what was that role? In what way was this team effort different or similar to working on your own?
- When did you last coordinate your work with others in a team project? What was your most successful contribution?
- When you feel that a team is working efficiently, except for the fact that one member is clearly not "pulling their weight", what steps will you take to address the situation?
- Describe a situation in which you had to arrive at a compromise or help others to compromise. What was your role? What steps did you take? What was the end result?
- Describe a team experience you found disappointing. What would you have done to prevent this?
- Describe a team experience you found rewarding.
- Describe the types of teams you've been involved with. What were your roles?
- Describe your leadership style and give an example of a situation when you successfully led a group.
- Give an example of how you have been successful at empowering a group of people in accomplishing a task.
- Give an example of how you worked effectively with people to accomplish an important result.
- Have you ever been a project leader? Give examples of problems you experienced and how you reacted.
- Have you ever been in a position where you had to lead a group of peers? How did you handle it?
- Have you ever participated in a task group? What was your role? How did you contribute?
- Please give your best example of working cooperatively as a team member to accomplish an important goal. What was the goal or objective? To what extent did you interact with others on this project?



- Some people work best as part of a group - others prefer the role of individual contributor. How would you describe yourself? Give an example of a situation where you felt you were most effective.
- Tell about a time that you had to work on a team that did not get along. What happened? What role did you take? What was the result?
- Tell about a work experience where you had to work closely with others. How did it go? How did you overcome any difficulties?
- Tell about the most difficult challenge you faced in trying to work cooperatively with someone who did not share the same ideas? What was your role in achieving the work objective? What was the long term impact on your ability to get things done while working?
- Tell me about the most difficult situation you have had when leading a team. What happened and what did you do? Was it successful? Emphasize the "single" most important thing you did?
- Tell me about the most effective contribution you have made as part of a task group or special project team.
- Think about the times you have been a team leader. What could you have done to be more effective?
- What is the difficult part of being a member, not leader, of a team? How did you handle this?
- What role have you typically played as a member of a team? How did you interact with other members of the team?
- When is the last time you had a disagreement with a peer? How did you resolve the situation?
- When working on a team project have you ever had an experience where there was strong disagreement among team members? What did you do?

### **Thinkers**

- How are M&Ms made?
- What was the hardest question asked of you so far today?
- Explain a scenario for testing a salt shaker.
- If you are going to receive an award in 5 years, what is it for and who is the audience?
- Why is it that when you turn on the hot water in any hotel, for example, the hot water comes pouring out almost instantaneously?
- Suppose you go home, enter your house/apartment, hit the light switch, and nothing happens - no light floods the room. What exactly, in order, are the steps you would take in determining what the problem was?
- Interviewer hands you a black pen and says nothing but "This pen is red." Your response?

### **Trick Questions**

- Have you already done the best work you are capable of?
- How long will you stay with the organization?
- Who is your role model?
- In what capacity would you like to be working five years from now?
- How would your friends describe you?
- How would you react if I told you your interview so far was terrible?
- Why should I hire you?
- What can you provide for us that someone else cannot provide?
- What was the last book you read or the last movie you saw and how did it affect you?
- Can you tell me what things really bother you?
- Do you feel you could have done a better job than your previous boss?
- What are some of the things about your boss that you disliked?
- As we still have some time left, can you tell me a story?
- I'm interested in your opinion; how do you rate me as an interviewer?
- What is the worst thing you have heard about our company?

### **Toughness**

- On many occasions, managers have to make tough decisions. What was the most difficult one you have had to make?

- Tell me about setbacks you have faced. How did you deal with them?
- What has been your major work-related disappointment? What happened and what did you do?
- What is the most competitive situation you have experienced? How did you handle it and what was the result?
- What is a major disappointment of yours?

#### **Written Communication Skills**

- What resources do you use when it is necessary to expand and/or correct your vocabulary in a technical sense while you are writing at work?
- When writing business correspondence how do you ensure the grammar is correct? Do you check for spelling errors?
- Do you have goals to improve your technical and writing skills in the future?
- What processes do you use to clarify your written work and verify its accuracy? Have you developed a precise routine to confirm this accuracy?
- Can you tell me about a recent writing assignment, what it entailed, and what steps you took to make sure the assignment was correct?
- What specific benefit has resulted from your efforts to improve your vocabulary and writing skill?

## Sample Counseling/Disciplinary Letter

Memorandum To: (Employee Name)

Date: September 16, 20XX

Subject: Letter of Counseling (or reprimand, warning, etc.)

On Tuesday, September 14<sup>th</sup>, 20XX, you reported to work late. You were scheduled to begin work at 4:00 PM. You arrived at work at 4:20 PM. After you arrived, you were further delayed in starting work because you engaged in a discussion with an employee in an adjacent office that was not work related. You reported to your desk to start taking calls at approximately 4:30.

Because you were late, you were not on time to relieve Mary, who was scheduled to depart at 4:15. Further, you were not available to be briefed on issues and problems of the day, for which 15 minutes of overlap is built into the schedule. After waiting for you until 4:20, Mary had to depart to attend to personal business. As a result, the office was unattended for 10 minutes, and you were not aware of issues that required your action during your shift to resolve.

Your failure to report to work on time does not meet the standards I expect of an employee in your position. This is not the first episode of lateness on your part. You were verbally counseled for reporting late to work on August 12<sup>th</sup> and again on August 30<sup>th</sup>. I expect you to be at work and ready to receive the shift-change briefing promptly at 4:00 PM. Your conduct is unacceptable and further episodes will cause me to question your continued employment. I urge you to commit to meeting the performance standards of your position consistently.

Your acknowledgement of this counseling is requested on the endorsement, below. Your signature is for receipt, only. It is not an admission of guilt. If you wish to make comments in rebuttal, you may write them, now, in the endorsement on this letter. Otherwise, you may submit your comments, in writing, no later than (date).

---

Signature of supervisor

1<sup>st</sup> endorsement

From: Name of employee

Receipt acknowledged. I do/do not intend to submit comments.

Comments: \_\_\_\_\_

\_\_\_\_\_

---

Signature of employee

---

Date

Note: If comments are not received by the deadline, consider annotating the letter: "Comments were invited, but not received by (deadline date)"



## COUNSELING/DISCIPLINARY ACTION

Name (subject): \_\_\_\_\_ Date of action: \_\_\_\_\_

ACTION TAKEN: ☐ Verbal counseling ☐ Verbal warning ☐ Written warning

DESCRIPTION OF ISSUE:

☐ ABSENCE ☐ SAFETY VIOLATION ☐ OTHER \_\_\_\_\_  
☐ TARDINESS ☐ POLICY VIOLATION  
☐ CONDUCT ☐ SUBSTANDARD PERFORMANCE OF DUTY

DETAIL (who, what, where, when):

Date of Occurrence: \_\_\_\_\_ Time: \_\_\_\_\_ ☐ AM ☐ PM Location: \_\_\_\_\_

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GOALS/CORRECTIVE BEHAVIOR:

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**YOU ARE HEREBY WARNED THAT FURTHER TRANSGRESSIONS SUCH AS THIS, OR OTHER FAILURE TO MEET STANDARDS WILL RESULT IN ADDITIONAL DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION.**

YOU MAY MAKE COMMENTS IN THE SPACE PROVIDED BELOW. YOUR SIGNATURE ON THIS DOCUMENT IS TO ACKNOWLEDGE THAT YOU HAVE RECEIVED THIS NOTICE. IT IS NOT AN ADMISSION OF GUILT.

Supervisor: \_\_\_\_\_ Date: \_\_\_\_\_

Employee Comments:

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Employee: \_\_\_\_\_ Date: \_\_\_\_\_

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# ADA Chemical Sensitivity

Tuesday, August 6, 2013

10:15 a.m. – 11:45 a.m.

Federal/Superior Rooms

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**Speaker:** Linda McCulloh, Senior Attorney  
*The Center for Judiciary Education and Research (CJER) of the Judicial Council of California*

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## **Linda McCulloh, Senior Attorney**

Linda McCulloh is a Senior Attorney in the Center for Judiciary Education and Research (CJER) of the Judicial Council of California – Administrative Office of the Courts. She is also the ADA Resources contact person for the California judicial branch. She has been teaching programs on the Americans with Disabilities Act (ADA) and requests for accommodations. She is the lead staff to the Access for Persons with Disabilities Subcommittee of the Judicial Council's Access and Fairness Advisory Committee and is an ADA liaison to several committees.

Ms. McCulloh has produced several videos, broadcasts and online programs covering issues on access for persons with disabilities. The topics include access to the courts, persons with service and assistance animals and ADA awareness on mental health disabilities.

She was a member of the State Bar Council on Access and Fairness and was Chair of the Education Subcommittee of the State Bar Committee of Legal Professionals with Disabilities. On a national level, she was on the Education Committee of the U.S. Access Board's Courthouse Access Advisory Committee.

Ms. McCulloh has conducted training and presentations to the California courts, Judicial Council of California – Administrative Office of the Courts, the State Bar of California, the National Conference of Appellate Court Clerks, Society of Government Meeting Professionals, National Association of Judicial Educators, the Practicing Law Institute, County Counsel Association and many other organizations. Also, Ms. McCulloh was the keynote speaker on ADA accessibility issues at many bar association programs, including the Los Angeles County Bar, Alameda County Bar and the Beverly Hills Bar Associations.

She has authored and co-wrote several publications including the State Bar of California's brochures on *I Have a Disability. What Are My Employment Rights Under the California Fair Employment & Housing Act* and *Disability Awareness: How To Accommodate Persons With Disabilities*.

---

AMERICANS WITH DISABILITIES ACT

CHEMICAL SENSITIVITY

**SPEAKER**

Ms. Linda P. McCulloh  
Senior Attorney  
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Center for Judiciary Education & Research  
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## Accommodation and Compliance Series

### Employees with Multiple Chemical Sensitivity and Environmental Illness

Job Accommodation Network  
PO Box 6080  
Morgantown, WV 26506-6080  
(800)526-7234 (V)  
(877)781-9403 (TTY)  
[jan@askjan.org](mailto:jan@askjan.org)  
[askjan.org](http://askjan.org)



A service of the U.S. Department of Labor's Office of Disability Employment Policy



## **Preface**

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Authored by Tracie DeFreitas Saab, M.S. Updated 02/27/13.

# **JAN'S ACCOMMODATION AND COMPLIANCE SERIES**

## **Introduction**

JAN's Accommodation and Compliance Series is designed to help employers determine effective accommodations and comply with Title I of the Americans with Disabilities Act (ADA). Each publication in the series addresses a specific medical condition and provides information about the condition, ADA information, accommodation ideas, and resources for additional information.

The Accommodation and Compliance Series is a starting point in the accommodation process and may not address every situation. Accommodations should be made on a case by case basis, considering each employee's individual limitations and accommodation needs. Employers are encouraged to contact JAN to discuss specific situations in more detail.

For information on assistive technology and other accommodation ideas, visit JAN's Searchable Online Accommodation Resource (SOAR) at <http://askjan.org/soar>.

## **Information about Multiple Chemical Sensitivity (MCS)/ Environmental Illness (EI)**

### **What is MCS/EI?**

Defining MCS/EI has been a difficult task for the environmental health community. MCS/EI is generally an inability to tolerate an environmental chemical or class of foreign chemicals. It develops from exposure to substances in the environment and may result in intolerance to even very low level exposure to chemicals. Symptoms can occur in more than one organ system in the body, such as the nervous system, the lungs, and the vascular system (heart problems). Exposures can come through the air, from food and water, or through the skin (What is MSC?, 2005).

### **What are the symptoms of MCS/EI?**

MCS/EI causes different symptoms in different people. Symptoms may include: headaches, dizziness, fatigue, nausea, breathing difficulties, tightening of the throat, difficulty concentrating, memory loss, learning disorders, eczema, arthritis-like sensations, and muscle pain. A person who experiences limitations due to MCS/EI may have any of the above mentioned symptoms when exposed to such irritants as fragrances, cleaning agents, smoke, pesticides, molds, office machines, car exhaust, paint, new carpeting, solvents, and poor indoor air quality among other irritants (What is MSC?, 2005).

## **MCS/EI and the Americans with Disabilities Act**

### **Is MCS/EI a disability under the ADA?**

The ADA does not contain a list of medical conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet. Therefore, some people with MCS/EI will have a disability under the ADA and some will not.

A person has a disability if he/she has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having such an impairment (EEOC, 1992). For more information about how to determine whether a person has a disability under the ADA, visit <http://askjan.org/corner/vol02iss04.htm>.

For additional information regarding whether MCS/EI is a disability, see the following in EEOC informal guidance letter:  
[http://askjan.org/letters/EEOCLetter\\_MCS\\_Disability\\_July\\_96.doc](http://askjan.org/letters/EEOCLetter_MCS_Disability_July_96.doc)



## **Accommodating Employees with MCS/EI**

(Note: People with MCS/EI may develop some of the limitations discussed below, but seldom develop all of them. Also, the degree of limitation will vary among individuals. Be aware that not all people with MCS/EI will need accommodations to perform their jobs and many others may only need a few accommodations. The following is only a sample of the possibilities available. Numerous other accommodation solutions may exist.)

### **Questions to Consider:**

1. What limitations is the employee with MCS/EI experiencing?
2. How do these limitations affect the employee and the employee's job performance?
3. What specific job tasks are problematic as a result of these limitations?
4. What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
5. Has the employee with MCS/EI been consulted regarding possible accommodations?
6. Once accommodations are in place, would it be useful to meet with the employee with MCS/EI to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
7. Do supervisory personnel and employees need training regarding MCS/EI?

### **Accommodation Ideas:**

#### **Ventilation and Indoor Air Quality Issues:**

- Provide an office or workspace that has working windows.
- Make certain the ventilation system is not distributing pollutants throughout the work-site from locations within or outside of the building.
- Use HEPA filters in the ventilation system if possible and have ducts maintained.
- Have an air quality test performed by an industrial hygiene professional to assess poor air quality, dust, mold or mildew accumulation, VOC concentration, etc.
- Work with specialists in the industrial hygiene field by contacting resources like the American Industrial Hygiene Association for a member referral.
- Use air purification systems throughout the building or in personal workstations. Work with specialists in the air filtration field by contacting resources like The National Air Filtration Association for a member referral.
- Maintain a work environment which is free of pollutants such as fragrances, toxic cleaning agents, pesticides, exhaust fumes, tobacco smoke, etc.
- Provide adequate exhaust systems to remove fumes from copiers and similar office machines.

### Construction, Remodeling, and Cleaning Issues:

- Provide pre-notification of events such as remodeling, painting, pesticide applications, floor waxing, and carpet shampooing by way of signs, memos, e-mail or an employee register. A voluntary registry can be created for people to be notified on a regular basis.
- Allow for alternative work arrangements for those people who may be sensitive to the chemical agents used in the above activities such as offering the use of another office, work on another floor of the building, work outside, or work from home.
- Use non-toxic building materials, furnishings, and supplies.
- Use non-toxic carpeting or alternative floor covering such as tile or cotton throw rugs. Products can be used to reduce the out-gassing of newly laid carpeting.
- If industrial products are being used such as solvents, primers, stains, paints, lubricants, etc., consider any alternative products that could possibly be used that may not illicit an MCS/EI reaction.
- If possible, have cleaning, maintenance, and remodeling activities performed when the building is not occupied to reduce employee exposure to these activities.
- Discontinue the use of toxic pesticides and opt for an alternative pest management policy. Contact resources like the National Pesticide Telecommunications Network or the National Coalition Against the Misuse of Pesticides to find out more about alternative pest management practices.
- Discontinue the use of synthetic lawn care products.

### Situations and Solutions:

A clerical employee was having difficulty breathing due to coworker fragrances and new carpet fumes. The employee was placed in a more enclosed cubicle with an air purification system, coworkers were asked to decrease or eliminate the use of fragrances, and time the employee spent in the office was reduced by altering face-to-face communication with coworkers to telephone, e-mail, or fax. It was also suggested that the carpet be detoxified or removed and replaced with a non-toxic floor covering like tile or wood.

A teacher diagnosed with sick building syndrome was required to attend weekly faculty meetings in the school building. She usually taught class from a portable classroom outside of the building and could not be in the school building for extended time. JAN suggested that she use either a speakerphone or public address (PA) system from her classroom to listen in and participate in the meetings, be provided with meeting minutes, or attend the meetings and wear a respirator mask if she felt comfortable doing so.

A graphic arts professional whose company was in the process of remodeling was having some difficulty working in the building due to paint fumes and construction materials. It was too far into the process to change the products that were being used so the company needed some other way to accommodate. The employee was able to

work from home on a temporary basis during the remodeling phase of her portion of the building. The employee already had a computer at home so the employer provided all of the necessary software, modem, and a new telephone line to be used for business purposes only. The company also provided a fax machine so the employee could fax materials back and forth between the work-site and her home office. To monitor her work performance, the employee was required to respond to e-mails in a given time period and to keep a log of all work completed. The employee attended weekly meetings by speakerphone.

An outside laborer was having difficulty doing his job due to the fumes from the diesel equipment he was operating. A portion of his time was spent operating heavy equipment while the rest of his time was spent as a laborer. He was better able to function as a laborer as he was not as exposed to the fumes performing laborer functions. JAN suggested he consider the use of a respirator mask to filter out the diesel fumes. Alternatively, his job could be restructuring so he only worked as a laborer or he could be reassigned to a vacant position that would accommodate the need to avoid exposure to diesel fumes.

### **Products:**

JAN's Searchable Online Accommodation Resource at <http://askjan.org/soar> is designed to let users explore various accommodation options. Many product vendor lists are accessible through this system; however, JAN provides these lists and many more that are not available on the Web site upon request. Contact JAN directly to discuss a specific accommodation situation, are looking for products, need vendor information, or are seeking a referral.



## Resources

### **Job Accommodation Network**

West Virginia University  
PO Box 6080  
Morgantown, WV 26506-6080  
Toll Free: (800)526-7234  
TTY: (877)781-9403  
Fax: (304)293-5407  
[jan@askjan.org](mailto:jan@askjan.org)  
<http://askjan.org>

The Job Accommodation Network (JAN) is a free consulting service that provides information about job accommodations, the Americans with Disabilities Act (ADA), and the employability of people with disabilities.

### **Office of Disability Employment Policy**

200 Constitution Avenue, NW, Room S-1303  
Washington, DC 20210  
Toll Free: (866)633-7365  
TTY: (877)889-5627  
Fax: (202)693-7888  
<http://www.dol.gov/odep/>

The Office of Disability Employment Policy (ODEP) is an agency within the U.S. Department of Labor. ODEP provides national leadership to increase employment opportunities for adults and youth with disabilities while striving to eliminate barriers to employment.

### **American Industrial Hygiene Association**

3141 Fairview Park Drive, Suite 777  
Falls Church, VA 22042  
Direct: (703)849-8888  
Fax: (703)207-3561  
[infonet@aiha.org](mailto:infonet@aiha.org)  
<http://www.aiha.org>

AIHA promotes, protects, and enhances industrial hygienists and other occupational health, safety, and environmental professionals in their efforts to improve the health and well-being of workers, the community, and the environment.

### **Beyond Pesticides**

701 E Street, SE, Suite 200  
Washington, DC 20003  
Direct: (202)543-5450  
Fax: (202)543-4791

info@beyondpesticides.org  
<http://www.beyondpesticides.org/>

A national, non-profit membership organization of groups and individuals formed in 1981 to serve as a national network committed to pesticide safety and the adoption of alternative pest management strategies to reduce or eliminate dependencies on toxic chemicals.

### **Chemical Injury Information Network**

P.O. Box 301  
White Sulphur Springs, MT 59645  
Direct: (406)547-2255  
Fax: (406)547-2455  
<http://ciin.org>

The Chemical Injury Information Network (CIIN) focuses primarily on education, credible research into Multiple Chemical Sensitivities (MCS), and the empowerment of the chemically injured.

### **Environmental Health Network**

P.O. Box 1155  
Larkspur, CA 94977-1155  
Direct: (415)541-5075  
<http://www.ehnca.org>

EHN was one of the first organizations to support and advocate on behalf of the chemically injured. The agency dates back to around 1982. They have a Support and Information Line (SAIL), a newsletter, The New Reactor, and a web site with extensive resources pertaining to chemical injury, including fragrance sensitivity.

### **Human Ecology Action League, Inc.**

PO Box 509  
Stockbridge, GA 30281  
Direct: (770)389-4519  
Fax: (770)389-4520  
HEALNatnl@aol.com  
<http://www.healnatl.org>

HEAL's purpose is to serve those whose health has been adversely affected by environmental exposures, to provide information to those concerned about the health effects of chemicals, and to alert the general public about the potential dangers of chemicals. HEAL's goals are to encourage healthy lifestyles that minimize potentially hazardous environmental exposures, and to establish chapters that implement HEAL's purpose at the local level.

**MCS Advocacy.com**

glenna55@yahoo.com

<http://mcsadvocacy.com>

**National Air Filtration Association**

PO Box 68639

Virginia Beach, VA 23471

Direct: (757)313-7400

Fax: (757)497-1895

[nafa@nafahq.org](mailto:nafa@nafahq.org)

<http://www.nafahq.org/>

Promotes and advances the common interest of those engaged in the air filtration industry.

**National Institute of Environmental Health Sciences**

111 T.W. Alexander Drive

Research Triangle Park, NC 27709

Direct: (919)541-3345

Fax: (301)480-2978

[webcenter@niehs.nih.gov](mailto:webcenter@niehs.nih.gov)

<http://www.niehs.nih.gov/>

The National Institute of Environmental Health Sciences (NIEHS) is one of 27 Institutes and Centers of the National Institutes of Health (NIH), which is a component of the Department of Health and Human Services (DHHS). The mission of the NIEHS is to reduce the burden of human illness and disability by understanding how the environment influences the development and progression of human disease.

**Women for a Healthy Environment**

1405 Shady Avenue

Pittsburgh, PA 15217-1350

Local: (412)420-2290

Fax: (412)420-4450

<http://www.womenforahealthyenvironment.org>

[michelle@womenforahealthyenvironment.org](mailto:michelle@womenforahealthyenvironment.org)

We are a representation of women from western Pennsylvania. Some of us are community volunteers; some of us represent concerned non-profit organizations; and some of us represent area foundations and corporations; all of us are interested in making western Pennsylvania as strong and healthy as it can be. Women for a Healthy Environment focuses on educating the general public on issues associated with food and consumer product safety, including sources of possible exposure to environmental toxins. We also collaborate with like-minded organizations to raise awareness on various water quality and air quality issues in our region.



## References

Equal Employment Opportunity Commission. (1992). *A technical assistance manual on the employment provisions (title I) of the Americans with Disabilities Act.*

Retrieved September 5, 2008, from <http://askjan.org/links/ADAtam1.html>

*What is MCS? MCS referral & resources.* Retrieved September 5, 2008, from

<http://www.geocities.com/HotSprings/Spa/4415/index.html> (no longer available)

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## PERFUMES & FRAGRANCES

### Eternity Eau de Parfum

CHICAGO, Feb. 7, 2000 /PRNewswire/ -- The following was released today by Samuel S. Epstein, M.D., Professor of Environmental Medicine, University of Illinois School of Public Health, Chicago, and Chairman of the Cancer Prevention Coalition, and Amy Marsh, President of the Environmental Health Network, Larkspur, California:

Lovers looking for the perfect Valentine's gift should think twice before giving a bottle of toxic chemicals to their sweethearts. **Recent analysis of Calvin Klein's ``Eternity Eau de Parfum`` (Eternity) by an industry laboratory specializing in fragrance chemistry revealed 41 ingredients. These include some known to be toxic to the skin, respiratory tract, nervous, and reproductive systems, and others known to be carcinogens; no toxicity data are available on several ingredients, while data on most are inadequate.** Additionally, some ingredients are volatile and a source of indoor air pollution. Since 1995, several consumers have complained to the Food and Drug Administration (FDA) of neurological and respiratory problems due to Eternity.

The analysis was recently commissioned by the Environmental Health Network (EHN) as many members had complained of asthma, migraine, sensitization, or multiple chemical sensitivity when exposed to Eternity. Based on this analysis, EHN filed a Citizen Petition with the FDA on May 11, 1999, which was subsequently endorsed by the Cancer Prevention Coalition. The petition requests that the FDA take administrative action and declare Eternity ``misbranded`` or ``adulterated`` since it does not carry a warning label as required by the terms of the Food, Drug, and Cosmetic Act and the Fair Packaging and Labeling Act. Grounds for requesting the warning label include FDA regulation 21CFR Sec. 740/10: ``Each ingredient used in a cosmetic product and each finished cosmetic product shall be adequately substantiated for safety prior to marketing. Any such ingredient or product whose safety is not adequately substantiated prior to marketing is misbranded unless it contains the following conspicuous statement on the principal display panel: Warning: the safety of this product has not been determined.``

Since May, over 700 consumers with health problems from exposure to various mainstream fragrances have written to the FDA supporting EHN's petition. The FDA responded on November 30 to the effect that they had been unable to reach a decision on the grounds of ``other priorities and the limited availability of resources.`` The petition is thus still open for further public complaints and endorsements.



A wide range of mainstream fragrances and perfumes, predominantly based on synthetic ingredients, are used in numerous cosmetics and toiletries, and also soaps and other household products. Currently, the fragrance industry is virtually unregulated. Its recklessness is abetted and compounded by FDA's complicity. The FDA has refused to require the industry to disclose ingredients due to trade secrecy considerations, and still takes the position that ``consumers are not adversely affected -- and should not be deprived of the enjoyment'' of these products. The Cancer Prevention Coalition and EHN take the unequivocal position that the FDA should implement its own regulations and act belatedly to protect consumer health and safety.

Valentine sweethearts should switch to organically grown (pesticide-free) roses or other flowers as safe alternatives to mainstream perfumes.

Contact: Samuel S. Epstein, M.D., Professor of Environmental Medicine, University of Illinois, School of Public Health, Chicago, Illinois, Chairman, the Cancer Prevention Coalition, 312-996-2297, or Barbara Wilkie of the Environmental Health Network, P.O. Box 1155, Larkspur, California 94977, 510-527-3567. SOURCE: Cancer Prevention Coalition and Environmental Health Network, Betty Bridges, RN. Frangranced Products Information Network (FPIN) For information on health effects of fragrances, visit: <http://www.ameliaww.com/fpin/fpin.htm>.



# Accommodation and Compliance Series

## Employees with Fragrance Sensitivity

Job Accommodation Network  
PO Box 6080  
Morgantown, WV 26506-6080  
(800)526-7234 (V)  
(877)781-9403 (TTY)  
[jan@askjan.org](mailto:jan@askjan.org)  
[askjan.org](http://askjan.org)



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Authored by Elisabeth Simpson, M.S. Updated 03/13/13.



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For information on assistive technology and other accommodation ideas, visit JAN's Searchable Online Accommodation Resource (SOAR) at <http://AskJAN.org/soar>.

## **Information about Fragrance Sensitivity**

### **What is fragrance sensitivity?**

Fragrance sensitivity is either an irritation or an allergic reaction to some chemical, or combination of chemicals, in a product. Although perfumes and colognes are generally what come to mind when discussing fragrance sensitivity, fragrance is often added to a variety of daily use items including but not limited to toiletries, cosmetics, air fresheners, cleaning products, and pesticides. Materials used in fragrance are not required to be disclosed on labels, which can make it difficult to identify the ingredient or product that is responsible for the sensitivity ("Fragranced Products," 2009).

Regardless of what the specific allergen is or whether it has been identified, common reactions to exposure include headaches, respiratory problems, asthma, and skin irritations. Individuals who already have allergies or asthma may be more sensitive to fragrances and may experience an exacerbation of symptoms when exposed to fragranced products (Rodriguez, 2011). Some effects of exposure to fragranced products can be immediate and transitory while others may be chronic and long lasting. For some individuals, exposure to any scent can cause a reaction while for others it may be that only a stronger scent triggers a reaction. Individuals with fragrance sensitivity can become increasingly sensitized over time to the point they cannot tolerate any exposure (Immen, 2010).

### **What are the symptoms of fragrance sensitivity?**

There are two types of allergy symptoms due to fragrance sensitivity - respiratory or skin allergy symptoms. Symptoms of fragrance sensitivity can include headaches, nausea, and a skin allergy like contact dermatitis, which causes redness, itching, and burning. Watery, itching, burning, and red eyes; sneezing; runny nose; and congestion are also common. In

some cases, individuals experience breathing difficulties, such as wheezing, a tight feeling in the chest, or worsening of asthma symptoms. Frequency and level of sensitivity can differ from one individual to another and identifying the exact cause of the irritation or allergy can be difficult because of the complex chemical formulas in many everyday use products (Rodriguez, 2011; Stone, 2010).

### **How is fragrance sensitivity prevented and treated?**

The potential for exposure can be high as fragrances are added to a multitude of everyday products and there has been an increase in the amount of time spent in indoor environments. Those with asthma, allergies, or other respiratory disorders may be more susceptible to the effects of fragranced products at levels that are much lower than what might cause problems for those in the general population (Lamas, Sanchez-Prado, Garcia-Jares, & Llompарт, 2010). The best way to prevent fragrance sensitivity is to remove, block, or avoid the offending substance. Discussing the fragrance sensitivity with people at work and at home also can help to limit exposure to other people's fragrances.

Because there is no requirement for manufacturers to list all the ingredients in their products, finding a product that is truly fragrance free can be challenging. Even some products that are labeled as being "unscented" or "fragrance free" contain herbal ingredients or oils from botanicals. It is important to carefully read labels and some may want to consult with an allergist or dermatologist for recommendations and suggestions for selecting the right products ("Fragrance Allergy," 2010). The U.S. Environmental Protection Agency's (EPA) Design for the Environment (DfE) program helps identify cleaning and other products that have been determined to be effective and safer for human health and the environment (EPA, 2012). These products carry the DfE label and a list of all partners and products recognized under the DfE Safer Product Labeling Program can be found at: <http://www.epa.gov/dfe/index.htm>.

As awareness of the physical effects of fragrance sensitivities continues to grow, so do the number of manufacturers of products that are natural and free of fragrances.

## **Fragrance Sensitivity and the Americans with Disabilities Act**

### **Is fragrance sensitivity a disability under the ADA?**

The ADA does not contain a list of medical conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet (EEOC Regulations . . . , 2011). Therefore, some people with fragrance sensitivity will have a disability under the ADA and some will not.

A person has a disability if he/she has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having an impairment (EEOC Regulations . . . , 2011). For more information about how to determine whether a person has a disability under the ADA, visit <http://AskJAN.org/corner/vol05iss04.htm>.

**Is an employer required to implement a fragrance policy as an accommodation?**

Under the ADA, an employer may not be required to totally ban fragrances from the workplace because of the difficulty of enforcing such a ban, especially when the public has access to the workplace. The exception is when the fragrance is unique to the work environment, minimal, and/or the employer has more control over it. For example, using unscented cleaning products or discontinuing the use of air fresheners.

Some employers are choosing to have a voluntary fragrance-free policy, educating employees about fragrance sensitivities and requesting employees to voluntarily refrain from wearing fragrances. Employers who have concerns about the legalities of implementing a fragrance-free policy as an accommodation should consult an appropriate legal professional.

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## **Accommodating Employees with Fragrance Sensitivity**

(Note: People with fragrance sensitivity may develop some of the limitations discussed below, but seldom develop all of them. Also, the degree of limitation will vary among individuals. Be aware that not all people with fragrance sensitivity will need accommodations to perform their jobs and many others may only need a few accommodations. The following is only a sample of the possibilities available. Numerous other accommodation solutions may exist.)

### **Questions to Consider:**

1. What limitations is the employee with fragrance sensitivity experiencing?
2. How do these limitations affect the employee and the employee's job performance?
3. What specific job tasks are problematic as a result of these limitations?
4. What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
5. Has the employee with fragrance sensitivity been consulted regarding possible accommodations?
6. Once accommodations are in place, would it be useful to meet with the employee with fragrance sensitivity to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
7. Do supervisory personnel and employees need training regarding fragrance sensitivity?

### **Accommodation Options:**

When dealing with fragrance sensitivity, there are really 3 main options to consider as accommodations:

- 1) Remove the offending fragrances.

When possible, an employer should try to remove the offending fragrance, especially if the fragrance is unique to the work environment, minimal, and/or the employer has more control over it. However, as mentioned earlier, under the ADA it is probably not reasonable for an employer to have and enforce a total no-fragrance policy because it is difficult if not impossible to enforce, especially if non-employees such as clients and volunteers come into the workplace.

- 2) Remove the employee from the area where the fragrances are located.

When it is not possible to remove the offending fragrance, an employer may be able to move the employee away from the fragrance. This usually means working at home or in a

private office with no exposure to coworkers, clients, or other members of the public. Regarding work at home, unless the employee wants to work at home, other options should be explored first to keep the employee in the workplace.

### 3) Reduce the employee's exposure to the fragrances.

If the offending fragrance cannot be removed and the employee cannot be moved completely away from the fragrance, it may be possible to reduce the employee's exposure to an acceptable level. This usually means a private office with its own ventilation, an air purifier/cleaner, and minimum exposure to others. It can also mean allowing the individual to wear a mask or respirator. Some individuals are able to wear masks/respirators while others are not or may not be comfortable wearing them. Employers should keep in mind that they cannot force an employee to use a mask/respirator.

#### **Accommodation Ideas:**

- Maintain good indoor air quality
- Discontinue the use of fragranced products
- Use only unscented cleaning products
- Provide scent-free meeting rooms and restrooms
- Modify workstation location
- Modify the work schedule
- Allow for fresh air breaks
- Provide an air purification system
- Modify communication methods
- Modify or create a fragrance-free workplace policy
- Telework

For information about improving indoor air quality, see "An Office Building Occupant's Guide to Indoor Air Quality" at <http://www.epa.gov/iaq/pubs/occupgd.html>.

For more detailed information about air cleaning systems, try these resources:  
<http://AskJAN.org/cgi-win/OrgQuery.exe?Sol955>.

If no accommodations are possible in the current job, the next thing is to consider a reassignment where an accommodation could be made.

## **Sample Policy Language:**

The following are examples of fragrance-free workplace policy statements.

Anonymous City Law Enforcement Agency Policy: "To reasonably accommodate bureau employees who have written memoranda documenting chemical sensitivity to perfume, employees will wear no perfume or cologne during business hours when they are scheduled to be within the bureau during their shift. This policy will not affect those bureau employees who are in an off-site training class, on city business, or out of the office for an entire shift."

Anonymous Employer: "(Name of employer) strives to ensure the comfort and safety of staff and visitors by encouraging a smoke free and fragrance free environment."

Anonymous State Community Development Agency, Employee Administrative Bulletin: "Given that chemically sensitive individuals may react to different products with widely varying degrees of severity, it is very difficult to ensure a consistently comfortable and accommodating work environment under every conceivable set of circumstances. Even so, it is the general consensus of the Labor/Management Committee and the desire of the (company name) to minimize to the extent possible the barriers and difficulties experienced in the workplace by both employees and clients subject to chemical/fragrance sensitivities. The (company name) requests that all offices and spaces used by the staff and their visitors remain free of chemical-based scented products."

Anonymous Employer, Staff Memo from Executive Director: "I ask that we refrain from applying spray colognes, hairsprays, and or air fresheners in the office, as the use of such products may trigger allergic reactions and create health problems."

Anonymous Employer, Administrative Manual Policy, Subject: Employee Appearance: "Cologne, perfume, aftershave lotions, scented lotions, or body washes are not to be worn in the Medical Center."

State Protection and Advocacy Agency: "This is a fragrance free office. Thank you for not wearing any of the following: cologne, after shave lotion, perfume, perfumed hand lotion, fragranced hair products, and/or similar products. Our chemically-sensitive co-workers and clients thank you."

Anonymous Employer: "This is a fragrance free office. Please help us to accommodate our co-workers and clients who are chemically sensitive to fragrances and other scented products. Thank you for not wearing perfume, aftershave, scented hand lotion, fragranced hair products, and or similar products."

Anonymous Employer, Memo to All Staff: "You may have noticed the signs up on the front door and on the library doors stating that this is a fragrance-free office. Please cooperate with this request because there are several of us on staff and visitors to our office who are chemically sensitive to varying degrees. Our bodies have a hard time when we come into contact with a variety of chemicals and each episode takes its toll on our bodies. Please

use only unscented products during work hours. This does not include deodorant or bath soap at this time."

U.S. Access Board: "Under this policy, the Board requests that all participants refrain from wearing perfume, cologne, and other fragrances, and use unscented personal care products in order to promote a fragrance-free environment. This request is included in notices and on displayed signage for the Board's meetings, hearings, and other public events. In addition, the Board will work with the operators of meeting sites to prevent the use of deodorizers and cleaning products immediately before the event in and around meeting locations."

The Access Board is an independent Federal agency devoted to accessibility for people with disabilities. The Board has adopted a policy to promote access for individuals who are sensitive to fragrances at <http://www.access-board.gov/about/policies/fragrance.htm>.

### **Products:**

Use JAN's Searchable Online Accommodation Resource (SOAR) to find accommodation ideas and products related to fragrance sensitivity. Visit SOAR at [AskJAN.org/soar](http://AskJAN.org/soar). Also, contact JAN directly to discuss a specific accommodation situation, for product information, or for an appropriate referral.



## MULTIPLE CHEMICAL SENSITIVITY RESOURCES

### **Job Accommodation Network**

West Virginia University  
PO Box 6080  
Morgantown, WV 26506-6080  
Toll Free: (800)526-7234  
TTY: (877)781-9403  
Fax: (304)293-5407

[jan@askjan.org](mailto:jan@askjan.org)  
<http://AskJAN.org>

►The Job Accommodation Network (JAN) is a free consulting service that provides information about job accommodations, the Americans with Disabilities Act (ADA), and the employability of people with disabilities.

### **Office of Disability Employment Policy**

200 Constitution Avenue, NW, Room S-1303  
Washington, DC 20210  
Toll Free: (866)633-7365  
Direct: (202)693-7880  
TTY: (877)889-5627

<http://www.dol.gov/odep/>

►The Office of Disability Employment Policy (ODEP) is an agency within the U.S. Department of Labor. ODEP provides national leadership to increase employment opportunities for adults and youth with disabilities while striving to eliminate barriers to employment.

### **American Industrial Hygiene Association**

3141 Fairview Park Drive, Suite 777  
Falls Church, VA 22042  
Direct: (703)849-8888  
Fax: (703)207-3561

[infonet@aiha.org](mailto:infonet@aiha.org)  
<http://www.aiha.org>

►AIHA promotes, protects, and enhances industrial hygienists and other occupational health, safety, and environmental professionals in their efforts to improve the health and well-being of workers, the community, and the environment.

### **Beyond Pesticides**

701 E Street, SE, Suite 200  
Washington, DC 20003  
Direct: (202)543-5450  
Fax: (202)543-4791

[info@beyondpesticides.org](mailto:info@beyondpesticides.org)  
<http://www.beyondpesticides.org/>

►A national, non-profit membership organization of groups and individuals formed in 1981 to serve as a national network committed to pesticide safety and the adoption of alternative pest management strategies to reduce or eliminate dependencies on toxic chemicals.

### **Chemical Injury Information Network**

P.O. Box 301

White Sulphur Springs, MT 59645

Direct: (406)547-2255

Fax: (406)547-2455

[chemicalinjury@ciin.org](mailto:chemicalinjury@ciin.org)

<http://ciin.org>

►The Chemical Injury Information Network (CIIN) focuses primarily on education, credible research into Multiple Chemical Sensitivities (MCS), and the empowerment of the chemically injured.

### **Environmental Health Network**

P.O. Box 1155

Larkspur, CA 94977-1155

Direct: (415)541-5075

<http://www.ehnca.org>

►Environmental Health Network (EHN) was one of the first organizations to support and advocate on behalf of the chemically injured. EHN has a Support and Information Line (SAIL), a newsletter, The New Reactor, and a Website with extensive resources pertaining to chemical injury, including fragrance sensitivity.

### **Human Ecology Action League, Inc.**

P.O. Box 509

Stockbridge, GA 30281

Direct: (770)389-4519

Fax: (770)389-4520

[HEALNatnl@aol.com](mailto:HEALNatnl@aol.com)

<http://www.healnatl.org>

►HEAL's purpose is to serve those whose health has been adversely affected by environmental exposures, to provide information to those concerned about the health effects of chemicals, and to alert the general public about the potential dangers of chemicals. HEAL's goals are to encourage healthy lifestyles that minimize potentially hazardous environmental exposures, and to establish chapters that implement HEAL's purpose at the local level.

### **MCS Advocacy.com**

[glenna55@yahoo.com](mailto:glenna55@yahoo.com)

<http://mcsadvocacy.com>

►MCS Advocacy.org was established to provide help to the MCS-disabled community through the following consultation services: \* Physician location \* SSD, Workers' Compensation, and other disability insurance procurement \* Accessibility implementation issues \* Attorney/Physician/Psychologist liaison for case reviews including

correspondence and summary preparation \* Safe housing issues \* Day-to-day MCS-related concerns

### **National Air Filtration Association**

PO Box 68639

Virginia Beach, VA 23471

Direct: (757)313-7400

Fax: (757)497-1895

[nafa@nafahq.org](mailto:nafa@nafahq.org)

<http://www.nafahq.org/>

►Promotes and advances the common interest of those engaged in the air filtration industry.

### **National Institute of Environmental Health Sciences**

111 T.W. Alexander Drive

Research Triangle Park, NC 27709-2233

Direct: (919)541-3345

Fax: (301)480-2978

[webcenter@niehs.nih.gov](mailto:webcenter@niehs.nih.gov)

<http://www.niehs.nih.gov/>

►The National Institute of Environmental Health Sciences (NIEHS) is one of 27 Institutes and Centers of the National Institutes of Health (NIH), which is a component of the Department of Health and Human Services (DHHS). The mission of the NIEHS is to reduce the burden of human illness and disability by understanding how the environment influences the development and progression of human disease.

### **Women for a Healthy Environment**

1405 Shady Avenue

Pittsburgh, PA 15217-1350

Direct: (412)420-2290

Fax: (412)420-4450

[michelle@womenforahealthyenvironment.org](mailto:michelle@womenforahealthyenvironment.org)

<http://www.womenforahealthyenvironment.org>

►We are a representation of women from western Pennsylvania. Some of us are community volunteers; some of us represent concerned non-profit organizations; and some of us represent area foundations and corporations; all of us are interested in making western Pennsylvania as strong and healthy as it can be. Women for a Healthy Environment focuses on educating the general public on issues associated with food and consumer product safety, including sources of possible exposure to environmental toxins. We also collaborate with like-minded organizations to raise awareness on various water quality and air quality issues in our region.

**Indoor Air Quality Information Clearinghouse**

National Service Center for Environmental Publications (NSCEP)

Toll Free: (800)490-9198

Fax: (301)604-3408

nscep@bps-lmit.com

<http://www.epa.gov/iaq/pubs/index.html>

The Indoor Air Quality Information Clearinghouse is a Web resource that provides links to articles on indoor air quality.

**Women for a Healthy Environment**

1405 Shady Avenue

Pittsburgh, PA 15217-1350

Direct: (412)420-2290

Fax: (412)420-4450

[michelle@womenforahealthyenvironment.org](mailto:michelle@womenforahealthyenvironment.org)

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We are a representation of women from western Pennsylvania. Some of us are community volunteers; some of us represent concerned non-profit organizations; and some of us represent area foundations and corporations; all of us are interested in making western Pennsylvania as strong and healthy as it can be. Women for a Healthy Environment focuses on educating the general public on issues associated with food and consumer product safety, including sources of possible exposure to environmental toxins. We also collaborate with like-minded organizations to raise awareness on various water quality and air quality issues in our region.



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## **Respiratory Difficulties Due to Fragrances**

(From The Job Accommodation Network)

It may be possible to accommodate a person who is sensitive to fragrances through a number of methods:

- Modify or create a workplace policy to reduce or eliminate the use of fragranced products in the work environment.
- Modify communication methods with coworkers to reduce face to face contact through telephone or electronic communication options such as E-mail or instant messaging (IM).
- Provide an air purification system or personal air supply.
- Modify the employee's work schedule to allow the employee to work when fewer people are in the facility.
- Modify the employee's workstation arrangement to minimize or eliminate exposure to fragrances or provide an enclosed office space. Allow the individual to work from home.
- Discontinue the use of fragranced cleaning chemicals in favor of alternative cleaning products.
- Maintain good indoor air quality by following practices such as those offered by the EPA. The US Environmental Protection Agency (EPA) provides suggestions for improving indoor air quality in the article, An Office Building Occupant's Guide to Indoor Air Quality.

## **AIR CLEANERS & PURIFIERS**

(From Job Accommodation Network, May 2013)

Indoor air cleaning systems remove allergens and pollutants from indoor air to create a cleaner, healthier work and home environment. There are a number of different types of air cleaners and filtration systems; HEPA, ULPA, carbon filter, electrostatic, electret, negative-ionizing, UV, and ozone generators. It's important to know the air cleaning needs for the situation when selecting an appropriate system.

A HEPA, or High Efficiency Particulate Air filter, removes approximately 99.97% of particles in the air 0.3 microns or bigger. These filters remove allergens such as dust, dust mites, pollens, and mold spores. HEPA filters do not kill viruses or germs, but can remove bacteria from the air. They do not remove chemical fumes, gases, cigarette smoke and other odors. Carbon filters will remove chemical fumes, gases, etc.

For more detailed information about air cleaning systems, try these resources:  
<http://www.abbysguide.com/air-purifier/>, <http://www.indoorpurifiers.com/air-purifier-guide.htm>, <http://www.airpurifiers-report.com/>

The following manufacturers and vendors can provide information on prices, availability of products, and usefulness of products.

### **Air Quality Engineering**

7140 Northland Drive North  
Minneapolis, MN 55428-1520  
Toll Free: (888)883-3273  
Direct: (763)531-9823  
Fax: (763)531-9900  
[info@air-quality-eng.com](mailto:info@air-quality-eng.com)  
<http://www.air-quality-eng.com/>

### **Air-N-Water**

17335 Mount Wynne Circle  
Fountain Valley, CA 92708  
Toll Free: (800)734-0405  
Direct: (714)241-4328  
Fax: (714)200-0665  
[sales@air-n-water.com](mailto:sales@air-n-water.com)  
<http://www.Air-N-Water.com>



**American Environmental Health Foundation, Inc.**

8345 Walnut Hill Lane  
Suite 225  
Dallas, TX 75231-4262  
Toll Free: (800)428-2343  
Direct: (214)361-9515  
Fax: (214)361-2534  
[ae hf@ahef.com](mailto:ae hf@ahef.com)  
<http://www.aehf.com>

**Austin Air Systems, Limited**

500 Elk Street  
Buffalo, NY 14210  
Toll Free: (800)724-8430  
Direct: (716)856-3700  
Fax: (716)856-6023  
[info@austinair.com](mailto:info@austinair.com)  
<http://www.austinair.com>

**BPA Air Quality Solutions**

1236 Folly Road  
Charleston, SC 29412  
Toll Free: (877)688-2703  
Direct: (843)795-5457  
[info@breathepureair.com](mailto:info@breathepureair.com)  
<http://www.breathepureair.com>

**Best Vacuum, Inc.**

2646 N. Lincoln Avenue  
Chicago, IL 60614  
Toll Free: (888)205-3228  
Fax: (773)348-4504  
[service@bestvacuum.com](mailto:service@bestvacuum.com)  
<http://www.aaa-bestvacuum.com>

**Biozone**

1054 20th Place  
Vero Beach, FL 32960  
Toll Free: (888)411-0964  
<http://www.cleanair4life.com>

**Commercial Air Cleaner**

4986 Timber Race Course

PO Box 5846

Charleston, SC

Toll Free: (800)564-0667

Direct: (843)795-5560

<http://www.commercialaircleaner.net>

**E.L. Foust Co.**

PO BOX 105

Elmhurst, IL 60126

Toll Free: (800)353-6878

Direct: (630)834-4952

Fax: (630)834-5341

[sales@foustco.com](mailto:sales@foustco.com)

<http://www.foustco.com>

**Friedrich**

4200 N. Pan Am Expressway

P.O. Box 1540

San Antonio, TX 78295-1540

Direct: (210)357-4400

<http://www.friedrich.com/index.asp>

**GetCozy.com**

24 Hawkins Road

Southbury, CT 06488

Direct: (203)264-4297

Fax: (203)264-4301

[info@getcozy.com](mailto:info@getcozy.com)

<http://www.getcozy.com>

**Goodlife**

519 Austin St.

Suite. D

Medford, OR 97501

Toll Free: (800)657-8214

Direct: (541)292-5267

<http://www.ultimateaircleaner.com>

**Honeywell**

101 Columbia Road

Morristown, NJ 07962

Toll Free: (800)328-5111

Direct: (973)455-2000

[info@corp.honeywell.com](mailto:info@corp.honeywell.com)

<http://www.honeywell.com>

**IQAir North America**

10440 Ontiveros Place  
Santa Fe Springs, CA 90670  
Toll Free: (877)715-4247  
[info@iqair.com](mailto:info@iqair.com)  
<http://www.iqair.us>

**Indoor Purification Systems**

334 North Marshall Way, Suite C  
Layton, UT 84041  
Toll Free: (888)812-1516  
Direct: (801)444-0606  
Fax: (801)991-4838  
[support@surroundair.com](mailto:support@surroundair.com)  
<http://www.indoorpurifiers.com/>

**King Air & Water Purification Company, Inc.**

P.O. Box 356  
Dewitt, NY 13214  
Direct: (315)446-2842  
Fax: (315)425-9613  
[orderdesk@kpure.com](mailto:orderdesk@kpure.com)  
<http://www.apc-ozone.com/>

**Living Source, The**

P.O. Box 20155  
Waco, TX 76702  
Direct: (254)776-4878  
[livingsource@earthlink.net](mailto:livingsource@earthlink.net)  
<http://www.livingsource.com>

**Natural Living Products**

P.O. Box 607  
Island Heights, NJ 08732  
Toll Free: (800)469-7583  
Direct: (732)506-7622  
Fax: (732)506-6658  
[sales@natural-living.com](mailto:sales@natural-living.com)  
<http://www.natural-living.com>

**Pure Home Air**

23857 Rio Ranch Way  
Valencia, CA 91355  
Toll Free: (800)570-9484  
Fax: (661)250-9572  
<http://www.purehomeair.com>


**Pure n Natural Systems**

5836 Lincoln Avenue  
Suite 100  
Morton Grove, IL 60053  
Toll Free: (800)237-9199  
Direct: (847)470-1652  
Fax: (847)470-1686  
[info@purennatural.com](mailto:info@purennatural.com)  
<http://www.purennatural.com>

**Safe Home Products**

3578 Perch Drive SE  
Iowa City, IA 52240  
Toll Free: (877)358-0900  
Fax: (319)358-0901  
[sales@SafeHomeProducts.com](mailto:sales@SafeHomeProducts.com)  
<http://www.safehomeproducts.com>  
 Wein Air Supply Car

**Sears**

Toll Free: (800)549-4505  
<http://www.sears.com>  
 Kenmore Products

**Whirlpool**

Toll Free: (866)698-2538  
<http://www.whirlpool.com/home.jsp>



**United States Court of Appeals  
FOR THE EIGHTH CIRCUIT**

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No. 98-2495

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Douglas J. Buckles,  
  
Appellee,

v.

First Data Resources, Inc.,  
a Nebraska Corporation,  
  
Appellant.

\*  
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\* Appeal from the United States  
\* District Court for the District  
\* of Nebraska.  
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Submitted: February 24, 1999

**Filed: June 2, 1999**

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Before MCMILLIAN, FAGG, and BEAM, Circuit Judges.

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BEAM, Circuit Judge.

First Data Resources, Inc., (First Data) appeals the denial of its motion for judgment as a matter of law following a jury verdict in favor of former employee Douglas J. Buckles. Buckles, who has sinusitis, was fired from his job and alleges his termination violates the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-

12213. First Data argues, *inter alia*, that Buckles was not qualified to perform the essential functions of his job since he was excessively absent, and further, that he did not advance a reasonable accommodation. We agree and reverse.

## **I. BACKGROUND**

In 1982, Douglas Buckles began working for First Data Resources as an authorizations agent. Authorizations agents verify credit card charges over the phone by entering specific information into a computer. Some time between 1986 and 1988, Buckles was diagnosed with acute recurrent rhinosinusitis. This condition, when manifested, could create a burning sensation, swelling in the face, wheezing or tightness in the chest, concentration problems, and eyes that watered and sometimes turned red. Buckles' sinus attacks were triggered by irritants such as heavy perfumes, smoke, nail polish, glue, tar, and various adhesives. In response to Buckles' condition, First Data created a work station for him in a room with better ventilation, and issued a memorandum prohibiting the use of nail polish in his department.

Throughout the course of his employment, Buckles' performance was generally satisfactory but he consistently struggled with his attendance. Like many employers, First Data maintains an attendance policy. First Data's policy allocates hours into three pools: pool A for vacation hours; pool B for sick leave; and pool C for additional sick leave. When an employee uses pool C hours after exhausting pools A and B, automatic corrective or disciplinary action is triggered.

On June 21, 1994, Buckles' anniversary of employment, his allotted hours for each pool were replenished. By August 3, Buckles had exhausted his pool A and B hours and used pool C hours. He received no disciplinary action for exceeding pool B hours, but instead his supervisors met with him and created a procedure to deal with any problems associated with his sinus condition. The procedure established that if he perceived or believed he would be exposed to irritants, he could sign off his phone, tell a supervisor of the potential problem, and vacate the area while an investigation ensued and a remedy was pursued.

Buckles continued to have attendance problems, however, resulting in three notices for corrective action. When Buckles thought he would be exposed to potential irritants, he went home. After leaving work again on September 20, Buckles was finally suspended and terminated on October 2, 1994. Buckles then brought this suit alleging violation of the ADA. The jury found in favor of Buckles and the district court entered judgment in the amount of \$98,998.56 for back pay, front pay, attorney's fees, costs, and general compensatory damages. First Data brings this appeal following denial of its motion for judgment as a matter of law.

## II. DISCUSSION

We review de novo the denial of a motion for judgment as a matter of law. See Gray v. Bicknell, 86 F.3d 1472, 1478 (8th Cir. 1996). Judgment as a matter of law is appropriate if there is insufficient evidence to support the jury verdict. Id. The evidence is insufficient if "no reasonable juror could have returned a verdict for the non-moving party"—Buckles. Morse v. Southern Union Co., No. 98-2050, 1999 WL 212844, at \*2 (8th Cir. Apr. 14, 1999) (sources omitted). In making this determination, we view all facts and resolve any conflicts in favor of Buckles, giving him the benefit of all reasonable inferences. See Varner v. National Super Markets, Inc., 94 F.3d 1209, 1212 (8th Cir. 1996).

For claims under the ADA, we utilize the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998). Under McDonnell Douglas, Buckles must first establish a prima facie case of discrimination by showing "that [he] is disabled within the meaning of the [ADA]; [that he] is qualified to perform the essential functions of [his] job with or without reasonable accommodation; and [that he] suffered an adverse employment action because of [his] disability." Webb v. Mercy Hosp., 102 F.3d 958, 959-60 (8th Cir. 1996). First Data argues that Buckles is not



disabled within the meaning of the ADA and is not qualified to perform the essential functions of his job with or without reasonable accommodation.

We focus our attention on Buckles' burden to establish that he is qualified to perform the essential functions of his job with or without reasonable accommodation.<sup>1</sup> First Data contends that Buckles is not qualified because of his excessive absences. In the context of the ADA, we have recognized that "regular and reliable attendance is a necessary element of most jobs." Nesser, 160 F.3d at 445. First Data is no exception and considers attendance to be an "essential function," as illustrated by the detailed attendance policies and procedures. Buckles, an hourly employee, disputes that attendance is essential to First Data since there are numerous employees and the company accounts for possible absences. We are not persuaded by such a conclusory argument,<sup>2</sup> which runs contrary to the express policies and procedures of First Data.

On June 21, 1994, Buckles' allotted vacation and sick leave time was replenished. In the short space of the six weeks that followed, he exhausted his entire year's worth of vacation and permitted sick leave time. Over the next two months, Buckles continued to have numerous absences and was finally terminated on October 2, 1994. Because of Buckles' frequent absences, he was unable to meet an essential function of his employment.

Buckles, nevertheless, argues that he is qualified to perform the essential functions of his employment—namely regular and reliable attendance—with a reasonable

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<sup>1</sup>We do not reach the question of whether Buckles is disabled within the meaning of the ADA.

<sup>2</sup>Buckles urges that under Carlson v. Inacom Corp., 885 F. Supp. 1314, 1321 (D. Neb. 1995), First Data must additionally show a specific financial impact resulting from the absences. The showing of a financial burden relates to the rebutting of a requested reasonable accommodation. See DeBord v. Board of Educ., 126 F.3d 1102, 1106 (8th Cir. 1997).

accommodation. Significantly, prior to his termination First Data made great efforts to accommodate Buckles. First Data issued a memorandum to employees prohibiting use of nail polish in Buckles' department. First Data also moved Buckles from the department he was in and created a work station in another room with better ventilation. Finally, a system was arranged for Buckles whereby if he was sensing an irritant he could sign off his phone, notify his supervisor, and wait until the problem was remedied.

Buckles contends that First Data's accommodation was not reasonable because it did not provide for "avoidance" of irritants in the workplace. In this situation, there is only so much avoidance that can be done before an employer would essentially be providing a bubble for an employee to work in. Even assuming Buckles is disabled within the meaning of the ADA, we think that First Data's accommodations in this regard were reasonable because they sought to avoid exposure, and in the event of possible exposure to an irritant, Buckles could "exit the area." Instead of exiting the area, however, Buckles went home when he thought he would be exposed to an irritant. Unfettered ability to leave work at any time is certainly not a reasonable accommodation here. Additionally, Buckles argues that First Data's accommodation was not in writing. However, an accommodation need not be in writing to be reasonable.

Although the adjustments made by First Data proved unsuccessful, the burden remains with Buckles. He must show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible. See Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998). The accommodation Buckles advances is "an irritant-free work environment" and "additional unpaid sick time." There is no precise test for what constitutes a reasonable accommodation, but an accommodation is unreasonable if it "either imposes undue financial or administrative burdens, or requires a fundamental alteration in the nature of the program." DeBord v. Board of Educ., 126 F.3d 1102, 1106 (8th Cir. 1997). The accommodation sought by Buckles would impose an undue financial and administrative burden on First Data. An employer is not required by the ADA to create a wholly isolated work space for an employee that is free from numerous possible irritants, and to provide an

unlimited absentee policy. While the ADA notes examples of reasonable accommodations, including restructuring of a job and providing part-time or modified work schedules, see 42 U.S.C. § 12111(9)(B), these are limited by the reasonableness requirement. As noted, First Data reasonably attempted to alter the work environment and procedures to reduce Buckles' absences. This effort was unsuccessful, and Buckles continued to have numerous and unpredictable absences. Cf. Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994) (stating there was no reasonable accommodation for "numerous unpredictable absences" within the first few months of temporary employment).

Because Buckles failed to advance a reasonable accommodation, he has not met his initial burden to show that he is a qualified individual under the ADA. Therefore, he “has not established a prima facie case of disability discrimination.” Moritz, 147 F.3d at 788. Consequently, there is not sufficient evidence to support the jury verdict and First Data is entitled to judgment as a matter of law.

### **III. CONCLUSION**

For the foregoing reasons we reverse the denial of judgment as a matter of law and remand for entry of judgment in favor of First Data.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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**SUSAN McBRIDE,  
Plaintiff, v.  
THE CITY OF DETROIT,  
Defendant.**

Case No. 07-  
12794.

**United States District Court, E.D. Michigan, Southern  
Division.**

November 25,  
2008.

## **OPINION AND ORDER**

LAWRENCE P. ZATKOFF, District Judge.

### **I. INTRODUCTION**

This matter is before the Court on Defendant's Motion for Summary Judgment [dkt 23]. The parties have fully briefed the Motion. The Court finds that the facts and legal arguments are adequately presented in the parties' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(e)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted. For the reasons set forth below, Defendant's Motion is GRANTED IN PART and DENIED IN PART.

### **II. BACKGROUND**

Plaintiff alleges that she suffers from a disability and Defendant failed to provide her with a reasonable accommodation, as required by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (the "Act"). Plaintiff suffers from a life-long sensitivity to perfumes, chemicals, and other scented objects. When Plaintiff is exposed to such scents, she experiences migraine headaches, nausea, chest tightness, coughing, loss of voice, a scratchy throat, and rhinitis. As a result, Plaintiff avoids certain public areas and cannot sit in proximity to others wearing perfumes or scents.

In September 2000, Defendant hired Plaintiff as a Senior City Planner. This position requires her to be in an office setting approximately 40 hours per week. One of Plaintiff's co-workers is Rosalind Chaney. Plaintiff's initial interactions with Ms. Chaney

were limited, but Plaintiff and Ms. Chaney were moved closer together following a rearrangement of workplaces. Shortly before this change, however, Plaintiff had her tonsils and adenoids removed, which temporarily diminished her senses of smell and taste. Thus, Plaintiff was unable to tell if Ms. Chaney was wearing perfume and also was unable to determine if the symptoms she was experiencing were after-effects of the surgery or reactions to perfumes.

About that time, Plaintiff and Ms. Chaney attended social office lunches together about once a month and even took a fishing trip together with another co-worker. Plaintiff remembers having a scratchy throat, coughing, and severe headaches during this time period, but she did not know the source of the symptoms. In 2001, Ms. Chaney was moved to a different floor for several years. During the time Ms. Chaney was on the other floor, Plaintiff's symptoms subsided.

In July 2006, Ms. Chaney returned to work on Plaintiff's floor. At that time, Ms. Chaney was wearing perfumes/oils, using a plug-in air freshener in the reception area, and using air fresheners and potpourri in the restroom. Plaintiff's symptoms immediately flared back up within days of Ms. Chaney's return and Plaintiff notified Kim Robinson, her immediate supervisor, about the medical difficulties Plaintiff was experiencing. At one point, John Baran, the department's Executive Manager, had a conversation with Ms. Chaney. As a result, Ms. Chaney ceased using the plug-in air fresheners but did not stop wearing perfumes/oils. Plaintiff frequently used FMLA leave and sick leave days due to her reactions.

In October 2006, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") (the EEOC dismissed the charge in April 2007), and Plaintiff sought the help of her union representative, Dempsey Addison, to institute a policy change regarding the use of scents in the workplace. Ms. Robinson also advocated the adoption of a scent policy to Mr. Baran, who then contacted the Human Resources ("HR") Department. The HR Department rejected a department wide scent policy and apparently little was done to formulate any other type of policy. Through the union grievance process, Plaintiff spoke with Ms. Chaney again. Ms. Chaney agreed to stop wearing perfume/oils, but she only did so for a brief period before her use of perfumes/oils resumed. Although there were discussions about relocating either Plaintiff's workstation or Ms. Chaney's workstation, neither Plaintiff nor Ms. Chaney was relocated. On July 3, 2007, Plaintiff commenced the present suit.

### III. LEGAL STANDARD

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); [\*Thompson v. Ashe\*, 250 F.3d 399, 405 \(6th Cir. 2001\)](#). The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact, and all inferences should be made in favor of the nonmoving party. [\*Celotex Corp. v. Catrett\*, 477 U.S. 317, 323 \(1986\)](#).

To support its motion, the moving party may show "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Although all inferences must be drawn in favor of the nonmoving party, this Court bears no obligation to imagine favorable facts where the nonmoving party has alleged none. The moving party must also set forth facts sufficient to establish its case: "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." [\*Anderson v. Liberty Lobby, Inc.\*, 477 U.S. 242, 252 \(1986\)](#).

### IV. ANALYSIS

This case presents two main issues. The first is whether Plaintiff has a disability under the Act. The second is whether Defendant failed to offer Plaintiff a reasonable accommodation.

#### A. The Framework of the Act

The Act mandates that "no covered entity shall discriminate against a qualified individual with a disability. . . ." 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of such covered entity." *Id.* § 12112(b)(5)(A). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

A *prima facie* case of discrimination for failure to accommodate requires the plaintiff to show:

- (1) she is disabled;
- (2) she is otherwise qualified for the position;
- (3) her employer was aware of her disability;
- (4) an accommodation was needed, in that a causal relationship existed between the disability and the request for accommodation; and,
- (5) the employer failed to provide the necessary accommodation.

[Gerton v. Verizon South, Inc., 145 Fed. Appx. 159, 164 \(6th Cir. 2005\)](#) (citations omitted).

## **B. Plaintiff's Alleged Disability Under the Act**

Although the term "disability" is not specifically defined by the Act, the EEOC defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 29 C.F.R. § 1630.2(g)(1). An impairment substantially limits an individual if she is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Id.* § 1630.2(j)(1)(i)-(ii).

The determination of whether one's major life activities are substantially limited must be made on a case-by-case basis. See [Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 198-99 \(2002\)](#); [Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 \(1999\)](#). This is especially important in cases where the impairment is "one whose symptoms vary widely from person to person." [Toyota, 534 U.S. at 199](#). Chemical sensitivities and allergies constitute impairments with varying effects on individuals. The following factors should be considered when determining whether an individual is substantially limited:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2). Plaintiff argues that her chemical sensitivity is disabling as it substantially limits her major life activities of breathing, speaking, socializing, and reproducing.



## 1. Breathing

Breathing is one of the major life activities specifically listed in the Regulations. *Id.* § 1630.2(i). Several courts have held that a plaintiff's allergies and/or chemical sensitivities substantially limit the major life activity of breathing or at least raise a genuine issue of material fact as to that issue. See e.g., [Kaufmann v. GMAC Mort. Corp.](#), No. 04-5671, 2006 WL 1371185 (E.D. Pa. May 17, 2006); [Wade v. DaimlerChrysler Corp.](#), 418 F. Supp. 2d 1045 (E.D. Wisc. 2006); [Hunt v. St. Peter Sch.](#), 963 F. Supp. 2d 843 (W.D. Mo. 1997); [Treadwell v. Dow-United Techs.](#), 970 F. Supp. 962 (M.D. Ala. 1997); [Whitlock v. Delta Air Lines, Inc.](#), 926 F. Supp. 1555 (N.D. Ga. 1995). On the other hand, several courts have found for the defendant on the grounds that the plaintiff was not substantially limited in breathing. See, e.g., [Robinson v. Morgan Stanley & Co., Inc.](#), 269 Fed. Appx. 603 (7th Cir.2008); [Franks v. Cent. Garden & Pet Co.](#), No. 3:06-68, 2007 WL 2320624 (M.D. Ga. Aug. 10, 2007); [Keck v. N.Y. State Office of Alcohol and Substance Abuse Servs.](#), 10 F. Supp. 2d 194 (N.D.N.Y. 1998). Most importantly, Plaintiff must show that she is significantly restricted as to the condition, manner or duration under which she can breathe compared to the average member of the population. See [Toyota](#), 534 U.S. at 198-99.

The severity level of Plaintiff's symptoms is mixed. Plaintiff gets a cough that "causes [her] throat to close a little and [her] chest to tighten" which "makes it really hard to breathe." She also has "something sharp and irritating . . . like a really sharp pebble" in her throat that "makes it a little hard to breathe." Plaintiff has missed work at both this job and her second job as a result. At various times Plaintiff has been "concerned about driving [her]self home" from work, was "bedridden," and thought "Oh my God, I'm dying." Depending on the level of exposure, Plaintiff's symptoms may remain after the workday ends and sometimes last until the next morning. The symptoms also have a compounding effect, as each day during the week Plaintiff feels worse and can "barely function" by the end of the week. Weekends allow Plaintiff's symptoms to subside until the next Monday, when the cycle repeats. Plaintiff says that a break of about ten days from work is required to begin feeling completely unaffected.

Plaintiff has visited several doctors, allergists, and even a speech therapist as a result of her reactions. She provided Defendant with a note from her allergist stating that she has a "cough and vasomotor [sic] rhinitis primarily triggered [sic] by irritants" such that "exposure to these smells should be eliminated as much as possible." Plaintiff has a negative reaction every time she is confronted with scents or other chemicals, and

Plaintiff is affected in both in the workplace and in public areas. Plaintiff is sensitive to a wide variety of chemicals, not just perfumes and fragrances.

For the foregoing reasons, the Court finds Plaintiff has produced evidence that her breathing is significantly restricted as compared to the average person, such that there is a genuine issue of material fact whether she is a person with a disability under the Act.

## ***2. Interaction with Others***

Plaintiff next argues that she is limited in many everyday activities, including (a) avoiding the detergent aisle of grocery stores, (b) speaking, and (c) sitting next to others wearing scents at theaters, on public transportation, or in other confined quarters. Detergent shopping is not a major life activity. Although speaking is a major life activity, see 29 C.F.R. § 1630.2(i), Plaintiff does not cite any instance where she was actually unable to speak or was significantly restricted in her ability to do so. In fact, Plaintiff's job requires a high amount of communication, and her ability to communicate in performing her job has not been questioned. The Court also notes that Plaintiff gave 139 pages worth of deposition testimony without incident.

The best characterization of the remaining limitations claimed by Plaintiff is an impairment of the major life activity of interacting with others. Circuit courts are split on their recognition of this as a major life activity, and the Sixth Circuit thus far has recognized only that it is valid in other circuits. See [\*MX Group, Inc. v. City of Covington\*, 293 F.3d 326 \(6th Cir. 2002\)](#). Even assuming its validity, the case law regarding this activity requires a much more substantial limitation than what Plaintiff has shown. See e.g., [\*McAlindin v. County of San Diego\*, 192 F.3d 1226, 1235 \(9th Cir. 2008\)](#) (the burden is to show "consistently high levels of hostility, social withdrawal, or failure to communicate when necessary"). The fact that Plaintiff moves seats in a theater or on a bus is not the substantial impairment required by the Act. Moreover, Plaintiff's job requires interaction with co-workers and the public, and she seems to accomplish this in a satisfactory manner (except as discussed above with respect to breathing).

For the reasons stated above, the Court concludes, as a matter of law, that Plaintiff's claims regarding detergent shopping, speaking and a substantial impairment in the major life activity of interacting with others shall be dismissed.

### 3. Reproduction

Plaintiff also argues that, as a result of her symptoms, she is substantially limited in the major life activity of reproduction. Specifically, Plaintiff claims that the medication she was taking to alleviate her chemical-related symptoms contraindicated her fertility treatments. As a result, she asserts she was forced to discontinue fertility treatments and is now unable to have a child. The Supreme Court has held reproduction to be a major life activity, [\*Bragdon v. Abbott\*, 524 U.S. 624, 638 \(1998\)](#), but difficulty in reproducing is not enough, in itself, to constitute a significant limitation on reproduction. *Sauer v. Univ. Internal Med. Assocs., Inc.*, 2008 WL 731492, at \*11 (S.D. Ohio Mar. 17, 2008). In a case involving in vitro fertilization, one court held that infertility is a disability under the Act that could significantly limit the major life activity of reproduction. See [\*LaPorta v. Wal-Mart Stores, Inc.\*, 163 F. Supp. 2d 758, 766 \(W.D. Mich. 2001\)](#). In *LaPorta* and *Bragnon*, however, the disability of infertility was directly linked to the plaintiff's limitation of the major life activity of reproduction. In this case, Plaintiff's alleged disability is incidental to reproduction. The Court is not willing to extend *Bragdon* and *LaPorta* to this case, where medications for an alleged disability, at most, may have *indirectly* contributed to a failure to conceive. The Court therefore dismisses Plaintiff's claim that she has a disability related to reproduction.

### 4. Conclusion

For the reasons set forth above, the Court concludes that Plaintiff may proceed with her claim of disability based on the major life activity of breathing, but Plaintiff's claim of disability based on detergent shopping, speaking, interacting with others and reproduction are dismissed.

## C. Reasonable Accommodation

Under the Act, a covered entity must make "reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Whether a proposed accommodation is reasonable is generally a question of fact. [\*Monette v. Elec. Data Sys. Corp.\*, 90 F.3d 1173, 1184 \(6th Cir. 1996\)](#). It is undisputed that Plaintiff is a qualified individual (*i.e.*, she can perform the essential functions of her job). Therefore, Defendant is required to reasonably accommodate Plaintiff's disability, if she has one. Plaintiff must first show that a proposed accommodation is objectively reasonable. [\*Monette\*, 90 F.3d at 1183](#). The burden then shifts to Defendant to show that the accommodation would "impose an undue hardship." 42 U.S.C. § 12112(5)(a); [\*Monette\*, 90 F.3d at 1183-84](#).

In order to determine an appropriate accommodation, "it may be necessary" for the covered entity to "initiate an informal, interactive process" with the qualified individual. 29 C.F.R. § 1630.2(o)(3). Despite this seemingly permissive language, the Sixth Circuit has held that the interactive process is mandatory and requires a good faith effort by both parties. See [\*Kleiber v. Honda of Am. Mfg., Inc.\*, 485 F.3d 862, 871 \(6th Cir. 2007\)](#). The requirement of participating in the interactive process is triggered as soon as an accommodation is requested or the employer knows of a disability. See [\*Taylor v. Phoenixville Sch. Dist.\*, 184 F.3d 296, 314 \(3d Cir. 1999\)](#). The failure to engage in the interactive process is not an independent violation of the Act, see [\*Bretfielder v. Leis\*, 151 Fed. Appx. 379, 386 \(6th Cir. 2005\)](#), and Plaintiff still must show that a reasonable accommodation was possible in order to hold Defendant liable for a violation of the Act. See [\*Kleiber\*, 485 F.3d at 872 n.6](#).

As Defendant asserts, a scent-free policy for the workplace is an unreasonable accommodation because it would require an undue hardship. See e.g., [\*Montenez-Denman v. Slater\*, No. 98-4426, 2000 WL 263279 at \\*3 \(6th Cir. Mar. 1, 2000\)](#); [\*Kaufmann v. GMAC Mortg.\*, 229 Fed. Appx. 164, 168 \(3d Cir. 2007\)](#). As such, Plaintiff is barred from arguing to the jury that Defendant was unreasonable in failing to accommodate her by enacting a scent-free policy.

The evidence in this case, however, read in a light most favorable to Plaintiff, shows that she did not seek a scent-free policy. Plaintiff simply wanted to "get an opportunity to work with management and [HR] to help come up with something . . . that would work" to "try to get some relief." Plaintiff sought to limit the most egregious scents through a written policy and employee education regarding chemical sensitivities. To that end, in January 2007, Plaintiff provided Defendant with a copy of a no-scent policy enacted by the Michigan Department of Information Technology as an example of the type of policy she was seeking. That policy provided that "[m]ild scents may be worn in moderation, but strong or offensive scents that become detrimental to the work unit will not be tolerated." Unlike the policies in *Kaufman* and *Montenez-Denman*, this type of policy does not require a completely scent-free environment nor does it address the public or those outside a department. Defendant has not offered evidence why such a policy would create an undue hardship. Defendant also has not offered any explanation why it could not simply have ordered Ms. Chaney to cease wearing offensive perfumes or oils, or why such a directive would constitute an unreasonable accommodation.

Two other possible accommodations discussed amongst the parties involved moving the workplace of Plaintiff or Ms. Chaney. In each situation, the record contains conflicting assertions why neither Plaintiff nor Ms. Chaney was relocated. The parties



dispute whether (a) either move was possible or feasible (because of union membership or the need for proximity to other workers), and (b) such move(s) were even pursued (Plaintiff contends that Ms. Chaney was never even contacted about relocating her space).

Plaintiff also asserts she sought accommodation through a union grievance request that her FMLA and/or sick leave time be re-credited as part of her accommodation. Defendant argues that it provided accommodation in the form of granting Plaintiff leave under the Family and Medical Leave Act, 29 U.S.C. §2601 et seq. ("FMLA"). FMLA leave can constitute a reasonable accommodation under the Act, see 29 C.F.R. § 825.702; [\*Swanson v. Senior Res. Connection\*, 254 F. Supp. 2d 945, 961 \(S.D. Ohio 2003\)](#), but generally additional time off after the exhaustion of FMLA leave is required for the accommodation to be reasonable. See [\*Vice v. Blue Cross & Blue Shield of Okla.\*, 113 Fed. Appx. 854, 856-57 \(10th Cir. 2004\)](#). See also [\*Cehrs v. N.E. Ohio Alzheimer's Rsrch Ctr.\*, 155 F.3d 775, 782 \(6th Cir. 1998\)](#) ("It is not clear why unpaid leave should be analyzed differently from any other proposed accommodation under the [Act]"). As such, there is a genuine issue of material fact whether Defendant provided Plaintiff reasonable accommodation in the form of granting Plaintiff FMLA leave.

Moreover, evidence in the record demonstrates that Defendant (through its HR Department) may not have engaged in a proper interactive process, as Defendant's representatives said:

- a. "If she's allergic to perfumes and colognes then she has the problem not the employer."
- b. "The problem is [Plaintiff] and her symptoms."
- c. "HR's position is to limit the contact between the employees."

For the reasons set forth above, the Court holds that there is a genuine issue of material fact for the jury to resolve with respect to each of the foregoing possible accommodations. Therefore, assuming the jury concludes that Plaintiff has a breathing disability under the Act, the jury shall determine whether the proposed accommodation was reasonable with respect to:

1. The adoption of a policy regarding scents,
2. The movement of Plaintiff,
3. The movement of Ms. Chaney, and
4. The FMLA leave afforded Plaintiff.

## **D. Conclusion**

Finally, in addition to barring Plaintiff from arguing the reasonableness of a scent-free policy to the jury, *see supra* at page 10, there are two "proposed" accommodations by Defendant the Court concludes are unreasonable as a matter of law. First, although Ms. Chaney apparently agreed to stop using perfumes on at least two occasions after discussions with Plaintiff and/or Defendant's representatives, her use resumed shortly thereafter each time. Second, Defendant mentions the use of a fan or filter. The only person who discussed it (Ms. Robinson), however, said that HR raised this issue to her but "nothing" further was done. In addition, there is no evidence the fan or filter accommodation was proposed to Plaintiff. Therefore, Defendant is prohibited from arguing either of these accommodations as a defense to the jury.

## **V. CONCLUSION**

For the reasons set forth above, IT IS ORDERED that Defendant's Motion for Summary Judgment [dkt 23] is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

PAMELA CORE,	:	Case No. 3:11-cv-166
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
CHAMPAIGN COUNTY BOARD	:	
OF COUNTY COMMISSIONERS,	:	
	:	
Defendant.	:	

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DECISION AND ENTRY GRANTING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT (Docs. 42, 48)

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This civil case is before the Court on the Motion for Summary Judgment filed by Defendant the Champaign County Board of County Commissioners. (Doc. 48).<sup>1</sup> Plaintiff Pamela Core filed a Memorandum in Opposition. (Doc. 49). Defendant then filed a Reply Memorandum. Defendant's Motion is now ripe for consideration and determination by the Court.

I. ALLEGATIONS

Plaintiff Pamela Core asserts claims against Defendant under the Americans with Disabilities Act ("ADA") and also asserts a disability claim under Ohio law. (Doc. 22). Plaintiff alleges that she suffers from asthma and a severe chemical sensitivity to certain

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<sup>1</sup> Defendant originally filed a Motion for Summary Judgment on July 13, 2012 (Doc. 42), but subsequently filed an Amended Motion (Doc. 48) which essentially reduced the total pages in an effort to comply with the page limitation set forth in Local Rule 7.2(a)(3). For purposes of this Order, the Court refers to both the original Motion and the Amended Motion as a single Motion.

perfumes and other scented products, and is, therefore, substantially limited in the major life activity of breathing. (Doc. 22, PAGEID 151, 154).

## II. FACTS<sup>2</sup>

Champaign County Department of Jobs and Family Services (“DJFS”) is responsible for administering programs involving employment and training services as well as other social services for adults and children of Champaign County, Ohio. DJFS employs approximately 48 employees. DJFS hired Plaintiff in February 2003 to the position of Social Service Worker I (“SSWI”), a position she occupied throughout her employment with DJFS. Plaintiff ceased physically reporting to DJFS on March 31, 2010, and has not performed any job functions for DJFS since that date.

DJFS maintains a written job description for the position of SSWI, which accurately depicts many, but not all, of the job functions performed by Plaintiff in the course of her employment. Essential functions of Plaintiff’s SSWI position include: (1) conducting onsite inspections of childcare facilities to ensure compliance with state standards; (2) interacting with non-employee clients and children relative to DJFS services; (3) attending and conduct trainings; (4) interacting with clients, the public, and employees both on and off the work site; (5) being subject to necessary direct supervision; and (6) performing in-house client interviews.

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<sup>2</sup> Pursuant to the Standing Order of the Court, Defendant filed a Proposed Statement of Undisputed Facts. (Doc. 49, PAGEID 2089-2092). Plaintiff responded to the Proposed Statement of Undisputed Facts by admitting the substance of the Facts stated here. (Doc. 49, PAGEID 2110-2111).



DJFS is open to the public and maintains office space within a common structure housing several different agencies and organizations. Visitors and employees enter and exit DJFS unannounced on a daily basis. DJFS cannot provide Plaintiff a work environment entirely free of chemicals, perfumes and/or other allergens.

Plaintiff's primary healthcare provider, Nurse Practitioner Rutan ("Nurse Rutan"), informed DJFS that Plaintiff can only work in an environment "free of perfume." Plaintiff's treating physician informed DJFS that Plaintiff can only work in an environment "without fumes she is allergic to."

At all times relevant to this matter, Plaintiff sells jewelry at craft shows open to the public. At craft shows, Plaintiff sells jewelry out of a vendor's booth measuring ten feet by ten feet. Plaintiff has never notified craft show attendees of her alleged disability. Plaintiff's alleged disability does not prevent her from shopping at malls, eating at restaurants, shopping at grocery stores, banking at banks, wearing perfume, attending college classes, or walking around the neighborhood. On March 11, 2010, DJFS notified all staff via email providing "requests/recommendations" to prevent Plaintiff from being exposed to perfumes/fragrances.

Plaintiff applied for leave from work under the Family Medical Leave Act ("FMLA") on or about June 30, 2010, which DJFS approved. On or about April 7, 2010, DJFS offered to permit Plaintiff to work "shorter work day hours, [and to have] her own office and private bathroom facilities," to which Plaintiff did not respond.

Plaintiff exhausted her FMLA leave entitlement in September 2010. DJFS placed Plaintiff on inactive pay status in September 2010. On or about December 8, 2010, DJFS offered to permit Plaintiff to return to work with the use of an inhaler and with breaks to go outside into the fresh air, an offer Plaintiff rejected. On or about January 7, 2011, DJFS offered to instruct staff to “refrain from wearing Japanese Cherry Blossom perfume while at work,” an offer Plaintiff rejected. On or about February 3, 2011, DJFS offered to post a notice in conspicuous locations throughout the agency requesting that individuals refrain from wearing Japanese Cherry Blossom perfume, an offer Plaintiff rejected.

On or about February 21, 2011, DJFS placed Plaintiff on involuntary disability separation. To date, Plaintiff has not applied for reinstatement from her involuntary disability separation.

### III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

“Summary judgment is only appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.’” *Keweenaw Bay Indian Comm. v. Rising*, 477 F.3d 881, 886 (6th Cir. 2007) (quoting Fed. R. Civ. P. 56(c)). “Weighing of the evidence or making credibility determinations are prohibited at summary judgment - rather, all facts must be viewed in the light most favorable to the non-moving party.” *Id.*

Once “a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading[.]” *Viergutz v. Lucent Technologies, Inc.*, 375 Fed. Appx. 482, 485 (6th Cir. 2010) (citing Fed. R. Civ. P. 56(e)(2)). Instead, the party opposing summary judgment “must - by affidavits or as otherwise provided in this rule - set out specific facts showing a genuine issue for trial.” *Id.* (citing Fed. R. Civ. P. 56(e)(2)).

#### IV. ANALYSIS

Defendant moves for summary judgment arguing: (A) that Plaintiff fails to prove a disability under the Americans with Disabilities Act (“ADA”); (B) Plaintiff is not otherwise qualified for the position in which she was employed; (C) Plaintiff cannot be considered otherwise qualified for the position she was employed because she rejected good faith offers of accommodation; (D) Plaintiff fails to identify a reasonable and effective accommodation; and (E) Plaintiff suffered no adverse employment action.

Under the ADA, employers are required to reasonably accommodate disabled individuals, unless the accommodation imposes an undue hardship. 42 U.S.C. § 12112(b)(5). Failure to reasonably accommodate an employee with a disability is

unlawful discrimination under the ADA. *Id.*; *Hoskins v. Oakland County Sheriff's Dep't.*, 227 F.3d 719, 724 (6th Cir. 2000). “In order to establish a prima facie of disability discrimination under the ADA for failure to accommodate, a plaintiff must show that: (1) [he or] she is disabled within the meaning of the Act; (2) [he or] she is otherwise qualified for the position, with or without reasonable accommodation; (3) [his or] her employer knew or had reason to know about her disability; (4) [he or] she requested an accommodation; and (5) the employer failed to provide the necessary accommodation.” *Myers v. Cuyahoga County, Ohio*, 182 Fed. Appx. 510 (6th Cir. 2006) (citing *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir. 2004)).

A. Whether Plaintiff is Disabled

Defendant first contends that Plaintiff cannot prove a disability entitled to protection under the ADA because Plaintiff is not substantially limited in the major life activity of breathing. The term “[d]isability” means, with respect to an individual - - a physical or mental impairment that substantially limits one or more major life activities of such individual[.]” 42 U.S.C. § 12102(1). Plaintiff alleges in her Amended Complaint that she is substantially limited in her ability to breathe. Breathing is a major life activity recognized in 42 U.S.C. § 12102(2)(A). Accordingly, Plaintiff is disabled if she can show that she is substantially limited in her ability to breathe.

Prior to May 24, 2011, the term “substantially limits” was defined in the Code of Federal Regulations as “[s]ignificantly restricted as to the condition, manner or duration



under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(1)(ii).<sup>3</sup> The regulations effective before to May 24, 2011, set forth three factors to be considered “in determining whether an individual is substantially limited in a major life activity[,]” namely, “(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2).

Here, Defendant argues that Plaintiff is not substantially limited in the major life activity of breathing because her purported asthma is triggered by a single irritant, one she predominately encountered only in the workplace. Defendant argues that Plaintiff’s reaction to the scent of Japanese Cherry Blossom has little impact on her daily activities of life. Plaintiff walks regularly in her neighborhood, shops, makes jewelry, and attends trade shows to sell her jewelry, and performs other activities of daily living all without breathing difficulties resulting from her asthma. The Court notes that Plaintiff recalls less than five encounters with Japanese Cherry Blossom outside of DJFS facility over a three year period. In fact, in April 2012, Plaintiff could not recall her last exposure, noting only

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<sup>3</sup> Plaintiff identifies the standard applicable in this case in determining whether her impairment substantially limits her ability to breathe as the “average person” standard. 29 C.F.R. § 1630.2(j)(1)(ii), effective post-May 24, 2011, provides that “[a]n impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” 29 C.F.R. § 1630.2(j)(1)(ii).

that “[i]t’s been awhile.” (Doc. 35, PAGEID 601).

Plaintiff’s response on the issue of whether she is disabled focuses little on her asthma and significantly on “anxiety and depression” resulting from DJFS’s alleged failure to respond to her complaints about Japanese Cherry Blossom in the workplace. Plaintiff does not point to evidence showing that depression and anxiety impacted the major life activity of breathing, or any other major life activity. The suggestion that Plaintiff was bullied in the workplace because of her sensitivities to Japanese Cherry Blossom is insufficient to establish a disability, at least in the absence of evidence that the resulting depression and anxiety substantially limited a major life activity. Plaintiff makes no such showing in this case.

With regard to asthma, Plaintiff simply points to her asthma diagnosis and a single trip to the emergency room. Plaintiff does not point to any evidence demonstrating the actual impact Plaintiff’s asthma has (or had) on her overall ability to breathe. Under the ADA effective prior to January 1, 2009, courts recognized that “[a]sthma can, in some cases, qualify as a disability[.]” *Boker v. Sec. Dept of Treasury*, No. 1:07-cv-446, 2009 WL 3199074, \*5 (S.D. Ohio Sept. 29, 2009).

However, under the ADA prior to January 1, 2009, simply “[s]uffering from asthma does not constitute a per se substantial limitation on the major life activity of breathing[.]” *Id.* Instead, asthma typically arose to the level of a disability in instances where “plaintiff has a long history of asthmatic attacks and endures numerous and severe

restrictions on daily activities as a result of the condition.” Id. If a person “suffer[ed] asthma attacks only in response to particular stimuli and [was] able to engage in almost all normal life activities, courts [were] . . . less likely to conclude that the plaintiff is substantially limited in the major life activity of breathing.” Id.

Based on Boker, the Court concludes that, under the ADA applicable prior to January 1, 2009, Plaintiff was not disabled because she was not substantially limited in the major life activity of breathing. Plaintiff’s history of exposure to Japanese Cherry Blossom prior to January 1, 2009 predominately occurred within the DJFS facility<sup>4</sup> and occurred approximately once a week or every other week. When exposed, Plaintiff suffered from difficulty breathing,<sup>5</sup> though Plaintiff fails to point to evidence regarding the severity or duration of these symptoms aside from a single trip to the emergency room. Outside of the DJFS facility, Plaintiff rarely encountered Japanese Cherry Blossom and was able to perform all activities, including regular walks in her neighborhood, all without breathing difficulty.

The Court notes, however, that the analysis is Boker, which involved conduct

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<sup>4</sup> The Court focuses solely on Plaintiff’s reaction to Japanese Cherry Blossom because, during her deposition, Plaintiff testified that her exposure to other fragrances generally resulted in headaches, nausea, coughing, a runny nose and sinus congestion. Plaintiff points to no evidence that her exposure to any other fragrance results in more than a minimal impact on Plaintiff’s ability to breathe.

<sup>5</sup> Plaintiff also notes suffering from headaches, nausea and coughing, but it is not clear whether headaches or nausea affected Plaintiff’s breathing. As noted by one court in a case where plaintiff suffered from “headaches, sinus trouble, watery eyes, shortness of breath, tightening of the chest, and nausea” upon exposure to certain fragrances: “a majority of the symptoms of which she complains are wholly unrelated to her breathing.” *Franks v. Central Garden & Pet Co.*, No. 3:06-CV-68(CDL), 2007 WL 2320624, \*4 n5 (M.D. Ga. Aug. 10, 2007).

occurring before January 1, 2009, may be impacted in this case because the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), effective January 1, 2009, provides that the term “disability” should be construed broadly. 42 U.S.C. § 12102(4)(A). Notably, the Sixth Circuit concludes that “the ADAAA does not apply to pre-amendment conduct[.]” *Jones v. Nissan North America, Inc.*, 438 Fed.Appx. 388, 387 n.9 (6th Cir. 2011) (citing *Milholland v. Sumner Cnty. Bd. of Educ.*, 569 F.3d 562, 567 (6th Cir.2009)).

Under the ADAAA, “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(C). Further, under the ADAAA, “[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” 42 U.S.C. § 12102(4)(C). In addition, when determining “whether an impairment substantially limits a major life activity[.]” medications and accommodations are not considered. 42 U.S.C. § 12102(4)(E).

Here, there is no genuine issue of material fact that Plaintiff is not disabled as that term was construed prior to January 1, 2009, i.e., before the effective date of the ADAAA.

Moreover, even if the Court were to conclude, under the broad construction required by the ADAAA, that a genuine issue of material fact exists as to whether Plaintiff is disabled, summary judgment is proper for other reasons set forth below.



B. Reasonableness of Plaintiff's Proposed Accommodations

Even assuming Plaintiff is disabled, Defendant argues that Plaintiff's claim must fail because she fails to show that her requested accommodations are reasonable. Under the ADA, plaintiffs bear "the initial burden of proposing an accommodation and showing that that accommodation is objectively reasonable." *Steward v. New Chrysler*, 415 F. App'x 632, 642 (6th Cir. 2011) (citing *Johnson v. Cleveland City Sch. Dist.*, 344 F. App'x 104 (6th Cir.2009); *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862 (6th Cir.2007)). "In order for an accommodation to be reasonable, it should be necessary in light of the plaintiff's known physical limitations." *Johnson*, 344 F. App'x at 111 (citing *Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir.2008)). A court properly grants summary judgment on a reasonable accommodation claim where a plaintiff fails to show that requested accommodations are reasonable. *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 635 (6th Cir. 1998).

Here, Plaintiff argues that working from home or, alternatively, a fragrance-free workplace are reasonable accommodation requests. With regard to Plaintiff's request to work from home as an accommodation, the Sixth Circuit has agreed with the general proposition that an employer is not required "to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced." *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (citing *Vande Zande v. Wisconsin*, 44 F.3d 538 (7th Cir.1995)). The Sixth Circuit also recognizes, however, the possibility of exceptions to

the general rule ““in the unusual case where an employee can effectively perform all work-related duties at home [.]” Id. (citations omitted).

Here, Defendant points to evidence that Plaintiff’s position at the DJFS required her to meet with non-employee clients regarding services, inspect and certify in-home daycare facilities, conduct and attend training sessions, input data into a state database only accessible at the DJFS facility,<sup>6</sup> and maintain physical files that are to be restricted to the DJFS facility. Defendant also points to Plaintiff’s own admissions that she cannot perform all of the essential functions of her position at home. Plaintiff points to no evidence rebutting these facts. Accordingly, the Court finds that the requested accommodation that Plaintiff be permitted to work from home is not reasonable.

Next, Plaintiff requested, as an accommodation, that DJFS institute a fragrance-free workplace “policy” by requesting that employees “refrain from wearing scented products, including but not limited to, colognes, after-shave lotions, perfumes, deodorants, body-face lotions, hair sprays, or similar products” in the workplace. A reasonable jury could not conclude that the full extent of this requested accommodation is reasonable for a number of reasons.

First, while Plaintiff states that she experiences difficulty breathing upon being exposed to Japanese Cherry Blossom, she points to no evidence of significant breathing

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<sup>6</sup> Plaintiff contends that there is no testimony that the state database is accessible only at the DJFS facility. (Doc. 49, PAGEID 2111). However, an affidavit of Sue Bailey-Evans, Director of the DJFS, states just that. (Doc. 42-1, PAGEID 1699).

difficulties upon exposure to any other fragrance and points to no evidence of breathing problems when encountering any other fragrances in the workplace. In fact, Plaintiff herself wears certain perfume. While Plaintiff testified that she experiences adverse symptoms when exposed to a limited number of other fragrances, these symptoms were limited to brief periods of headaches, stuffy nose, coughing, sinus congestion and nausea, i.e., symptoms not significantly limiting Plaintiff's ability to breathe. See Franks, 2007 WL 2320624, \*4 n5.

Thus, there is no need for a broad fragrance-free workplace encompassing the entire spectrum of products and scents when Plaintiff evidences difficulty breathing only upon exposure to a single scent, namely Japanese Cherry Blossom. Again, "[i]n order for an accommodation to be reasonable, it should be necessary in light of the plaintiff's known physical limitations." Johnson, 344 F. App'x at 111 (emphasis added) (citing Nance, 527 F.3d 539). The only breathing limitation evidenced by Plaintiff is difficulty occurring only upon exposure to Japanese Cherry Blossom.

Second, the Sixth Circuit has found that a fragrance-free workplace is objectively unreasonable. See *Montenez-Denman v. Slater*, 208 F.3d 214, 2000 WL 263279 (6th Cir. Mar. 1, 2000). The court in *Montenez-Denman* adopted the reasoning set forth by the district court, which stated that:

a "fragrance-free" work environment still purports to require her employer to engage in the undue burden of establishing and enforcing a prohibition against "scents." This imposes an obligation on her employer to prohibit plaintiff's co-workers and those who

occasionally come into the office of their right to wear “scents,” to engage in the burdensome and unseemly task of enforcing such a prohibition and to identify and rid plaintiff’s workplace of many other common, scent producing agents such as cleaning supplies.

Id. at \*2.

This Court also recognizes the burden that such a broad policy would have on individual employees who would have to alter all of their personal habits to ensure that all products of daily-living, i.e., deodorant, lotions, hair products, etc., used in their private homes before coming into the workplace, are fragrant-free. As noted by other courts, “[t]here is nothing in the Act to suggest that the non-disabled population was expected to give up or substantially alter their lifestyle.” *McDonald v. Potter*, No. 1:06-cv-1, 2007 WL 2300332, \*43 (E.D. Tenn. Aug. 7, 2007) (citing *Kaufman v. GMAC Mortgage Corp.*, No. 04-CV-5671, 2006 WL 1371185 (E.D. Pa. May 17, 2006)).

Third, despite all of the numerous alleged exposures to Japanese Cherry Blossom in the workplace for over a two year period of time, Plaintiff states that she “demonstrated the ability to perform the essential functions of her job with no accommodation.” (Doc. 49, PAGEID 2103). Plaintiff’s admission in this respect is bolstered by the admission of Sue Bailey-Evans, Director of the DJFS, who testified that, “as far as a worker and getting the job done, [Plaintiff] was excellent. She does very good work.” The aforementioned testimony is the only portion of the record referenced by either party regarding Plaintiff’s actual ability to do her job.

“[W]here Plaintiff is able to perform the job without accommodation, plaintiff cannot demonstrate the objective reasonableness of any desired accommodation.” Black v. Wayne Center, 225 F.3d 658, 2000 WL 1033026, \*3 (6th Cir. Jul. 17, 2000) (emphasis added). Such holding is consistent with the definition of “reasonable accommodation,” which includes “[m]odifications or adjustments to the work environment . . . that enable an individual with a disability who is qualified to perform the essential functions of that position[.]” At the very least, “[a]n employee’s ability to perform all essential job functions without accommodation is a factor weighing against the reasonableness of an accommodation[.]” Nawrot v. CPC Int’l, 259 F.Supp.2d 716, 725 (N.D. Ill. 2003). Accordingly, Plaintiff fails to show that the broad request for a totally fragrance-free workplace is a reasonable accommodation.

Based on all of the foregoing, the Court concludes that Plaintiff fails to satisfy her burden of demonstrating that the accommodations she requested are reasonable.

C. Reasonableness of DJFS’s Proposed Accommodations

Defendant also argues that Plaintiff’s claims should be denied because Plaintiff rejected reasonable accommodations offered by DJFS. Insofar as Plaintiff suggests that an accommodation is required to enable her to perform the essential functions of her job, a “plaintiff’s refusal to accept available reasonable accommodations precludes her from arguing that other accommodations should also have been provided.” Hankins v. The Gap, Inc., 84 F.3d 797, 802 (6th Cir. 1996).



Aside from DJFS's rejection of Plaintiff's unreasonable accommodation requests to work from home or for a fragrance-free workplace, DJFS ultimately offered every other accommodation Plaintiff requested, i.e., advising staff of Plaintiff's reaction to Japanese Cherry Blossom and offering to request that employees refrain from wearing Japanese Cherry Blossom. In fact, DJFS ultimately proposed all of the following specific accommodations: allowing Plaintiff to work shorter work days; allowing Plaintiff to have her own office and her own bathroom facilities; allowing Plaintiff to have and use an inhaler at work; allowing Plaintiff to exit the building as needed; considering any other accommodation recommended by a pulmonologist that examined Plaintiff; considering any recommendations based upon results of a methacholine challenge and/or provocation challenge; emailing all DJFS staff a memorandum stating:

As an agency we strive to be sensitive to employees who may have perfume and chemical sensitivities. Employees who are sensitive to perfumes and chemicals may suffer potentially serious health consequences. In order to accommodate employees with known or believed perfume and/or chemical sensitivities, the Champaign County Department of Job and Family Services requests that you refrain from wearing Japanese Cherry Blossom perfume while at work. The agency thanks you for your cooperation[;]

and posting the above memorandum in conspicuous locations within the DJFS facility.

Plaintiff admittedly failed to respond to DJFS's offer to allow Plaintiff to work shorter work days and to allow Plaintiff to have her own office and her own bathroom facilities.

Plaintiff rejected all of the other offered accommodations.

Plaintiff rejected DJFS's offer to email and post a memorandum requesting that employees refrain from wearing Japanese Cherry Blossom because the offered accommodation did not encompass all fragrances and because the offered accommodation provided no enforcement mechanism. With regard to the suggestion that the offered accommodation was too narrow because it did not encompass all fragrances, as noted above, such a broad workplace policy encompassing all fragrances is unreasonable based on the record in this case, which shows only that Plaintiff experiences significant breathing limitations only when exposed to Japanese Cherry Blossom and no other fragrance.

With regard to the contention that DJFS's proposed accommodation is unreasonable because it was a mere request set forth in a memorandum rather than a "policy," the Court first notes that the specific language proposed by Plaintiff as a policy simply "requests that [employees] refrain from wearing scented products[.]"<sup>7</sup> Thus, Plaintiff's requested "policy" is nothing more than a mere request, not an absolute prohibition.

Further, with regard to enforcement through disciplinary measures, an exhibit referenced repeatedly by Plaintiff shows that employees are already subject to discipline via the employee handbook for "[c]onduct violating . . . common decency" or for the

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<sup>7</sup> Plaintiff, in her Memorandum in Opposition, also characterized the request as "a formal workplace policy . . . that encouraged employees to refrain from wearing strong scents." (Doc. 49, PAGEID 2098).

“discourteous treatment of others.”<sup>8</sup> Certainly, disciplining employees for ignoring a specific DJFS request to refrain from wearing a single particular perfume in an effort to accommodate employees with documented allergies, asthma or chemical sensitivities, and to avoid potentially serious health consequences to those employees, would be proper under written policies already in place at the DJFS regarding “common decency” and/or “discourteous treatment of others.”

Thus, based on all of the foregoing, no reasonable jury could find any substantive difference between the “request” offered by DJFS and a “policy” codifying a request. See *Murray v. Dawn Foods, Inc.*, No. 09-cv-12160, 2010 WL 4063731, \*4 (E.D. Mich. Oct. 14, 2010) (stating that “a claim that an employer failed to ‘reasonably accommodate’ a disabled person cannot be based solely on minor differences between requested accommodations and provided accommodations”).

Further, no reasonable jury could conclude that the accommodations proposed by DJFS were unreasonable. DJFS offered to request staff not to wear Japanese Cherry Blossom, an accommodation specifically requested by Plaintiff initially, and Plaintiff failed to show that any other fragrance significantly affected her ability to breathe. In addition, the evidence in the record, including Plaintiff’s own admission, shows that

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<sup>8</sup> Plaintiff suggests that Bailey-Evans admitted that there is no enforcement mechanism behind the proposed posted sign or the proposed email. However, a review of Bailey-Evans’s testimony does not support Plaintiff’s characterization. Bailey-Evans simply testified that she was not sure whether she could enforce the request through disciplinary measures, but acknowledged that “doing things that you know can cause harmful reactions” to others may violate the “common decency” or “discourteous treatment” provisions of the policy already in place, depending upon the circumstances.

Plaintiff was able to perform all essential functions of her position for two years without any accommodation despite frequent exposure to the offending perfume.

Accordingly, summary judgment is proper because Plaintiff rejected reasonable accommodations offered by DJFS.

D. DJFS's Participation in the Interactive Process

Finally, Plaintiff argues that DJFS failed to engage in the interactive process in good faith. "Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046 (6th Cir. 1998) (citing 29 C.F.R. pt. 1630 App. § 1630.9).

"To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3). The interactive "process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.*

Here, the crux of Plaintiff's argument in this regard is that she first reported breathing difficulties resulting from exposure to perfume in February 2008, and that she requested accommodations at that time without any response for approximately two years. In other words, Plaintiff argues that DJFS ignored Plaintiff's February 2008 requests "for more than two years, which resulted in the incident in February, 2010." As set forth

above, however, Plaintiff was not “disabled” under the terms of the ADA as it existed prior to enactment of the ADAAA, effective January 1, 2009. Accordingly, prior to January 1, 2009, DJFS was not required to provide any accommodations to Plaintiff.

Even following the effective date of the ADAAA, the first requested accommodation by Plaintiff was via Nurse Rutan on February 12, 2010, following Plaintiff’s emergency room treatment. Nurse Rutan suggested that Plaintiff’s “coworkers be advised” of Plaintiff’s reaction to Japanese Cherry Blossom. (Doc. 38-1, PAGEID 1533). Thereafter, DJFS began a dialogue with Nurse Rutan seeking additional information about the requested accommodation. “When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.” 29 C.F.R. pt. 1630 App. § 1630.9.

On March 2, 2010, following DJFS’s request for documentation to confirm the need for the requested accommodation, Nurse Rutan responded that “[m]inimizing and limiting her allergic responses are the best recommendations that [she] can provide[,]” and suggesting that the work environment “can be controlled simply by requesting all staff to avoid some of those major triggers for [Plaintiff] out of respect.” (Doc. 38-1, PAGEID 1537).

On March 11, 2010, Bailey-Evans acted upon Nurse Rutan’s recommendations.



On that date, after collaborating directly with Plaintiff,<sup>9</sup> Bailey-Evans sent an email to staff informing them of Plaintiff's reaction to Japanese Cherry Blossom and requesting that they limit coming into contact with Plaintiff in the office unless that contact occurred in well ventilated areas. (Doc. 36, PAGEID 1072).<sup>10</sup> Plaintiff's suggestion that she takes

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<sup>9</sup> See *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007) (stating that the interactive process "is designed to encourage direct participation on behalf of both the employee and the employer" rather than through proxies or other representatives).

<sup>10</sup> Plaintiff cites this portion of Bailey-Evans' deposition for the proposition that "[d]espite a request by Ms. Core that the staff be asked to cease wearing Perfume, Ms. Bailey-Evans again refused to make that simple request." (Doc. 49, PAGEID 2097) (citing Bailey-Evans Deposition, at 61). A review of that testimony, however, does not support such a factual contention, and, instead, supports the contention that isolating Plaintiff to the extent explained was based upon a collaboration with Plaintiff and would eliminate Plaintiff's exposure to all scents to which she purportedly suffered adverse reactions. In full, Bailey-Evans's cited testimony with regard to the March 11, 2010 email is as follows:

Q. You felt this was an adequate response that would help the problem?

A. As Ms. Core and I had discussed prior to sending this e-mail out, yes.

Q. So this was based on Ms. Core's recommendation, not your own?

A. This was based on a conversation between Ms. Core and I.

Q. So Ms. Core never asked you in the e-mail to specifically ask people to refrain from wearing Japanese Cherry Blossom?

A. She probably did during the conversation; but as we talked about the concerns that she has identified, there were other triggers in the Agency, that removing Japanese Cherry Blossom was not going to provide a safe environment for her.

Q. That's what she said to you, or that's what you concluded?

A. She and I had that conversation together at the same time, and that's why I was not going to request them not to wear Japanese Cherry Blossom.

Q. Why did you think this was going to be a better solution than asking people to cease wearing the Japanese Cherry Blossom?

A. It would eliminate as much as possible any other additional triggers that Ms. Core may experience being in this public workplace.

(Doc. 36, PAGEID 1071-72).

offense to Bailey-Evans's email because it was an attempt to "isolate [her] like some modern-day Hester Prynne" is an unreasonable suggestion on its face considering Plaintiff now requests to be totally isolated from co-workers in a work-at-home setting.

Soon after Bailey-Evans's email on March 11, 2010, Plaintiff went on leave and never returned to work. Nevertheless, on April 7, 2010, DJFS proposed allowing Plaintiff to work shorter work days and allowing Plaintiff to have her own office and her own bathroom facilities. Plaintiff admits that she never responded to this proposed accommodation proposal. Plaintiff's next requested accommodation was the unreasonable requested accommodation to work from home. As an additional alternative request, Plaintiff requested a fragrance-free workplace, which is also an unreasonable accommodation request, as set forth above.

Despite Plaintiff's requesting of unreasonable accommodations, DJFS nevertheless responded by proposing additional accommodations, namely: (1) allowing Plaintiff to have and use an inhaler at work; (2) allowing Plaintiff to exit the building as needed; (3) considering any other accommodation recommended by a pulmonologist that examined Plaintiff; (4) considering any recommendations based upon results of a methacholine challenge and/or provocation challenge; (5) emailing all DJFS staff the afore-cited memorandum; and (6) posting the memorandum in

conspicuous locations within the DJFS facility. As noted above, all of these offers of reasonable accommodation were rejected.

Based on all of the foregoing, Plaintiff's contention that DJFS failed to engage in the required interactive process has no merit.

V.  
CONCLUSION

As set forth above, no reasonable jury could conclude that Plaintiff's requested accommodations were reasonable and no reasonable jury could conclude that DJFS's offered accommodations were unreasonable. Accordingly, Defendant's Motion for Summary Judgment is GRANTED, Plaintiff's claims are DISMISSED,<sup>11</sup> and this case is CLOSED.

IT IS SO ORDERED.

Date: 10/17/12

s/ Timothy S. Black  
Timothy S. Black  
United States District Court

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<sup>11</sup> Because ADA claims are analyzed using "the same analysis for claims of disability discrimination under Ohio law[.]" the Court concludes that summary judgment on Plaintiff's state claim is also proper. *Myers v. Cuyahoga County, Ohio*, 182 Fed.Appx. 510, 515 (6th Cir. 2006) (citing *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 418 (6th Cir.2004)).

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## **ACCOMMODATIONS: CLEANING CHEMICALS**

If cleaning chemicals present a problem for the employee, use alternative cleaning products and practices. Use cleaning products that are known to be non-toxic or non-irritating. Products like Borax, baking soda, vinegar, lemon juice, isopropyl alcohol and cornstarch, when used properly, may serve cleaning needs. Do not use air fresheners, potpourri or candles in the work environment. To remove odors add plants to the room, use baking soda, ventilate the room, use a non-toxic odor removing product. Arrange for professional cleaning activities to take place when the building is not occupied.

### **RESOURCES: CLEANING CHEMICALS**

(Job Accommodation Network, May 2013)

#### **ALTERNATIVE CLEANING PRODUCTS**

Traditional cleaning chemicals can trigger limitations for people with chemical sensitivities, fragrance sensitivities, migraine headaches, asthma and other respiratory impairments. To prevent limitations like respiratory difficulty, headaches, nausea, and tightening of the throat, investigate the use of alternative, non-toxic cleaning products, and fragrance-free cleaning products and practices.

Below is a non-exhaustive list of companies that offer a variety of environmentally safe products and tips for non-toxic cleaning. The list of manufacturers and distributors of alternative cleaning products is provided as a resource to enhance personal research. JAN does not recommend or endorse any products or services, or guarantee that the referrals will provide an effective solution for everyone. It may be necessary to try various products or practices to identify a solution that suits you.

Also, Design for the Environment (DfE) is a program under the Environmental Protection Agency (EPA). DfE offers the Safer Product Labeling Program, which



includes a list of cleaning products. The DfE logo on a product indicates that its ingredients have been screened for "potential human health and environmental effects" by the DfE Scientific Review Team. According to DfE, a product with their logo "contains only those ingredients that pose the least concern among chemicals in their class". Visit DfE at <http://www.epa.gov/dfe> to learn more.

The following manufacturers and vendors can provide information on prices, availability of products, and usefulness of products. If you would like to return to Step 1 and select another impairment, go to: <http://www.jan.wvu.edu/soar/disabilities.html>.

**AFM Safecoat & SafeChoice**

300 West Ash Street  
#700

San Diego, CA 92101

Toll Free: (800)239-0321

Direct: (619)239-0321

[info@afmsafecoat.com](mailto:info@afmsafecoat.com)

<http://www.afmsafecoat.com>

☛ SafeChoice Cleaners (Super Clean & Safety Clean)

☛ SafeChoice Carpet Shampoo

**American Environmental Health Foundation, Inc.**

8345 Walnut Hill Lane

Suite 225

Dallas, TX 75231-4262

Toll Free: (800)428-2343

Direct: (214)361-9515

Fax: (214)361-2534

[aehf@ahef.com](mailto:aehf@ahef.com)

<http://www.aehf.com>

**Clean Environment Company, The**

13305 C Street

Omaha, NE 68144

Toll Free: (800)266-2353

[envirocycl@aol.com](mailto:envirocycl@aol.com)

<http://www.cleanenvironmentco.com/index.htm>

**Core Products**

Toll Free: (800)825-2673

<http://coreproductsco.com>

☛ Green Logic Floor Care System

**Eco Simplista**

699 East Oakland Park Blvd.

Oakland Park, FL 33334

Direct: (954)565-5900

Fax: (954)565-5978

<http://www.ecosimplista.com>

☛ Soy-It Polyurethane Stripper

**EnviroSystems, Inc.**

224 Rolling Hill Road, Suite 2A

Mooresville, NC 28117

Toll Free: (800)374-0017

Direct: (704)658-3350

Fax: (704)658-3358

<http://www.envirosi.com/>

☛ EcoTru – Disinfectant

**Healthgoods**

P.O. Box 254

Derry, NH 03038

Toll Free: (888)878-2497

Direct: (603)434-8484

[info@healthgoods.com](mailto:info@healthgoods.com)

<http://www.healthgoods.com>

**Kandel and Son**

211 Park Avenue

Hicksville, NY 11801

Direct: (516)931-4455

Fax: (516)931-5500

[info@kandelandson.com](mailto:info@kandelandson.com)

<http://www.kandelandson.com>

☛ ECOSPHERE Cleaning Products

**Lifekind Products**

P.O. Box 1774  
Grass Valley, CA 95945  
Toll Free: (800)284-4983  
Fax: (530)477-5399  
[info@lifekind.com](mailto:info@lifekind.com)  
<http://www.lifekind.com>

**Living Source, The**

P.O. Box 20155  
Waco, TX 76702  
Direct: (254)776-4878  
[livingsource@earthlink.net](mailto:livingsource@earthlink.net)  
<http://www.livingsource.com>

**Method**

30 Hotaling Place, 3rd Floor  
San Francisco, CA 94111  
Toll Free: (866)963-8463  
Direct: (415)931-3947  
[info@methodhome.com](mailto:info@methodhome.com)  
<http://www.methodhome.com>

**Microbloc**

<http://www.getmicrobloc.com>  
🚿 Green Cleaning/Restoration Products

**Mountain Green**

2625 S. Wilson St Suite #102  
Tempe, AZ 85282  
Toll Free: (866)686-4733  
Fax: (866)686-4732  
[Alison@ahealthierclean.com](mailto:Alison@ahealthierclean.com)  
<http://www.mtnngreen.com>

**Parish Maintenance Supply**

114 Palmett St.  
Syracuse, NY 13206  
Toll Free: (800)836-0862  
Direct: (315)433-9031  
Fax: (315)433-9840  
<http://www.parish-supply.com/>  
🚿 Low Odor Floor Stripper

**Real Earth Environmental**

P.O. Box 728  
Malibu, CA 90265  
Toll Free: (800)987-3326  
Direct: (310)455-7010  
Fax: (310)455-7012  
[info@treeco.com](mailto:info@treeco.com)  
<http://www.treeco.com>

**Real Earth Environmental**

P.O. Box 728  
Malibu, CA 90265  
Toll Free: (800)987-3326  
Direct: (310)455-7010  
Fax: (310)455-7012  
[info@treeco.com](mailto:info@treeco.com)  
<http://www.treeco.com>

**SCM Distributors**

Toll Free: (866)567-7873  
Direct: (631)567-4549  
Fax: (631)567-4575  
[info@scmdistributors.com](mailto:info@scmdistributors.com)  
<http://www.scmdistributors.com>  
🔧 Low Odor Floor Finish

**Seventh Generation**

60 Lake Street  
Burlington, VT 05401-5281  
Toll Free: (800)456-1191  
Direct: (802)658-3773  
Fax: (802)658-1771  
<http://www.seventhgeneration.com>

**Soy Clean**

118 W Front  
Brooklyn, IA 52211  
Direct: (641)522-9559  
Fax: (641)522-5559  
<http://www.soyclean.biz>  
🔧 Dry-Erase Markerboard Restorer

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## ACCOMMODATIONS: CARPETS AND PAINTS

When possible, arrange for construction and remodeling activities to take place when the building is not occupied (nights, weekends, holiday breaks etc.). Provide notification to employees who are chemically sensitive prior to such activities so accommodation arrangements can be made. Plan to use non-toxic building products and practices during construction and remodeling.

The chemicals used in new carpet can trigger symptoms for individuals with MCS. If possible consider carpet alternatives or natural wool carpeting. If carpeting is necessary, consider taking measures to reduce employees' exposure to the chemicals. Install carpet when the building is not occupied. When selecting carpet, explain concerns about chemical exposure to the retailer so the company can assist with identifying a carpet with low emissions.

If the carpet must be glued to a surface, the Environmental Protection Agency (EPA) suggests a water based or low emitting adhesive. It may be possible to have the retailer unroll the carpet a few days before the carpet is to be installed to speed up the out-gassing of fumes. Once installed, let the facility air-out by opening windows, if weather permits, and by using exhaust fans to draw the indoor air outdoors. If fumes are still intolerable consider applying a carpet seal that will lock in the fumes.

When possible, arrange for painting activities to take place when the building is not occupied (nights, weekends, holiday breaks etc.). Provide notification to employees who are chemically sensitive prior to such activities so accommodation arrangements can be made. Use low/no odor paints and stains that emit low to no volatile organic compounds (VOCs) or are made of natural substances. Allow sufficient drying time and ventilation. Provide a respirator mask if the individual is able and willing to wear one. Arrange for the employee to relocate during painting activities or investigate working from home as an accommodation.

When applicable, use air filtration devices such as portable air purifiers and vent filters to reduce exposure to dust. When purchasing office furniture, try to avoid pressed wood products, fabric covered products and plastics. New furniture tends to off-gas chemicals, such as formaldehyde, which can trigger MCS symptoms. Seek out products made of metal, untreated woods or leather. Arrange for the employee to relocate during construction activities or investigate working from home as an accommodation.

## **RESOURCES**

### **CARPETS AND PAINTS**

(Job Accommodation Network, May 2013)

#### **CARPET ALTERNATIVES, SEALANTS, AND SUSTAINABLE FLOORING**

Individuals who are sensitive to chemicals may experience symptoms and limitations after exposure to new carpeting. The following resources can assist with identifying 'safe' carpeting, carpet alternatives and carpet sealants.

JAN does not recommend or endorse any products or services and cannot make any statement regarding the effectiveness of the products. JAN encourages contacting manufacturers and vendors for more information to identify products that will meet individual needs.

The following manufacturers and vendors can provide information on prices, availability of products, and usefulness of products.

##### **AFM Safecoat & SafeChoice**

300 West Ash Street  
#700

San Diego, CA 92101

Toll Free: (800)239-0321

Direct: (619)239-0321

[info@afmsafecoat.com](mailto:info@afmsafecoat.com)

<http://www.afmsafecoat.com>

☛ SafeChoice Cleaners (Super Clean & Safety Clean)

☛ SafeChoice Carpet Seal

☛ SafeChoice Carpet Lock-Out

##### **American Environmental Health Foundation, Inc.**

8345 Walnut Hill Lane  
Suite 225

Dallas, TX 75231-4262

Toll Free: (800)428-2343

Direct: (214)361-9515

Fax: (214)361-2534

[aehf@ahcf.com](mailto:aehf@ahcf.com)

<http://www.aehf.com>

☛ AFM SafeChoice Products

**Eco-Wise**

110 West Elizabeth

Austin, TX 78704

Direct: (512)326-4474

<http://www.ecowise.com>

☛ Various flooring options (carpet, wood, cork)

**Healthy Environments**

4742 42nd Avenue SW

Suite 631

Seattle, WA 98116

Toll Free: (800)511-7732

<http://www.healthye.com>

☛ AFM SafeChoice Products

**Natural Home Products.Com**

4925 Gravenstein HWY. 116 N.

Sebastopol, CA 95473

Direct: (707)824-0914

Fax: (707)824-4366

<http://www.naturalhomeproducts.com>

☛ Various flooring options (carpet, wood, cork)

**Nirvana Safe Haven**

3441 Golden Rain Rd.

Suite 3

Walnut Creek, CA 94595

Toll Free: (800)968-9355

Fax: (925)938-9019

<http://www.nontoxic.com>

☛ Wool Carpet

**Sustainable Flooring, Inc.**

4390 Pali Way

Boulder, CO 80301

Direct: (303)544-6076

Fax: (303)447-0491

[info@sustainableflooring.com](mailto:info@sustainableflooring.com)

<http://www.sustainableflooring.com>

## **LOW/NO ODOR PAINTS AND STAINS**

(Job Accommodation Network, May 2013)

Individuals who are sensitive to chemicals may experience symptoms and limitations after exposure to paints and stains. When painting, select products that emit low or no volatile organic compounds (VOCs). Many products are now formulated to meet this need. Sealers are also available to reduce the off-gassing of painted walls.

Following is a list of resources for non-toxic paint products that may be tolerable by individuals who are sensitive to paint. JAN does not recommend or endorse any products or services and cannot make any statement regarding the effectiveness of the products. JAN encourages contacting manufacturers and vendors for more information to identify products that will meet individual needs.

The following manufacturers and vendors can provide information on prices, availability of products, and usefulness of products. If you would like to return to Step 1 and select another impairment, go to: <http://www.jan.wvu.edu/soar/disabilities.html>.

### **AFM Safecoat & SafeChoice**

300 West Ash Street  
#700  
San Diego, CA 92101  
Toll Free: (800)239-0321  
Direct: (619)239-0321  
[info@afmsafecoat.com](mailto:info@afmsafecoat.com)  
<http://www.afmsafecoat.com>

### **American Environmental Health Foundation, Inc.**

8345 Walnut Hill Lane  
Suite 225  
Dallas, TX 75231-4262  
Toll Free: (800)428-2343  
Direct: (214)361-9515  
Fax: (214)361-2534  
[ae hf@ahef.com](mailto:ae hf@ahef.com)  
<http://www.aehf.com>

### **BioShield Healthy Living Paints**

Plaza Entrada  
3005 South St. Francis  
Suite 2A  
Santa Fe, NM 87505  
Toll Free: (800)621-2591

Direct: (505)438-3448  
<http://www.bioshieldpaint.com>

**Devoe Coatings**

1434 Portland Avenue  
Louisville, KY 40203  
Toll Free: (888)681-6353  
<http://www.devoepaint.com>

ICI Paints, produces and sells a low odor, no VOC paint under the Devoe® Paint Wonder Pure label.

**Eco-Wise**

110 West Elizabeth  
Austin, TX 78704  
Direct: (512)326-4474  
<http://www.ecowise.com>

**Ellen Kennon**

10164 Trails End  
St. Francisville, LA 70775  
Toll Free: (877)877-7628  
<http://www.ellenkennon.com/>

**ICI Paints North America**

925 Euclid Avenue  
Cleveland, OH 44115-1487  
Direct: (216)344-8000  
<http://www.icipaints.com>

**Living Source, The**

P.O. Box 20155  
Waco, TX 76702  
Direct: (254)776-4878  
[livingsource@earthlink.net](mailto:livingsource@earthlink.net)  
<http://www.livingsource.com>

**Livos Phytochemistry of America, Inc**

P.O. Box 1740  
Mashpee, MA 02649  
Direct: (508)477-7955  
<http://www.livos.com>

**Nirvana Safe Haven**

3441 Golden Rain Rd.  
Suite 3  
Walnut Creek, CA 94595



Toll Free: (800)968-9355  
Fax: (925)938-9019  
<http://www.nontoxic.com>

**Old Fashioned Milk Paint Co.**  
436 Main St.  
Groton, MA 01450  
Direct: (978)448-6336  
<http://www.milkpaint.com>

**Real Milk Paint**  
11 West Pumping Station Rd.  
Quakertown, PA 18951  
Toll Free: (800)339-9748  
Direct: (215)538-3886  
<http://www.realmilkpaint.com>

## **RESPIRATOR MASKS**

(Job Accommodation Network, May 2013)

Respirators are devices to protect individuals from inhaling dangerous substances, such as chemicals and infectious particles. There are several different types of respirators, including escape (used only in an emergency), particulate (only protect against particles), chemical cartridge/gas mask (clean chemical gases and possibly particles), honeycomb charcoal, powered air-purifying respirator (use a fan to blow air through a filter to the user), and self-contained breathing apparatus (use their own air tank).

The following manufacturers and vendors can provide information on prices, availability of products, and usefulness of products. If you would like to return to Step 1 and select another impairment, go to: <http://www.jan.wvu.edu/soar/disabilities.html>.

### **ALLEGRO Industries**

7221 Oranewood Ave.  
Garden Grove, CA 92841  
Toll Free: (800)622-3530  
Direct: (714)899-9855  
[custsvc@allegrosafety.com](mailto:custsvc@allegrosafety.com)  
<http://www.allegrosafety.com>

### **Aearo Corporation**

Toll Free: (800)328-1667  
<http://www.aearo.com/>

### **American Health & Safety Inc.**

325 Industrial Circle  
Stoughton, WI 53589  
Toll Free: (800)522-7554  
Fax: (800)522-7554  
<http://www.ahsafety.com>

### **Conney Safety Products**

3202 Latham Drive  
Madison, WI 53744-4190  
Toll Free: (888)356-9100  
Direct: (608)277-5320  
Fax: (800)845-9095  
[safety@conney.com](mailto:safety@conney.com)  
<http://www.conney.com/>

**I Can Breathe! Inc.**

Toll Free: (888)313-0123

Direct: (773)643-1062

[icbmask@sbcglobal.net](mailto:icbmask@sbcglobal.net)

<http://www.icanbreathe.com>

☛ Honeycomb Mask with Carbon Filter

**MAXAIR Systems**

17171 Daimler Street

Irvine, CA 92614

Toll Free: (800)443-3842

<http://maxair-systems.com/>

**Moldex**

1011 W. Jefferson Blvd.

Culver City, CA 90232

Toll Free: (800)421-0668

Direct: (310)837-6500

Fax: (310)837-9563

[customersupport@moldex.com](mailto:customersupport@moldex.com)

<http://www.moldex.com>

**Safe Home Products**

3578 Perch Drive SE

Iowa City, IA 52240

Toll Free: (877)358-0900

Fax: (319)358-0901

[sales@SafeHomeProducts.com](mailto:sales@SafeHomeProducts.com)

<http://www.safehomeproducts.com>

☛ ViraMask with Viraseal

**Sellstrom Manufacturing Co.**

One Sellstrom Drive

Palatine, IL 60067

Toll Free: (800)323-7402

Direct: (847)358-2000

Fax: (847)358-8564

[sellstrom@sellstrom.com](mailto:sellstrom@sellstrom.com)

<http://www.sellstrom.com>

**Sperian Protection**

900 Douglas Pike

Smithfield, RI 02917

Toll Free: (800)343-3411

[http://www.honeywellsafety.com/Americas/Product\\_Catalog/Sperian\\_Respiratory\\_Protection.aspx](http://www.honeywellsafety.com/Americas/Product_Catalog/Sperian_Respiratory_Protection.aspx)

**U.S. Safety**

8101 Lenexa Drive

PO Box 15965

Lenexa, KS 66285

Toll Free: (800)821-5218

Fax: (800)428-7304

[info@ussafety.com](mailto:info@ussafety.com)

<http://www.ussafety.com>

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## WEBSITE REFERENCE SHEET

- For general ADA questions, contact the Department of Justice ADA Hotline at 1-800-514-0301 or [www.ada.gov/infoline.htm](http://www.ada.gov/infoline.htm).
- For information on the different types of disabilities and suggested accommodations for a specific disability, contact the **Job Accommodation Network** at [www.askjan.org](http://www.askjan.org) (click on “A-Z of Disabilities and Accommodations”).
- For information on accommodations for employees, go to EEOC at: [www.EEOC.gov/laws/types/disability.cfm](http://www.EEOC.gov/laws/types/disability.cfm).
- For ADA resources, go to the **National Center for State Courts** at [www.ncsc.org](http://www.ncsc.org).
- For general information and publications on access, go to:
  - [www.disability.gov](http://www.disability.gov) (U.S. Dept. of Health & Human Services)
  - [www.ada.gov](http://www.ada.gov) (U.S. Dept. of Justice)
  - [www.disabilityaccessinfo.ca.gov](http://www.disabilityaccessinfo.ca.gov) (The California Department of Rehabilitation)
- For the **Americans with Disabilities Act Accessibility Guidelines**, architectural and facilities standards, contact the U.S. Access Board at [www.access-board.gov](http://www.access-board.gov).
- For publications on the **Americans with Disabilities Act Title I and Title II** Technical Assistance Manuals, contact: EEOC Publications at 1-800-669-3362. Website: [www.eeoc.gov/eeoc/publications](http://www.eeoc.gov/eeoc/publications).

MAY 2013

*Prepared by:*  
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Administrative Office of the Courts  
Education Division-6<sup>th</sup> Floor  
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San Francisco, CA 94102

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# iPads: Better than Paper?

Wednesday, August 7, 2013

8:30 a.m. – 9:30 a.m.

Federal/Superior Rooms

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## **Speakers:**

Jenny Abbott Kitchings, Clerk of Court  
*South Carolina Court of Appeals*  
John Reynolds, Internal Applications Analyst  
*South Carolina Judicial Department*

---

### **Jenny Abbott Kitchings, Clerk of Court**

Jenny Abbott Kitchings received a Bachelor of Arts from Converse College with a major in Modern Languages, including Spanish, Italian, and French. She went on to graduate from the University of South Carolina School of Law with a Juris Doctor and from the top-ranked Moore School of Business with an International Masters of Business Administration.

Upon graduation, Jenny came to work in the judicial system as a law clerk for the Honorable Daniel F. Pieper, then a circuit judge. She transitioned to private practice as an associate with Thurmond, Kirchner, & Timbes, PA before she returned to the court system as a law clerk at the Court of Appeals. Jenny was appointed as Clerk of Court on January 25, 2012.

Jenny and her husband, Craig, are lucky enough to be parents to Julia Anne.

---

### **John Reynolds, Internal Applications Analyst**

John has been with the SC Judicial Department IT staff since April of 2001. Spending his first ten years in the Call Center, John has seen just about every technical issue that a user can come up with. After rising through the ranks and becoming a team leader in the Call Center, John was promoted to our Internal Applications office to take on new challenges.

Currently he is tasked with support for Appellate Case Management, Time Matters software support for Disciplinary Council, and the "Apple Guy" of the agency for iPads and iPhones. John is always looking for new ways to integrate the iPad into court business. Currently, he is working with the clerk's office to digitize exhibits for viewing on the PC and the iPad. So long VCR tapes.

---

# iPads: Better than Paper!

National Conference of  
Appellate Court Clerks  
August 7, 2013

# Introduction



**Jenny Abbott Kitchings**

*Clerk of Court*  
South Carolina Court of Appeals  
[jkitchings@sccourts.org](mailto:jkitchings@sccourts.org)  
(803) 734-1891



**John Reynolds**

*Internal Applications Analyst*  
South Carolina Judicial Dept.  
[jreynolds@sccourts.org](mailto:jreynolds@sccourts.org)  
(803) 734-1733

# iPad Implementation for Appellate Courts

- ✓ How to Get It Done
  - Connectivity
  - Security
- ✓ How We're Using Them
  - Clerk's Office
  - Judges and Staff
- ✓ How Much We Love Them
  - E-Boxes
  - Video Conferencing
  - Exhibits
- ✓ Other Options



## Network Connectivity

Remote appellate offices need ability to securely connect with our internal network

## Appellate Case Management

Users need access on the iPad

## Web Portal

Users also need access to secure internal websites

## The Role of the iPad in the South Carolina Judiciary



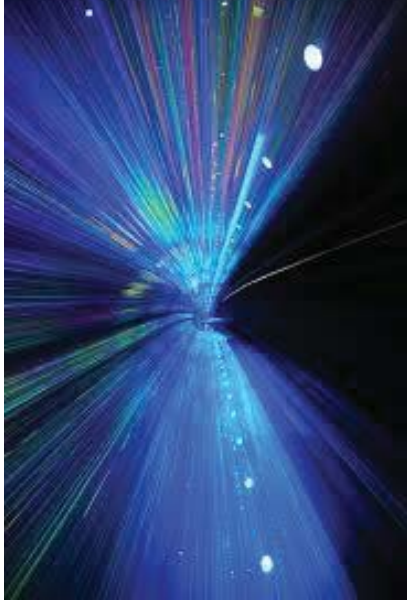
# Collaboration



The iPad should enable appellate courts to collaborate on their work more efficiently than ever before.

# Connectivity

- Access to C-Track (appellate case management)
- Access to internal web sites
- Data collaboration
- Access to legal research (such as Westlaw)
- Speed



# Security

- Cisco 5521X ASA for remote VPN (virtual private network) access via **AnyConnect** App
- **MobileIron** for mobile device management



- iPad-only internal wireless network
  - IEEE 802.11
  - AD iPad Group
  - Certificate Based
- 8 digit device passcode
- Apple data encryption

# Using the iPads ...

We're securely connected to the network . . . now what?



# Our Workhorse Apps

## GoodReader

- Handles large documents with ease
- Offers annotation with comment bubbles, highlights, markups, bookmarks, and freehand notes
- Syncs with our internal server
- Uses Apple's data protection on files and folders
- Allows customizable access to work folders so that only a judge and his chambers may view the documents

## WebDav

- Publishes network drive folders on our internal server
- Allows users to collaborate on pdf documents with PC and iPad users
- Serves as secure data storage for sync'd documents

# GoodReader



Makes the switch from the paper-based world oh, so good!

# WebDav



Behind the Magic

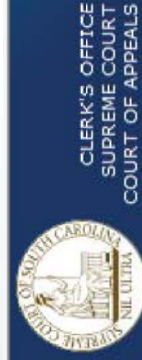
# Clerk's Office

Appellate Case Management: C-Track



THOMSON REUTERS

LT Court Tech



CLERK'S OFFICE  
SUPREME COURT  
COURT OF APPEALS

South Carolina Appellate Case Management System

C-Track, the browser based CMS for Appellate Courts

Case Management Reporting Calendar Agenda Administrative

Jenny Kitchings

Appellate Case No. ...

## Case Management

Create Case  
Create Admin File  
Case Search  
Participant Search  
LCT Search  
Harvest Case

## Case Search

Court: Court of Appeals  
Group:   
Type:   
Subtype:   
Return to Current Case: 2011-194348

Full Title:   
Roster No.:   
Case No.:   
Status:

Filed Date From:   
Filed Date To:   
Exclude Closed:

Return to Current Case: 2011-194348

Search

- Accessible from the iPad through Safari
- Accessible from anywhere through Cisco AnyConnect VPN
- Documents accessible offline through the GoodReader App

# Day-to-day Usage

- Remote access to case management system to view status of case
- Ability to view all documents filed in a case and search the OCR'd documents
- Access to digitized exhibits available to all users
- Signing outgoing orders and correspondence prepared by staff and uploaded into GoodReader
- Instant accessibility to judges and staff via email
- Electronically circulated opinions can be digitally signed anywhere, any time



# Judges and Staff



# Training and Support

•••

"What I hear, I forget.  
What I see, I remember.  
What I do, I understand."  
- Confucius

*The South Carolina Judicial Department utilizes a two-step training method.*

**Step One:** Class setting devoted to basic iPad use, such as email, internet access, the app store, and VPN connectivity

**“Technology is just a tool... [t]he teacher is the most important.”**

*Bill Gates*



**Step Two:** Personalized training with each judge regarding using the GoodReader app to annotate and sync documents in chambers

“I like a teacher who gives you something to take home to think about besides homework.”

*Lily Tomlin*



- *IT staff dedicated to iPad support and training*
- *Westlaw trainers on-site for classes on Westlaw Next (added bonus—free CLE!)*

# Westlaw Next



- Research at your fingertips
- Accessible on iPad
- Seamless



# Acceptable Use Policy



## South Carolina Judicial Department (SCJD) Special Acceptable Use Policy iPad Security and Usage

### 1.0 Purpose

This document describes the obligations and responsibilities for employees of the SCJD that have been assigned an agency-owned Apple iPad. In addition, it details what information our management processes will collect.

### 2.0 Scope

This policy applies to users of SCJD-issued Apple iPads.

### 3.0 Special Acceptable User Policy

Employees have the responsibility to protect the iPads and the data, networks, and systems that these devices store and access. The iPads are subject to all other applicable SCJD standards and procedures, including the SCJD Acceptable Use Policy. Under this Special AUP, paragraphs 7 and 8 of the "Specific Provisions" section of the SCJD AUP dated August 29, 2011, are modified to permit the personal of the SCJD iPads for texting and accessing social networking sites as long as the integrity, dignity, and reputation of SCJD is not jeopardized or harmed in any manner.

#### 3.1 Device passcodes

At all times, the device must be protected by a password, or passcode, that is at least 8 characters in length. The passcode must contain at least one letter and one number. The use of both lower and upper case letters is strongly recommended. Do not use a passcode that could be easily guessed by others. Passcodes should be changed annually or whenever they are suspected of having been compromised.

#### 3.2 Passcode protection

The SCJD employee needs to protect the device passcode from discovery by others. Observe caution when entering passcodes to avoid disclosure. Do not give the passcode to others.

#### 3.3 Failed logins

The maximum number of failed attempts to login to the iPad will be 8. After 8 consecutive unsuccessful login attempts, the device will be wiped. This will delete all data from the iPad. If a user can't remember his or her passcode, SCJD's Internal Applications Support person, John Reynolds, should be contacted for the users' passcodes.

#### 3.4 Device lock timeouts

The Grace Period setting will be set to "Immediately." This ensures that the iPad will require the entry of the passcode when resuming from sleep states regardless of their duration. The Maximum Inactivity Timeout will be set to 15 minutes.

*In April 2012, the Chief Justice issued an order governing the use of iPads, computers, network resources, internet, and email in the South Carolina Judicial Department.*

- Acceptable use is always ethical, reflects honesty, and shows restraint in the consumption of shared resources.
- Employee correspondence in the form of electronic messages may be a public record subject to inspection under the state Freedom of Information Act.
- A complete list of apps installed on each iPad is compiled by the MDM software. If an app is determined to be inappropriate or dangerous, it must be removed upon request. By accepting this device, a user consents to allow the discovery of all apps that have been installed on the device. User-installed apps are not supported by the SCJD Help Desk.
- Users must protect their user IDs and passwords.
- After 8 bad password attempts, the device will wipe itself.

# Digital Media: The Flow of Information

•••

“Get your facts first, and then you can distort them as much as you please.” *Mark Twain*

# Editing Confidential Memos



## Interplay Between Law Clerk and Judge

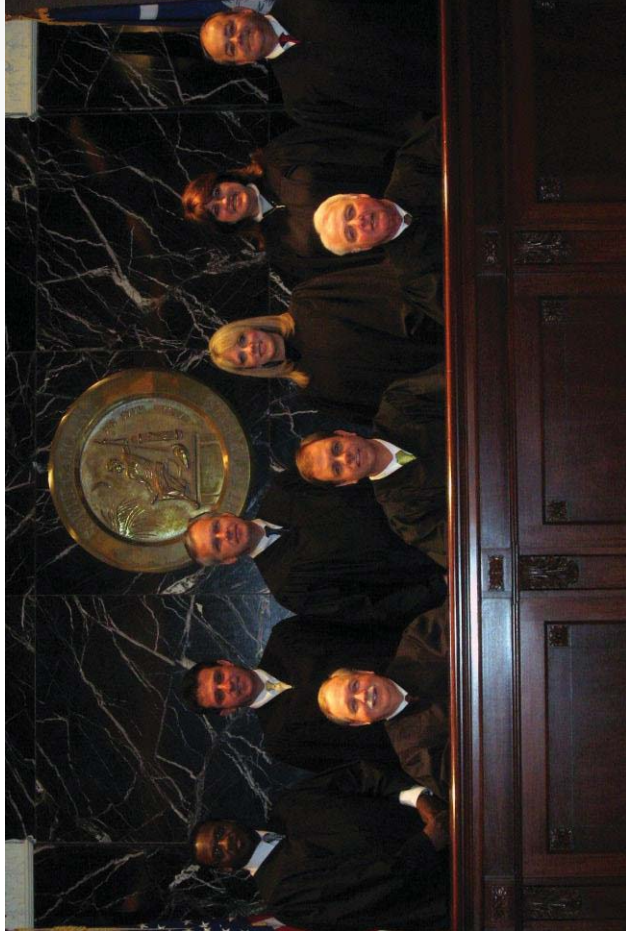
- Law Clerk prepares memo
- Law Clerk saves memo as a pdf in judge's GoodReader folder on shared drive
- Judge syncs GoodReader
- Judge annotates memo
- Judge syncs GoodReader again
- Law Clerk opens pdf and views annotations, which can be summarized by page



# From the Bench

## Using an Annotated Record on Appeal

- Staff saves a pdf of the record on appeal in judge's GoodReader folder on shared drive
- Judge syncs GoodReader
- Judge opens record and highlights as she reads
- Judge uses auto-generated index of annotations from the bench for quick access to portions of the record during counsel's oral argument
- Judge can also search the document, such as a transcript, for buzzwords





# Electronically Circulated Opinions



THOMSON REUTERS

LT Court Tech

- When an opinion is circulated by the authoring judge or justice, everyone on the panel gets an immediate email notification that the opinion has circulated
- Broadcast: opinions can be sent to all members of the panel so voting can occur simultaneously, from anywhere

Votes by Chambers		
Judge	Date	Action
Few	Majority Opinion - Staff Attorney	Concur
Geathers		
Lockemy		

# Extras Judges Love

- E-Boxes
- Video Conferencing
- Digital Exhibits
- Annotations and Collaboration
- Accessibility
- Convenience of judicial account and intranet access

Hey! This Really Is



Better than Paper!



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The SCJD employee needs to protect the device passcode from discovery by others. Observe caution when entering passcodes to avoid disclosure. Do not give the passcode to others.

#### **3.3 Failed logins**

The maximum number of failed attempts to login to the iPad will be **8**. After **8** consecutive unsuccessful login attempts, the device will be wiped. This will delete all data from the iPad. If a user can't remember his or her passcode, SCJD's Internal Applications Support person, John Reynolds, should be contacted for the users' passcodes.

#### **3.4 Device lock timeouts**

The Grace Period setting will be set to "Immediately." This ensures that the iPad will require the entry of the passcode when resuming from sleep states regardless of their duration. The Maximum Inactivity Timeout will be set to **15 minutes**.

### **3.5 Cloud data storage**

All data should be stored either locally on the device itself or on SCJD internal resources. The employee must not use Cloud-based services such as iCloud, Dropbox, SugarSync, or box.com.

### **3.6 Protection of data stored on the iPad**

Sensitive SCJD data should only be accessed by apps that take advantage of *Apple's Data Protection* feature which provides for strong encryption of application data. The employee must not open or store sensitive SCJD data using an app that does not make use of this feature.

### **3.7 Connectivity requirement**

The iPads are managed by a Network Services Mobile Device Management (MDM) solution that relies on the ability to communicate frequently with the device. The iPad must be maintained so that it can make contact with this management utility at least once every **21** days. This ensures that updates and management tasks can be carried out. IT staff will be notified if an iPad does not maintain contact with the management utility.

### **3.8 Public WiFi networks**

Device communications can be intercepted on public WiFi networks. Do not use *public* WiFi networks for professional use.

### **3.9 Physical storage of the iPad**

Do not leave the device unattended and unsecured. Devices should not be left in unlocked vehicles or stored where they are visible to would-be thieves. Do not store the iPad in heat above 95 degrees or cold below 32 degrees. Keep the iPad out of humid or wet conditions.

### **3.10 Remote wiping service**

An iPad device that has been lost, stolen, or otherwise determined to be compromised will be wiped. The wiping process will permanently delete all data from the device. If circumstances warrant, the device may be wiped without notice. After an iPad device is reported missing, the IT staff will contact the Chief Justice of the Supreme Court, the Chief Judge of the Court of Appeals, the Supreme Court Clerk of Court, the Court of Appeals Clerk of Court, and/or the Director of Information Technology for permission to wipe the device.

### **3.11 Backup responsibilities**

Each iPad user is responsible for regularly backing up the device using iTunes installed on an SCJD workstation. This constitutes the only backup for data stored on the iPad. Backups should be performed on a weekly basis as a guard against device failure, loss, theft, or accidental erasure.

### **3.12 Encrypted backup**

iPad backup files should be encrypted by the use of a password that meets or exceeds the complexity requirements of the device's passcode which is a 7-character alphanumeric passcode. This is accomplished by using a secure password for your



Apple ID and activating the option in iTunes to encrypt the backup. It can be the same as the new passcode to access the iPad device.

### **3.13 Ad-hoc wireless networks**

Ad-hoc and peer-to-peer wireless networks--connections created directly between the iPad and another workstation--should be avoided unless prior permission has been obtained from the Help Desk.

### **3.14 Monitoring and privacy**

The device is the property of SCJD and is subject to the SCJD Acceptable Use Policy. Users should have no expectation of privacy in regards to the device, its data, and its communications.

### **3.15 Location tracking**

Device location is tracked and stored by the MDM software. Location history is maintained for **72 hours**. By accepting this device, you consent to allow the iPad's location to be tracked.

### **3.16 Report a lost or stolen iPad**

Users must report a lost or stolen iPad to the Help Desk within **24 hours**. Users may follow self-service instructions for wiping the device. When possible, location history will be used to assist in locating the device.

### **3.17 User-installed apps**

A complete list of apps installed on each iPad is compiled by the MDM software. If an app is determined to be inappropriate or dangerous, it must be removed upon request. By accepting this device, a user consents to allow the discovery of all apps that have been installed on the device. User-installed apps are not supported by the SCJD Help Desk.

### **3.18 Secure transfer of files and data**

Do not send sensitive data and documents via email. Use only agency-approved methods for transferring SCJD data.

### **3.19 Sharing the iPad**

The iPad is meant for the use of the employee to whom it is assigned. The device should not be shared or loaned to another person. Individual passcodes are private information.

## **4.0 Enforcement**

Any employee found to have violated this policy may be subject to disciplinary action, up to and including dismissal, or other sanctions appropriate to the violation.

## **5.0 Limitations**

It is not possible to anticipate all possible usage and security situations. For questions and situations not covered by this document, please consult the Help Desk (phone 803.734.1799 or email [ithelpdesk@sccourts.org](mailto:ithelpdesk@sccourts.org)) for clarification or additional

instructions. With appropriate justification, exceptions to existing policies may be granted with written approval from the IT Director or designee.

## **6.0 Revision History**

1.0 - initial policy version, released May 2, 2012.

**South Carolina Judicial Department (SCJD)  
Special Acceptable Use Policy  
iPad Security and Usage Agreement Form**

By signing below, I certify that I have read, understood, and agree to adhere to the requirements and guidelines outlined in the iPad Security and Usage Policy. In addition, I give informed consent to the location tracking and the application discovery capabilities of the Mobile Device Management utility that will be in use.

Name (printed): \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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# Technology and Ethics

Wednesday, August 7, 2013

1:45 p.m. – 3:00 p.m.

Federal/Superior Rooms

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**Speaker:** Eric Magnuson, Former Chief Justice  
Minnesota Supreme Court

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## **Eric Magnuson, Former Chief Justice**

Eric is a shareholder in the firm of Briggs and Morgan, Professional Association. After serving as Chief Justice of the Minnesota Supreme Court from 2008 to 2010, he rejoined Briggs' Business Litigation Section, and is a member of the firm's Appellate Practice Group.

Eric's practice has focused almost exclusively in the state and federal appellate courts for more than 25 years, and he is regarded as one of the most effective and respected appellate lawyers in Minnesota and the 8th Circuit. He has handled hundreds of appeals involving a wide range of issues.

Working collaboratively alongside general counsel and other private practice attorneys (both inside and outside the firm), Eric works to ensure the best possible representation for the client. He provides a full range of appellate consulting services, from evaluating appeals and procedural issues, to reviewing and critiquing briefs, and providing moot court review, all in addition to fully briefing and arguing cases himself.

Although he is primarily an appellate lawyer, Eric regularly consults with trial attorneys on complex procedural and substantive issues in anticipation of appeal. His comprehensive legal consultation covers all aspects of pre-trial practice, monitoring the course of trials to ensure that proper record is made, and handling significant post-trial motions and arguments.

He is the founding president of the 8th Circuit Bar Association, a fellow and past president of the American Academy of Appellate Lawyers, and a longtime member of the American Bar Association, serving as co-chair of the Appellate Practice Committee of the Section on Litigation and in the same capacity for the Appellate Advocacy Committee of the Tort Trial and Insurance Practice Section. Eric also has served as an associate professor of law at William Mitchell College of Law and the University of St. Thomas School of Law, and an adjunct professor at the University of Minnesota Humphrey School of Public Policy.

Eric has been selected continuously by his peers for inclusion in *Best Lawyers in America*, and has been recognized in the *Annual Guide to Appellate Law in America*. He has been listed in *Minnesota Super Lawyers* and was recognized as one of the designation's top 10 in 2007, before joining the Minnesota Supreme Court. He was also listed as one of the state's top 25 appellate lawyers in 2005. In 2000, Eric was honored as an "Attorney of the Year" by *Minnesota Lawyer*.

He is admitted to practice in Minnesota state and federal courts; the U.S. Court of Federal Claims; the 6th, 7th, 8th, 9th, 10th and Federal Circuit Courts of Appeals; and the U.S. Supreme Court.

Eric graduated cum laude from William Mitchell College of Law in 1976.

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# National Conference of Appellate Court Clerks 40<sup>th</sup> Annual Meeting

**August 4-9, 2013 Seattle, WA**

**Technology and Ethics**

**Eric J. Magnuson**

Shareholder, Briggs and Morgan, P.A.

Former Chief Justice of the Minnesota Supreme Court





“Because things are the way they are,  
things will not stay the way they are.”

- Bertolt Brecht

# OVERVIEW

- The State of the Courts
- Turning to Technology
- Technology and Ethics

# THE STATE OF THE COURTS

- The New Normal - [Minnesota and the New Normal](#)
- Courts at a Tipping Point?
  - [The Real Danger of Inadequate Court Funding](#)
  - [Justice Disserved](#)
  - [Crisis in the Courts: Reconnaissance and Recommendations](#)

# TURNING TO TECHNOLOGY

Before a Luxury...

- Technology Now a Survival Mechanism
  - Results of the 2009 NCSC Survey:

“With court hours and staff time on the chopping block, an overwhelming number of courts said they are turning to advanced technology as a means to protect the public’s access to courts.”
  - [Minnesota Judicial Branch 2012 Annual Report](#)

# TURNING TO TECHNOLOGY

- Impact of Technology on the Court
  - [A Word from the Future](#)
  - [E-Filing in State Appellate Courts](#)
  - [eCourtMN](#)
  - [Hyperlinked Briefs](#)

# TECHNOLOGY AND ETHICAL ISSUES FOR LAWYERS

- Client Representation:
  - [The Duty of Competence](#) – Generally
  - [Rule 1.1 Competence: Amendment to Comment](#)

## Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . . .

- [Changing Times Means Changing Ethical Issues For Lawyers](#)



# JUDICIAL ETHICS & INTERNET RESEARCH

- May a judge conduct independent internet research?
  - ABA Model Code of Judicial Conduct Rule 2.9(C): "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."
  - Comment [6]: "The prohibition ... extends to information available in all mediums, including electronic."
  - No provision in Code of Conduct for United States Judges parallels the prohibition in ABA Model Code

# JUDICIAL ETHICS & INTERNET RESEARCH

- Fed. R. Evid. 201(c)(1): The court ... may take judicial notice on its own."
- Rule 201(d): "The court may take judicial notice at any stage of the proceeding."
- [\*Ashcroft v. Iqbal\*, 556 U.S. 662, 679 \(2009\)](#)
  - "Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

# JUDICIAL ETHICS & INTERNET RESEARCH

- *Matthews v. National Football League Mgmt. Council* 688 F.3d 1107, 1113 2012 U.S. App. LEXIS 16295 (9<sup>th</sup> Cir. Aug. 6, 2012)
  - “We take judicial notice of the fact that Matthews' teams played 13 games in California during Matthews' 19-year career. See Tennessee Titans Team Page, NFL.COM, <http://www.nfl.com/teams/profile?team=TEN> (last visited July 19, 2012)”
- [\*State v. Peck\*, 773 N.W.2d 768, 775 n.3 \(Minn. 2009\) \(Anderson, P. dissenting\)](#)
  - “A quick and rudimentary Internet search suggests that bong water is commonly altered using fruity flavors in an effort to mask the chemical flavor common to methamphetamine.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- [\*United States v. Bari\*, 599 F.3d 176, 180 \(2d Cir. 2010\)](#): “The District Court’s independent internet research served only to confirm [its] common sense supposition.... 20 years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store. Today, ... a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.”
- [\*M.P. v. M.P.\*, 54 a.3D 950, 955 \(PA. Super. 2012\)](#): “The trial court here abused its discretion by relying on information it obtained through its own internet search that took place after the hearing had been concluded and while under advisement by the court.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Judicial Notice
  - **Rule 201(e): "Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard."

# JUDICIAL ETHICS & INTERNET RESEARCH

- Government Websites: Self-Authentication
  - Rule 902(5): "Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority."
  - *McGaha v. Baily*, 2011 U.S. Dist. LEXIS 73389 (D.S.C. July 7, 2011): The "court may take judicial notice of factual information located in postings on governmental websites...."



# JUDICIAL ETHICS & INTERNET RESEARCH

- Newspaper/Periodical Websites: Self-Authenticating as of 12/1/11
  - **Rule 101(b)(6):** “[A] reference to any kind of written material or any other medium *includes electronically stored information.*”
  - **Rule 902(6):** “**Newspapers and periodicals.** Printed materials purporting to be newspapers or periodicals.”
  - **Rule 803(16):** “A statement in a document that is at least 20 years old and whose authenticity is established.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Judges and Independent Research:
  - [Appellate Courts Use of Internet Materials](#)
  - [Link Rot](#)
  - [The Curious Appellate Judge](#)
  - “A judge who takes it upon herself to do fact research departs from her normal role and from the parties’ expectations about the sources of information on which the court will depend. The rules governing independent judicial research should therefore make it clear to both judges and litigants when research is and is not permitted, and should subject judge-supplied information to the same adversarial testing as any other kind of evidence.”

# JUDICIAL ETHICS & INTERNET RESEARCH

- Judges and Independent Research:
  - [Independent Internet Research Survey](#)
  - [Independent Judicial Research in the \*Daubert\* Age](#)
  - [When Judges Google](#)
  - [Confronting Supreme Court Fact Finding](#)
  - [The Lure of the Internet and the Limits on Judicial Fact Research](#)
  - [Judicial Ethics and The Internet: May Judges Search The Internet in Evaluating and Deciding a Case? \(16 No. 2 prof. Law.2\)](#)
  - [Attorneys Must Relitigate Cases for Free](#)

# IMPACT ON DECISION MAKING

- Impact on Decision Making:
  - [The Unblinking Eye Turns Appellate Law: Cameras in Trial Courtrooms and Their Effect on Appellate Law](#)
  - [Thawing Out the Cold Record](#)
  - [Deference in a Digital Age](#)

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# Managing Technology in Courts

Wednesday, August 7, 2013

3:00 p.m. – 4:00 p.m.

Federal/Superior Rooms

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**Speaker:** Rich Johnson, Court Administrator Clerk  
*Washington State Court of Appeals*

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## **Rich Johnson, Court Administrator Clerk**

Richard D. Johnson has been the Court Administrator/Clerk of the Washington State Court of Appeals, Division I since 1998. He has served on the statewide Judicial Information Systems Committee (JISC) for the past ten years, and also serves as Chair of the Data Management Steering Committee. Prior to joining the Court of Appeals Mr. Johnson was the Deputy Court Administrator of Branch Operations and Information Systems for the Los Angeles Municipal Court. In addition to more than 25 years experience in trial court operations and administration, Johnson has extensive experience in planning and implementing technology applications in the courts.

Johnson has a Masters Degree in Public Administration and Certification in Judicial Administration from the University of Southern California and a Bachelors Degree in Criminal Justice from the University of Washington. He has taught courses in Records Management, Imaging Technology in the Courts, and Managing Technology for the Institute of Court Management (ICM) and the Judicial Administration Institute of California (JAIC), and the State of Washington Court Management Council (CMC). Johnson is also a Fellow of the Institute of Court Management (1993).

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National Conference of Appellate Court Clerks  
Seattle, Washington  
August 7, 2013

# Managing Technology In Courts

Presented By:

Richard D. Johnson  
Court Administrator/Clerk  
Division I, Court of Appeals



# Managing Technology in Courts

## Program Outline

- **Basic Assumptions**
  - All have some experience managing technology
  - Must have multi-faceted approach to court technology projects
  - Use of standard project management methodology on IT projects
  - Progress in government is glacial....
- **Infrastructure**
  - Network/Servers
  - Bandwidth
  - Workstations
  - Monitors
  - Seating/Ergonomics
- **Case Management**
  - Case Management System
  - File Tracking
  - Records Management
- **Courtroom Technology**
  - Audio/Video
  - Presentation
  - Podium
  - Computer/Bench Access

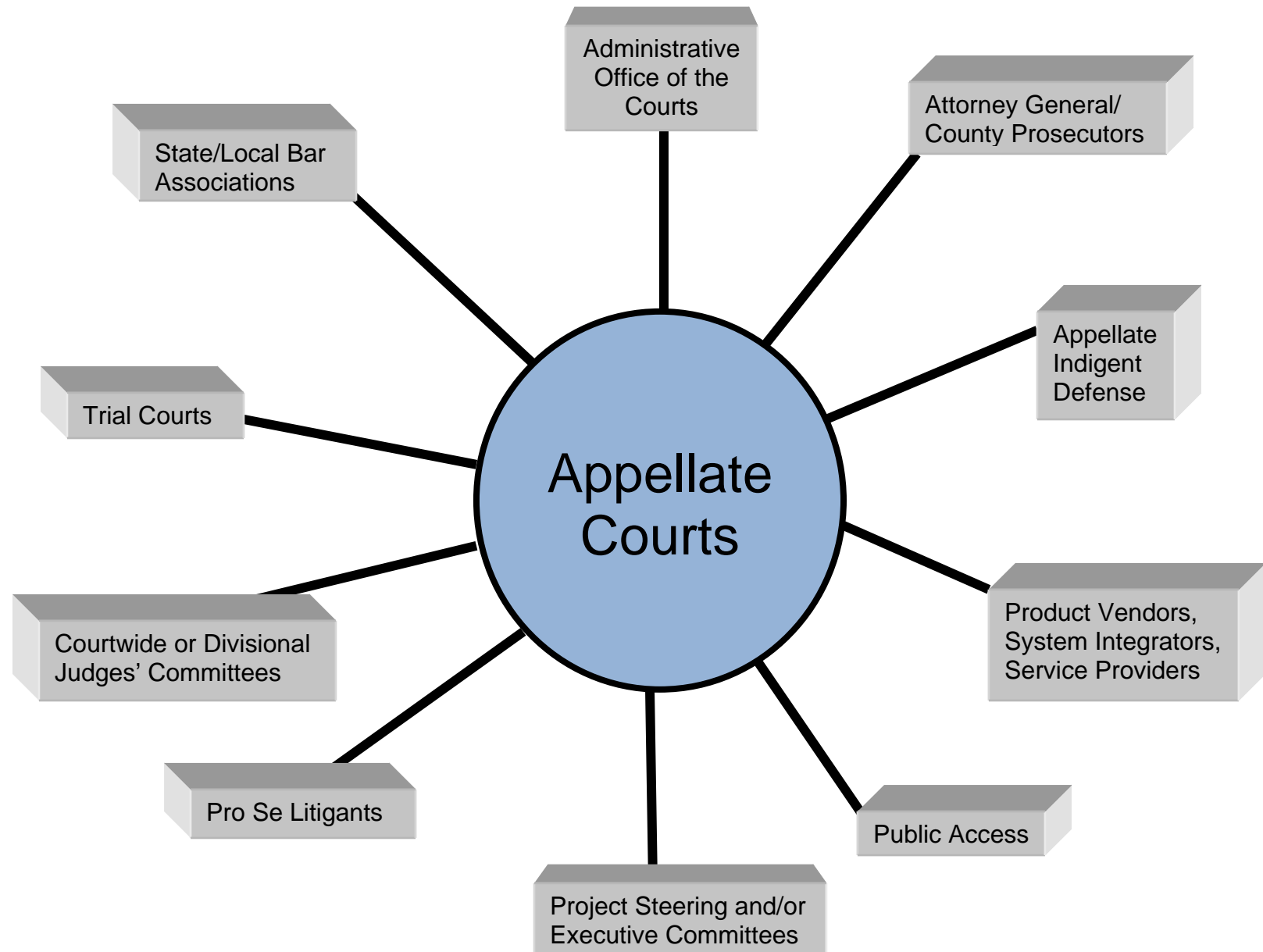
# Managing Technology in Courts

## Program Outline

- **Electronic Court Records**
  - Project Initiation Document
  - Governance Model
  - Budget/Resources
  - Stakeholders
  - Rules, Policies, and General Orders
  - Access Model/E-Commerce
  - E – Pain ???
  
- **Organizational Readiness**
  - Infrastructure
  - Experimentation
  - Evolution
  - Remote Strategies
  - Policy Formulation
  - Judicial Participation and Support
  - Risk Tolerance
  - Paper on Demand as Strategic Approach
  
- **Question and Answer**

# Managing Technology in Courts

## The Environment



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# Human Trafficking in the United States: An Introduction

Thursday, August 8, 2013

8:30 a.m. – 10:00 a.m.

Federal/Superior Rooms

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**Panel:** Dr. Sutapa Basu, Executive Director and Co-Chair of the Human Trafficking Task Force  
*Women's Center, University of Washington*  
Mike Garske, Detective  
*Kings County Sheriff's Office*  
Dr. Dana Raigrodski, Assistant Director and Part-Time Lecturer  
*Asian Law Center, University of Washington School of Law*  
Anita Ramasastry, D.Wayne and Anne Gittinger Professor of Law  
*University of Washington School of Law*  
Velma Veloria, Co-Chair of the Human Trafficking Task Force  
*Women's Center, University of Washington*

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## **Dr. Sutapa Basu, Executive Director and Co-Chair of the Human Trafficking Task Force**

Sutapa Basu is the Executive Director of the University of Washington Women's Center and co-chair of its Task Force against Human Trafficking. Under Dr. Basu's leadership, the UW Women's Center has grown into the largest university-based women's center in the country, where women and men work in partnership to build a culture of gender equity. At the UW Women's Center, she ensures that through an array of educational, professional, and personal support programs, women and girls have access to the resources and information needed to make the best decisions for their future. Dr. Basu and the work of the Women's Center is grounded in her dedication to empower women to speak out, take leadership roles, and demand equal treatment for women and children. Dr. Basu's areas of academic specialization are women in developing economies and international development. She is passionate about women's human rights and works extensively with women's groups both locally and in India to promote girls education, gender equality, food security, sustainable development, and social justice. While abroad, Dr. Basu works on the ground, often times in red light districts to understand in-depth the daily experiences and brutality women and children face. Dr. Basu is a recognized national leader and advocate for young immigrant women, particularly those who have been victims of human trafficking abuse. Through her work at the UW Women's Center, she helped create the first statewide anti-trafficking legislation and new protections for mail-order brides. Dr. Basu serves on many boards and committees statewide, and has received several local and national awards for her human rights work.

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## **Mike Garske, Detective**

Mike Garske has been a police officer for 25 years. For the past 22 years Detective Garske has been with the King County Sheriff's Office.

Detective Garske has worked primarily undercover/proactive assignments in his career with and exception of a 5 year stint working homicides and robberies for the KCSO Major Crimes Unit.

Since the early 90's Detective Garske has investigated organized crime related to prostitution and gangs in the South King County area. Detective Garske is recognized for his innovative and undercover approach to working complex investigations and criminal organizations.

In the specialized field of Vice Investigations, Detective Garske has trained over a 1000 officers nationally in all aspects of undercover investigations, organized crime, vice and money laundering investigations.

Detective Garske has testified as an expert witness in several states and is recognized as an expert witness in U.S. Federal Court.

As a task Force Officer with ATF, Detective Garske ran multi agency operations in King County to target street gangs participating in Human Trafficking and other crimes. Detective Garske is currently assigned to the KCSO Special Assault Unit and is a task Force Officer for the FBI Child Exploitation Task Force.

Along with Detective Taylor, Det. Garske started a nonprofit to rescue victims from the Domestic Minor Sex Trafficking in 2010.

Detective Garske's spare time is occupied with perusing rainbow trout with a fly rod and chasing a small white ball with a 7 iron.

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**Dr. Dana Raigrodski, Assistant Director and Part-Time Lecturer**

Dana Raigrodski is an Assistant Director and Part Time Lecturer at the University of Washington School of Law. She is a member of the University of Washington Women's Center Anti-Trafficking Task Force and chairs the task force committee on continuing legal education, and assembled the program "Human Trafficking: Forced Labor and Corporate Responsibility." Dr. Raigrodski holds an LL.B magna cum laude, Tel Aviv University and an LL.M with distinction and SJD from Tulane University. She is a member of the New York and the Israel Bars. She previously practiced law as a military prosecutor for the Israeli Defense Forces Military Advocate General Staff Command in Tel Aviv. Professor Raigrodski teaches legal research and writing and comparative legal studies; her scholarship and research interests examine criminal procedure and jurisprudence, human trafficking and globalization, and law and development.

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**Anita Ramasastry, D.Wayne and Anne Gittinger Professor of Law**

Anita Ramasastry is the D. Wayne and Anne Gittinger Professor of Law at the University of Washington Law School. Ramasastry has worked with trafficking victims in their immigration proceedings for T and U Visas and founded the Immigrant Families Advocacy Project, a volunteer organization at the Law School. She currently serves as the Vice Chair of the Drafting Committee on the Prevention of and Remedies for Human Trafficking of the Uniform Law Commission. She teaches and researches in the areas of business and human rights, international and comparative law, commercial law and law and development.

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**Velma Veloria, Co-Chair of the Human Trafficking Task Force**

Velma Veloria, born in the Philippines, is the first Filipina American to be elected to the Washington State Legislature, serving from 1992 until 2004. Her many accomplishments in office include the passage of HB1175, which made the State of Washington the first state in the nation to criminalize human trafficking. Linking her concerns of human trafficking to international trade agreements, she authored legislation that created a Joint Legislative Oversight Committee on International Trade Policy in the State Legislature. As a former labor organizer, Ms. Veloria has demonstrated a track record of successfully lobbying for and educating the broader community on important working family issues and in motivating and mentoring a multicultural workforce. In 2009, she launched the Political Empowerment Initiative (PEI) and solicited the help of a friend, Alice Coil, to develop and facilitate political empowerment training sessions. In 2010, she joined the rank of faculty advisers recruiting women to run for office with The 2012 Project housed at Rutgers University's Center for American Women and Politics. In 2011, Ms. Veloria was recognized by the National Women's Political Caucus (NWPC) with the Women of Courage Award, which is presented to women from diverse backgrounds that have demonstrated courage by taking a stand to further civil rights and equality and who exemplify women's leadership. Currently, she serves as co-chair of the University of Washington Women's Center Human Trafficking Task Force.

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**Detective Mike Garske, King County Sheriff's Office**

Mike Garske has been a police officer for 25 years. For the past 22 years Detective Garske has been with the King County Sheriff's Office.

Detective Garske has worked primarily undercover/proactive assignments in his career with and exception of a 5 year stint working homicides and robberies for the KCSO Major Crimes Unit.

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## **Human Trafficking in the United States: An Introduction**

**Presented at the 40th annual meeting of the National Conference of Appellate Court Clerks (NCACC)**

August 8, 2013; 8:30-10am; Renaissance Seattle Hotel in Seattle

Human trafficking is the commercial exploitation of people. The International Labor Organization and the U.S. State Department estimates that there are at least 20.9 million adults and children who are victims of forced labor, bonded labor, and commercial sexual servitude at any given time.<sup>1</sup> In 2005 and 2009, ILO estimated that annual profits are at least 32 billion US\$ and that victims of forced labor forgo at least 21 billion US\$ each year in unpaid wages and illegal recruitment fees. No country is exempt from the pandemic of human trafficking. Washington State itself, with its international border, airport and seaport, and the prevalence of trade related occupations and the demand for agricultural labor in outlying areas, is an unwilling participant in this egregious human rights violation. The panel aims to provide a better understanding of human trafficking and the current efforts to combat it. It will offer an overview of human trafficking as it manifests in the United States and address some of the economic issues attendant to trafficking that are not readily discernible to those who work in the courts.

### **What is Human Trafficking?**

Dr. Dana Raigrodski, Assistant Director (Int'l) Law, University of Washington School of Law

### **Human Trafficking in the State of Washington: From the First State Legislation to Current Efforts**

Former Representative Velma Veloria, Washington State Representative 1993-2004 *and* Dr. Sutapa Basu, Executive Director, University of Washington Women's Center

### **Spotlight on Businesses and Human Trafficking and Efforts to Unify State Law**

Anita Ramasastry, D. Wayne and Anne Gittinger Professor of Law, UW School of Law, and Vice Chair of the Drafting Committee on the Prevention of and Remedies for Human Trafficking of the Uniform Law Commission

### **Challenges of Combatting Trafficking in the Era of Globalization**

Dr. Sutapa Basu, Executive Director, University of Washington Women's Center *and* Former Representative Velma Veloria, Washington State Representative 1993-2004

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<sup>1</sup> International Labour Organization Report, A Global Alliance against Forced Labour and Trafficking in persons, Key Achievements of the ILO's Special Action Programme to Combat Forced Labour 2001-2011, published May 15, 2012, available at [http://www.ilo.org/sapfl/Informationresources/Factsheetsandbrochures/WCMS\\_203446/lang--en/index.htm](http://www.ilo.org/sapfl/Informationresources/Factsheetsandbrochures/WCMS_203446/lang--en/index.htm) (last visited 6/4/13). *See also* 2012 TIP Report p.45.



# Human Trafficking in the Era of Globalization

Dr. Dana Raigrodski  
UW School of Law  
&

Dr. Sara R. Curran  
UW Jackson School of International Studies & Evans  
School of Public Affairs

# What is Trafficking

U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol; signed 2000; in force 12/2003) defines trafficking as, essentially, the obtaining of persons, by means of coercion, deception, or consent for the purpose of exploitation such as forced labor or prostitution:

*"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs... The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used.*

# What is Trafficking

The Trafficking Victims Protection Act (TVPA; signed 2000), describes human trafficking as various activities when one person obtains or holds another person in compelled service such as involuntary servitude, slavery, debt bondage, and forced labor and commercial sex.

22 U.S.C. § 7102(8) defines “severe forms of trafficking in persons” as

- (A) sex trafficking (... the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act) in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

# What is Trafficking

The focus is on the forms of enslavement and exploitation for economic gain not on activities involved in international transportation.

The victim doesn't need to be physically transported from one location to another (domestically or across border) to be legally 'trafficked' – millions trafficked within their own countries

People may be trafficking victims regardless of whether

- they were born into a state of servitude or were transported to the exploitative situation
- they once consented to work for a trafficker
- they participated in a crime as a direct result of being trafficked.

# Slavery, Human Trafficking or Smuggling

- Slavery
  - Socio-economic system that deprives persons of their freedom and compels them to perform labor or services
- Human Trafficking
  - Recruitment, transportation, transfer, harboring or receipt of people for exploitation
  - Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability
  - E.g. sex work, forced labor, child exploitation
- Human Smuggling
  - Facilitation of illegal entry into a country for a fee



# **Major Forms of Trafficking**

- **Forced Labor**
- **Sex Trafficking**
- **Bonded Labor**
- **Debt Bondage Among Migrant Laborers**
- **Involuntary Domestic Servitude**
- **Forced Child Labor**
- **Child Soldiers**
- **Child Sex Trafficking**
- **Bride Trafficking**

# Scope of Trafficking

- ILO and The U.S. State Department estimate that there are at least 20.9 million adults and children who are victims of forced labor, bonded labor, and commercial sexual servitude at any given time
- Human Trafficking is the second or third largest illegal industry in the world, generating approximately \$32 billion annually (2005 UNODC and ILO reports) -- \$15.5 billion from industrialized countries; victims of forced labor forgo at least \$21 billion annually in unpaid wages and illegal recruitment fees
- No country is exempt as a source, transit and/or destination country. Human trafficking affects every continent and every type of economy
- E.g. contributing factors in WA: international border, airport and seaport; prevalence of trade related occupations; demand for agricultural labor in outlying areas
- For every trafficking victim subjected to forced sex work, nine people are subjected to other forms of forced labor
- Women and girls represent most of those subjected to forced commercial sexual exploitation
- Women and girls are also increasingly exploited for non-sexual labor (feminization of migration)

# Scope of Trafficking in the U.S.

The U.S. is a source, transit, and destination country for men, women, and children subjected to forced labor, debt bondage, document servitude, and sex trafficking.

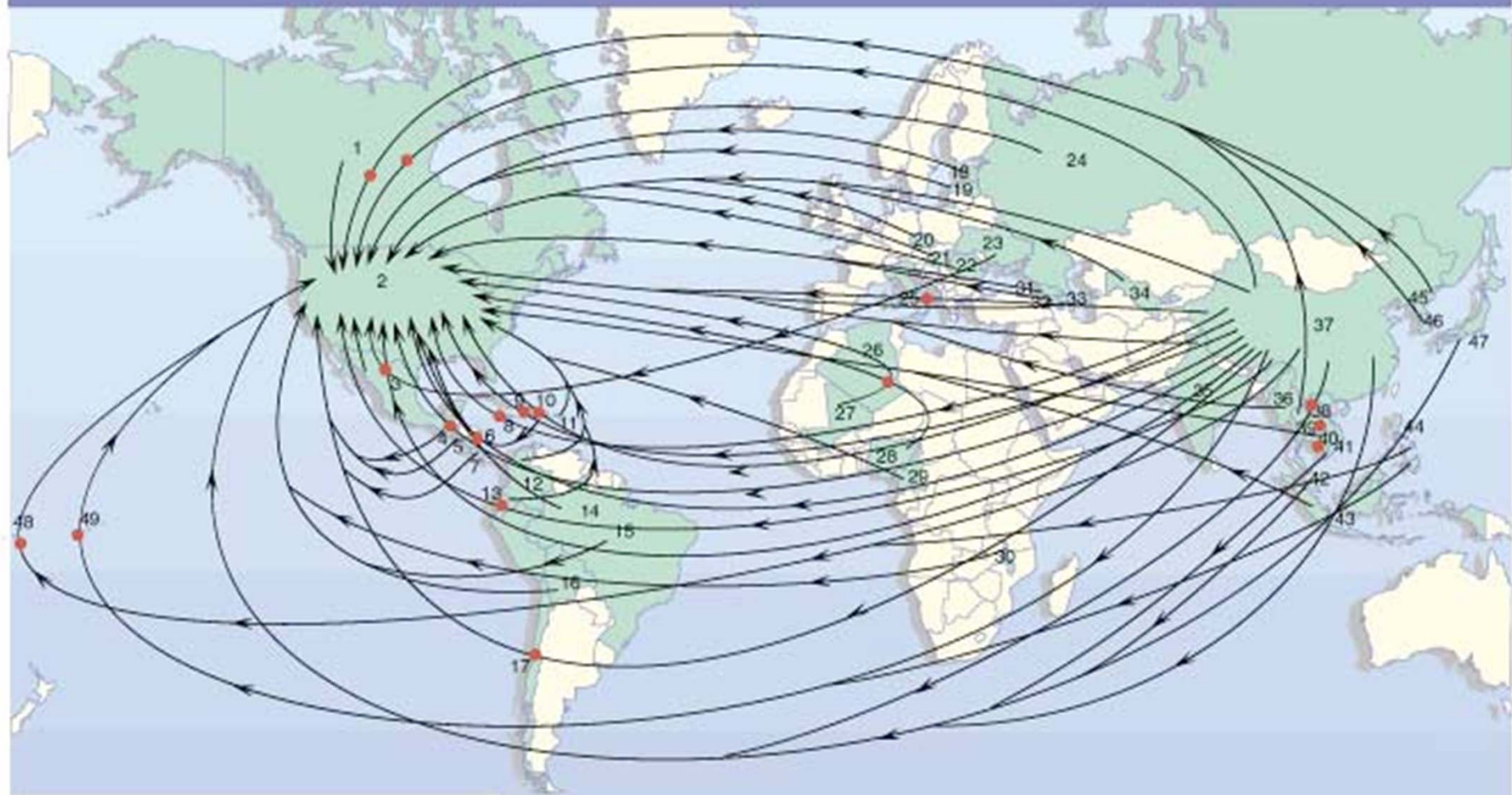
Trafficking in the U.S. occurs in licit and illicit industries/markets including:

- domestic service
- Agriculture
- Manufacturing
- janitorial services
- hotel services,
- hospitality industries
- construction
- health and elder care
- Hair and nail salons
- strip club dancing and massage parlors
- Brothels and street sex work

U.S. citizen victims, both adults and children, are predominantly found in sex trafficking  
Foreign victims, and increasingly female victims, are more often found in labor trafficking



Individuals who enter the U.S. without legal status have been identified as trafficking victims, as have persons identified in visa programs for temporary workers that fill labor needs in many of the industries described above.

## Trafficking of Persons, Especially Women and Children: USA Routes



1) Canada, 2) USA, 3) Mexico, 4) Guatemala, 5) El Salvador, 6) Nicaragua, 7) Costa Rica, 8) Jamaica, 9) Haiti, 10) Dominican Republic, 11) Puerto Rico, 12) Colombia, 13) Ecuador, 14) Peru, 15) Brazil, 16) Bolivia, 17) Chile, 18) Estonia, 19) Latvia, 20) Czech Republic, 21) Hungary, 22) Romania, 23) Ukraine, 24) Russia, 25) Italy, 26) Algeria, 27) Mali, 28) Nigeria, 29) Cameroon, 30) Malawi, 31) Georgia, 32) Armenia, 33) Azerbaijan, 34) Uzbekistan, 35) India, 36) Burma, 37) China, 38) Laos, 39) Thailand, 40) Cambodia, 41) Vietnam, 42) Malaysia, 43) Indonesia, 44) Philippines, 45) North Korea, 46) South Korea, 47) Japan, 48) Nauru, 49) Kiribati.

Routes represent at least one documented case of trafficking of persons. See individual country reports for additional information.

 Countries with trafficking activity  
 Transit Stop

Source: ©The Protection Project  
 Johns Hopkins University  
 School of Advanced  
 International Studies

Created by Neha Mathur

March 2002

# The “3P” Paradigm

**Both the Palermo Protocol and the TVPA have adopted a “3P” paradigm to provide nations with tools to combat trafficking:**

- Prosecution of traffickers and the criminalization of all forms of human trafficking
- Protection and services to trafficking survivors
- Prevention of trafficking through increase in public awareness

Recent efforts re-order the paradigm to focus on Prevention, Protection and Prosecution

[TVPA requires the U.S. State Dept. to submit each year to Congress a report on foreign governments’ efforts to eliminate severe forms of trafficking in persons – The 2012 TIP Report ranks more than 180 governments on their efforts to combat trafficking in persons; U.S. is included starting with the 10<sup>th</sup> TIP Report in 2010]

# The 4<sup>th</sup> P: Partnerships

In 2009 Secretary Clinton announced the addition of a 4<sup>th</sup> P -- Partnerships with governments and NGOs around the world, because the repercussions of trafficking affect us all

On March 7, 2013 President Obama signed the reauthorization of the Violence Against Women Act and the Trafficking Victims Protection Act (113 Congress, S.47), which specifically addresses public-private partnerships:

## **SEC. 1202. PARTNERSHIPS AGAINST SIGNIFICANT TRAFFICKING IN PERSONS.**

The Trafficking Victims Protection Act of 2000 is amended by inserting after section 105 (22 U.S.C. 7103) the following:

“SEC. 105A. CREATING, BUILDING, AND STRENGTHENING PARTNERSHIPS AGAINST SIGNIFICANT TRAFFICKING IN PERSONS.

“(a) DECLARATION OF PURPOSE.—The purpose of this section is to promote collaboration and cooperation—

“(1) between the United States Government and governments listed on the annual Trafficking in Persons Report;

“(2) between foreign governments and civil society actors; and

“(3) **between the United States Government and private sector entities.**

“(b) PARTNERSHIPS.—The Director of the office established pursuant to section 105(e)(1) of this Act, in coordination and cooperation with other officials at the Department of State, officials at the Department of Labor, and other relevant officials of the United States Government, **shall promote, build, and sustain partnerships between the United States Government and private entities, including foundations, universities, corporations, community based organizations, and other nongovernmental organizations, to ensure that—**

**“(1) United States citizens do not use any item, product, or material produced or extracted with the use and labor from victims of severe forms of trafficking; and**

**“(2) such entities do not contribute to trafficking in persons involving sexual exploitation.**



# Root Causes of Human Trafficking: Push and Pull Factors in the Era of Globalization

Wealth disparities created by the global economy feed increased labor migration as economic opportunities disappear in less wealthy countries and communities.

Sectoral Pathways Increasingly Global & Transnational

- Commercial Sex
- Labor Contracting, Outsourcing
- Adoption & Mail Order Brides

Proliferation of Organized Crime & Illicit Trade

# Root Causes of Human Trafficking: Push and Pull Factors in the Era of Globalization

Push Factors include:

- Increasing wealth disparity and poverty world-wide
- Social disruption
- Lack of employment opportunities in poor countries and in rural areas
- Higher wages and job opportunities in urban areas and rich nation
- Feminization of poverty and migration

# Push and Pull Factors in the Era of Globalization

Pull Factors include:

- Demand for cheap products and services feeds demand for cheap labor
  - Production of raw materials in complex supply chains
- Unmet labor demands in wealthier destination countries primarily in the informal sector jobs
  - Migrant and seasonal workers constitute the majority of labor force in poultry and seafood industries, produce farms
  - They are invariably paid lower wages and do not receive benefits
  - Employers may prefer migrant workers due to their vulnerability and lack of choice that results from their foreign status, whether legal or illegal
- Labor shortage on one hand, and strict migration laws and border control on the other hand, incentivize trafficking.

# The Impact of Globalization

Substantive - macro level globalizing trends that produced an environment conducive to trafficking:

- export oriented production of goods
- entry of multi-national corporations into developing countries and their use of extensive networks of subcontractors (complex production chains)
- IMF and World Bank conditioning loans on opening markets and take measures that impact mostly the poor

Institutional

- Shift of power at the international level to market focused institutions (IMF, World Bank, WTO) rather than “human” focused agencies such as ILO.
- New technologies facilitate ease of trafficking – cell phones, text messaging, internet and chat rooms, social networking, IM, GPS, biometric data and chips
- Travel around the globe is much easier

# Challenges of Combatting Trafficking in the Era of Globalization

- Finding Trafficked Victims, Prosecuting Traffickers (Migrant Invisibilities)
- Complexities of system require multi-stakeholder collaboration, multi-prong, and multi-level approaches
- Reframing to examine BOTH supply & demand with greater focus on prevention

# Reframing Policy @Trafficking in the Era of Globalization

We need to acknowledge the Economics of Trafficking – reframing trafficking as a global migratory response to current globalizing socioeconomic trends (economic necessity to migrate v. restrictions on migration) – huge trade revenue:

- The “business” of human trafficking – a worldwide criminal industry that generates billions of dollars of yearly profits
- Huge trickle-down effect on legitimate trade (from tourism, to financing, to travel and hospitality)
- Migrant worker remittance (\$300 billion annually) – possibly as high as 20% siphoned to traffickers/recruiters as commission and debt bondage

Recent promising efforts focus on developing best practices for transnational businesses and governments to regulate supply chains, better regulation of labor recruiters and re-examination of guest-worker programs

Explore avenues via bilateral and multilateral trade and labor agreements, revise international, public and private lending policies, and re-examine restrictive migration policies, while working towards fair pay and work conditions both in the poor countries and in the U.S.





# ILO 2012 Global estimate of forced labour

## Executive summary

### RESULTS

Using a new and improved statistical methodology, the ILO estimates that 20.9 million people are victims of forced labour globally, trapped in jobs into which they were coerced or deceived and which they cannot leave. This figure, like the previous one in 2005, represents a conservative estimate, given the strict methodology employed to measure this largely hidden crime. Human trafficking can also be regarded as forced labour, and so this estimate captures the full realm of human trafficking for labour and sexual exploitation or what some call “modern-day slavery”<sup>1</sup>. The figure means that around three out of every 1,000 persons worldwide are in forced labour at any given point in time.

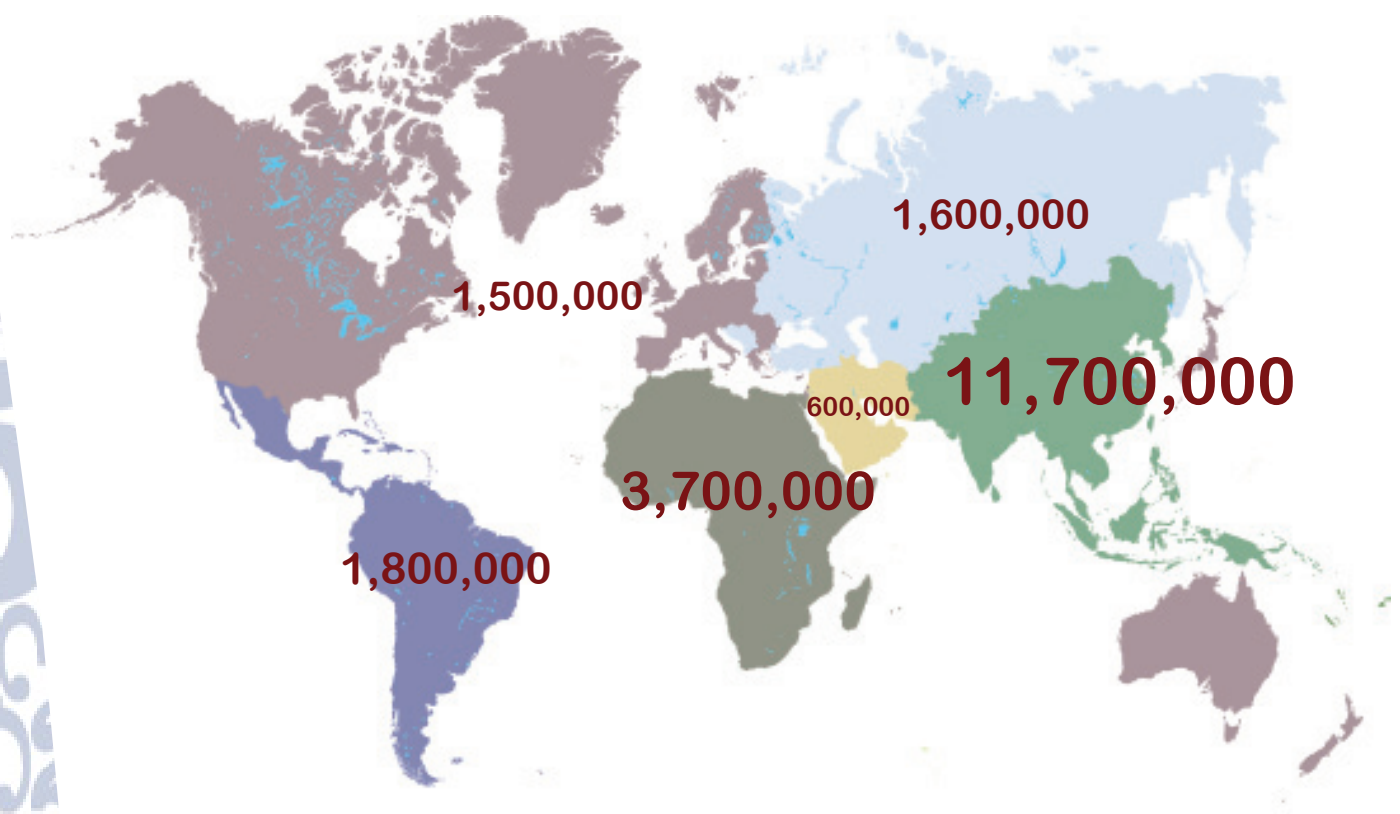
Women and girls represent the greater share of the total – 11.4 million (55%), as compared to 9.5 million (45%) men and boys. Adults are more affected than children – 74% (15.4 million) of victims fall in the age group of 18 years and above, whereas children aged 17 years and below represent 26% of the total (or 5.5 million child victims).

Of the total number of 20.9 million forced labourers, 18.7 million (90%) are exploited in the private economy, by individuals or enterprises. Out of these, 4.5 million (22%) are victims of forced sexual exploitation, and 14.2 million (68%) are victims of forced labour exploitation in economic activities, such as agriculture, construction, domestic work or manufacturing. The remaining 2.2 million (10%) are in state-imposed forms of forced labour, for example in prisons, or in work imposed by the state military or by rebel armed forces.

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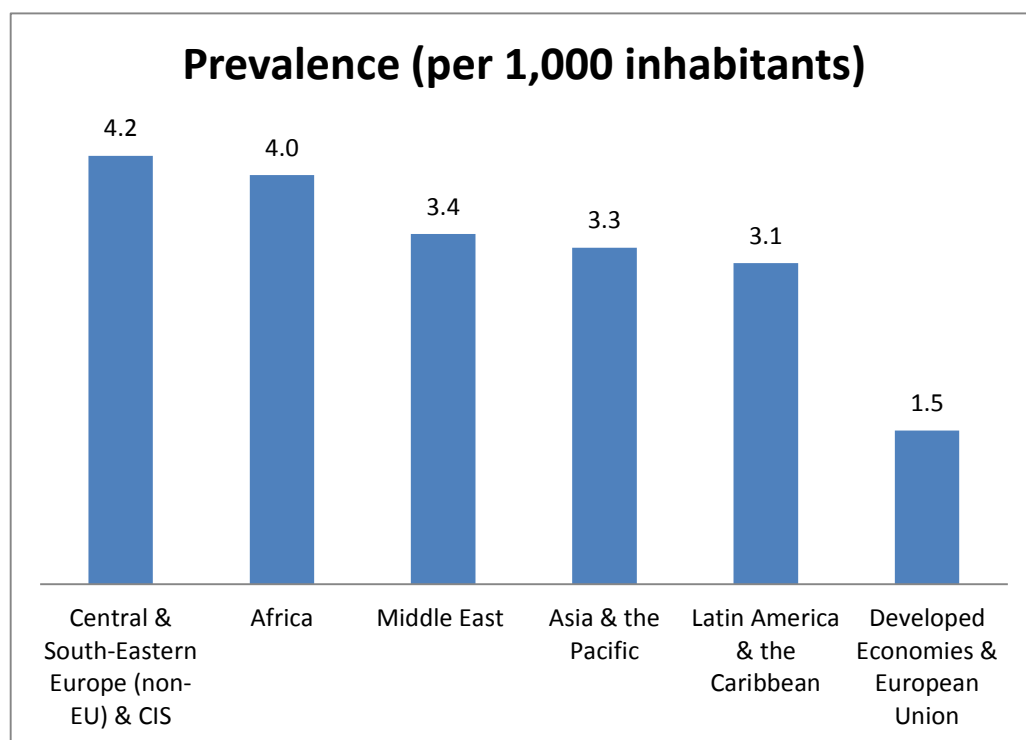
1. The figures do not include trafficking for the removal of organs or for forced marriage/adoption unless the latter practices lead to a situation of forced labour or service.

Turning to the regional distribution, the Asia-Pacific region (AP) accounts for by far the largest number of forced labourers – 11.7 million or 56% of the global total. The second highest number is found in Africa (AFR) at 3.7 million (18%), followed by Latin America and the Caribbean (LA) with 1.8 million victims (9%). The Developed Economies and European Union (DE&EU) account for 1.5 million (7%) forced labourers, whilst countries of Central, Southeast and Eastern Europe (non EU) and the Commonwealth of Independent States (CSEE) have 1.6 million (7%). There are an estimated 600,000 (3%) victims in the Middle East (ME)<sup>2</sup>.



The prevalence rate (number of victims per thousand inhabitants) is highest in the CSEE and Africa regions at 4.2 and 4.0 per 1,000 inhabitants respectively, and lowest in the DE&EU at 1.5 per 1,000 inhabitants. The relatively high prevalence in Central and South Eastern Europe and CIS can be explained by the fact that the population is much lower than for example in Asia, while reports of trafficking for labour and sexual exploitation and of state-imposed forced labour in the region are numerous.

2. Regional groupings are based on those used in ILO's Employment Trends Report, 2012. Percentages and numbers are rounded.



The estimates also allow an assessment of how many people end up being trapped in forced labour following migration. There are 9.1 million victims (44% of the total) who have moved either internally or internationally, while the majority, 11.8 million (56%), are subjected to forced labour in their place of origin or residence. Cross-border movement is strongly associated with forced sexual exploitation. By contrast, a majority of forced labourers in economic activities, and almost all those in state-imposed forced labour, have not moved away from their home areas. These figures indicate that movement can be an important vulnerability factor for certain groups of workers, but not for others.

The 2012 estimates cannot be compared to those from 2005 for the purpose of detecting trends over time, i.e. whether forced labour has increased or decreased over the period concerned. What can be said is that we now have a more reliable estimate, based on a more sophisticated methodology and more and better data sources. This estimate, at 20.9 million victims globally, is considerably higher than ILO's first estimate in 2005. Another major difference from earlier ILO estimates is that state-imposed forced labour represents a lower proportion of the total, at around 10%. This could in part be due to the fact that far fewer data are available on state-imposed forced labour relative to the other forms, pointing to a need for further research in this area.

The age distribution of forced labourers has also changed from the earlier estimate of the ILO, with children at 26 %, representing a smaller proportion of the total. The new data confirm our previous conclusion that women and girls are more affected, and particularly by forced sexual exploitation. However, men and boys still account for an overall 45% of all victims. Finally, while regional comparisons cannot accurately be made because of changes in the country groupings, Asia and the Pacific retains its place as the region harbouring the greatest absolute number of forced labourers

in the world, although its proportion of the total has decreased somewhat (to just over one-half of all victims). The share and number of victims in Africa has, by contrast, increased in the current estimate (18% or nearly one-fifth of the total), which we believe represents a more accurate reflection of reality, thanks to better reporting in the region.

The new estimates on movement, which were not calculated previously, illustrate the fact that cross-border movement is closely allied with forced sexual exploitation, whereas a greater proportion of victims of non-sexual forced labour are exploited in their home area. An interesting new piece of information to emerge from the estimates is that the average period of time that victims spend in forced labour, across all forms and regions, is approximately 18 months, with variation between the different forms of forced labour.

## **BACKGROUND AND METHODOLOGY**

Forced labour is the term used by the international community to denote situations in which the persons involved – women and men, girls and boys – are made to work against their free will, coerced by their recruiter or employer, for example through violence or threats of violence, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. Such situations can also amount to human trafficking or slavery-like practices, which are similar though not identical terms in a legal sense. International law stipulates that exacting forced labour is a crime, and should be punishable through penalties which reflect the gravity of the offence. Most countries outlaw forced labour, human trafficking and slavery-like practices in their national legislation, but successful prosecutions of offenders sadly remain few and far between.

Governments and their partners require information about the nature and extent of forced labour if they are to devise effective policy measures to combat it. But the practice is extremely difficult to research and quantify as, being a criminal activity, it is most often hidden, out-of-sight of law enforcement and administrative personnel, and invisible to the public at large. The ILO is working with governments to assist them to measure forced labour in their country, but so far only a handful of countries have been able to undertake special surveys on the topic.

In the absence of solid national data, the ILO has produced a new estimate of forced labour at the global and regional levels using mostly secondary sources of information, supplemented by the results of four national surveys conducted by the ILO in collaboration with local partners. During the development of the estimation methodology, ILO benefited from the expertise of four independent and respected peer

reviewers, who examined the proposed methodology in detail, and provided valuable feedback and suggestions for its improvement.

The method used to generate the estimates is essentially a refinement of that applied by the ILO in 2005, when it made its first global estimate of forced labour, of a minimum of 12.3 million victims. The method relies on the collection of “reported cases” of forced labour, over the 10 year period 2002-2011, from all countries in the world. “Reported cases” are those which refer to specific instances of forced labour, indicating where and when the activity took place and how many people were involved. Cases can be found in various secondary sources of information, ranging from official statistics and NGO reports to newspaper articles.

Two teams of researchers, based in the ILO in Geneva, had the task of collecting cases over a 13 week period in September - December 2011, following an intensive training exercise and working strictly independently of each other. This research method is known as “capture-recapture”: A sample of forced labour cases is “captured” by the first team from all those cases potentially available; a separate sample is “recaptured” by the second team.

By comparing the two samples, and identifying those cases “captured” by both teams, it is possible to make a statistical estimation of the total number of reported cases of forced labour over the 10 year period<sup>3</sup>. Details of those cases identified as being forced labour, by filtering them using a set of forced labour “indicators”, were entered into a database, which was then scrutinized by ILO experts to ensure that the cases that were retained indeed amounted to forced labour. When available, information was also entered on the duration of the forced labour episodes, economic sectors and judicial responses.

Finally, “aggregate” data were entered, meaning reports from credible institutional sources, which contained data on, for example, trafficking victims identified by the police in a given region or country over a 6-month period, or those sheltered by an NGO (for which detailed case-based information was not available). No estimate or “guesstimate” data were retained for use in the estimation procedure.

Using these raw data entries, and following a rigorous data validation and “matching” process to detect the common cases of forced labour recorded in the database, ILO statisticians estimated first, the total number of reported cases of forced labour and second, the total number of victims in these cases. In the final, crucial step, an extrapolation from estimated “reported” to “total” number of forced labour victims, at any given point in time during the ten year period, was made – further drawing upon the estimated duration of “completed episodes” of forced labour in the private economy (had the victims not been identified and released). The methodology allows for estimates to be presented on the basis of the “type” of forced labour (whether exacted by the

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3. This method was originally developed for the purpose of estimating populations of fish and elusive wildlife, and is now widely used in social science research.

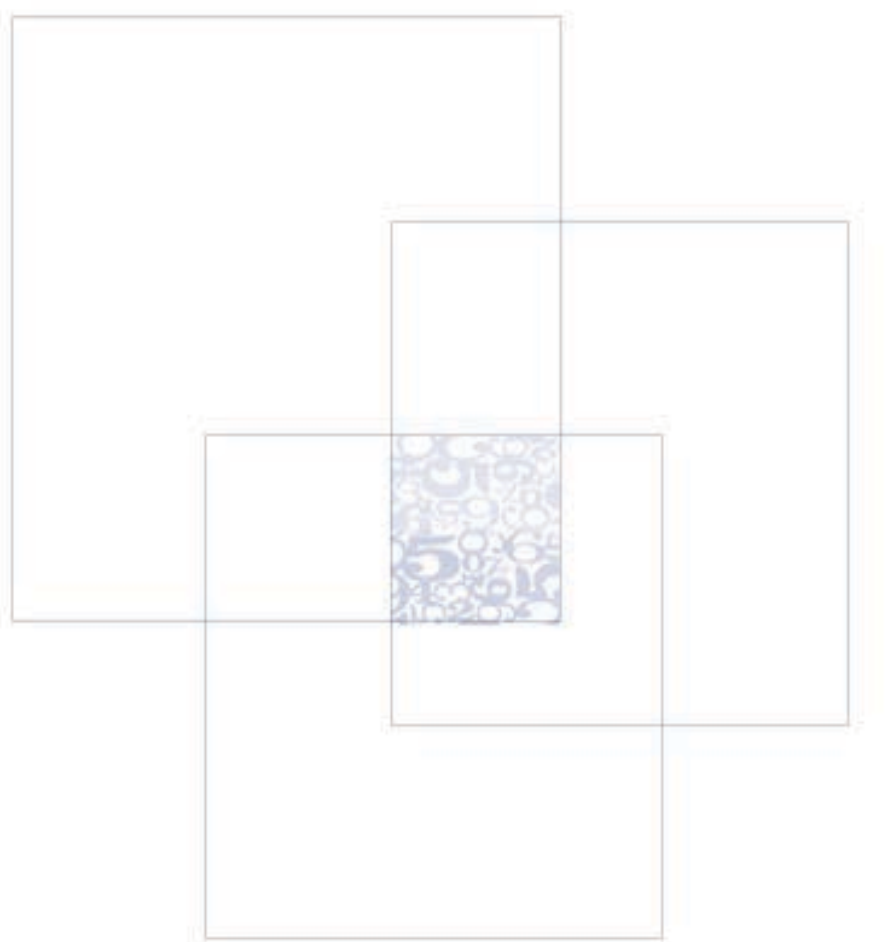
state, or imposed in the private economy for either labour or sexual exploitation), by the sex of the victim, by the victim's age group (adult or child) and by region.

The 2012 estimates are more robust than those made in 2005. The margin of error for the global estimate of 20.9 million is 7% (1.4 million) - meaning that the actual number lies between 19.5 million and 22.3 million, with a 68% level of confidence. As compared to 2005, the margin of error has decreased significantly, from 20% to 7%.

Given the rigorous process of data validation, discarding all cases which did not meet the specified criteria, the global estimate is also considered to be conservative. Nonetheless, we must sound several strong notes of caution over how the estimates should be used and interpreted. First, given differences in the methodology employed and the availability of data between 2005 and 2012, the respective estimates are not comparable and cannot be used to claim that there has been an increase in the incidence of forced labour over this seven-year period. The regional breakdowns are similarly not comparable, being based on different country groupings in some instances.

Despite the fact that ILO believes this methodology to be the best possible given the current availability of data on forced labour, it equally acknowledges its limitations. As more and better information becomes available, especially through primary surveys conducted at national level, it will become possible to progressively generate more accurate estimates in the future. This will further strengthen the basis for more effective policy responses and interventions to end the crime of modern forced labour.







**ILO Special Action Programme to combat Forced Labour (SAP-FL)**

Programme for the Promotion of the Declaration  
on Fundamental Principles and Rights at Work

4 route des Morillons

1211 Geneva - Switzerland

[forcedlabour@ilo.org](mailto:forcedlabour@ilo.org)

[www.ilo.org/forcedlabour](http://www.ilo.org/forcedlabour)

## **THE ROAD TO H.B. 1175: MAKING HUMAN TRAFFICKING A CRIME IN THE STATE OF WASHINGTON, MY STORY, 9 Seattle J. Soc. Just. 549 (2001)**

**By Velma Veloria, Washington State Representative 1993-2004**

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*This article is dedicated to the men, women and children who are victims of human trafficking and to the people who work to educate the public on this issue and serve those who have been victimized. Thank you for all your work.*

In 1995, while Suzanna Remerata Blackwell, her unborn child, and her two friends, Phoebe Dizon and Victoria Laureata, were waiting for the judge to hear Suzanna's plea for divorce inside the King County Courthouse, they were shot to death by Suzanna's husband as he passed through. Suzanna was brought to the United States as a mail-order bride from the Philippines. Upon hearing the news, the Filipino American community in Seattle and the state of Washington were in shock, disbelief, and deeply angered. The media treated the event as a family domestic violence incident. Once their grief turned to anger, the Filipino American community demanded justice.

### **MAIL-ORDER BRIDES**

The Blackwell murder spurred heart-rending community discussions. The community wanted the mail-order bride industry in the state of Washington to be held accountable.

The murders of these Filipina women provoked a strong call for justice for the victims and galvanized efforts to establish the nonprofit Asian Pacific Islander Women and Family Safety Center.

In 1995, I was the chair of the Community, Trade, and Economic Development Committee of the state House of Representatives. As the only Filipina American legislator in the state, I grappled with how to ease the pain my own community was experiencing.

I wanted the mail-order bride industry in this state to be regulated, to be registered as legitimate businesses, and to pay taxes. Perhaps then, we could make them accountable. Legislation was being prepared. However, frontline workers were afraid that if the mail-order bride industry were regulated, many of the victims, who are women, would no longer report the violence against them. Victims usually do not have access to their own passports--either they do not have one or their husbands keep their passports to maintain control over them. Further, many do not have jobs and are economically dependent on their husbands.

### **A PATTERN BEYOND DOMESTIC VIOLENCE**

While we continued to seek justice for the Blackwell murders, in 1999, a mere four years later, another Filipina mail-order bride made front-page news. Helen Clemente had been brought to the United States by her bigamist husband, Eldon Doty. Helen had actually become a maid, a domestic helper for Doty and his first wife. Around the same time, the body of a twenty-year-old University of Washington student, Anastasia King from Kyrgyzstan, was found near the home she shared with her husband. Anastasia was also brought to the United States as a mail-order bride. These two additional cases broadened the scope of the problem. It was now beyond the Filipino American community, and it was no longer just domestic violence.

More questions began to emerge. Why is this happening? What is causing all this harm to women? Why are there so many mail-order brides here in Washington State? Is it just a poverty issue? What is

causing this level of poverty in an era where there seems to be so much wealth?

Researching the mail order bride industry, we began to discover patterns.<sup>1</sup> We were convinced that this was another form of human trafficking--"bride trafficking." Washington State had no way of dealing with human trafficking, let alone "bride trafficking." While discussions on trafficking were already happening in other parts of the country, many Washingtonians did not know much about the topic. If I was going to put together legislation, I needed to educate the public about human trafficking.

## PUBLIC EDUCATION ON HUMAN TRAFFICKING

The definition of human trafficking varies, but it can generally be defined as any act that involves the recruitment or transportation of a person within or across national borders, for work or services, by means of violence or threat of violence, debt bondage, deception, or other coercion. A person may be trafficked for a number of reasons including forced prostitution, exploitative domestic service in private homes, and indentured servitude in sweatshops.

Dr. Sutapa Basu, Director of the University of Washington Women's Center and an advocate against human trafficking; Emma Catague, Field Manager of the Asian Pacific Islander Women and Family Safety Center; and I decided to hold the first conference on human trafficking in Washington. From that conference, H.B. 2381 was formulated, which created a human trafficking task force. Key questions that needed to be pursued included: does human trafficking exist in Washington State? If yes, what should we do about it, and what recommendations would the task force have to protect victims?

Once we had proven human trafficking existed in Washington State,<sup>2</sup> we needed to make it a crime. The federal government already had laws governing trafficking crimes, but Washington State did not. Thus, H.B. 1175, which would make human trafficking a state crime in Washington, was introduced and passed by the legislature in 2003.<sup>3</sup> Washington State was the first state in the nation to pass human trafficking legislation. It was a historic moment for the state but more so for the Filipino American community. Finally, we had a piece of legislation that we could use in the future to combat human trafficking.

Fast forward. It is now the year 2011; human trafficking has become the fastest growing criminal industry in the world, tied with the illegal arms industry as the second largest criminal industry after the drug trade.

According to US State Department data, "an estimated 600,000 to 820,000 men, women, and children [are] trafficked across international borders each year [:] approximately 80 percent are women and girls, and up to 50 percent are minors."<sup>4</sup>

To date, Washington's human trafficking law has only been used to prosecute one offender, a nineteen-year-old pimp named DeShawn "Cash Money" Clark who was convicted in 2009 and sentenced

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<sup>1</sup> L.E. Orloff & H. Sarangapani, *Governmental and Industry Role and Responsibilities with Regard to International Marriage Brokers: Equalizing the Balance of Power Between Foreign Fiancés and Spouses*, 13 VIOLENCE AGAINST WOMEN 469 (2007); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PUB. N. 08-862, INTERNATIONAL MARRIAGE BROKER REGULATION ACT OF 2005: AGENCIES HAVE IMPLEMENTED SOME, BUT NOT ALL OF THE ACT'S REQUIREMENTS (2008), *available at* <http://www.gao.gov/products/GAO-08-862>.

<sup>2</sup> Office of Crime Victims Advocacy, State of Washington Department of Community, Trade and Economic Development, Human Trafficking: Present Day Slavery (2004), *available at* [http://www.commerce.wa.gov/\\_cted/documents/ID\\_29\\_Publications.pdf](http://www.commerce.wa.gov/_cted/documents/ID_29_Publications.pdf).

<sup>3</sup> H.B. 1175, 58th Leg., Reg. Sess. (Wash. 2003).

<sup>4</sup> U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005), *available at* <http://state.gov/documents/organization/47255.pdf>.

to seventeen years in prison.<sup>5</sup>

## WHY DOES HUMAN TRAFFICKING EXIST?

Research points to several causes of human trafficking:

- *Poverty*: Women constitute 70 percent of the world's 1.3 billion absolute poor, those living on less than \$1 per day.
- *Violence*: Often linked to economic instability, violence can also make women and children more vulnerable to trafficking.
- *Conflict*: Traffickers often take advantage of the desperate conditions created by conflict or natural disasters preying upon those living in refugee camps.
- *Greed*: Traffickers make a lot of money from the sale of humans, their parts, and their services.
- *Demand*: Without the demand from the perpetrators, suppliers would not have a market.

Many in the anti-trafficking world have termed human trafficking as “modern day slavery.” In the “old slavery,” where a slaveholder had legal ownership over another, the purchase cost of a slave was high and profits were low. There was also a shortage of potential slaves because ethnic differences were important. Slaves had long-term relationships with their traffickers and were sometimes taken care of.

In “modern day slavery,” because there is a potential surplus of slaves, the purchase price of the slave is very low and the profits are high. Ethnic differences are not important and the relationships with their traffickers are short-term. Therefore, these trafficked persons are considered disposable.

## THE CALL

We know there are many cases of human trafficking out there but there are also many more challenges. For those of us in the anti-human trafficking arena, our call is for people to educate themselves and others about the push and pull factors of human trafficking, work with law enforcement to enforce Washington's human trafficking law, advocate for stronger laws and enforcement, volunteer time to address the issues, campaign for more research and services funding, demand fair trade policies, and donate time and money.

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<sup>5</sup> Sara Jean Green, *19-Year-Old Man Sentenced For Promoting Teen Prostitution*, SEATTLE TIMES, Jan. 22, 2010, [http://seattletimes.nwsources.com/html/localnews/2010868511\\_mobbsentence23m.html](http://seattletimes.nwsources.com/html/localnews/2010868511_mobbsentence23m.html).

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Hotline: 1-800-562-6000  
TTY: 1-800-635-9993

## **Landmark Washington State Accomplishments to Prevent Human Trafficking and Sexual Exploitation of Minors**

### **2002**

- **House Bill (HB) 2381** created the Task Force Against Trafficking of Persons—the first of its kind in the nation—directed to measure and evaluate the state's progress in trafficking prevention activities, identify available programs providing services to victims of trafficking, and recommend methods to provide a coordinated system of support and assistance to victims of trafficking (Veloria). *Not codified; Report issued in 2004 (see below).*
- **Senate Bill (SB) 6412**, the International Matchmaking Organization Act—also the first of its kind in the nation—established protections for prospective foreign spouses of Washington residents who go through online international marriage brokers by requiring the brokers to notify recruits in their native language that background check and marital history information is available for prospective spouses who are Washington residents (Kohl-Welles). *RCW 19.220.010.*
- The Washington State Task Force Against the Trafficking of Persons issued its first report and recommendations (<http://www.commerce.wa.gov/Documents/OCVA-HT-2002-HT-Report.pdf>).

### **2003**

- **HB 1175** created two human trafficking crimes, both class A felonies, and expanded the definition of criminal profiteering to include the crime of trafficking—making Washington the first state in the nation to criminalize trafficking and specify criminal and civil penalties (Veloria). *RCW 9A.40.100.*
- **HB 1826** increased protections for prospective foreign spouses by also making personal history information available to them, including spousal abuse and founded child abuse (Veloria). *RCW 19.220.010.*
- The Federal International Marriage Brokers Regulations Act is sponsored by U.S. Sen. Maria Cantwell and U.S. Rep. Rick Larsen, modeled after the 2002 International Matchmaking Organization Act.



## 2004

- The Task Force released its second report (<http://www.commerce.wa.gov/Documents/OCVA-HT-2004-Task-Force-Report.pdf>).

## 2005

- **SB 5127** created requirements for state agencies to develop written protocols for the delivery of services to victims of human trafficking (Kohl-Welles). *RCW 7.68.360*
- State funding was provided for legal aid to undocumented immigrants who are victims of sexual assault, domestic violence, or human trafficking.
- The Task Force released its third report (<http://www.commerce.wa.gov/Documents/OCVA-HT-2005-Task-Force-Report.pdf>).

## 2006

- **SB 6731** prohibited sex tourism—making WA the second state in the nation to do so (Fraser). *RCW 9A.88.085*.
- Task Force funding was renewed and the task force was directed to create a Comprehensive Response to Human Trafficking—a coordinated system containing seven components, including prevention, victim identification and victim services.
- The Federal International Marriage Brokers Regulations Act was signed into law as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005. *Pub. L. No. 109-162, 119 Stat. 2960 (2006)*.

## 2007-2008

- **SB 6339** added victims of human trafficking to the list of persons eligible for the state's address confidentiality program (Kohl-Welles). *RCW 40.24.010*.
- **SB 5718** created four new crimes relating to child sexual exploitation: commercial sexual abuse of a minor (CSAM) that replaced the crime of patronizing a juvenile prostitute, promoting CSAM, promoting travel for CSAM, and permitting CSAM. It also added an additional one-year penalty to the sentence for a conviction of the most serious crimes of child sex abuse if the offender paid to engage in the abuse (Kohl-Welles). *RCW 9.68A.100 through .103*.
- The Task Force released its fourth report (<http://www.commerce.wa.gov/Documents/OCVA-HT-2008-HT-Report.pdf>).

## 2009

- **SB 5850**—the first legislation of its kind in the nation—required international labor recruiters and domestic employers of foreign workers to disclose federal and state labor laws to employees and required health care professionals be provided with information to help identify human trafficking victims (Kohl-Welles). *RCW 19.320.020*.
- **HB 1505** allowed prosecutors to divert cases in which a minor is alleged to have committed the offense of prostitution, if the juvenile agrees to participate in a program that provides wraparound services, including mental health counseling (Dickerson). *RCW 13.40.213*.

## 2010

- **SB 6332**, built on SB 5850 enacted in 2009, added nonimmigrant workers to the list of employees who must be provided with federal and state labor laws, and established civil penalties for labor recruiters and employers who fail to do so (Kohl-Welles). *RCW 19.320.010*.
- **SB 6476** strengthened penalties for the crime of commercial sexual abuse of a minor and required development of training for law enforcement officers (Stevens). *RCW 9.68A.100, .101, and .105, and 9A.88.140*.
- **SB 6330** allowed informational posters on domestic trafficking, including trafficking of minors and a “1-800” number, to be placed at rest stops throughout the state which could be very helpful for individuals being taken to international events, such as the Winter Olympics which were held in British Columbia (Kohl-Welles). *RCW 47.38.080*.

## 2011

- **SB 5482** authorized local governments to use affordable housing funds to provide housing assistance to victims of human trafficking and their families (Kohl-Welles). *RCW 36.22.178, .179, and .1791*.
- **HB 1874** authorized law enforcement officers to conduct surveillance operations on suspected human-trafficking and commercial sexual abuse activities with the consent of the victim. It also authorized prosecutors to request assistance from minors in the undercover surveillance of telephone communications in trafficking investigations without putting youth in danger (Dickerson). *RCW 9.73.210 and .230*.
- **SB 5546** amended the crime of human trafficking to include the illegal harvesting or sale of human organs and broadened the scope of the crimes to hold criminals accountable when caught transporting a person despite not knowing whether the person would eventually be forced into prostitution or manual labor (Kohl-Welles). *RCW 9A.40.100 and .010, 9.95.062, and 10.64.025*.

## 2012

- **SB 6251** created a new crime, making it illegal to knowingly publish an escort ad on-line or in print that involves a minor (Kohl-Welles). *Chapter 9.68A RCW.*
- **SB 6252** added the crimes of commercial sexual abuse of a minor and promoting commercial sexual abuse of a minor to the list of offenses that may constitute a pattern of criminal profiteering activity (Kline). *RCW 9A.82.010 and .100.*
- **SB 6253** authorized law enforcement agencies to seize any proceeds or property that facilitate the crimes of commercial sexual abuse of a minor (Eide). *Chapter 9A.88 RCW.*
- **SB 6254** criminalized the act of compelling a person with a disability that renders the person incapable of consent to engage in an act of prostitution (Delvin). *RCW 9A.88.070.*
- **SB 6256** added to the list of gang-related crimes the promotion of sexual abuse of a minor that provides the gang with an advantage, control, or dominance over a market sector (Conway). *RCW 9.94A.030.*
- **SB 6257** defined sexually explicit acts with regard to sex trafficking and promoting the sexual abuse of a minor (Roach). *RCW 9.68A.101 and 9A.40.100.*
- **SB 6258** criminalized ordering, luring, or attempting to lure a minor or a person with a cognitive disability into any transportation terminal or into a motor vehicle (Stevens). *RCW 9A.40.090.*
- **SB 6103** prohibited anyone from practicing reflexology or representing himself or herself as a reflexologist unless certified as a reflexologist or licensed by the health department as a massage practitioner (Keiser). *Chapter 18.108 RCW.*
- **SB 6255** allowed minors who were convicted of prostitution resulting from being trafficked by force, fraud, or coercion to request the court to vacate the conviction (Fraser). *RCW 9.96.060 and Chapter 9A.88 RCW.*
- **HB 1983** increased the fees imposed against individuals convicted of promoting or patronizing prostitution (Parker). *RCW 9A.40.100, 9A.44.128, 9A.88.120, 9.68A.105, 3.50.100, 3.62.020, 3.62.040, 10.82.070, and 35.20.220.*
- **HB 2692** increased the additional fine a person must pay when convicted of patronizing a prostitute and requires those fees be used to pay for increased enforcement and prevention programs (Orwall). *RCW 9A.88.130, 3.50.100, 3.62.020, 3.62.040, 10.82.070, and 35.20.220.*
- **HB 2177** prohibited the duplication or distribution of child pornography as part of the discovery process in a criminal prosecution, and instead required the material to be made reasonably available to the prosecutor, defense attorney, and expert witnesses who may testify at trial (Ladenburg). *Chapter 9.68A RCW.*

Senator Jeanne Kohl-Welles, Washington State Senate

*For more information about Washington bills and laws, go to [www.leg.wa.gov](http://www.leg.wa.gov).*

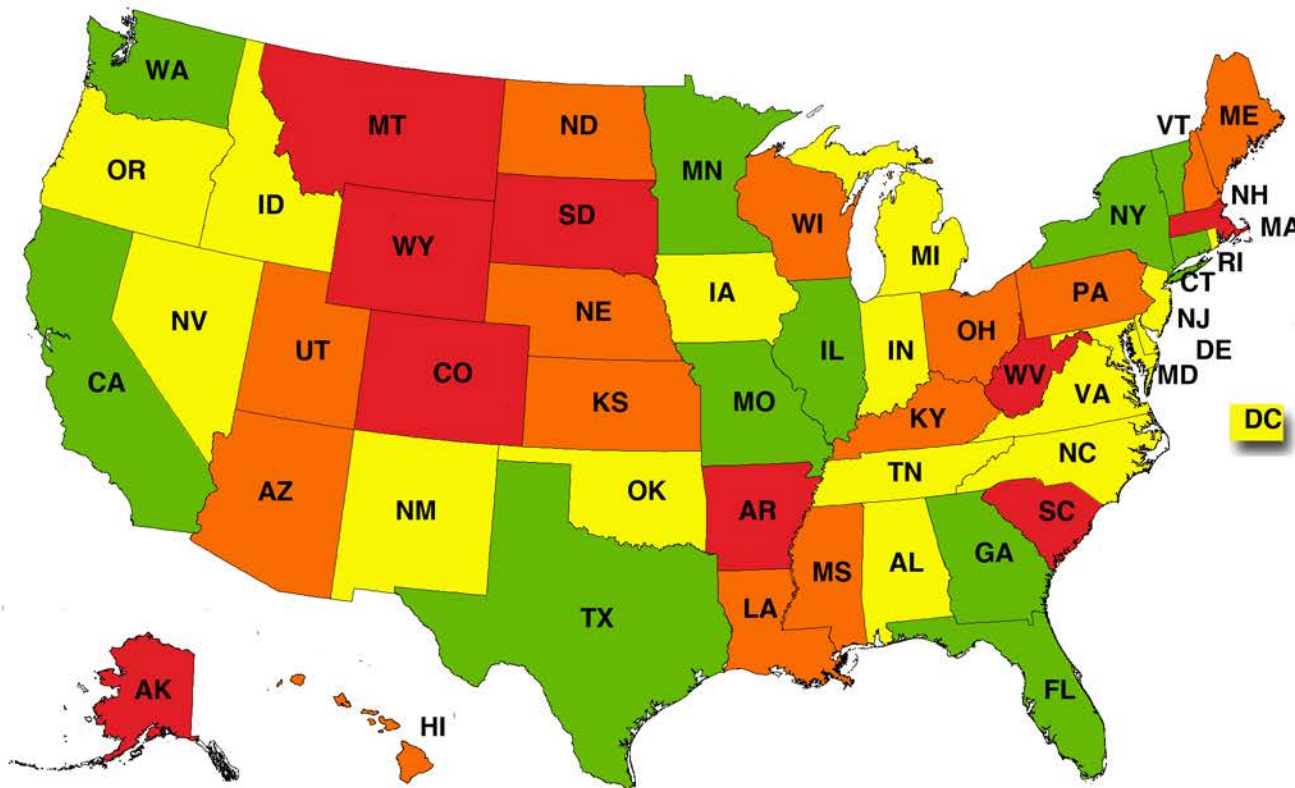
# HOW DOES YOUR STATE RATE ON HUMAN TRAFFICKING LAWS?



**POLARIS PROJECT**  
FOR A WORLD WITHOUT SLAVERY

The Polaris Project annual state ratings process tracks the presence or absence of 10 categories of state statutes that Polaris Project believes are critical to a comprehensive anti-trafficking legal framework: (1) Sex trafficking, (2) Labor trafficking, (3) (a) Asset forfeiture and/or (b) Investigative tools, (4) (a) Training on human trafficking and/or (b) Human trafficking task force, commission, or advisory committee, (5) Posting of a human trafficking hotline, (6) Safe harbor; protecting sex trafficked minors, (7) Lower burden of proof for sex trafficking of minors, (8) Victim assistance, (9) Access to civil damages, and (10) Vacating convictions for sex trafficking victims.

-  7-9 conditions met
-  5-6 conditions met
-  3-4 conditions met
-  0-2 conditions met



Map is current as of October 2011

## NINE LAGGING BEHIND

Alaska  
Arkansas  
Colorado  
Massachusetts  
Montana  
South Carolina  
South Dakota  
West Virginia  
Wyoming

A state ratings chart, individual state reports, and a methodology document are available on our website at [www.Polarisproject.org/2011StateRatings](http://www.Polarisproject.org/2011StateRatings). Polaris Project's U.S. Policy Program provides support to legislators and policy advocates through model state anti-trafficking legislation, analyses of human anti-trafficking bills, and briefings for legislators and policy advocates. For more information, please contact us at [Policy@PolarisProject.org](mailto:Policy@PolarisProject.org), 202-745-1001 x 130 or visit [www.PolarisProject.org](http://www.PolarisProject.org).



## **Uniform Law Commission Project Proposal**

### **Uniform Human Trafficking Law**

Submitted by: ABA Center for Human Rights

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ULC Meeting: July 2010

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#### **Project Description and Background**

The American Bar Association (ABA) Center for Human Rights, LexisNexis, and Reed Elsevier propose that the Uniform Law Commission undertake a project to create uniform state anti-human trafficking legislation. This memo outlines the background for the project, the need for and benefit of uniform anti-trafficking legislation, current Federal and State anti-trafficking legislation, and the key stakeholders and resources necessary to develop a uniform state human trafficking law.

Human trafficking is defined by the Trafficking Victims Protection Act of 2000 (TVPA) persons as a.) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or b.) the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery<sup>1</sup>. Human trafficking is a significant and growing crime in the United States. The U.S. State Department Office to Monitor and Combat Trafficking in Persons estimates between 14,000 and 17,500 people are trafficked into the U.S. each year, from as many as 48 countries. But human trafficking is not just limited to foreign nationals; U.S. citizens and Legal Permanent Residents also are trafficked within the United States. The National Center for Missing and Exploited Children (NCMEC) estimates that at least 100,000 American children are trafficked into the commercial sex industry within in the U.S. each year. Trafficked persons have been identified in large and small cities, suburban neighborhoods, and urban areas in states across the country.

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<sup>1</sup> 8 U.S.C. § 1101

Human trafficking often takes place across international or state borders. While interstate movement is not necessarily a component of human trafficking, it is not uncommon for victims to be trafficked in or through several states. Some forms of human trafficking, such as forced prostitution or forced farm labor, are more frequently mobile, with perpetrators committing crimes in several jurisdictions. Other forms of trafficking, such as domestic servitude or forced marriage, are less mobile and may involve only one jurisdiction. Because interstate movement is often a component of human trafficking, inter-jurisdictional collaboration and communication are vital to the successful investigation and prosecution of human trafficking cases.

The Trafficking Victims Protection Acts (TVPA) provides Federal authority to prosecute human trafficking crimes. Some states, however, also have enacted anti-trafficking legislation. According to the Center for Women's Policy Studies' U.S. Policy Advocacy to Combat Trafficking (US PACT) project, 42 states and the District of Columbia currently have legislation criminalizing human trafficking. Yet, among those states, the definitions of trafficking, the availability of victim assistance and access to a private right of action, the penalties recommended for perpetrators, and other aspects of the laws vary greatly. The remaining eight states have passed no anti-trafficking legislation.

The proposed uniform state human trafficking legislation would address discrepancies in existing state laws, encourage states which have not yet criminalized human trafficking to do so, and promote collaboration among law enforcement officers, prosecutors, NGOs, lawyers, and other stakeholders in the investigation and prosecution of human trafficking.

### **Need, Benefits, and Feasibility**

States' adoption of a comprehensive anti-trafficking law is critical for a number of reasons. First, Federal resources alone cannot keep up with the high volume of human trafficking cases. The prevalence of the crime, as outlined above, warrants anti-trafficking legislation at the State level to reduce the strain on Federal resources. Second, State anti-trafficking laws spur local law enforcement to investigate cases as first responders and provide the option of local jurisdiction where necessary or desirable. And third, they can catalyze increased awareness and training for police officers, which often leads to increased victim identification, investigations, and prosecutions.

In short, state law uniformity will render the current patchwork of state anti-trafficking laws far more effective by providing a centralized "one-stop" standard that most accurately reflects the actual criminal behavior of traffickers and avoids piecemeal investigations and prosecutions under divergent state statutes, where they exist at all. Uniformity will:

- Increase levels of State prosecutions nationwide, which currently are very low;
- Support the enforcement and implementation of enacted anti-trafficking laws;
- Strengthen existing State codes for related crimes, such as pandering or money laundering, by creating an alternative for prosecutors;
- Provide a common basis for increased training for law enforcement and local prosecutors on the scope, extent, and methods used by traffickers;
- Build stronger relationships among local law enforcement and NGOs/service providers;
- Avoid conflicts of law where more than one state is involved, which occurs frequently in human trafficking cases, and thus further promote inter-jurisdictional collaboration among law enforcement, prosecutors, and human trafficking task forces; and
- Address the demand for trafficking, including questions of corporate liability and demand-reduction strategies for sex trafficking.



Developing such uniformity also is politically feasible. Historically, Federal and State anti-trafficking legislation has enjoyed broad, bipartisan support. The fight against human trafficking has been championed by both Republican and Democratic members of Congress, state legislatures, and governors.

## **Analysis of Existing State Law**

Within the United States there are wide variations in state attempts to address human trafficking. The majority of states do have specific provisions regarding human trafficking, while others include elements of human trafficking in kidnapping and other criminal statutes.

### **Criminal Penalties**

The legal elements of criminal human trafficking are similar throughout the states and territories. The following language is typical:

Trafficking in persons for forced labor or services. A person commits the offense of trafficking in persons for forced labor or services when he or she knowingly: (1) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (2) benefits, financially or by receiving anything of value, from participation in a venture that has engaged in an act of involuntary servitude or involuntary sexual servitude of a minor.<sup>2</sup>

Two further elements widely shared among the states are, 1) Causing or threatening to cause serious physical injury to any person; and 2) Physically restraining or threatening to physically restrain another person.<sup>3</sup> There is greater diversity, however, in other additional elements. Numerous states include control of identifying documents<sup>4</sup> such as unlawful possession or destruction of another's immigration, travel, or identifying documents. In Missouri a defendant is subject to prosecution under this element where s/he

Destroys, conceals, removes, confiscates, or possesses a valid or purportedly valid passport, government identification document, or other immigration document of another person while committing crimes or with the intent to commit crimes."<sup>5</sup>

Another element that many states use is to derive benefit or value from trafficking.<sup>6</sup> States also frequently utilize abuse of the law or legal process as another criminal element.<sup>7</sup> Somewhat less common is the use of blackmail or extortion,<sup>8</sup> debt bondage,<sup>9</sup> financial harm,<sup>10</sup> and access to controlled substances.<sup>11</sup> A small number of states utilize a broad definition labeled as fraud

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<sup>2</sup> 720 ILCS 5/10-9

<sup>3</sup> Exceptions include KRS §§ 529.100 through 529.110, Nev. Rev. Stat. Ann. §§ 200.464 through 200.468, S.C. Code Ann. § 16-3-930

<sup>4</sup> AZ, CA, CO, DE, FL, GA, GU, IL, IA, LA, ME, MI, MN, MS, MO, MT, NE, NH, NJ, NM, NY (see also [here](#)), NC, ND, OK, OR, PA, RI, TN, TX, UT, VA, VI, WI

<sup>5</sup> § 566.215 R.S.Mo.

<sup>6</sup> AK, AR, DE, FL, GU, IL, IN, IA, KS, KY, MD, MI, MS, MT, NE, NJ, NM, ND, OK, OR, RI, TN, TX, UT, VT, WA, WI

<sup>7</sup> AZ, AR, CO, DE, GU, IL, MI, MN, MS, MO, MT, NH, NM, ND, OK, OR, PA, TN, TX, UT, VT

<sup>8</sup> DE, GA, GU, IL, IA, LA, MI, MN, MS, MT, NH, NY (see also [here](#)), NC, ND, RI, TN

<sup>9</sup> AR, FL, GA, GU, IA, MN, NY (see also [here](#)), NC, ND, OR, TX, UT, WI

<sup>10</sup> AZ, DE, FL, GU, IL, MI, MS, MT, NE, TN

<sup>11</sup> AZ, GA, GU, NH, NY (see also [here](#)), NC, WI

or coercion.<sup>12</sup> Still other states apply more generalized language alluding to fraud or deceit, such as this example from New Jersey, “by means of any scheme, plan or pattern intended to cause the person to believe that the person or any other person would suffer serious bodily harm or physical restraint”.<sup>13</sup> Trafficking for the purposes of utilizing a victim's body parts is another element in three other states.<sup>14</sup> And withholding such necessities as food or water is specifically mentioned by two states.<sup>15</sup>

While most states share similar language and components of criminal human trafficking statutes, both California and Connecticut stand out with differing definitions. California describes human trafficking as,

unlawful deprivation or violation of the personal liberty of another [as] ... substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.<sup>16</sup>

Duress is further defined as, “knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim.”<sup>17</sup> The felonies associated with human trafficking include procurement,<sup>18</sup> pimping,<sup>19</sup> pandering,<sup>20</sup> and abduction of a minor for prostitution,<sup>21</sup> employment of minor in sale or distribution of obscene matter or production of pornography,<sup>22</sup> extortion,<sup>23</sup> and forced labor or services.

The key element for a human trafficking violation in Connecticut is coercion. An individual is guilty of coercion if he or she

compels or induces another person to engage in conduct which such other person has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which such other person has a legal right to engage, by means of instilling in such other person a fear that, if the demand is not complied with, the actor or another will: (1) Commit any criminal offense; or (2) accuse any person of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair any person's credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action.<sup>24</sup>

The other two elements of trafficking in persons in Connecticut are that the victim is coerced to engage in work or prostitution; trafficking in persons is a felony.<sup>25</sup> Coercion is an affirmative defense to prostitution charges.<sup>26</sup>

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<sup>12</sup> CA, FL, GU, LA, MS, NH, WI

<sup>13</sup> N.J. Stat. § 2C:13-8; see also 21 Okl. St. § 748

<sup>14</sup> DE, MN, ND

<sup>15</sup> NH, OR

<sup>16</sup> Cal Pen Code § 236.1

<sup>17</sup> Ibid.

<sup>18</sup> Cal Pen Code § 266

<sup>19</sup> Cal Pen Code § 266h

<sup>20</sup> Cal Pen Code § 266i

<sup>21</sup> Cal Pen Code § 267

<sup>22</sup> Cal Pen Code § 311.4

<sup>23</sup> Cal Pen Code § 518

<sup>24</sup> Conn. Gen. Stat. § 53a-192

<sup>25</sup> Conn. Gen. Stat. § 53a-192a

<sup>26</sup> Conn. Gen. Stat. § 53a-82

As shown above, the majority of states go into a fair amount of detail of what can constitute human trafficking. But there are a few states that either define human trafficking without much specificity or incorporate these elements into kidnapping or sex offenses rather than trafficking per se. Idaho, for example, defines human trafficking as:

- (1) Sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained eighteen (18) years of age; or
- (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>27</sup>

Elements such as “fraud or coercion” and “debt bondage” are used here but not defined. Indiana similarly uses the phrase, “knowingly or intentionally recruits, harbors, or transports another person by force, threat of force, or fraud,” to enter into forced labor, involuntary servitude, prostitution or marriage.<sup>28</sup> Again, though, no elaboration is offered.

Other states, while not invoking human or sex trafficking, nevertheless include some elements of human trafficking in their other criminal statutes. Maine and Virginia, for example, include control of identifying documents as components of kidnapping.<sup>29</sup> Wyoming, as part of its felonious restraint statute, incorporates involuntary servitude as an element, while both West Virginia and Massachusetts include a prohibition on transport in or out of their respective states as part of kidnapping statutes.<sup>30</sup> Massachusetts and Ohio also have trafficking-like elements in prostitution statutes,<sup>31</sup> and Ohio does mention human trafficking in sentencing provisions.<sup>32</sup>

Finally, there are three states that have legalized, or regulated, trafficking. Oklahoma and Tennessee both have chapters or parts of chapters entitled “Trafficking in Children.” Oklahoma’s provisions seek to criminalize unauthorized placement and adoption of children.<sup>33</sup> Tennessee also criminalizes violations of its Trafficking in Children provisions, but is much more concerned with regulating out-of-state adoptions.<sup>34</sup> Washington regulates the lawful entry of foreign workers and international labor recruiters. Among the requirements for domestic employers of foreign workers is a disclosure statement that discusses wages, withholdings and control of identifying documents.<sup>35</sup>

In sum, nearly every state carries a criminal penalty for trafficking. These states also utilize and share the most basic elements of trafficking: the use or threat of force and restraint. Control of identifying documents and deriving benefit or value from trafficking are found in roughly half of the states. And a few states incorporate typical trafficking elements into other criminal statutes or seek to regulate trafficking in other ways.

## Civil Remedies and Penalties

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<sup>27</sup> Idaho Code § 18-8602

<sup>28</sup> Burns Ind. Code Ann. § 35-42-3.5-1

<sup>29</sup> See footnote 34

<sup>30</sup> Wyo. Stat. § 6-2-202, W. Va. Code § 61-2-14a, ALM GL ch. 265, § 26

<sup>31</sup> ALM GL ch. 272, § 12, ORC Ann. 2907.22

<sup>32</sup> ORC Ann. 2929.01, ORC Ann. 2929.14, ORC Ann. 2941.1422

<sup>33</sup> 21 Okl. St. § 865 through 21 Okl. St. § 869

<sup>34</sup> Tenn. Code Ann. §§ 37-5-401 through 37-5-406

<sup>35</sup> Rev. Code Wash. (ARCW) §§ 19.320.010 through 19.320.030

Aside from criminal penalties, a number of states address human trafficking in three general areas: 1) victim assistance, which overlaps to some degree with 2) additional punitive measures for perpetrators; and 3) government awareness/training.

### Public Assistance

Public assistance programs are one of the major ways states aid human trafficking victims. Almost half the states provide some type of assistance, whether it is specific mention in victims' compensation provisions or other welfare aid, including access to medical assistance. A number of states address public assistance to trafficking victims directly. Florida, for example, provides assistance on an interim basis until a visa is granted. Assistance includes access to medical care, cash, housing and other social services equivalent to other state or community programs available to other refugees.<sup>36</sup> Oklahoma provides services as part of medical treatment, which also includes access to legal services and protection from retaliation, while Connecticut allows for private contractors to aid in granting assistance.<sup>37</sup>

California and New York are a bit more expansive than other states. While California generally disallows undocumented aliens from receiving public assistance, exceptions are made for trafficking victims to receive emergency cash, social services, and be included in refugee resettlement programs.<sup>38</sup> New York provides aid to exploited children and crime victims, and ties benefits to the Federal Victims Protection Act.<sup>39</sup> Other states have followed suit and grant benefits and assistance until the victim receives federal aid, provided the victim's status is confirmed and the victim cooperates with investigators.<sup>40</sup>

Some types of assistance are provided through victim compensation laws. Iowa specifically mentions trafficking victims, assuring that victims will have the same rights as other crime victims.<sup>41</sup> Other states take a more general approach and include trafficking victims in the list of eligible compensation recipients, while other states provide protection to victims by including victims in address confidentiality programs.<sup>42</sup> Finally, a small number of states include trafficking victims as qualified for receiving general welfare benefits such as emergency cash, housing or medical care.<sup>43</sup>

Guam also assumes the obligation to protect victims and their families from threats and reprisals or perpetrators, keep information regarding victims private, provide information for victims in a language they can understand, and develop plans of support with victims. Other forms of victim assistance include prohibiting disclosure of shelter locations and support measures for minors, such as health care, reunification with family, court testimony by video, and access to compensation funds.<sup>44</sup>

### Victim Immunity

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<sup>36</sup> Fla. Stat. § 409.9531; see also COMAR 07.06.08.01, Minn. Stat. § 299A.795, N.D. Admin. Code 75-02-01.2-28.1, 305 ILCS 5/1-11 for other treatment of refugees

<sup>37</sup> 21 Okl. St. § 748.2, Conn. Gen. Stat. § 54-234; see also Tex. Gov't Code § 531.382

<sup>38</sup> Cal Wel & Inst Code § 13283, Cal Wel & Inst Code § 14005.2, Cal Wel & Inst Code § 18945; see also Cal Gov Code § 13956 and 2 CCR 649.48

<sup>39</sup> NY CLS Soc Serv § 447-b, NY CLS Soc Serv §§ 483-aa through 483-ee, 9 NYCRR § 6174.1 through 9 NYCRR § 6174.5, 18 NYCRR § 765.1 through 18 NYCRR § 765.7

<sup>40</sup> N.M. Stat. Ann. § 30-52-2; see also § 566.223 R.S.Mo., OAC Ann. 5101:1-2-30.3

<sup>41</sup> Iowa Code § 915.51

<sup>42</sup> Ala. Admin. Code r. 262-X-4-.02, this is the only mention of human trafficking in Alabama law; see also N.J. Stat. § 52:4B-11, N.C. Gen. Stat. § 15C-1, ORS § 192.822 and ORS § 192.826

<sup>43</sup> 7 Alaska Admin. Code 100.052, 106 CMR 203.675, 106 CMR 320.620, 106 CMR 362.220, and CRIR 15-020-022

<sup>44</sup> 9 GCA § 26.30 through 9 GCA § 26.41

Immunity from prosecution is another tool states use to protect victims and ensure their assistance with prosecution of perpetrators. Such provisions typically state that

[i]t shall be an affirmative defense, in addition to any other affirmative defenses for which the victim might be eligible, to a prosecution for a criminal violation directly related to the defendant's status as a victim of a crime, that the defendant committed the violation under compulsion by another's threat of serious injury, provided that the defendant reasonably believed that such injury was imminent.<sup>45</sup>

Minnesota requires that a victim prove victimization by a preponderance of the evidence, while in Oregon, putative victims may claim duress.<sup>46</sup> Indiana and Kentucky both prohibit authorities from incarcerating victims and New York prohibits labor or sex trafficking victims from being charged as accomplices.<sup>47</sup> While providing immunity from prosecution, Guam also offers testimonial privilege between victims and human trafficking case workers, as does California.<sup>48</sup>

### Restitution

A number of states require perpetrators to make restitution to victims. The form of restitution is fairly straightforward and standard. Illinois provides a useful example:

Restitution is mandatory under this Section. In addition to any other amount of loss identified, the court shall order restitution including the greater of (1) the gross income or value to the defendant of the victim's labor or services or (2) the value of the victim's labor as guaranteed under the Minimum Wage Law and overtime provisions of the Fair Labor Standards Act (FLSA)... or the Minimum Wage Law, whichever is greater.<sup>49</sup>

Supplemental to economic loss, some states also order restitution in the form of physical or mental rehabilitation and transport for rehabilitation, childcare or the return of property.<sup>50</sup> Indiana, New Mexico, New Jersey and Oklahoma tie restitution for trafficking in with overall criminal restitution.<sup>51</sup>

### Civil Actions

Along with restitution, several states also allow victims to bring civil actions against perpetrators. The most common awards are for actual, compensatory or statutory, and punitive damages along with court costs and attorneys fees.<sup>52</sup> Other states grant treble damages in lieu of punitive damages, with California allowing the greater of treble damages or \$10,000.<sup>53</sup> California also deducts from such awards restitution previously paid.<sup>54</sup> While Pennsylvania simply states that any private remedies are available, Connecticut may grant statutory damages of up to \$1000 for each day the victim was coerced by the perpetrator.<sup>55</sup> Illinois and Texas both

<sup>45</sup> Iowa Code § 710A.3; see also Conn. Gen. Stat. § 53a-192, 21 Okl. St. § 748 (D), N.C. Gen. Stat. § 14-43.11, and 13 V.S.A. § 2635a(d)

<sup>46</sup> Minn. Stat. § 609.325, ORS § 163.269 and ORS § 161.270

<sup>47</sup> Burns Ind. Code Ann. § 35-42-3.5-4, KRS § 431.063, NY CLS Penal § 135.36, and NY CLS Penal § 230.36

<sup>48</sup> 9 GCA § 26.03, 9 GCA § 26.40, and Cal Evid Code §§ 1038 through 1038.2

<sup>49</sup> 720 ILCS 5/10-9 (g); see also 11 Del. C. § 787 (c), Iowa Code § 710A.4, 17-A M.R.S. § 1322 (F), § 566.218 R.S.Mo., 18 Pa.C.S. § 3003, R.I. Gen. Laws § 11-67-4, Tenn. Code Ann. § 39-13-307

<sup>50</sup> 9 GCA § 26.06, Idaho Code § 18-8604, RSA 633:10, and ORC Ann. 2929.18

<sup>51</sup> Burns Ind. Code Ann. § 35-42-3.5-2, N.M. Stat. Ann. § 30-52-1, N.J. Stat. § 52:4B-11 and 21 Okl. St. § 748

<sup>52</sup> Burns Ind. Code Ann. § 35-42-3.5-3, 5 M.R.S. § 4701, Minn. Stat. § 609.284, 21 Okl. St. § 748.2, ORS § 30.867, and Tex. Civ. Prac. & Rem. Code §§ 98.001 through 98.006

<sup>53</sup> Cal Civ Code § 52.5, 9 GCA § 26.31, Fla. Stat. § 772.104, and Wis. Stat. § 940.302

<sup>54</sup> Cal Civ Code § 52.5 (g)

<sup>55</sup> 18 Pa.C.S. § 3003 and Conn. Gen. Stat. § 52-571i

take more expansive approaches. In addition to state ordered-restitution, victims in Illinois may sue for economic loss, death, and physical harm and rehabilitation costs.<sup>56</sup>

### Forfeiture

Whereas restitution and civil actions are provided to either restore or compensate the victim, forfeiture is a tool governments use to recoup costs and as legal action against perpetrators. Four of the states that utilize forfeiture specifically tie such provisions within human trafficking chapters or subchapters.<sup>57</sup> California, Illinois, and Maine all include human trafficking among broader forfeiture provisions.<sup>58</sup>

California allocates proceeds from forfeiture sales to the Victim-Witness Assistance Fund, fifty percent of which is granted to community-based organizations that aid with minor trafficking victims.<sup>59</sup> In Guam, assets, including overseas assets that are retrievable, are used to pay for victim restitution and awards from civil actions. Any remaining proceeds are used to fund government aid to trafficking victims and other crime victims.<sup>60</sup> Typically, forfeited property must have been used or acquired as a result of trafficking.<sup>61</sup> Both New Hampshire and Pennsylvania go into a significant detail concerning seizure, hearings, and transfers of property for forfeiture.

### Business Liability

Another form of punitive civil action in some states is to hold liable businesses and corporations that engage in or facilitate human trafficking. In Nevada, corporations engaging in trafficking will found guilty of a gross misdemeanor.<sup>62</sup> In Georgia and Tennessee, a business can be prosecuted only if an agent committed the act or omission while acting within the scope of employment.<sup>63</sup> Wisconsin calls for administrative dissolution for human trafficking violations, and in Minnesota, Missouri, and Guam, if a corporation or business entity is convicted of trafficking, courts may order dissolution or reorganization of the business, surrender or revocation of licenses or permits, or surrender of any charters or certificates for conducting business.<sup>64</sup>

### Task Force/Council

Another method states employ to combat human trafficking is through task forces or councils. Most task forces are comprised of members from various agencies throughout the state, including law enforcement, women or children's advocacy committees, labor departments and social services, to name a few. The task forces usually analyze programs, both within and outside of the state for effectiveness in combating trafficking and aiding victims. Most councils or task forces either meet annually or publish an annual report of findings and recommendations.<sup>65</sup>

### Law Enforcement Training

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<sup>56</sup> 740 ILCS 128/20; see 740 ILCS 128/1 through 740 ILCS 128/99 for the entire Act.

<sup>57</sup> 9 GCA § 26.07, RSA 633:8, 18 Pa.C.S. § 3004, and R.I. Gen. Laws § 11-67-5

<sup>58</sup> Cal Pen Code § 186.8, 725 ILCS 5/124B-300, and 15 M.R.S. § 5821

<sup>59</sup> Cal Pen Code § 186.8

<sup>60</sup> 9 GCA § 26.07

<sup>61</sup> California is the lone exception and Rhode Island places proceeds into the general fund.

<sup>62</sup> Nev. Rev. Stat. Ann. § 613.080

<sup>63</sup> O.C.G.A. § 16-5-46 (g) and Tenn. Code Ann. § 39-13-311

<sup>64</sup> Wis. Stat. § 181.1420, Minn. Stat. § 609.284, § 566.265 R.S.Mo., and 9 GCA § 26.05

<sup>65</sup> Colorado and Rhode Island each have a set date to report findings; Connecticut meets quarterly; Guam and Minnesota meet annually, while New Mexico, New York, and Utah each publish an annual report; Texas publishes a report at the end of even-numbered years.



Proper training of law enforcement personnel is an integral element of preventing human trafficking and aiding victims. California, for example, requires training in understanding “the dynamics and manifestations of human trafficking,” as well as identifying victims, the necessary documentation to satisfy state and federal law, and in providing proper assistance to victims.<sup>66</sup> Identifying and communicating with victims, along with knowledge of services available for victims, are common in training programs.<sup>67</sup> Some states also require that training be in conjunction with other agencies or standing committees. In Connecticut, the Commission on the Status of Women, along with the Police Officer Standards and Training Council, is tasked with developing a training program for law enforcement personnel on both the state and local level.<sup>68</sup> Other states stipulate training with other aspects of law enforcement, such as prosecutors or public safety personnel.<sup>69</sup>

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In sum, criminal penalties for human trafficking are the most common form of legislation among the states and territories. Additional commonality is found in the language and elements used in the various statutes prohibiting human trafficking. Use or threat of force and restraint are nearly universal elements. Control of identifying documents and deriving financial benefit from trafficking, while not quite as widespread, are proscribed in numerous states. A large number of states address civil penalties and remedies as well. Civil actions, restitution, and forfeiture are tools the various jurisdictions use to make victims whole, fund state anti-trafficking programs, and deter perpetrators. Some states have also established task forces to prescribe future measures, including legislation, that address human trafficking. Finally, law enforcement training programs that instruct personnel in interacting with victims and collaborating with other state, federal and non-governmental agencies is found in a number of states.

### **Impact of Existing Federal Laws and Regulations**

In 2000, the Federal Trafficking Victims Protection ACT (TVPA), which regulates and prohibits human trafficking in the U.S., was signed into law. Since then, that legislation has been reauthorized every two to three years. The Federal legislation not only approves of the development of complimentary state anti-trafficking laws, it anticipates their creation and provides the following guidelines for their development:

#### **SEC. 225. PROMOTING EFFECTIVE STATE ENFORCEMENT.**

(b) **MODEL STATE CRIMINAL PROVISIONS.**— In addition to any model State anti-trafficking statutes in effect on the date of the enactment of this Act, the Attorney General shall facilitate the promulgation of a model State statute that —

(1) furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes; and

<sup>66</sup> Cal Pen Code § 13519.14; see also Minn. Stat. § 299A.79

<sup>67</sup> Burns Ind. Code Ann. § 5-2-1-9

<sup>68</sup> Conn. Gen. Stat. § 46a-4b; see also N.J. Stat. § 52:4B-44

<sup>69</sup> Fla. Stat. § 787.06 (d), 9 GCA § 26.22 and Iowa Code § 80B.11 (e)

(2) is based in part on the provisions of the Act of August 15, 1935 (49 Stat. 651; D.C. Code 22–2701 et seq.) (relating to prostitution and pandering).

Accordingly, no changes to any Federal laws or regulations would be required for the development of uniform state anti-trafficking legislation.

### **Key Stakeholders**

The American Bar Association Center for Human Rights, LexisNexis, and Reed Elsevier have strong relationships with several of the organizations and individuals who have been leaders in the development of state anti-trafficking legislation in the past. These partners have expressed support of model anti-trafficking legislation and would be key participants in the process of developing a uniform statute. While this list is not exhaustive, it represents some of the most critical allies and partners to include in the drafting and development process. The key stakeholder organizations and their primary points of contact include:

**Amy Farrell, Assistant Professor**

College of Criminal Justice  
Northeastern University

**Nigel Roberts, Director**

LexisNexis

**Vivian Huelgo, Chief Counsel**

ABA Commission on Domestic Violence

**Jolene Smith, Executive Director**

Free the Slaves

**Teresa Jennings, Senior Director,  
State Government Affairs**

Reed Elsevier

**Charles Song**

Howrey LLP

**Eva Klain, Director**

Child and Adolescent Health  
ABA Center on Children and the Law

**Brad Myles, Deputy Director**

Polaris Project

**Amanda Kloer, Program Associate**

ABA Center for Human Rights

**Martina Vandenberg**

Jenner and Block

**William Livermore, Executive Director**

The Somaly Mam Foundation

**Samantha Vardaman, Policy Director**

Shared Hope International

**Michael Pates, Director**

ABA Center for Human Rights

**Leslie Wolfe, Director**

Center for Women Policy Studies

### **Availability of Existing Research and/or Financial Support**

There is a fair quantity of existing research on state anti-trafficking legislation. Several non-governmental organizations have developed rich online depositories of information about existing and pending state anti-trafficking laws, legal analysis, and model comprehensive legislation. Some of the best resources for existing research and examples of model anti-trafficking legislation include:

LexisNexis Legal Memo on Ancillary Human Trafficking Provisions, attached here as Appendix

Department of Justice (DOJ) Model Law, based on criminal sections of the TVPA 2000. Available at [http://www.justice.gov/crt/crim/model\\_state\\_law.pdf](http://www.justice.gov/crt/crim/model_state_law.pdf)

Polaris Project Comprehensive Model Law (due to be updated 6/30/2010). Available at [www.polarisproject.org/images/.../Model-Comprehensive-State-Legislation.pdf](http://www.polarisproject.org/images/.../Model-Comprehensive-State-Legislation.pdf)

Freedom Network Comprehensive Model Law. Available at [www.legislationline.org/.../action/.../5b6fb5af473eb70407d29b957330.pdf](http://www.legislationline.org/.../action/.../5b6fb5af473eb70407d29b957330.pdf)

Center for Women Policy Studies (CWPS) Human Trafficking Resource Guide, which provides model law guidelines. Available at [www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf](http://www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf)

As yet, no outcome-neutral sources of financial support for this project have been identified, but the proposing entities are currently exploring a number of options.

## APPENDIX

### **MEMORANDUM**

To: Brian Cole, LexisNexis

From: Troy Lemke, LexisNexis

Re: Provisions Ancillary to Human Trafficking

Date: May 28, 2010

### **Introduction**

Human trafficking touches on a wide variety of laws and topics. This memo, which serves as an addendum to the earlier human trafficking memo, will provide an overview of the following topics: prostitution, sexual solicitation of minors, statutory rape, regulation of domestic workers, and wage and hour laws concerning migrant and undocumented laborers. Representative samples of laws will also be included.

### **Prostitution**

Sex trafficking is, perhaps, the more common form of human trafficking. As such, most trafficking victims are forced into prostitution. Prostitution statutes can be divided into three general categories; 1) prostitution; 2) patronizing and; 3) pandering or “pimping”.

Prostitution is typically defined as exchanging money or anything of value for sexual conduct; prostitution itself is usually a misdemeanor.<sup>70</sup> Patronizing a prostitute is usually a misdemeanor or low level felony.<sup>71</sup> Some states also impound vehicles used for patronizing prostitutes.<sup>72</sup>

Promoting prostitution is the most heavily criminalized of the three categories. A handful of states classify promotion by degrees. First degree promotion, like human trafficking, penalizes force or threats of force, or if the prostitute is a minor.<sup>73</sup> Subsequent degrees penalize controlling a prostitution operation or merely drawing benefit from prostitution.<sup>74</sup> Enhanced penalties are provided when the prostitute is a minor, alternately deemed as “aggravated promotion” or child prostitution.<sup>75</sup> Other states, Colorado and South Carolina most notably, devote more effort to defining and penalizing child prostitution.<sup>76</sup>

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<sup>70</sup> See HRS § 712-1200 and N.D. Cent. Code, § 12.1-29-03

<sup>71</sup> See N.M. Stat. Ann. § 30-9-3 and Tenn. Code Ann. § 39-13-514 as examples of misdemeanors; and § 567.030 R.S.Mo., 18 Pa.C.S. § 5902 (E), and NY CLS Penal §§ 230.02 through 230.06 of felonies.

<sup>72</sup> See Conn. Gen. Stat. § 54-36m and D.C. Code § 22-2724 as examples of impoundment; and

<sup>73</sup> Code of Ala. § 13A-12-111 and Alaska Stat. § 11.66.110.

<sup>74</sup> HRS § 712-1203 and Conn. Gen. Stat. § 53a-88; see also Burns Ind. Code Ann. § 35-45-4-4 and K.S.A. § 21-3513 which combine the elements and degrees into one statute.

<sup>75</sup> See Mont. Code Anno., § 45-5-603 and 17-A M.R.S. § 852 for aggravated promotion and ALM GL ch. 272, § 4A and A.R.S. § 13-3212 for promotion of child prostitution.

<sup>76</sup> C.R.S. 18-7-401 through 18-7-409, S.C. Code Ann. § 16-15-39 through 16-15-445, and N.M. Stat. Ann. § 30-6A-4.

Two other areas that touch on prostitution and human trafficking are marriage brokers and sex tourism. Only one state, Missouri, regulates marriage brokers by requiring both the broker and clients be subject to criminal background checks, for clients to provide a marital history, and information on basic rights for recruits.<sup>77</sup> Provisions on sex tourism are slightly more common, with Missouri prohibiting travel agent or agencies from promoting, advertising, or selling “sex travel.”<sup>78</sup> Hawaii and Washington also prohibit promoting travel for prostitution, while Alaska and New York list encouraging or facilitating travel as an element of promoting prostitution.<sup>79</sup>

## **Sexual Solicitation of Minors**

As with child prostitution, an essential aspect of sex trafficking is soliciting minors for sex. States tend to use similar language such as, “Solicits, requests, commands, importunes or otherwise attempts to cause any child who has not yet reached that child’s eighteenth birthday to engage in a prohibited sexual act.”<sup>80</sup> Beyond the element of solicitation itself, states vary in the depth and breadth of statutes. Some states only address solicitation of a minor through technology.<sup>81</sup> Many states include electronic solicitation as elements of the larger crime.<sup>82</sup> Other states, however, have adopted a broad approach and definition, such that spelling out the actual means of solicitation are unnecessary.<sup>83</sup>

## **Statutory Rape**

Sex abuse of minors has generally subsumed statutory rape provisions.<sup>84</sup> However a handful of states, primarily in the southern United States, still retain statutory rape laws.<sup>85</sup> Common elements of statutory rape laws are age differences between victim and perpetrator with threshold ages for each. Some states, such as South Dakota, determine 13 to be the threshold age, with a younger victim constituting a rape charge with stiffer penalties.<sup>86</sup> Other states determine that a range, between 14 and 16 for example, is more appropriate.<sup>87</sup> An age difference of three to four years between victim and perpetrator is also common.<sup>88</sup> The age of the perpetrator also plays a factor in determining the severity. As seen in Georgia, a perpetrator 18 or younger will be charged with a misdemeanor, while a perpetrator 21 or older will be charged with a felony.<sup>89</sup>

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<sup>77</sup> § 566.221 R.S.Mo.

<sup>78</sup> § 567.087 R.S.Mo.; see also § 567.089 R.S.Mo.

<sup>79</sup> HRS § 712-1208, Rev. Code Wash. (ARCW) § 9A.88.085, Alaska Stat. § 11.66.120, and NY CLS Penal § 230.25

<sup>80</sup> 11 Del. C. § 1112A

<sup>81</sup> Code of Ala. §§ 13A-6-120 through 13A-6-127, La. R.S. 14:81.3, N.C. Gen. Stat. § 14-202.3, and Utah Code Ann. § 76-4-401; see also Tex. Penal Code § 33.021 and W. Va. Code § 61-3C-14b for states that list electronic solicitation under computer crimes.

<sup>82</sup> Tenn. Code Ann. § 39-13-528, 720 ILCS 5/11-6, and R.I. Gen. Laws § 11-37-8.8

<sup>83</sup> O.C.G.A. § 16-6-5, Iowa Code § 710.10, and MCLS §§ 750.145a through 750.145b.

<sup>84</sup> See D.C. Code § 22-4001 (6)(B) as an example.

<sup>85</sup> California has a law entitled “Unlawful sexual intercourse with a minor” which shares many of the same elements as other statutory rape laws.

<sup>86</sup> See S.D. Codified Laws § 22-22-1 (5)

<sup>87</sup> See Miss. Code Ann. § 97-3-65

<sup>88</sup> See O.C.G.A. § 16-6-3 (c) and Tenn. Code Ann. § 39-13-506

<sup>89</sup> See footnote above; compare with § 566.034 R.S.Mo.

## Domestic, Migrant and Undocumented Workers

Labor trafficking victims are most likely to be forced into either domestic or agricultural work. Unfortunately, the regulations for both types of laborers tend to hold them apart from other types of workers. New York does have a statement of rights for domestic workers and, along with California, regulates employment agencies that place domestic workers.<sup>90</sup> However, California and other states do not include domestic or agricultural workers in unemployment insurance, workers compensation or some wage and hour provisions.<sup>91</sup> Missouri and Nevada are exceptions regarding workers compensation. Missouri allows coverage after domestic workers cross a certain earning threshold and Nevada permits coverage under homeowner liability policies.<sup>92</sup>

One potential reason domestic and, particularly, agricultural workers may be exempt from wage and hour requirements is because employer tend to offer housing, food, and other amenities.<sup>93</sup> Nevertheless, agricultural labor is typically regulated through large contracts that can control working conditions and wages.<sup>94</sup> Of course numerous states penalize employers for hiring undocumented workers. Many states disallow employers with illegal employees from working on public works contracts.<sup>95</sup> Employers who knowingly or intentionally hire illegal aliens are subject to fines, license revocation, or even prison.<sup>96</sup>

## Conclusion

A useful step to crafting a uniform law on human trafficking is an understanding of ancillary laws and topics. The overview of prostitution, sexual solicitation of minors, statutory rape, and domestic, migrant and undocumented workers, along with a sampling of the laws themselves, has provided a basic understanding of these issues. Combined with previous memo on human trafficking, this memo will, hopefully, aid the ABA in devising a more standardized approach to human trafficking.

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<sup>90</sup> See NY CLS Gen Bus § 185-a, NY CLS Labor § 692, and Cal Civ Code § 1812.5095

<sup>91</sup> For unemployment see Cal Unemp Ins Code § 629, Cal Unemp Ins Code § 687.2, and C.R.S. 8-70-141; for workers compensation see D.C. Code § 32-1501 (E), Idaho Code § 72-1385, and Tex. Lab. Code § 406.091; for wage and hour see RSA 279:21 and N.M. Stat. Ann. § 50-4-1.

<sup>92</sup> Md. LABOR AND EMPLOYMENT Code Ann. § 9-209 and Nev. Rev. Stat. Ann. § 616B.032.

<sup>93</sup> N.C. Gen. Stat. §§ 95-222 through 95-229.1

<sup>94</sup> Idaho Code §§ 44-1601 through 44-1618, La. R.S. 23:881 through 23:889, and ALM GL ch. 151, § 2A

<sup>95</sup> Cal Pub Contract Code § 6101, Idaho Code § 44-1005, and Nev. Rev. Stat. Ann. § 338.130

<sup>96</sup> § 285.025 R.S.Mo., § 285.025 R.S.Mo. and A.R.S. § 23-212; but see Wyo. Stat. §§ 27-4-113 through 27-4-115 which discusses contracts with aliens and prohibits payment to third parties.



# THE CHALLENGES OF AND POTENTIAL SOLUTIONS TO THE PROBLEM OF THE TRAFFICKING OF WOMEN AND CHILDREN

## *An Overview*

SUTAPA BASU

*University of Washington*

**T**his chapter will begin with an introduction and background to the trafficking of women and the matchmaking industry, specifically in the United States. Current U.S. trafficking policy and its implementation will also be discussed. In addition, information on how best to assist women survivors of trafficking via policy expansion and coordination of service organizations, authorities, and government will be included.

### AN OVERVIEW OF TRAFFICKING

#### The Trafficking Network

Simply put, human trafficking, or modern slavery, is the international and domestic transport of human beings solely for the purpose of

their exploitation. Though trafficking affects both men and women, the vast majority of trafficking victims are women and children under the age of 24.<sup>1</sup> Most often, the countries of origin of trafficking victims, commonly known as sending countries, are economically troubled areas, including Asia, Africa, Eastern Europe, the former Soviet Union, and Latin America. Traffickers of these women and girls exploit them physically for domestic labor or sexual services, while taking advantage of lax laws and corrupt officials surrounding the business of human trafficking. A number of human rights organizations work to raise awareness about the issue of human trafficking. Governments are also beginning to acknowledge that trafficking is a human rights violation and are starting to create laws to protect survivors and raise awareness among potential victims.

As borders become increasingly permeable and cyberspace continually facilitates human availability, the scale of the international trade in people has skyrocketed. Trafficking in women and girls is now the third-largest grossing sector of international organized crime, surpassed only by drugs and arms.<sup>2</sup> According to the United Nations' calculations, the profits of the trafficking industry may have even surpassed the trade in illegal weapons, generating profits of more than 9 billion dollars annually.<sup>3</sup> Worldwide, at least 4 million people are victims of human trafficking each year, or one person every 30 seconds.<sup>4</sup> It is estimated that "every ten minutes another human being is trafficked to the United States for slavery—a total of 45–50,000 women and children each year," not including men.<sup>5</sup>

A common scenario starts with a naive and desperate young woman attempting to escape bleak employment prospects at home. She receives offers for good wages and "legitimate" work abroad as a waitress, dancer, or secretary from traffickers posing as "employment brokers." Instead, she is unknowingly selling herself into virtual slavery. She will end up working as a domestic servant, or in a sweatshop, or in the sex industry. She will be forced to pay off exorbitant travel debts to her traffickers for smuggling her into the country. Like most other trafficked women, she might find herself confined to her place of employment, forced to work almost continually, and denied wages. For example, for years a complex trafficking ring "lured young women from Asia with the promise of a better life in the United States, only to make them virtual sex slaves in brothels in Seattle and Portland."<sup>6</sup> "Brokers" would sell temporary or student visas to young women seeking better economic opportunities. Upon arrival in the United States, the women were forced into prostitution in order to repay their "debt."<sup>7</sup> In September 2002, after a 2-year investigation, the Federal Bureau of Investigation broke up the ring.

Though many women enter the trade voluntarily, too often they are unaware of the nature of the work they will be performing. In a recent study of child prostitutes in Thailand, "several girls who said they knew they would be working as 'prostitutes' thought that the term meant wearing Western clothes and working in a restaurant."<sup>8</sup> Another scenario is women's

participation in the flourishing matchmaking industry. This common and socially accepted form of trade in women is not considered by many governments to be trafficking, despite the fact that women are regarded as commodities and that the system is widely abused.

One of the main causes of the current upsurge in trafficked women is global economic liberalization. It has exacerbated the economic and social stability of women worldwide, especially in developing countries. The U.N. Development Fund for Women describes how women are affected by globalization affected:

By definition, trade liberalization seeks to create a level playing field on which economies at different levels of development can compete by reducing tariff and non-tariff barriers. However, longstanding power imbalances between nations and among men and women have translated into uneven patterns of growth and heightened inequality. Women—especially poor women—have unequal access to resources such as land, credit and education. This in turn makes them the least able to benefit from trade liberalization and the most likely to suffer from the adjustment costs of trade reform and economic restructuring.<sup>9</sup>

The inability of women in their home or sending countries to find economic advancement opportunities with which to support their families is another cause of their complicity in the trafficking industry. The native countries of most of these women are usually those in economic and social transition, suffering from high levels of poverty and unemployment. *Many times this has little to do with educational level, as 36.8% of Philippine women who are involved in reproductive labor or in the "tourist industry" have obtained college degrees.* For example, studies show that between 70% and 80% of the unemployed workers in the Russian Federation, a major source of trafficking victims, are women.<sup>10</sup> Elina Penttinen, in her paper "Globalization, Bio-power and Trafficking in Women," highlighted that women who can no longer support themselves or their family join the global sex trade, "tak[ing] on the opportunity of international prostitution and thus using their bodies as means for exchange, rather than remain in a place where there are few prospects of making a living."<sup>11</sup> Penttinen contends that

"this can be seen as a form of structural violence taking place, that in a situation of impoverishment and unemployment women are 'forced to choose' their own sexual exploitation."

The ways in which women and girls fall victim to trafficking vary in relation to many factors, including nationality, educational background, and employment circumstances in their country of origin. Although many women are enticed by misleading or blatantly false advertisements, others are "bonded" or sold into indentured servitude by family members for financial gain. Some families are unaware of the nature of the service, clinging to the potential for riches gained through legitimate employment.

Although it is a commonly held belief that all trafficked women are forced into the sex trade, this is not wholly true: in actuality, domestic servitude is an equally common type of slavery for these women. "Indentured servitude is in part spawned by the high cost of gaining entry into the United States, with trafficked persons from sending countries often paying up to \$50,000 to smugglers. Since few workers from developing nations can afford such fees, immigrants will often agree to work off their smuggling debts over a period of years."<sup>12</sup> In a case that exemplifies this trend, Saeieo, a 59-year-old cook from Thailand, was brought into the United States and enslaved for 5 years by Supawan Veerapol, a wealthy Thai restaurant owner in Los Angeles. She was forced to work from 12 to 20 hours a day, 7 days a week, made to sleep on the floor of a closet-size utility room where Veerapol kept her washer and dryer, and denied any medical care. It was not until her employer was tried and convicted on charges of indentured servitude in 1998 that she was finally freed.

Despite increasing global attempts to monitor and curb the trafficking trade, authorities have been largely ineffective in dealing with the problem. According to Human Rights Watch, "Although trafficking in women and girls has become a lucrative and expanding cross-border trade, it routinely escapes effective national and international sanctions."<sup>13</sup> Also, current laws regard trafficking largely as a migration issue and do nothing to help trafficking victims. The legal context of migration cannot give full justice to the nebulous crime of trafficking. Traffickers are not properly punished for their crime.

An alarming example is the case of Lakireddy Bali Reddy from Berkeley, California. One of the Bay Area's wealthiest landlords, with a fortune estimated at \$70 million, he was able to abuse the law and helpless immigrants.<sup>14</sup> Between 1986 and 2000, Reddy and his family members smuggled poverty-stricken girls, men, and women from their hometown of Velavadam, Andhra Pradesh, India.<sup>15</sup> Upon arrival, the victims worked virtually as slaves or indentured servants in Reddy's buildings and restaurants. In addition to their domestic work, the teenage girls, some as young as 13 years old, were forced to sexually service Reddy. Reddy was caught in 1999 when authorities discovered two unconscious Indian girls, brought to the United States for labor and sex, in his apartment building suffering from carbon monoxide poisoning.<sup>16</sup> Tragically, 17-year-old Chanti Prattipati, one of the two girls, died. It was later discovered that she was in the early stages of pregnancy with Reddy's child. In 2001, Lakireddy Bali Reddy was sentenced to 8 years in federal prison, forced to pay \$2 million in restitution to the victims, and required register in California as a sex offender.<sup>17</sup>

Reddy was able to exploit, degrade, and victimize these girls, women, and men through abuse of laws, social and cultural norms, and power structures. He is a member of India's most powerful caste and "virtually owns" his hometown where he has built schools and invested millions of dollars.<sup>18</sup> Reddy's clout in Velavadam enabled him to easily take advantage of the local people who were desperate to escape the poverty and lack of opportunity in their village.<sup>19</sup> He was able to traffic people using his resources and contacts to produce fraudulent visas.<sup>20</sup> The people that he trafficked were helpless to do anything about their situation once in the United States. Most of them did not speak English and were reluctant to report Reddy because they did not want to reveal their falsified immigration documents.<sup>21</sup> It is also important to note that when the government prosecuted Reddy, his charges consisted of mostly illegal immigration and fraud as opposed to exploitation.<sup>22</sup>

Another example is the experience of Helen Clemente, which demonstrates how legally framing trafficking as solely a migration issue revictimizes the victim. Clemente was brought

illegally to Washington State in 1990 from the Philippines by retired police officer Eldon Doty and his wife Sally to work as their servant. The Dotys were able to bring Helen Clemente to the United States by manipulating laws: They arranged a sham marriage between Clemente and Eldon Doty, which enabled her to immigrate here. The Dotys had divorced to allow Eldon to marry Clemente, but Eldon and Sally continued to live as man and wife. When Clemente ran away after nearly 3 years of servitude, the Dotys worked with the Immigration and Naturalization Service (INS) to deport her in exchange for de facto immunity. Clemente, who was granted permission to remain in the United States while her case is pending, has been fighting a difficult, precarious legal battle. She has courageously rebuilt her life, re-marrying and raising two daughters. However, she still faces the possibility of deportation. The Dotys have never been prosecuted for their abuse of the law and exploitation of Helen Clemente.

In addition, there are many instances outside of the United States that reveal the negative consequences of framing trafficking as a migration issue. A recent study of Eastern European women working within Israeli prostitution rings demonstrated this trend: The victims were freed from bondage only when local authorities raided their place of business. The trafficked women were then imprisoned as illegal immigrants and charged with prostitution; bail was then set and paid by their employer, relinquishing them back into the hands of their captors<sup>23</sup>. In too many similar scenarios, the women involved are treated as criminals rather than as victims. Similarly, until the late 1990s, Vietnam did not recognize trafficking as a legislative issue, and a harsh crackdown on prostitution meant that women trafficked into Vietnam's sex trade were considered guilty.<sup>24</sup> In such situations, trafficked women are often reluctant to seek help or approach the authorities.

Despite the fact that the trafficking of women is a worldwide epidemic, legislation to punish traffickers or to protect victims is rare. This is due, in part, to the fact that government officials and law enforcement officers often facilitate the trafficking process, as the recipients of bribes to ignore the crime or to help falsify documents.

Human Rights Watch goes so far as to say that, "without such corruption and complicity on the part of state officials, trafficking could not thrive."<sup>25</sup>

### The Matchmaking Industry

There is another kind of trade in women that is not always recognized as trafficking: the matchmaking industry.<sup>26</sup> Catalogues and Internet sites list women and girls advertising for foreign husbands. Women are sorted by national origin and listed with names, photos, and measurements—so men can pick them out by the color and size they desire, as if they were choosing a shirt to buy. For a fee, men can obtain addresses and begin correspondence with the potential brides. Some girls as young as 13 years old have been advertised in such catalogues, and a considerable proportion of them are aged 15 to 18.<sup>27</sup> The majority of these women are from Southeast Asia, although an increasing number come from Eastern Europe and the former Soviet Union. Like other trafficked women and girls, they are motivated by the desire to escape bleak economic conditions, and they view marriage to a Western man as a ticket out of their desperate situation at home.

Women participating in the matchmaking industry are advertised as being more traditional, feminine, and submissive than the majority of Western women. In addition, "the multi-million dollar mail-order bride business . . . frequently uses marketing techniques that reinforce racial stereotypes." The women are also promoted as being willing to marry men much older than they are—the typical woman from the matchmaking industry is 10 to 20 years younger than her Western husband.<sup>28</sup> The men who make use of matchmaking services are white, financially successful, and politically and ideologically conservative.<sup>29</sup> Gary Clark, the author of the book *Your Bride Is in the Mail*, showcases the motivations of these men: "What [we] want is a woman who will be a more traditional kind of wife . . . because of the confrontational chip-on-the-shoulder attitudes held by so many of today's feminism-influenced American . . . women."<sup>30</sup> Apparently, desire for a submissive, dependent wife is what prompts these marriages.



Why are women from the matchmaking industry at risk? Because many of them do not speak English well and do not have a support system in their new country, they find themselves in a vulnerable position where the husband can freely abuse his position of power and dominance. "The women are dependent on their husbands in regard to their immigration status, due to the conditional basis of their resident status and the fact that they must jointly file for the removal of the conditional status."<sup>31</sup> Academics studying the matchmaking industry conclude that there is a disturbing potential for domestic abuse, including rape and battering. The potential for abuse is stronger if the bride does not live up to her husband's expectations, if she refuses to perform sexual services he demands, or if she becomes more independent as she accustoms herself to her new country, no longer conforming to the expected role of docile and submissive wife. "This is compounded by the fact that since the husband has purchased his wife, there is the belief that he owns her."<sup>32</sup> Women from the matchmaking industry also have limited access to health services due to language and cultural barriers.

The Philippines is a major source of women participants in the matchmaking industry. One reason is that structural adjustment programs have resulted in a much lower demand for migrant Filipino men's labor. Therefore, in order to maintain the survival of their family, Filipino women are filling the gap, and one route is through joining the matchmaking industry.<sup>33</sup> According to Aida Santos, "Many Filipino brides have admitted that marrying foreign spouses assures them of a more materially comfortable life overseas, not just for themselves but also for their families of origin. They expect that their husbands would understand the Filipino culture of married children helping out their elderly parents and siblings who are in less fortunate circumstances."<sup>34</sup>

However, media representation of the industry and the women involved often obscures the complexity of the issue. The topic of the mail-order bride industry gained attention in the Canadian press due to a court case involving a 68-year-old man and his 23-year-old wife. His attempt to obtain a "virgin homemaker" failed

to provide him with the compliant wife that he desired. After showing no interest in sex, his wife left after 6 months, sued for support, and won 10% of the family assets valued at \$186,000.<sup>35</sup>

The article portrayed the man as misguided and the woman as subtly manipulative and dishonest. Recently Hollywood entered the discourse with the production of "Birthday Girl," a film about a lonely English banker who orders a bride from Russia. The woman is a con artist who works in conjunction with her boyfriend and brother to rob unsuspecting men out of their fortunes. With these images being promoted, the real crimes of abuse, imprisonment, and indentured servitude become lost.

In the United States there have been several high-publicity cases of domestic violence and even murder in such marriages. Such a case recently came to light in Seattle. Anastasia King, a young bride through the matchmaking industry from Kyrgyzstan, was a student at the University of Washington. A vibrant 20-year-old who dreamed of earning a degree in business, Anastasia came to the United States by becoming the wife of a man nearly twice her age who had already divorced a previous mail-order bride. In autumn 2000, she was murdered. Her body was wrapped in a dog blanket and buried in a shallow grave near the Tulalip Indian Reservation. According to court documents, Anastasia was taking steps to obtain a divorce because of domestic violence. Her husband, Indle King, who has since been charged with her murder, apparently started looking for a third wife through the matchmaking industry as early as summer 2000.

After the death of Anastasia King, several women married through the matchmaking industry have come forward to me in my capacity as director of the University of Washington Women's Center. Although all of them relayed similar stories of a life filled with abuse and fear, they were reluctant to seek help. This was in large part due to the Russian Mafia's involvement in trafficking. If any of them were to leave their husbands, the mafia would threaten their family. These women felt trapped and hopeless. Stories like Anastasia's and these other women's remind us of the potential costs of this trade, whether it takes the form of illegal

debt-bondage trafficking or the legal matchmaking industry.

## DANGERS OF THE TRAFFICKING INDUSTRY: RISKS AND HEALTH CONSEQUENCES

### Trafficking and Gender-Based Violence as Public Health Issues

Governments and international organizations have begun to acknowledge the human rights abuses caused by trafficking. However, the health consequences of the problem are still not fully recognized. It is necessary to place more of an emphasis on the public health dimension of trafficking for the following reasons. First, a public health focus helps make the costs of this illegal but profitable trade more visible. Also, there is a pressing need for more intervention and services to deal with the health problems of trafficked women and children. Finally, by reconceptualizing trafficking as a public health issue as well as a human rights violation, another platform for action against the trafficking trade would be created.

In the campaign against violence against women worldwide, scholars and activists have increasingly pointed out the health consequences. According to a World Bank Report, "gender-based violence . . . is a profound health problem across the globe . . . although gender violence is a significant cause of female morbidity and mortality, it is almost never seen as a public health issue."<sup>36</sup> The World Health Organization (WHO) calls violence against women "a priority health issue" and points out that on a worldwide basis, violence against women "is as serious a cause of death and incapacity among women of reproductive age as cancer, and a greater cause of ill-health than traffic accidents and malaria combined."<sup>37</sup> Yet relatively little attention has been paid to trafficking in this context. Although WHO includes "trafficking in women [and] forced prostitution" among the forms of gender-based violence, the focus of most of the work on this issue appears to deal with domestic violence, female genital mutilation, and rape. This approach to gender-based violence must also be applied to the specific health consequences that result from the

abuse of women in trafficking, especially in the sex trade.

### Health Risks of Trafficked Women

Trafficked women and girls, particularly those who work in the sex trade, face damage to their physical and mental health. In addition, the sex trade is a growing sector for the transmission of HIV/AIDS. Trafficked women and girls are probably more at risk for contracting the virus, as well as other sexually transmitted diseases, than other sex workers. Trafficked Nepali women make up about half of the 100,000 brothel workers in Bombay, India. Twenty percent of the brothel population are under 18, and as many as half were estimated to be HIV positive in the mid-1990s. Even when women are aware of how to protect themselves from disease, they have little autonomy over their bodies or work conditions. Beatings, rape, and other forms of physical abuse are endemic in the trafficking trade. According to Human Rights Watch, the physical abuses to which some trafficked women are subjected constitute "torture."<sup>38</sup>

Trafficked women working as domestic laborers are also often subjected to physical abuse, according to a study of Filipino women who worked in a variety of Middle Eastern, European, and African countries as maids.<sup>39</sup> Working conditions for trafficked women are frequently abysmal. In both domestic labor and sex work, excessive hours are often a problem. Confinement and overwork lead to ill health, and access to medical care is usually strictly controlled by traffickers, employers, and brothel owners.

In addition, as demonstrated through Anastasia King's story, women in the matchmaking industry are vulnerable to becoming victims of domestic violence in their own homes. Because their husbands sponsor their visas, which allow them to reside in the United States, they are often forced to stay in abusive relationships. Oftentimes, the inability to leave their husbands and lack of recourse lead to mental and physical trauma in the women and, increasingly, death.

### CURRENT U.S. POLICY

In October 2000, President Clinton signed the Victims of Trafficking and Violence Protection



Act (TVPA). The legislation imposes severe penalties on traffickers and exempts victims from criminal liability.<sup>40</sup> The TVPA also provides benefits for survivors, including social assistance, shelter, medical care, and the right to seek residency.<sup>41</sup> Previously, victims were treated as illegal aliens and criminals. Trafficked women were arrested when they sought help or upon discovery by police. They were held in jails or detention centers alongside convicted criminals, where they did not receive proper medical treatment, until they were deported to their home country.<sup>42</sup> The legislation also includes the introduction of a new nonimmigrant T Visa that can be granted to trafficking victims, allowing them to receive benefits comparable to those of refugees, to remain in the United States for 3 years, and to apply for lawful permanent resident status at the end of that time.<sup>43</sup> This measure is meant to ensure that trafficked women are not treated as illegal immigrants or as criminals and that they have a chance to remain legitimately in their new country and recover from their ordeal.

The passage of the legislation was an important step to legitimize the severity of trafficking and the fact that survivors are not criminals. However, little has been done to implement the law. To date, only five T Visas have been issued despite thousands of requests. Also, women still do not receive proper services because of lack of coordination among authorities and service providers and lack of funding. Finally, to be able to receive social services, trafficked persons must first undergo a "certification" process that evaluates their situation and deems them eligible for benefits and services.<sup>44</sup> Oftentimes, the process is long, and survivors cannot receive assistance immediately after authorities apprehend them, the time of their greatest need for assistance.<sup>45</sup>

In regard to the matchmaking industry, there is no federal law to protect these women. They cannot receive assistance under the TVPA. Nationally, the industry is not regulated. However, the State of Washington, as will be discussed, has become a national leader by establishing legislation to protect women entering the matchmaking industry. Still, more needs to be done to ensure their safety and well-being.

Vanessa B. M. Vergara has argued for the application of the Thirteenth Amendment in

cases of abusive mail-order bride marriages. Slavery was more than economic exploitation; "the abomination of slavery also included sexual and reproductive services that clearly fell outside the wage-labor system."<sup>46</sup> An examination of the applicability of the amendment to various cases found the courts upheld that the "words involuntary servitude have a larger meaning than slavery."<sup>47</sup> The cases of the mail-order bride industry and trafficking are closely linked and "have been recognized as institutions which subject women to conditions tantamount to slavery."<sup>48</sup> The application of the Thirteenth Amendment provides another means with which to prosecute offenders and protect future victims of these industries.

## POSSIBLE SOLUTIONS FOR VICTIM ASSISTANCE

### Need for Coordination Among Service Providers

In the United States, once a trafficking victim is freed from his or her traffickers—via escape or intervention of law enforcement—he or she is afflicted with complicated health, psychological, legal, and economic problems. Currently, service providers across the country, including domestic violence shelters, hospitals, clinics, and authorities, are not capable of successfully assisting these women. This is in part due to the nature of the crime; trafficked women are "invisible" and are scattered throughout the country, well hidden in neighborhoods, rural areas, and cities. As demonstrated in examples throughout this chapter, the type of abuse suffered by victims varies tremendously, as well as their immigration status; some come as new brides, others are smuggled illegally with fraudulent visas. A greater understanding is needed of these women and how services and authorities can best use their skills to provide support.

### Needs of Trafficked Women

Women who have been trafficked suffer from severe psychological trauma. For the most part, traffickers have brainwashed women to distrust law enforcement, "as the traffickers have played

upon their concerns of [corrupt and inept] law enforcement in their own countries."<sup>49</sup> For example, a *Chicago Sun-Times* article about an INS raid in Chicago's China town reported that upon discovery by authorities "the girls would not say anything at all to our officers, . . . these women are extremely afraid of law enforcement."<sup>50</sup> Importantly, trafficking victims almost always fear deportation and resist cooperating with law enforcement. This can impede efforts to apprehend their captors. They also fear that their traffickers will find them and physically hurt them or their family members abroad. In addition, some women become substance abusers because their traffickers introduce them to illegal drugs in order to easily control them. Therefore, their need for mental health services and protection from traffickers is paramount.<sup>51</sup>

Attorneys representing trafficking victims feel that it is better for them to be housed together after their release rather than split among different shelters. "Trafficking victims have often bonded with one another because of their shared traumatic experiences."<sup>52</sup> Keeping them together allows them to retain their support network and reduces emotional separation anxiety. Also, counseling should be offered in the survivor's native language. Women are trafficked to the United States from more than 49 countries around the world, and most do not speak English.

Some women who are trafficked voluntarily return to their home country to an uncertain future, whereas women from the matchmaking industry may be forcibly removed after leaving an abusive husband. Their return interrupts their counseling and treatment, and oftentimes they do not receive repatriation assistance.<sup>53</sup> This leaves them vulnerable to either rejoining the trafficking industry or being shunned by their community because of trafficking's negative reputation. Alternatively, the women who choose to stay in the United States need assistance finding housing and learning job skills.

### Steps That Need to Be Taken

Service providers, law enforcement, immigration attorneys, and health care professionals must collaborate to best assist trafficking survivors. Police officers are most often the first

point of contact with the women; therefore they should receive cultural sensitivity training and be made aware of the types of trauma trafficking victims are suffering. This will make it easier for them to identify trafficking victims and address their specific requirements. Law enforcement should be able to work with translators to inform victims of their rights and should have translated material informing them of the situation to dispel myths fed to them by traffickers. Authorities should also know which service organizations are equipped to help trafficking victims and ensure that victims receive assistance from them immediately. Isabel Carter Steward, executive director of the Chicago Foundation for Women, aptly sums up the plight of survivors: "Women and girls who are victims of this crime are being denied access to health service and information, economic self-sufficiency and freedom from violence. In short, they are being denied human dignity."<sup>54</sup>

Domestic violence shelters can also identify victims and what their needs are. Therefore, shelters should receive cultural sensitivity training. Shelter staff should be able to refer women to specialized shelters, agencies, and support groups serving women from their respective countries of origin and that understand their cultural backgrounds and language. Shelter staff should be able to easily access multilingual counselors and know which attorneys to contact. Survivors need lawyers who have the knowledge to help them navigate the complex legal battle that will determine their ability to stay in or leave the United States or to prosecute their traffickers.

Victims who need to remain in the United States for legal reasons (e.g., pending trials, awaiting visas) should be provided with assistance to find safe housing and job training combined with their counseling. They also need protection from their traffickers, whether they are their ex-husbands or members of criminal networks. It is extremely important for them to be protected from the individuals who exploited them. Women who return to their home country need assistance in resettling. Service organizations in the United States should be in contact with groups who can help women transition back into life in their home countries. "According to a professor from California State University with

an expertise in Southeast Asian and women's studies, some non-profit organizations in Los Angeles are trying to partner up with NGOs abroad so that returnees can be met at the border or airport upon their return and receive repatriation assistance. In her opinion, these networks are easy to create but time consuming."<sup>55</sup>

In order for these steps to be taken, it is imperative that the aforementioned groups receive proper funding. Currently, most agencies across the country are suffering due to economic downturns and funding cuts for social services. Regardless, it is imperative that support organizations become aware of the crime of trafficking and of other agencies that assist victims. This connectedness will allow for different agencies to identify trafficking survivors and for women to receive help as quickly as possible.

#### WASHINGTON STATE: A MODEL FOR NATIONAL SUCCESS

In 2001, the Washington state legislature overwhelmingly passed legislation to address human trafficking. It became the first state in the country to legislatively address this modern-day form of slavery. The legislation was drafted at a November 2001 conference at the University of Washington, where lawmakers, activists, service providers, education attorneys, and survivors gathered to discuss the challenges of and solutions to trafficking. From the draft legislation, Senator Jeanne Kohl-Welles produced the Mail Order Bride Act, which requires "international matchmaking services to show women in other countries the results of criminal background checks and marital histories, in the woman's native language, of any Washington state men interested in them."<sup>56</sup> The men have to pay for the background checks themselves. This legislation was a response to the growing violence against women from the matchmaking industry, specifically the murders of Anastasia King and a Filipina woman, Susana Blackwell, who was shot to death by her husband. At the time of her murder, she was pregnant with her first child.

State Representative Velma Veloria and Senator Jeri Costa introduced and led the passage of the Trafficking in Persons Act. This

legislation created a task force to study human trafficking in Washington and recommended to the governor and state legislature how to best provide assistance to victims.<sup>57</sup> The task force met between July and November 2002 and assembled representatives from law enforcement; social services; academia; city, state, and federal government; members of the legal community; and survivors of trafficking. The group "measure[d] and evaluate[d] the state's progress in trafficking-related activities; identify[ed] available services to trafficked persons at the local, state and federal levels; and recommend[ed] methods to provide a coordinated system of support for persons who are victims of trafficking."<sup>58</sup> Their recommendations included establishing trafficking as a state crime, regulating the matchmaking industry and providing comprehensive legal services for victims, "including services during the pre-certification stage," increased funding to community agencies, and increased public awareness, education, and training.<sup>59</sup> The legislation was a result of grassroots mobilization, public education conferences, and media support and coverage. Elected officials also mobilized their colleagues in government.

#### CONCLUSION

The global epidemic of trafficking of women and children is a complex, multifaceted problem that repeatedly victimizes the world's most vulnerable people. The frequency of this crime will increase in the coming years as its profitability rises in the face of corrupt governments and there becomes an unending supply of people desperate to escape poverty and lack of opportunity in their home countries.

Trafficking is fueled by infinite factors, some as abstract and amorphous as the increase of women who are financially responsible for their extended families, the widespread abuse of laws, corrupt government officials cashing in on the illegal trade of humans, and the increasing connectedness of global criminal networks due to better technology (e-mail, cell phones, etc.).

Possible solutions to ending trafficking must account for its complexity and address the problem on multiple levels. Women who are most

likely to be trafficked must be made aware of the crime and the huge risks and consequences. In order to reduce the "supply" of trafficking victims, women should have options of legitimate work in their home countries to prevent them from considering the illegal trade. Severe consequences should exist for traffickers to dissuade them from facilitating the trade. Furthermore, law enforcement around the world should work to disband crime rings. As mentioned earlier in this chapter, lawmakers should provide relevant and coordinated services for victims. Law-makers should develop legislation that does not criminalize victims. In addition, trafficking must be treated as much more than just a migration issue. Currently, traffickers are not accountable for violating victims' human rights.

### The Sex Industry as a Cause of Trafficking

A major force propelling trafficking is the growing "demand" of prostitution. Women are moved across the world, increasingly from the global South to North, supplying cheap or free labor to sustain the booming sex business. The negative reputation of prostitution stereotypes participating women as "immoral" and as willingly selling their bodies. However, this is far from true. According to Donna Hughes, professor of Women's Studies at the University of Rhode Island, "Survivors of prostitution often report that each act of prostitution feels like a rape. In order to endure the multiple invasions of the body women use drugs and alcohol to numb the assaults to their dignity and bodily integrity. Eventually, the woman's physical and emotional health is destroyed."<sup>1</sup> In the case of trafficked women, most are unaware that they will end up in strip clubs, brothels, or the street. Some countries have legalized the sex industry, leading to an influx of illegally trafficked women and legitimizing the abuse of women and the commodification of their bodies.<sup>2</sup> I learned through my longtime work with women in the red-light district of Kolkata (Calcutta), India, that trafficked women and local prostitutes did not choose to work in the sex industry. They were driven to prostitution because they were desperately poor, with no other means of providing for themselves and their children. All of the women I worked with told me that they

would give up sex work if they were able to find other sources of income.

One of the most important ways to quell the demand for trafficked women is to crack down on the sex industry, without criminalizing the victims. The women, instead, need to be treated with consideration, and provided health care and social services. The legalization of prostitution must end. Although it is widely perceived as a way to protect women, it is only legitimizing their abuse. In addition, a state-sponsored market for women results in suppliers turning to the developing world to meet the demand. As throughout history, it is often imported labor that provides the meanest level of work in the global North's workforce. This situation threatens to designate prostitution as the work of poor women from the developing world. Finally, by framing prostitution as a legitimate industry, governments relinquish the responsibility to stamp out the factors that drive women to prostitution such as poverty, inequality, and lack of job opportunities.

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56. "Washington Responds to Trafficking," Office of Crime Victims Advocacy Quarterly Newsletter 10, no. 1 (Spring 2002): 4.
57. State of Washington, Department of Community, Trade and Economic Development, *Washington State Task Force Report on Trafficking in Persons* November 2002. Accessed March 30, 2003, from [http://www.ocva.wa.gov/trafficking\\_final\\_report.htm](http://www.ocva.wa.gov/trafficking_final_report.htm)
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61. Ibid.



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# Civics Education: Reviving an Appreciation for the Three Branches of American Government

Thursday, August 8, 2013

10:15 a.m. – 11:30 a.m.

Federal/Superior Rooms

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**Speakers:** Andrea Lynn Hoch, Associate Justice  
*California Center for Judicial Education and Research (CJER)*  
Frank McGuire, Court Administrator and Clerk  
*Supreme Court of California*

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## **Andrea Lynn Hoch, Associate Justice**

Born and raised in California, Justice Hoch is a graduate of Stanford University (B.A. 1981) and the University of the Pacific, McGeorge School of Law (J.D. 1984).

Justice Hoch worked in private practice, and then began her 23-year career in state public service. From 1987 to 1992, Justice Hoch worked on labor law issues at the Agricultural Labor Relations Board and Public Employment Relations Board.

In 1992, Justice Hoch joined the California Attorney General's Office and worked on many high profile and significant legal matters, including the tobacco litigation, energy crisis, and recall litigation.

In 2004, Justice Hoch was appointed as Administrative Director of the Division of Workers' Compensation, where she was responsible for developing regulations to implement the Governor's comprehensive workers' compensation reforms.

From 2005 through 2010, she served as the Governor's Legal Affairs Secretary.

On January 3, 2011, Justice Hoch was sworn in as an associate justice. She serves on the Appellate Practice Curriculum Committee for the California Center for Judicial Education and Research (CJER) and is a member of the Anthony M. Kennedy American Inn of Court.

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## **Frank McGuire, Court Administrator and Clerk**

Frank A. McGuire is the Court Administrator and Clerk of the Supreme Court of California. A long-tenured employee of both the Supreme Court of California and the California Court of Appeal, First Appellate District, Mr. McGuire has served as a judicial staff attorney, lead appellate court attorney and managing attorney to the administrative presiding justice. He is a graduate of Stanford University and Stanford Law School

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**CIVICS EDUCATION: REVIVING AN APPRECIATION FOR  
THE THREE BRANCHES OF AMERICAN GOVERNMENT**

**Thursday, August 8, 2013**

**10:15 a.m. to 11:30 a.m.**

**Hon. Andrea Hoch, Associate Justice, California Court of Appeal, Third Appellate District**

**Frank A. McGuire, Court Administrator and Clerk, Supreme Court of California**

**OUTLINE OF WRITTEN MATERIALS**

	<b>Pages</b>
<b>Special Oral Argument Sessions</b>	
<b>Materials from the California Court of Appeal,         Third Appellate District</b>	<b>1-12</b>
<b>Materials from the Supreme Court of California</b>	<b>13-34</b>
<b>Students Attending Oral Argument Sessions</b>	<b>35-38</b>
<b>California State Fair Event</b>	<b>39-46</b>
<b>Operation Protect and Defend</b>	<b>47-71</b>
<b>California Civic Learning Award</b>	<b>72-98</b>
<b>Civic Learning California Summit: Making Democracy Work</b>	<b>99-104</b>
<b>California Law Day 2013: Realizing the Dream</b>	<b>105-106</b>
<b>National Civics Education Outreach Materials</b>	<b>107-138</b>
<b>Civics Education Web Resources</b>	<b>139-140</b>

## OUTREACH PROGRAM CHECKLIST

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1. **3 to 4 months before:** Meet with the Presiding Justice and Managing Attorney to select location and tentative dates.
2. **3 to 4 months before:** Contact the local trial court executive officer and explain what we have in mind, i.e., oral session and Q&A at local school site, bar function, etc. Ask the CEO to discuss what our visit entails with the presiding judge of the court and ask the presiding judge to call me.
3. **3 to 4 months before:** When the presiding judge calls, ask the presiding judge for assistance with the local bar, school district, recommendation for accommodations, etc., i.e., for contact names and numbers.
4. **3 to 4 months before:** Contact the local school board and explain what we have in mind and select possible dates.
5. **3 to 4 months before:** Confirm dates with the Presiding Justice and notify Managing Attorney and calendar clerk of selected dates.
6. **3 to 4 months before:** Send email to Judicial Assistants of panel members forwarding overview of outreach program.
7. **3 to 4 months before:** Notify Gary McCurdy at CCAP of outreach program dates, location, and cases on calendar. (Notification may be by either email at gmccurdy@capcentral.org or telephone at 441-3792.)
8. **3 to 4 months before:** Notify Jody Patel at Sacramento Regional Office of outreach program dates and location. (Notification may be by either email or telephone at 263-1333).
9. **3 to 4 months before:** Notify school board that dates are confirmed and obtain directions to the school site(s) for both the Q&A and oral argument sessions.
10. **3 to 4 months before:** Contact the local bar president and explain what we have in mind and ask if the local bar will sponsor a function similar to what has occurred in other locations, i.e., reception and dinner.
11. **2 to 3 months before:** Have the Presiding Justice and the Managing Attorney select the panel and the cases for the event.
12. **2 to 3 months before:** Have the calendar deputy send the calendar order, special letter, modified calendar instructions, and directions to the location.

13. **2 to 3 months before:** If accommodations are necessary, contact the hotel(s) suggested by Presiding Justice for rooms at State price. 10 non-smoking rooms should be reserved to start. (The Clerk/Administrator uses her own VISA card to hold the rooms under the Clerk/Administrator's name. Once further details have been worked out, call the hotel and provide individual names **BUT NO TITLES**. On the day of registration, the rooms are charged to the individual's card.)
14. **2 to 3 months before:** Prepare a draft press release for the Presiding Justice to review. The final press release should be transmitted to Lynn Holton in the Public Information Office of the AOC so that she can issue it 3 to 4 weeks prior to the event.
15. **2 to 3 months before:** The other justices not sitting should be notified about the trip. Send a "Save the Date" email to all justices with a copy to the judicial assistants.
16. **2 to 3 months before:** Determine which staff from the clerk's office and security should attend, i.e., Clerk/Administrator, deputy, sound engineer, CHP, and Guardsmark staff. CHP will determine how many CHP officers are needed.
17. **1 to 2 months before:** Once the bar president has informed you of the menu selections, inform those attending what choices they have. Normally, CHP is working so they do not select a meal. The justices, Managing Attorney, Guardsmark officer, and other staff should be making a selection. ASAP notify the bar president of the selections including a special request i.e., vegetarian. Obtain the name, address, and telephone number of contact person for bar dinner.
18. **1 to 2 months before:** Ask deputy to reserve a van and a car for the trip. This van will transport the Clerk/Administrator, Guardsmark officer, and all sound and camera equipment. The car will transport the deputy and sound engineer.
19. **1 to 2 months before:** Meet with deputy, sound engineer, CHP, and Guardsmark staff about the trip and schedule a pre-session visit to various sites, etc.
20. **1 to 2 months before:** Contact the school district, bar president and hotel to arrange a pre-session visit to each location. Ask what the school colors are. Bring photos from previous Outreach sessions, drawing of the bench, brochures, etc., to the school on the first visit.
21. **1 to 2 months before:** Have the deputy make one copy of all the briefs, unless the case is confidential, i.e., juvenile. If the case is a juvenile, do not

make copies. Ask the Managing Attorney to have the staff attorneys prepare summaries of the cases. (In Redding the court did make a summary of the juvenile case.) The briefs and summaries should be sent to the school district about 30 days before calendar. Also, make copies from WEB page re 3<sup>rd</sup> DCA, What Appellate Justices Do, How Appellate and Supreme Court Justices are Selected, Appellate Retention Elections, etc.

22. **1 to 2 months before:** Ask the Presiding Justice if he would like to invite the mayor.
23. **1 to 2 months before:** Remind the deputy attending the next session to sit in court as a reminder of responsibilities.
24. **1 month before:** Send the press release to Lynn Holton and ask her to issue it 3 to 4 weeks before the session date and to send us a copy of the actual document on the day it is issued. Send copies of the issued press release to local trial court CEO, the bar president and the school district. She will notify the local media.
25. **1 month before:** Prepare planning meeting agenda and itinerary.
26. **1 month before:** The planning meeting visit should take place. The Clerk/Administrator, deputy, sound engineer, CHP, and Guardsmark staff, should make the trip to view the sites and surrounding area. They will work with local staff on the setup of the bench, tables, podium, etc., for the Q&A and oral argument. Determine what equipment we need to bring, i.e., record, speakers, camera, video camera, podium, etc.
27. **1 month or less before:** Have CHP review handout for students on what and what not to bring on the day of oral argument. Send a copy to the school district for distribution to the students prior to the day.
28. **1 month or less before:** Prepare final itinerary and provide to CHP.
29. **1 month or less before:** Have receptionist call the clerk's office of the county where the session is being held and surrounding counties for a list of the bench members of those counties. Copies should be made for all justices, Managing Attorney, and clerk's staff attending.
30. **1 month or less before:** Check with sound engineer to ensure there are ample cassette tapes, videotapes, etc., for the Q & A and oral argument.
31. **1 month or less before:** Check with Presiding Justice to see if he needs a special statistical information, etc.

32. **7 days before:** Check with CHP about transportation schedules for all justices attending. CHP is to notify them when and where they will be picked up, etc.
33. **7 days before:** Hold meeting with CHP, Guardsmark, deputy, and sound engineer to review all details of program.
34. **7 days before:** Provide PJ with brief summary for introduction at dinner of Clerk's Office staff that will attend.
35. **7 days before:** Prepare program containing case summaries to be distributed at the day of oral argument.
36. **Several days before:** Charge batteries for cameras.
37. **Several days before:** Place a few media request forms in binder.
38. **Several days before:** Get the court's extra cell phone and charge it for sound engineer.
39. **Several days before.** Prepare name tags for justices, name tags for court staff, and reserved signs for seating at oral argument.
40. **Several days before.** Prepare name tents for all justices and court staff for tables at dinner.
41. **Several days before.** Ask Cheryl or Reba to prepare revolving fund check to pay for dinners of those attending from the court.
42. **Several days before.** Send sample statement to bar association. Request bar association to prepare statement for only court dinners that will be submitted with business meal claim.
43. **Several days before.** Have the deputy gather the robes, gavel, paper, pencils, water jugs and cups, recording equipment, camera, video camera, tapes, podium, Court of Appeal brochures, etc.
42. **Several days before.** Send program itinerary to participating justices, their judicial assistants, Dave Hall, administrative specialist, assistant clerk/administrator, supervisor, and receptionist.
43. **Several days after:** Contact the local court and media for copies of any articles, etc.
44. **Several days after:** Prepare a list of individuals to whom the Presiding Justice may want to send thank you letters.



45. **Several days after:** Check with Presiding Justice on whether a brief description of our visit should be prepared for the Sacramento Lawyer.
46. **Several days after:** Deputy that participated in the program is to check and replenish the items in the suitcases in preparation for the next trip.
47. **Several days after:** Schedule debriefing meeting with CHP, Guardsmark, bailiff, and sound engineer.



Court of Appeal  
Third Appellate District

**Award Winning Outreach Program**

The jurisdiction of the Court of Appeal, Third Appellate District, includes 23 counties and covers the largest geographic district in the state. In order to enhance access to the court by those residing outside of Sacramento County, where the courtroom is located, and to effectively educate the residents of outlying counties regarding the appellate process, the Court Outreach Program was instituted in April 2000.

According to Presiding Justice Arthur G. Scotland, the court decided that the time had come to encourage interested individuals to attend argument and learn firsthand how appellate courts operate. Justice Scotland said, "We chose to hold court in a school setting so we could make it an educational opportunity for students." The program is held in high schools located within the Third District's jurisdiction. Programs have been held in Shasta, Butte, Nevada, Yolo, Placer, Sacramento, San Joaquin, El Dorado, Plumas, Tehama, Amador, Mono, Yuba, Glenn, Lassen, Trinity, Alpine, Sutter, and Calaveras counties.

In January 2002 the Court of Appeal was awarded the Ralph N. Kleps Award for Improvement in the Administration of the Courts. This prestigious annual award was created in 1991 in honor of Ralph N. Kleps, the first administrative director of the California courts. This award honors contributions made by California courts to the administration of justice. The Third District received this award for its exemplary Court Outreach Program.

The program is structured as follows. The court conducts a two-day program in a county within the court's jurisdiction. On the evening of the first day, the Court of Appeal facilitates an educational and social event. Justices and court staff attend along with local government officials, members of the local court, school officials, and various members of the legal community.

On the second day, a panel of three justices conducts oral argument at a local high school with students, teachers, and the general public in attendance. Other high schools take advantage of this educational opportunity by transporting students to the site to observe the proceedings. The schools are provided in advance with copies of the briefs and synopses of the cases to assist the students and teachers in understanding the arguments, questions, and comments of counsel and the court.

The court will hear two cases usually beginning around 9:30 a.m. After oral argument, the court will conduct a question and answer session. The justices invite the audience to ask questions about the appellate process and the role of the Court of Appeal in our system of government. Questions are not permitted about the specific cases in which argument is heard. Some of the questions previously asked by students include the requirements to hold office as an appellate justice, the confirmation and retention of the justices, applicability of search and seizure laws to students, and how the justices balance their professional and family lives.

After the Court of Appeal files the opinions in the cases, copies of the opinions will be forwarded to the participating high schools so discussion of the issues may occur.

Further information about the Court of Appeal may be obtained by calling Deena C. Fawcett, Clerk/Administrator, (916) 653-0187, or from the Judicial Council's website:

<http://www.courtinfo.ca.gov/courts/courtsofappeal/about.htm>



**Colusa County Outreach Program**

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**Calendar of Events**

**Colusa County Outreach Program  
Colusa High School  
Colusa, CA**

**May 19, 2011**

8:30 a.m. - 9:00 a.m.

Students and public enter the Colusa High School gymnasium, 901 Colus Avenue, Colusa.  
(All attendees proceed through security screening.)

9:00 a.m. - 9:30 a.m.

First case: Oral argument in **The People v. Quintin Joey Watts**, case number C063651.

9:30 a.m. - 10:00 a.m.

Second case: Oral argument in **The People ex rel. Edmund G. Brown, Jr., as Attorney General, etc. v. Native Wholesale Supply Company**, case number C063624.

10:00 a.m. - 11:27 a.m.

Question and answer session between justices and audience.

11:27 a.m.

Court session ends. Students' lunch period begins.

8

**COURT OF APPEAL  
THIRD APPELLATE DISTRICT**



**Oral Argument Calendar  
May 19, 2011**

**Colusa County  
Colusa, CA**



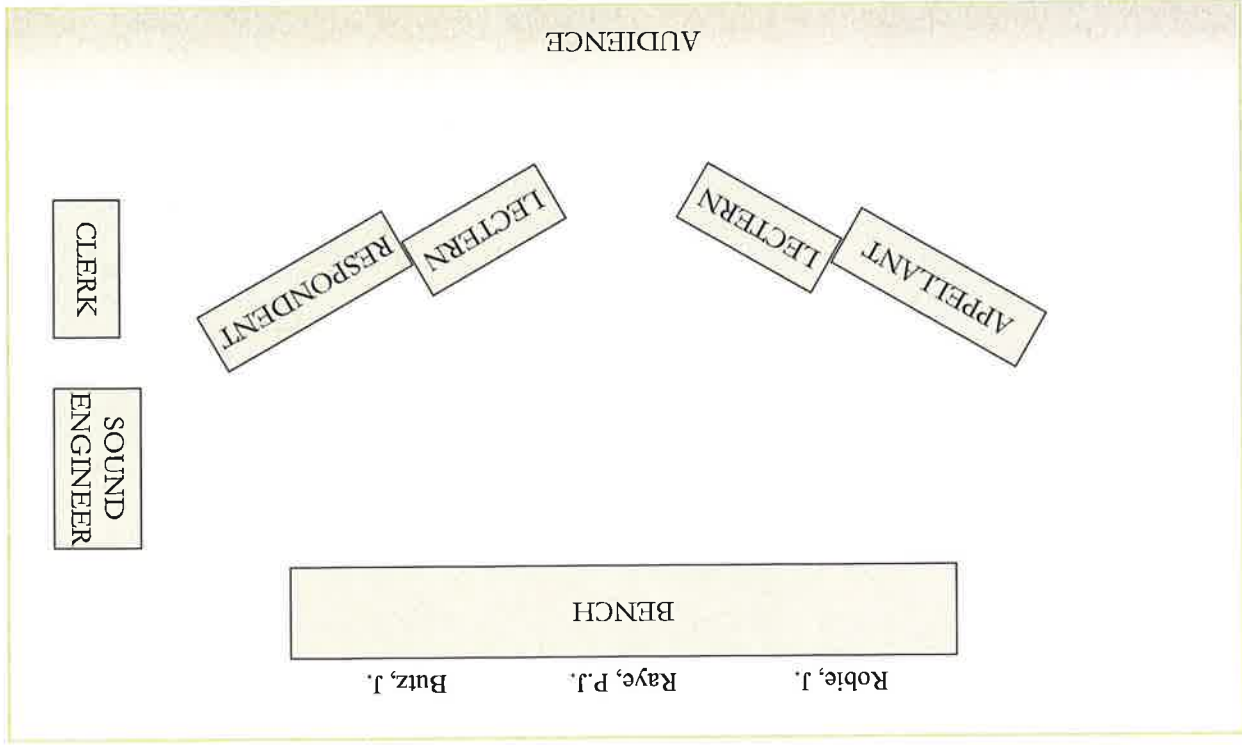
# JUSTICES OF THE COURT OF APPEAL

Vance W. Raye, Presiding Justice  
 Coleman A. Blease, Associate Justice  
 George W. Nicholson, Associate Justice  
 Harry E. Hull, Jr., Associate Justice  
 Ronald B. Robie, Associate Justice  
 M. Kathleen Butz, Associate Justice  
 Louis Mauro, Associate Justice  
 William J. Murray, Jr., Associate Justice  
 Elena J. Duarte, Associate Justice  
 Andrea Lynn Hoch, Associate Justice

Court of Appeal  
 Third Appellate District  
 621 Capitol Mall, 10th Floor  
 Sacramento, CA 95814  
 (916) 654-0209

[www.courts.ca.gov](http://www.courts.ca.gov)

COURT OF APPEAL, THIRD APPELLATE DISTRICT  
 SEATING PLAN





On appeal, California contends that NWS's contacts with the state are sufficient to confer personal jurisdiction over the nonresident corporation. NWS counters by arguing that merely transporting cigarettes through California does not constitute "purposeful availment," that the alleged causes of action do not arise out of contacts with the state but only from contacts with sovereign Indian tribes, that the exercise of personal jurisdiction is not fair and reasonable, and that, under the Indian Commerce Clause, California lacks subject matter jurisdiction over its sales to an Indian tribe. California also argues that the trial court erred in not sanctioning NWS for failing to respond to discovery requests and in dismissing the case with discovery still outstanding, and that the trial court erred in excluding from evidence four declarations from members of the general public who purchased cigarettes from Indian retailers.

## JUSTICES

Vance W. Raye, Presiding Justice  
Ronald B. Robie, Associate Justice  
M. Kathleen Butz, Associate Justice

## COURT STAFF

Deena C. Fawcett, Clerk/Administrator  
Colette M. Bruggman, Assistant Clerk/Administrator  
Ben Haskett, Sound Engineer  
Bobby Johnson, Guardsmark Security



**Silence is appreciated while court is in session.**

The following case summaries are issued to inform the public and the press of cases that the Court of Appeal has scheduled for oral argument and of the general subject matter. The descriptions do not necessarily reflect the view of the court or define the specific issues that will be addressed by the court.

**PEOPLE OF THE STATE OF CALIFORNIA v.  
QUINTIN JOEY WATTS**  
Case No. C063651  
Colusa County Case No. CR50607

The following evidence was presented at trial of this criminal case: Defendant Quintin Joey Watts was employed as a bus driver for a company chartering round-trip excursions to Thunder Valley Casino and Colusa Casino. Defendant had 12 or 13 years' experience as a truck driver. On October 5, 2008, defendant was driving a bus carrying 40 passengers. The bus swerved into the oncoming lane and then appeared to try to correct, resulting in a sudden turn across both lanes with the bus flipping over and careening into a drainage ditch. There was no indication that defendant had applied the brakes. Eight passengers died and 21 others sustained great bodily injuries. Defendant had been observed by passengers asleep or falling asleep. Defendant stated he "blacked out" and that he did not recall the moments before and during the accident. Defendant was an insulin-dependent diabetic who had lost his card for calculating insulin dosages, so he was guessing at the calculations. Hours before the accident, he had drunk some lemonade. When his blood sugar level was too high and he did not inject insulin, he became drowsy and tired. Defendant stated he did not believe his blood sugar was too high at the time of the accident, but that he was "just plain tired" from "trying to hold onto a job," having slept three to three-and-one-half hours between awaking at 4:00 or 4:30 a.m. on October 4 for a round trip to Thunder Valley to the time of the accident, 6:00 p.m. on October 5. In addition to these statements to law enforcement, defendant advised a member of the media that he was not sleepy at the time of the accident and that he would have to have been "knocked out" to have not "experienced" the accident without waking up.

The jury found defendant guilty of 11 counts of gross vehicular manslaughter with 21 findings of infliction of great bodily injury. He was sentenced to a term of 26 years 4 months.

Defendant appeals, contending that:

- Trial counsel failed to render effective assistance of counsel in that he failed to request that the jury be instructed on the legal defenses of unconsciousness and accident and misfortune.
- The trial court erred in not instructing on its own motion on the legal defenses of unconsciousness and accident and misfortune.

(Case No. C063651, continued)

- The prosecutors committed misconduct in closing argument by making inflammatory statements, by inviting the jurors to view the case through the perspective of the victims, and by attempting to arouse the jurors' passions and sense of retribution. Defendant also asserts that trial counsel was ineffective for failing to object to these statements.

**PEOPLE ex rel. EDMUND G. BROWN, JR., as Attorney General  
v. NATIVE WHOLESale SUPPLY COMPANY**

Case No. C063624

Sacramento County Case No. 34-2008-00014593-CU-CL-GDS

By this appeal the State of California seeks to establish its power to regulate the sale of certain cigarettes. California is among 46 states that have entered into a Master Settlement Agreement (MSA), releasing manufacturers of tobacco products from liability for smoking-related public healthcare costs in exchange for limitations on marketing of tobacco products and payments of billions of dollars each year in perpetuity. California has enacted a statute, Revenue and Taxation Code section 30165.1, requiring compliance with the provisions of the MSA in the sale, distribution, and importation of cigarettes in the state. California has sued respondent Native Wholesale Supply Company (NWS), alleging violation of section 30165.1 and violation of state law pertaining to cigarette fire safety. The trial court granted NWS's motion to quash service because the court lacked personal jurisdiction over NWS. California appeals.

Generally, a state court can exercise personal jurisdiction over a nonresident only if that defendant has sufficient "minimum contacts" with the state, either: (1) because defendant's activities in the state were substantial, continuous, and systematic ("general jurisdiction"); or (2) because defendant purposefully availed itself of the benefits of the state, the dispute arising out of or having substantial connection with defendant's contacts with the state, and the exercise of jurisdiction being fair and reasonable ("specific jurisdiction").

NWS is a tribal chartered corporation, headquartered in New York. NWS imports cigarettes from a Canadian manufacturer, stores the cigarettes at several locations in the United States, and sells the cigarettes to tribal entities in the United States, including Big Sandy Rancheria, an Indian tribe located northeast of Fresno, California. Since 2003, NWS has shipped over 325 million cigarettes to Big Sandy and other Indian retailers in California.



Judicial Council of California, Administrative Office of the Courts  
Office of Communications, 455 Golden Gate Ave., San Francisco, CA 94102-3688  
California Courts Infoline 800-900-5980, [www.courts.ca.gov](http://www.courts.ca.gov)

**MEDIA ADVISORY**

Contact: Leanne Kozak, 916-263-2838

**FOR IMMEDIATE RELEASE**

August 17, 2012

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## **California Supreme Court to Hold Special Session at UC Davis School of Law**

### **Save the Date**

**What:** Chief Justice Tani G. Cantil-Sakauye, on behalf of the California Supreme Court, today announced a Special Session at UC Davis School of Law (King Hall). The court will hear oral argument in three cases. The arguments will be open to both UC Davis law students and local high school students, as well as to members of the general public. The students will also have an opportunity to ask questions of the court before the calendar begins.

**When:** Wednesday, October 3, 2012, 10 a.m. to 3:15 p.m.

**Where:** UC Davis School of Law (King Hall), 400 Mrak Hall Drive, Davis, California.

**Links:** California Supreme Court Homepage: <http://www.courts.ca.gov/supremecourt.htm>

Special Session Webpage (including special session calendar, case summaries and briefing): [Add Link]

**Note:** Seating is limited. Media planning to attend should inform in advance the AOC Office of Communications.

###

*The Judicial Council is the policymaking body of the California courts, the largest court system in the nation. Under the leadership of the Chief Justice and in accordance with the California Constitution, the council is responsible for*

*ensuring the consistent, independent, impartial, and accessible administration of justice. The Administrative Office of the Courts carries out the official actions of the council and promotes leadership and excellence in court administration.*



Judicial Council of California, Administrative Office of the Courts  
Office of Communications, 455 Golden Gate Ave., San Francisco, CA 94102-3688  
California Courts Infoline 800-900-5980, [www.courts.ca.gov](http://www.courts.ca.gov)

**NEWS RELEASE**

Contact: Leanne Kozak, 916-263-2838

**FOR IMMEDIATE RELEASE**

September 27, 2012

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## **Supreme Court to Hold Special Outreach Session at the UC Davis School of Law, Martin Luther King, Jr. Hall**

*Hundreds of Students to Observe Oral Arguments; event will also be  
broadcast live on the California Channel*

The Supreme Court of California will hold a special oral argument session on Wednesday, October 3, 2012, in the new Kalmanovitz Appellate Courtroom, University of California at Davis School of Law, Martin Luther King, Jr. Hall, 400 Mrak Hall Drive, Davis, California.

The morning session will begin at 10 a.m. and will include introductory remarks, student questions and answers by the justices, followed by oral argument in *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (Case No. S185544). The afternoon session will begin at 1:10 p.m. and will include oral argument in *Nalwa v. Cedar Fair, L.P.* (Case No. S195031) and *Sargon Enterprises, Inc. v. University of Southern California et al.* (Case No. S191550). Information about these cases can be found at <http://www.courts.ca.gov/18845.htm>.

“The Supreme Court justices are extremely grateful to the UC Davis School of Law for hosting this special oral argument session,” said Chief Justice Tani G. Cantil-Sakauye. “The special session will provide a unique educational opportunity for both law school and local high school students to observe the Supreme Court in action as it hears oral arguments in three cases of major statewide importance.”

Hundreds of UC Davis law students, joined by 60 local high school students, members of the public, and the press, are expected to attend the oral arguments. To enhance understanding of the proceedings, the Supreme Court previously posted a calendar with expanded summaries of the cases to be argued, as well as links to the parties’ briefing in these cases. (See <http://www.courts.ca.gov/18845.htm>.)

Using these materials, teachers at Davis, West Sacramento Early College Prep, and Pioneer High Schools, assisted by Shama Mesiwala, a chambers attorney to Justice Ronald B. Robie of the California Court of Appeal, Third Appellate District, have been working with the high school students to provide context for the proceedings they are about to witness and to otherwise maximize this unique learning experience. The event will also be broadcast live on the California Channel, enabling other students and members of the public throughout the state to witness the Supreme Court in action.

Before oral arguments begin, selected law school and high school students will have a chance to ask questions of the justices from the podium. In addition to the courtroom proceedings, as part of the visit, the Supreme Court will attend a luncheon with law school faculty and students, as well as members of the Yolo County bench and bar.

Finally, during the special session, the Supreme Court will recognize the opening of the new UC Davis California Supreme Court Clinic. The clinic was created to provide UC Davis law students an invaluable opportunity to focus on cases pending before the California Supreme Court. Under the supervision of clinic director Aimee Feinberg, students will research and draft pleadings, such as petitions for review and amicus curiae briefs, on behalf of clinic clients.

Seating in the courtroom is very limited, but proceedings will be available to all interested students and visitors in overflow classrooms and the many video screens throughout King Hall.

Media planning to attend should contact Leanne Kozak, [leanne.kozak@jud.ca.gov](mailto:leanne.kozak@jud.ca.gov), to assure accommodation.

###



August 21, 2012

Dear Principal (see attached list)

On behalf of the Supreme Court of California, it is my pleasure to invite students from your high school to attend an Outreach Session of the California Supreme Court on October 3, 2012, at the University of California, Davis School of Law. The Supreme Court of California periodically conducts Special Sessions throughout the state to increase students' access to, and understanding of, the Judicial Branch and its role in our democracy.

The Outreach Session cases are selected to be of interest to students, and case summaries, briefs, and other educational materials are provided on the California Courts website, <http://www.courts.ca.gov/18845.htm>. Biographies of the seven California Supreme Court Justices are also available on the website, <http://www.courts.ca.gov/3014.htm>. Logistics regarding location, directions, parking and dress code will be available shortly on the University of California, Davis School of Law website, <http://www.law.ucdavis.edu/> (see Featured Events Column).

We welcome a total of twenty students and chaperones from your school to hear oral argument for one case. To participate, please complete the attached form, and return it by email or fax by August 31 to Deborah Genzer, [deborah.genzer@jud.ca.gov](mailto:deborah.genzer@jud.ca.gov), fax (415) 865-4330, and/or please contact Deborah Genzer at (415) 865-8755 for more information. We look forward to partnering with you to further your students' civic education.

Sincerely,

Frank A. McGuire  
Court Administrator and Clerk of the Supreme Court of California

FAM/DG/ah  
Enclosures

cc: Hon. Tani G. Cantil-Sakauye, Chief Justice of California  
Hon. David Rosenberg, Presiding Judge, Superior Court of Yolo County  
Dr. Jorge Ayala, Superintendent, Yolo County Office of Education  
Mr. Kevin R. Johnson, Dean, University of California, Davis School of Law

# Supreme Court of California Outreach Session

Wednesday, OCTOBER 3, 2012

University of California, Davis School of Law

400 Mrak Hall Drive, Davis, California

## High School RSVP

### Procedure

- 1) Please RSVP by **Friday, August 31, 2012.**
- 2) **Email form or information requested on form to [deborah.genzer@jud.ca.gov](mailto:deborah.genzer@jud.ca.gov) or fax to: 415-865-4330.**
- 3) The Court will send confirmation of the time of your group's session via email by September 5.
- 4) If your school does not have a blanket photo/video release form on file for the student participants, please have students complete and turn in the attached photo release form.

### Form (Please complete the following):

A. Oral argument for each case is sixty minutes. Please rank your session preference \*\*\*

10:00 a.m. – 11:40 a.m. \_\_\_\_\_

*Note: This session includes a forty minute opening, from 10:00 – 10:40, during which three high school students will be selected to ask questions of Supreme Court Justices.*

1:10 a.m. – 2:10 p.m. \_\_\_\_\_

2:10 p.m. – 3:15 p.m. \_\_\_\_\_

\*\*\* Please plan to arrive at least 30 minutes before the session.

B. Name of School: \_\_\_\_\_

C. Contact Name: \_\_\_\_\_

D. Contact email: \_\_\_\_\_

E. Contact phone: \_\_\_\_\_ Best time to call: \_\_\_\_\_

F. Number of Students: \_\_\_\_\_ Number of Chaperones: \_\_\_\_\_

*Due to space limitations, we must ask that there be no more than a combined total of 20 students and chaperones.*



## JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE  
OF THE COURTS

### Photo/Video Release

I grant to the Judicial Council of California and the Administrative Office of the Courts (together referred to as the AOC) the right to copy, use, and distribute in any media for any purpose any photographs or videos of me that were taken or recorded by or on behalf of the AOC. This right shall include the right to use any recordings of my voice and any personal information about me that I voluntarily provided.

I further grant the AOC the right to copy, use, and distribute in any media for any purpose any photographs, video, or recordings made of me while participating in any event sponsored, photographed, or taped by the AOC.

I waive the right to inspect or approve all versions of my image. All copies of my image or voice recording made by or on behalf of the AOC shall be the property of the AOC.

I hereby release the AOC and its assigns, licensees, and successors from any claims that may arise regarding the copying, use, or distribution of my images, voice recordings, presentation, or personal information. The AOC is permitted, although not obligated, to include my name as a credit in connection with my image, voice recording, or presentation.

The AOC may also freely assign or license the rights granted under this release to another party.

I have read and understood this release. I am over the age of 18, or, if I am under 18, a parent or guardian must sign below.

Event Name: \_\_\_\_\_ Date: \_\_\_\_\_

This release expresses the complete understanding of the parties.

Print: Name: \_\_\_\_\_ Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

### Parent/Guardian Consent (if the person is under 18)

I am the parent or guardian of the minor named above. I have the legal right to consent to and do consent to the terms and conditions of this release.

Print: Parent/Guardian Name: \_\_\_\_\_ Date: \_\_\_\_\_

Parent/Guardian Signature: \_\_\_\_\_

Parent/Guardian Address: \_\_\_\_\_

-----For AOC Use-----

Project: \_\_\_\_\_

ID No.: \_\_\_\_\_

Notes: \_\_\_\_\_



**SUPREME COURT OF CALIFORNIA  
ORAL ARGUMENT CALENDAR  
SPECIAL SESSION — UC DAVIS SCHOOL OF LAW  
OCTOBER 3, 2012**

The following cases are placed upon the calendar of the Supreme Court for hearing at its Special Session at the UC Davis School of Law (King Hall), 400 Mrak Hall Drive, Davis, California, on October 3, 2012.

Prior to this Special Session the court will hold oral argument in a number of other cases in its San Francisco courtroom on October 2, 2012. The full calendar for both days will be available at <http://www.courts.ca.gov/supremecourt.htm>.

The case summaries set forth below have been prepared for the use of students who will view the oral argument sessions.

**WEDNESDAY, OCTOBER 3, 2012 — 10:00 A.M.**

***Opening Remarks: Historic Special Session***

- (1) S185544 *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*

The United States Constitution's First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The California Constitution, in article I, section 2, states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Under both federal and state Constitutions, public sidewalks and parks are considered "public forums" where peaceful speech activities must be permitted. Under California's Constitution, but not under the federal Constitution, as construed by the highest state and federal courts, shopping centers, although private property, are also public forums.

Both California and federal law provide certain protections for labor union picketing of businesses. California Code of Civil Procedure section 527.3, known as the Moscone Act, which is based on a similar provision of the federal Norris-LaGuardia Act, states that certain speech activities, undertaken to communicate information about an existing labor dispute, are legal and therefore cannot be prohibited by a court injunction. California Labor Code section 1138.1, which was based on a different provision of the

federal Norris-LaGuardia Act, prohibits a court from issuing an injunction during a labor dispute unless, based upon witness testimony in open court, the court makes certain findings, including that an injunction is necessary to prevent “substantial and irreparable injury” to property resulting from the commission of unlawful acts.

Here, a grocery store workers’ union began picketing outside the entrance to the nonunion Foods Co. grocery store located in Sacramento’s College Square. Ralphs Grocery Company, which owns the store, had adopted its own speech regulations, which prohibited standing within 20 feet of the entrance, distributing literature, and all speech activities during specified hours and for a week before certain holidays. When the union refused to obey the regulations, Ralphs applied to the Sacramento Superior Court for an injunction. In response, the union argued that the Moscone Act and section 1138.1 prohibited issuance of an injunction under the circumstances. In reply, Ralphs argued that the Moscone Act and section 1138.1 are invalid under the federal Constitution’s equal protection clause because they give speech about labor disputes greater protection than speech about other topics.

The trial court denied Ralphs’s request for injunctive relief. The Court of Appeal reversed, holding that the private sidewalk in front of the store entrance is not a public forum under the state Constitution’s liberty-of-speech provision because it is not a place where the public is invited to congregate and socialize. The Court of Appeal also agreed with Ralphs that California’s Moscone Act and Labor Code section 1138.1 violate the federal Constitution’s equal protection guarantee by giving speech about labor disputes greater protection than speech about other topics.

The California Supreme Court has been asked to decide whether a privately-owned sidewalk in front of the entrance to a supermarket located in a shopping center is a public forum under the California Constitution’s liberty-of-speech provision, the extent to which state law protects labor picketing of a targeted business, and whether such protection violates the federal Constitution’s equal protection guarantee by giving speech about labor disputes greater protection than speech on other topics.

### **1:10 P.M.**

#### **(2) S195031 *Nalwa (Smriti) v. Cedar Fair, L.P.***

While she was riding in a bumper car at the Great America amusement park (owned and operated by defendant Cedar Fair, L.P.), Dr. Smriti Nalwa’s bumper car collided with another car and her wrist was fractured. She claims her injury resulted from Cedar Fair’s negligence in operating the ride. Cedar Fair contends that by participating in the bumper car ride she assumed the risk of being injured by bumping. Can Nalwa sue Cedar Fair for her injuries, or is her suit barred under the doctrine known as “primary assumption of the risk?”

Ordinarily, each person has a legal duty to use reasonable care in his or her activities, so as not to cause others an unreasonable risk of harm. But in *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court explained that participants, instructors and operators of certain recreational activities, such as sports, owe to other participants only the more limited duty not to unreasonably increase the risk of harm beyond that inherent in the activity. When this “primary assumption of the risk” doctrine applies, there is no legal duty to protect a participant from the types of risks that are inherent in the activity. For example, participants in a touch football game do not have a duty to be careful in how they run and tag each other, and the operator of a ski resort does not have a duty to protect skiers from rocks or trees on the slope. Lawsuits can still be brought over risks that are *not* inherent, such as a poorly-maintained ski chairlift.

The main issue in this case is whether the primary assumption of risk rule applies to riding on bumper cars. Plaintiff contends the rule should be limited to sports, a category not including bumper car rides. (Most prior decisions have involved sports.) Defendant points to cases that have applied the doctrine to nonsport activities and argues that logically it should apply more generally to avoid chilling participation in recreation, including bumper car rides.

Plaintiff also argues the doctrine should not apply because amusement parks in California are regulated to protect the safety of guests and because the California Supreme Court has previously held a roller coaster ride to be a “common carrier for reward” (like train and bus lines), which under California law means the operator has the duty to use “the utmost care” for riders’ safety. Defendant maintains it violated no state regulations in operation of the bumper cars and primary assumption of risk should apply whether or not bumper cars are considered a common carrier.

Finally, plaintiff contends that even if the doctrine applies to bumper cars, it does not apply when the injury is caused by a *head-on* collision because those are not inherent in the activity. (Some bumper car rides have been configured to make all the cars move in the same general direction.) Defendant argues the record does not show plaintiff was injured in a head-on collision and, in any event, all risks from bumping, whatever the direction, are inherent in the activity.

(3) S191550 *Sargon Enterprises, Inc. v. University of Southern California et al.*

Sargon Enterprises, Inc. (Sargon), a dental implant company that had a net profit of about \$100,000 in 1998, contracted with the dental school at the University of Southern California (USC) to clinically test a new implant the company had developed. Later, it sued USC, successfully claiming the university had breached the contract. The issue before the Supreme Court concerns the amount of monetary damages Sargon may receive from USC for lost profits.

Sargon sought to present the testimony of an expert, James Skorheim, that Sargon would have become one of the leading companies worldwide in the dental implant



industry if USC had not breached the contract and that, accordingly, it would have earned future profits beginning in 1998 ranging from \$200 million to over \$1 billion. The exact amount within this range would depend on how innovative the jury found Sargon's new dental implant to have been. After holding an evidentiary hearing, the trial court excluded the proffered testimony, finding it impermissibly speculative. Ultimately, Sargon received a damages award of \$433,000 for breach of the contract. Sargon appealed.

By a two-to-one vote, the Court of Appeal reversed the judgment. The majority held that the trial court erred in excluding Skorheim's testimony, finding that it was up to the jury to assess that testimony. The dissent argued that the trial court acted within its discretion to exclude speculative testimony. The Supreme Court granted review to determine under what circumstances, if any, a trial court may exclude expert testimony regarding lost profits, and whether the trial court properly did so in this case.

Sargon argues that it was up to the jury, not the trial court, to decide whether to credit Skorheim's testimony. USC argues the trial court properly acted as a "gatekeeper" to exclude expert testimony it found unreliable.

###

## Pooling Arrangements for UC Davis Special Session

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1. Two still photographers—Penne Soltysik, Administrative Office of the Courts, Office of Communications and Karin Higgins, Principal Photographer, University Communications, University of California, Davis—have been designated as the official pool still photographers. They can both photograph up until the oral arguments begin (i.e., still photographs of the justices and bench, still photographs of the students asking questions of the justices, and background still photographs of the special session).
2. These two official still photographers will also serve as the pool still photographers—sharing a selection of still photographs with media outlets.
3. Only one official still photographer will be permitted to shoot during the oral arguments—Karin Higgins, Principal Photographer, University Communications, University of California, Davis, has been designated for this role. All still photographs during oral arguments must be taken from a fixed location.
4. Photographers from media outlets will be permitted to take still photographs during the luncheon and the post-argument reception if they request advance permission.
5. The California Channel is the official pool videographer—it will provide a live feed to other media outlets (including KVIE and UC Davis as approved under orders S191550, S195031, and S185544).
6. No outside media outlet videographers are permitted during the special session introductory remarks, Q&A, oral arguments, luncheon, or post-argument reception.
7. No audio recording (including digital recorders or phones) is permitted during the special session introductory remarks, Q&A, oral arguments, luncheon, or post-argument reception—other than by the official pool videographer or the certified shorthand reporter.
8. As previously arranged, Kristen Simoes may conduct a brief on-camera interview with Chief Justice Tani G. Cantil-Sakauye during the post-argument reception regarding the UC Davis California Supreme Court Clinic.

## SCHEDULE FOR OCTOBER 3, 2012 U.C. DAVIS SPECIAL SESSION

### 10:00 to 10:20 a.m. – Introductions and Welcome Remarks (20 minutes total)

Special session begins. Chief Justice Tani G. Cantil-Sakauye briefly introduces the members of the Court and acknowledges Yolo County Superior Court Presiding Judge David Rosenberg, a law school alumnus, if he is in attendance at the oral argument portion of the special session. The Chief Justice then turns the podium over to U.C. Davis Law School of Law Dean Kevin R. Johnson for his welcome remarks. (5 minutes)

Welcome remarks by Dean Johnson. (10 minutes)

Welcome remarks by the Chief Justice. (5 minutes)

### 10:20 to 10:40 a.m. – Q&A with Law School and High School Students (20 minutes)

The Q&A includes a total of seven pre-screened questions from a combination of law school and high school students, with each member of the Court answering one question.

### 10:40 a.m. to 11:40 a.m. – Morning Calendar (1 hour)

The Clerk calls the morning calendar and one case, sixty minutes in length, is argued.

### 11:40 a.m. to 12:10 p.m. – Justices' Morning Post-Argument Conference (Private) (30 minutes)

The morning session ends and the Court adjourns to its morning post-argument conference. Sandwiches will be provided for those Justices who may prefer to eat lunch in advance of the official luncheon. Travel time is included for short trip from the law school to the nearby facility for the official luncheon.

### 12:10 p.m. to 1:10 p.m. – Official Luncheon (1 hour)

The Justices arrive at the nearby facility for the official luncheon and are each seated at different eight-person round tables with the law school dean, select faculty members, members of the local trial bench, and representatives of local bar association. The faculty advisor and the six students of the inaugural class of the U.C. Davis California Supreme Court Advocacy Program, the first program of its kind, will each serve as a host for one of the Justices and will introduce the Justice to his/her table. Luncheon guests (including those Justices who have not already eaten at the morning post-argument conference) will be able to select from an array of gourmet sandwiches and dessert items. After everyone

is seated, the Chief Justice, Presiding Judge Rosenberg, and the Yolo County Bar President each make brief, informal remarks. Travel time is included for return trip from the official luncheon facility to the law school.

1:10 p.m. to 3:15 p.m. – Afternoon Calendar (2 hours, 5 minutes)

The Clerk calls the afternoon calendar and two cases, sixty minutes in length each, are argued. Time is included to switch out the courtroom audience between the two cases.

3:15 p.m. to 3:35 p.m. – Justices' Afternoon Post-Argument Conference (Private) (20 minutes)

The afternoon session ends and the Court adjourns to its afternoon post-argument conference. The Justices then join the post-argument reception, already in progress.

3:15 p.m. to 4:15 p.m. – Post-Argument Reception with Law Faculty and Students (60 minutes total; 40 minutes for justices)

The Justices arrive at an adjacent reception, already in progress. Light appetizers, as well as wine, soft drinks and water, will be served.

Questions by law and high school students for the justices  
October 3, 2012, UC Davis special session

1. Question from law school student Richard Andrews, for the Chief Justice:

During the past fiscal year, 75 of this Court's 86 cases were decided unanimously. The total dissent rate for the year dropped to a century-low 2.3 percent. Are these numbers an anomaly or a likely trend for the future? What factors are likely to have contributed to the Court's high rate of agreement during the past year? Is a high rate of agreement desirable?

2. Question from high school student Sofia Cardenas, for Justice Kennard:

Do you have suggestions for lawyers appearing in your court? Advice for brief writing? Advice for oral argument?

3. Question from law school student Kelly Volkar, for Justice Corrigan:

All law students aspire to have fulfilling careers. Many law students aspire, specifically, to become a member of the bench. Speaking as a student who falls into both categories, what advice could you give me and my fellow classmates regarding various career paths one could take in order to be well-suited to become a judge? I was particularly hoping you could expound on why you chose the career path you did, and whether you did so with an eye towards one day joining the bench.

4. Question from high school student Daniel Tutt, for Justice Chin:

What steps are taken to ensure that your rulings are both current and resilient? (We suggest that before answering, state: "I take this to mean, how do we write opinions that are abreast of current developments but also will provide guidance in future decades?")

5. Question from law school student Alexander Rich, for Justice Baxter:

What are the practical consequences of the budget cuts to the state's judiciary? What has the judiciary done to mitigate those consequences?

6. Question from high school student Tessa Peters, for Justice Werdegarr:

The California Supreme Court selects only a small number of cases each year. What factors do you consider when deciding to hear a case?

7. Question from law school student Margaret Alden Moody, for Justice Liu:

California's budget crisis is impacting the state court system just as law school tuition is skyrocketing. At the same, the economic crisis has left many Californians with unmet legal needs. How can law students and new lawyers most effectively advocate for justice at this moment? What can we do in our careers or volunteer endeavors to ensure that the integrity of our justice system not be undermined by economic woes?



SUPREME COURT  
OF  
CALIFORNIA



ORAL ARGUMENT  
CALENDAR  
HISTORIC SPECIAL SESSION  
UNIVERSITY OF CALIFORNIA  
AT DAVIS SCHOOL OF LAW,  
MARTIN LUTHER KING, JR. HALL

OCTOBER 3, 2012

*SEATING PLAN  
FOR SESSIONS OF THE  
CALIFORNIA SUPREME COURT*

Justice  
Carol A.  
Corrigan

Justice  
Kathryn M.  
Werdegar

Justice  
Joyce L.  
Kennard

Chief Justice  
Tani G.  
Cantil-Sakauye

Justice  
Marvin R.  
Baxter

Justice  
Ming W.  
Chin

Justice  
Goodwin Liu

Clerk

Court  
Attendant

Table

Lectern

*Silence is appreciated while the Court is in session*

## NOTICE TO COUNSEL

1. The Supreme Court generally convenes at 9 a.m. and 1:30 p.m.
2. Counsel who are scheduled to present oral argument before the court are required to check in by presenting a business card to the clerk of the courtroom thirty minutes prior to the convening of court, at 8:30 and 1:00 respectively. Thirty minutes prior to the convening of the court, the clerk will conduct a briefing for counsel which will include a review of the procedure to be followed in presenting oral argument.
3. Counsel who are scheduled to present oral argument are expected to be present and seated inside the bar of the courtroom for the call of the calendar. Once the court is convened, the clerk will call the calendar in its entirety. As each case is called, counsel for the respective parties will be introduced by name. When introduced to the court, counsel should rise and answer, "Ready." At the conclusion of the calendar call, counsel in the first case should immediately proceed to the lectern.
4. The petitioner in cases in which review has been granted, the petitioner in an original proceeding, or the appellant in an automatic appeal will commence the argument.
5. Counsel who desire to reserve some of their previously allocated time for "true" rebuttal should so indicate to the clerk at the time of check-in or it shall be deemed waived.
6. Unless otherwise ordered, the court allows a maximum of 30 minutes per side. Only one counsel may be heard for each side. Counsel wishing to divide the time for oral argument must submit a written application to the court not later than ten days after the case has been set for oral argument. In no event shall oral argument be divided into segments of less than ten minutes, except that one counsel for the opening side (unless additional counsel are so authorized) may reserve a portion of his or her allotted time for rebuttal.
7. Counsel are expected to take note of time limitations and inquiry should not be made of the court as to the amount of time remaining.
8. At the conclusion of argument, the case stands "submitted," and unless submission is vacated, the court's opinion will be filed within ninety days.
9. When Supreme Court opinions are issued, they are posted online at [www.courts.ca.gov/opinions](http://www.courts.ca.gov/opinions).

## THE JUSTICES

Hon. Tani G. Cantil-Sakauye, Chief Justice  
Hon. Joyce L. Kennard, Associate Justice  
Hon. Marvin R. Baxter, Associate Justice  
Hon. Kathryn M. Werdegarr, Associate Justice  
Hon. Ming W. Chin, Associate Justice  
Hon. Carol A. Corrigan, Associate Justice  
Hon. Goodwin Liu, Associate Justice

## OFFICERS OF THE COURT

Frank A. McGuire, Clerk of the Court  
Edward Jessen, Reporter of Decisions  
Gail Gray, Calendar Coordinator

Historic Special Session  
Supreme Court of California  
UC Davis School of Law (King Hall)  
400 Mrak Hall Drive  
Davis, CA 95616-5201

[www.courts.ca.gov](http://www.courts.ca.gov)

## HISTORIC SPECIAL SESSION

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### *Welcome and Introductory Remarks*

**Chief Justice Tani G. Cantil-Sakauye**  
**Supreme Court of California**

**Dean Kevin R. Johnson**  
**Mabie-Apallas Professor of Public Interest Law**  
**and Chicana/o Studies**  
**UC Davis School of Law (King Hall)**

### **Acknowledgements**

The Supreme Court of California would like to thank the University of California at Davis School of Law for its invitation to hold this special session at Martin Luther King, Jr. Hall. The Supreme Court extends its special thanks to the following individuals for their extraordinary efforts in helping to coordinate this event: Presiding Judge David Rosenberg, Judge Daniel P. Maguire, and Certified Shorthand Reporter Jeanette Baker of the Yolo County Superior Court; Yolo County Bar Association President Sarah Orr; Dean Kevin R. Johnson, California Supreme Court Clinic Director Aimee Feinberg, Executive Assistant Kathleen Harbaugh, Director of Marketing and Public Relations Pamela Wu, Events Manager Gia Hellwig, and Assistant Debbie Hicks of the UC Davis School of Law; and Principal Photographer Karin Higgins of the UC Davis Office of Communications.

The court also thanks the many individuals who helped coordinate the high school outreach component of the special session: Justice Ronald B. Robie and his chambers attorney Shama Mesiwala of the Court of Appeal, Third Appellate District; Senior Court Services Analyst Deborah Genzer of Court Programs and Services of the Administrative Office of the Courts; Principal Jacqueline Moore and

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\* \* \*

Teacher Peter Reilly of Davis High School; Principal Kerry Callahan and Teacher Kurt Guemmer of Pioneer High School; Principal Yolanda Falkenberg of West Sacramento Early College Prep High School; Superintendent Jorge Ayala of the Yolo County Unified School District; Superintendent Debra LaVoi of the Woodland Unified School District; Superintendent Winfred B. Roberson, Jr. of the Davis Joint Unified School District; and Superintendent Dayton Gilleland of the Washington Unified School District.

In addition, the court extends special thanks to the California Channel and to both the Office of Communications and the Center for Judicial Education and Research of the Administrative Office of the Courts for their efforts in broadcasting and webcasting this special session and making these proceedings accessible to a very large viewing audience. The collective efforts of all of these individuals and entities to educate Californians in an inspiring and captivating way are a testament to their passion for fostering interest and promoting trust and confidence in California's judicial system. It is our hope that the example of this special session will guide and inspire similar efforts in the future.

## HEARING LIST

**NOTE:** *The statements of the issues are intended simply to inform the public and the press of the general subject matter of the cases. The descriptions in this pamphlet do not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court.*

## **Sargon Enterprises, Inc. v. University of Southern California et al., SI91550**

For Defendants and

Appellants: Kathleen Sullivan, Redwood Shores.

For Plaintiff and

Appellant: Eric M. George, Los Angeles.

Sargon Enterprises, Inc. (Sargon), a dental implant company that had a net profit of about \$100,000 in 1998, contracted with the dental school at the University of Southern California (USC) to clinically test a new implant the company had developed. Later, it sued USC, successfully claiming the university had breached the contract. The issue before the Supreme Court concerns the amount of monetary damages Sargon may receive from USC for lost profits.

Sargon sought to present the testimony of an expert, James Skorheim, that Sargon would have become one of the leading companies worldwide in the dental implant industry if USC had not breached the contract and that, accordingly, it would have earned future profits beginning in 1998 ranging from \$200 million to over \$1 billion. The exact amount within this range would depend on how innovative the jury found Sargon's new dental implant to have been. After holding an evidentiary hearing, the trial court excluded the proffered testimony, finding it impermissibly speculative. Ultimately, Sargon received a damages award of \$433,000 for breach of the contract. Sargon appealed.

By a two-to-one vote, the Court of Appeal reversed the judgment. The majority held that the trial court erred in excluding Skorheim's testimony, finding that it was up to the jury to assess that testimony. The dissent argued that the trial court acted within its discretion to exclude speculative testimony. The Supreme Court granted review to determine under what circumstances, if any, a trial court may exclude expert testimony regarding lost profits, and whether the trial court properly did so in this case.

Sargon argues that it was up to the jury, not the trial court, to decide whether to credit Skorheim's testimony. USC argues the trial court properly acted as a "gatekeeper" to exclude expert testimony it found unreliable.

WEDNESDAY, OCTOBER 3, 2012  
10:00 A.M.

***Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8, S185544***

For Respondent:

Paul L. More, San Francisco.

For Appellant:

Miriam A. Vogel, Los Angeles.

Plaintiff also argues the doctrine should not apply because amusement parks in California are regulated to protect the safety of guests and because the California Supreme Court has previously held a roller coaster ride to be a "common carrier for reward" (like train and bus lines), which under California law means the operator has the duty to use "the utmost care" for riders' safety. Defendant maintains it violated no state regulations in operation of the bumper cars and primary assumption of risk should apply whether or not bumper cars are considered a common carrier.

Finally, plaintiff contends that even if the doctrine applies to bumper cars, it does not apply when the injury is caused by a head-on collision because those are not inherent in the activity. (Some bumper car rides have been configured to make all the cars move in the same general direction.) Defendant argues the record does not show plaintiff was injured in a head-on collision and, in any event, all risks from bumping, whatever the direction, are inherent in the activity.

The United States Constitution's First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The California Constitution, in article I, section 2, states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Under both federal and state Constitutions, public sidewalks and parks are considered "public forums" where peaceful speech activities must be permitted. Under California's Constitution, but not under the federal Constitution, as construed by the highest state and federal courts, shopping centers, although private property, are also public forums.

Both California and federal law provide certain protections for labor union picketing of businesses. California Code of Civil Procedure section 527.3, known as the Moscone Act, which is based on a similar provision of the federal Norris-LaGuardia Act, states that certain speech activities, undertaken to communicate information about an existing labor dispute, are legal and therefore cannot be prohibited by a court injunction. California Labor Code section 1138.1, which was based on a different provision of the federal Norris-LaGuardia Act, prohibits a court from issuing an injunction during a labor dispute unless, based upon witness testimony in open court, the court makes certain findings, including that an injunction is necessary to prevent "substantial and irreparable injury" to property resulting from the commission of unlawful acts.

Here, a grocery store workers' union began picketing outside the entrance to the nonunion Foods Co. grocery store located in Sacramento's College Square. Ralphs Grocery Company, which owns the store, had adopted its own speech regulations, which prohibited standing within 20 feet of the entrance, distributing literature, and all speech activities during specified hours and for a week before certain holidays. When the union refused to obey the regulations, Ralphs applied to the Sacramento Superior Court for an injunction. In response, the union argued that the Moscone Act and section 1138.1 prohibited issuance of an injunction under the circumstances. In reply, Ralphs argued that the Moscone Act and section 1138.1 are invalid under the federal Constitution's equal protection clause because they give speech about labor disputes greater protection than speech about other topics.

The trial court denied Ralphs's request for injunctive relief. The Court of Appeal reversed, holding that the private sidewalk in front of the store entrance is not a public forum under the state Constitution's liberty-of-speech provision because it is not a place where the public is invited to congregate and socialize. The Court of Appeal also agreed with Ralphs that California's Moscone Act and Labor Code section 1138.1 violate the federal Constitution's equal protection guarantee by giving speech about labor disputes greater protection than speech about other topics.

The California Supreme Court has been asked to decide whether a privately-owned sidewalk in front of the entrance to a supermarket located in a shopping center is a public forum under the California Constitution's liberty-of-speech provision, the extent to which state law protects labor picketing of a targeted business, and whether such protection violates the federal Constitution's equal protection guarantee by giving speech about labor disputes greater protection than speech on other topics.

1:10 P.M.

***Nalwa (Smriti) v. Cedar Fair, L.P., S195031***

For Respondent: Jeffrey M. Lenkov, Los Angeles.  
For Respondent: Steven J. Renick, Los Angeles.  
For Appellant: Mark D. Rosenberg, Redwood City.

While she was riding in a bumper car at the Great America amusement park (owned and operated by defendant Cedar Fair, L.P.), Dr. Smriti Nalwa's bumper car collided with another car and her wrist was fractured. She claims her injury resulted from Cedar Fair's negligence in operating the ride. Cedar Fair contends that by participating in the bumper car ride she assumed the risk of being injured by bumping. Can Nalwa sue Cedar Fair for her injuries, or is her suit barred under the doctrine known as "primary assumption of the risk?"

Ordinarily, each person has a legal duty to use reasonable care in his or her activities, so as not to cause others an unreasonable risk of harm. But in *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court explained that participants, instructors and operators of certain recreational activities, such as sports, owe to other participants only the more limited duty not to unreasonably increase the risk of harm beyond that inherent in the activity. When this "primary assumption of the risk" doctrine applies, there is no legal duty to protect a participant from the types of risks that are inherent in the activity. For example, participants in a touch football game do not have a duty to be careful in how they run and tag each other, and the operator of a ski resort does not have a duty to protect skiers from rocks or trees on the slope. Lawsuits can still be brought over risks that are *not* inherent, such as a poorly-maintained ski chairlift.

The main issue in this case is whether the primary assumption of risk rule applies to riding on bumper cars. Plaintiff contends the rule should be limited to sports, a category not including bumper car rides. (Most prior decisions have involved sports.) Defendant points to cases that have applied the doctrine to nonsport activities and argues that logically it should apply more generally to avoid chilling participation in recreation, including bumper car rides.





*California Supreme Court,  
the highest court in the state.*

*The court's primary role is to review  
the decisions of the California Courts of Appeal  
and superior courts and decide matters of  
statewide importance in order to maintain  
uniformity in the law throughout California.*

*California's judicial branch, which  
includes 7 justices of the Supreme Court,  
105 justices of the intermediate Courts of Appeal,  
and approximately 1,600 superior court judges,  
is the largest court system in the world.*



## ◆ THE COURT'S JURISDICTION

The Supreme Court is called the "court of last resort" in California because its decisions are binding on all other courts of this state. Under the state Constitution, the Supreme Court is required to review all death penalty judgments from the superior courts (the courts in which the trials of these cases originally took place). The Supreme Court has discretion to review decisions of the Courts of Appeal, the Public Utilities Commission (concerning, for example, utility regulation issues), the State Bar Court (attorney discipline), and the Commission on Judicial Performance (judicial discipline). In addition, the court has original jurisdiction in proceedings for "extraordinary relief," such as petitions seeking writs of certiorari, mandate, prohibition, and habeas corpus.

Because the Supreme Court annually receives many thousands of requests to review legal matters, the justices spend a substantial amount of time deciding which cases they should review. In fiscal year 2010–2011, the court received more than 10,007 case filings.

## ◆ THE JUSTICES

When established in 1849 by California's first Constitution, the Supreme Court consisted of a Chief Justice and two associate justices who were elected by the Legislature for 6-year terms. Today, the court consists of a Chief Justice and six associate justices, all of whom are appointed by the Governor and confirmed by voters statewide for 12-year terms.

The Governor appoints members of the Supreme Court after an assessment by the State Bar's Judicial Nominations Evaluation Commission. The Commission on Judicial Appointments must confirm appointees. To be eligible for appointment, a person must have been an attorney admitted to practice in California or a judge of a court of record in the state for at least 10 years immediately before appointment.

All justices stand for confirmation for the remainder of their predecessor's unexpired term at the first statewide general election following their appointment and must appear on the ballot again for retention at the end of their term if they wish to continue to serve.

## ◆ THE COURT'S LOCATION

The court is headquartered in San Francisco's Civic Center at the Earl Warren Building in the Ronald M. George State Office Complex. Because of damage to the building from the Loma Prieta earthquake, the court had to vacate the building in 1989. In early 1999, the court returned to its historic headquarters, where it first held oral argument in 1923. The Supreme Court's courtroom has been completely restored, with oak paneling, a 30-foot-high skylight, and a coffered



*Supreme Court justices in the court's San Francisco courtroom in the Earl Warren Building. Left in right: Associate Justice Carol A. Corrigan, Associate Justice Kathryn Michelle Werdegar, Chief Justice Tani G. Chutich, Associate Justice Marvin R. Baxter, Associate Justice Goodwin Liu, Associate Justice Ming W. Chin, Associate Justice Joyce L. Kennard, Associate Justice Kathryn Michelle Werdegar, and Associate Justice Carol A. Corrigan. Photo by Wayne Webb.*



*The California Supreme Court is headquartered in the restored Earl Warren Building, pictured in the foreground of this aerial view of the Ronald M. George State Office Complex in San Francisco. The court returned to this historic home in January 1999. Photo by William A. Rowe.*

ceiling. Above the bench is a mural of a scenic California landscape painted by Marin County artist Willard Dixon. The courtroom's state-of-the-art technology allows it to broadcast oral argument sessions throughout the state building to accommodate overflow crowds. The courtroom also features listening devices for persons with a hearing loss.

## ◆ ORAL ARGUMENT


Supreme Court public proceedings are called "oral argument," calendar sessions. Oral argument, a tradition that dates back to the early days of the English court system, is also used in the Supreme Court of the United States and state appellate courts throughout the country.

Oral argument is the only opportunity the justices have to question the litigants or attorneys representing them about issues raised in their parties' legal briefs. Each side generally has 30 minutes to argue its case before the court. In death penalty appeals, that time may be extended to 45 minutes for each side.

In American appellate courts, it is customary for justices to interrupt an attorney's argument at any time to ask the advocate to address a specific point. The justices ask such questions from the bench to clarify issues of concern as they consider how to decide the case.

During oral argument, the justices sit on the bench in order of seniority, with the Chief Justice in the center and the most senior associate justices alternating on each side, starting to the Chief Justice's right.

The California Supreme Court hears oral argument during one week each month from September through June. Each year, four oral argument calendars are held in Los Angeles, four in San Francisco, and two in Sacramento. Occasionally, oral argument sessions are held elsewhere in the state. Throughout the year, the court remains open and engaged in case-related work.

 Headphones are available for persons with hearing loss. Please request headphones from the courtroom staff.

## ◆ COURTROOM STAFF

At each oral argument session, the Clerk of the Court or a member of his or her office sits at the head of the counsel table, directly in front of the bench, and calls the calendar. The California Highway Patrol serves as the court's bailiff, oversees security and decorum in the courtroom, and calls the court to order. In addition to counsel and court staff, visitors to calendar sessions include interested members of the public, the news media, and law school professors and students.

## ◆ HOW A CASE PROGRESSES THROUGH THE COURT

The California Supreme Court has discretion to decide whether it will accept any case, except for death penalty cases, which automatically are appealed directly to the court. The following process generally governs Supreme Court review.

### WEEKLY CONFERENCE

The Court Decides Whether to Review a Case

A "petition for review" is filed with the court and scheduled for one of the court's weekly petition conferences, which are held each Wednesday, except when oral argument is scheduled. At these conferences, the court typically considers an average of 270 cases, most of which are petitions for review. The court has 60 days from the filing of the petition to decide whether to accept the case and may extend this time up to 30 additional days. Although the justices frequently prepare their own memoranda on these and related matters, most of these cases initially are assigned to one of the court's central staffs (civil or criminal) for preparation of a conference memorandum. The justices use the memoranda to assist them in assessing the merits of the cases and the importance of the issues involved. Certain memoranda in death penalty cases are prepared by the capital central staff and also are voted on at the Wednesday conference.

### AFTER A CASE IS ACCEPTED

Preparing the Calendar Memorandum

In general, after a case has been accepted for review, the Chief Justice assigns the preparation of the calendar memorandum to one of the justices who voted to grant review. The calendar memorandum sets forth the facts, analyzes the legal issues in the case, makes a recommendation concerning the case's disposition, and is circu-

lated to all the justices. The justices individually review and respond to each circulating memorandum. After a majority of the justices indicate that they tentatively agree with the calendar memorandum or a revised or new memorandum, the Chief Justice sets the matter for oral argument.

### ORAL ARGUMENT

Attorneys Appear Before the Court

Oral argument is described above. A case is "submitted" for decision after oral argument, or if post-argument briefs are ordered or permitted, at the time all briefing is completed. Generally, the court must issue a written decision in a case within 90 days after a case is submitted.

### AFTER ORAL ARGUMENT

Assignment, Preparation, and Circulation of Proposed Opinions

The justices hold a conference on each case after oral argument. At this time, the justices take a tentative vote on the case. The justice assigned by the Chief Justice to write the majority opinion thereafter prepares and circulates the proposed majority opinion. All justices carefully review all circulated opinions—majority, concurring, dissenting, etc.—and are given time to write and circulate separate concurring or dissenting opinions. Typically, changes ranging from minor modifications to substantial rewriting are made to the original versions of circulated opinions before they are filed.

### THE FINAL STEP

Filing the Court's Decision

After the justices complete their deliberations and have subscribed to the majority, concurring, or dissenting opinion, a "Notice of Forthcoming Filing" is filed with the Clerk's Office. That notice announces the date on which the court's written opinion will be filed.

For the convenience of the litigants, the public, and the press, decisions normally are filed at two set times each week: Mondays and Thursdays at 10 a.m. At those times, the decisions are sent to the Clerk's Office, stamped "Filed," and made public, both in hard copy



*Supreme Court justices at their post-oral-argument conference. Photo by Wayne Thayer*

at the Clerk's Office and on the court's Web site (see front cover).

A decision does not become final until 30 days after the opinion has been filed, and the court may extend that time for an additional 60 days. In the interim, the court has discretion whether to grant a timely petition for rehearing or to modify its decision. If a petition for rehearing is granted, the process begins again, and a new calendar memorandum is prepared and circulated.

### PUBLISHING THE SUPREME COURT'S DECISIONS

Official Reports and the California Courts Web Site

The court's opinions establish precedent that must be followed by all California appellate and superior courts. Opinions of the California Supreme Court are published in bound volumes called the *Official California Reports*, as well as by private publishers. As a service to the public, both Supreme Court and Court of Appeal opinions are posted at the time of filing to the California Courts Web site at [www.courts.ca.gov](http://www.courts.ca.gov). The site also includes the Supreme Court's minutes, calendars, "Internal Operating Practices and Procedures," photographs and biographies of current justices, and a video overview of the court's history and procedures, called *Inside the Supreme Court*.

In addition to the Web site, the Supreme Court provides a computer terminal in its Clerk's Office to improve public access to detailed case docket information. The terminal allows the public and the press to obtain quick and accurate information about cases before the court.

# A VISITORS' GUIDE to the SUPREME COURT of CALIFORNIA



RONALD M. GEORGE  
STATE OFFICE COMPLEX,  
EARL WARREN BUILDING  
350 McAllister Street  
San Francisco, California 94102-4797

STANLEY MOSK  
LIBRARY AND COURTS BUILDING  
Sacramento

RONALD REAGAN  
STATE OFFICE BUILDING  
Los Angeles

[www.courts.ca.gov/supremecourt.htm](http://www.courts.ca.gov/supremecourt.htm)





*Tani Cantil-Sakauye*

CHIEF JUSTICE OF CALIFORNIA

The 28th Chief Justice of California, Tani Cantil-Sakauye, took office in 2011. As Chief Justice, she is Chair of the Judicial Council of California, the policymaking body for state courts, and the Commission on Judicial Appointments, the panel that reviews the Governor's appointments to the state appellate courts. She previously served on the Court of Appeal, Third Appellate District (Sacramento), 2005–2010; the Superior Court of Sacramento County, 1997–2005; and the Municipal Court of Sacramento, 1990–1997. In 1997, she established and presided over the first court in Sacramento dedicated solely to domestic violence issues. Chief Justice Cantil-Sakauye received her J.D. from the University of California, Davis, School of Law in 1984.



*Joyce L. Kennard*

ASSOCIATE JUSTICE

Justice Kennard was appointed to the state's high court in 1989. She served as Associate Justice of the Court of Appeal, Second Appellate District (Los Angeles), 1988–1989; judge of the Los Angeles County Superior Court, 1987–1988; and judge of the Los Angeles County Municipal Court, 1986–1987. She served as a senior attorney on the state Court of Appeal, Second Appellate District, 1979–1986, and as a Deputy Attorney General in Los Angeles, 1975–1979. In 1974, she graduated from the University of Southern California's Gould School of Law and at the same time received a master of public administration degree from USC's School of Public Administration.



*Marvin R. Baxter*

ASSOCIATE JUSTICE

Justice Baxter was appointed to the California Supreme Court in 1991. He served as Associate Justice of the Court of Appeal, Fifth Appellate District (Fresno), 1988–1991, and was Judicial and Executive Appointments Secretary for Governor George Deukmejian, 1983–1988. Before that, he was in private law practice in Fresno, 1968–1983, and served as a Fresno County Deputy District Attorney, 1966–1968. Justice Baxter received a J.D. from Hastings College of the Law and a B.A. from California State University at Fresno. After completing his undergraduate degree, he was selected in a national competition as a Coro Foundation Fellow in Public Affairs.



*Kathryn M. Werdegarr*

ASSOCIATE JUSTICE

Justice Werdegarr was appointed to the state's high court in 1994. She served on the Court of Appeal, First Appellate District (San Francisco), 1991–1994. Her legal background includes positions with the U.S. Department of Justice; Director, Criminal Law Division of California Continuing Education of the Bar; Senior Staff Attorney, California Supreme Court and Court of Appeal; and Associate Professor and Associate Dean, University of San Francisco School of Law. Justice Werdegarr received law degrees from the University of California at Berkeley's Boalt Hall School of Law and George Washington University School of Law. She received a B.A. from the University of California at Berkeley.



*Ming W. Chin*

ASSOCIATE JUSTICE

Justice Chin was appointed to the Supreme Court in 1996. He served as Presiding Justice, Court of Appeal, First Appellate District, Division Three (San Francisco), 1994-1996; Associate Justice, Court of Appeal, First District, Division Three, 1990-1994; and judge, Alameda County Superior Court, 1988-1990. Before becoming a judge, he was a partner in Aiken, Kramer & Cummings, Inc., 1976-1988, and an associate, 1973-1976. He was an Alameda County Deputy District Attorney, 1970-1972, and he was a captain in the U.S. Army, 1967-1969, and served in the Army Reserves, 1969-1971. Justice Chin received his J.D. from the University of San Francisco School of Law and B.A. from the University of San Francisco.



*Carol A. Corrigan*

ASSOCIATE JUSTICE

Justice Corrigan was appointed to the Supreme Court in 2006, having served as Associate Justice of the Court of Appeal, First Appellate District (San Francisco), 1994-2006; judge of the Alameda County Superior Court, 1991-1994; and judge of the Oakland-Piedmont-Emergencyville Municipal Court, 1987-1991. She practiced as a trial lawyer in the Alameda County District Attorney's Office from 1975 to 1987. She has been an adjunct professor of law at the University of California's Boalt Hall School of Law and Hastings College of Law, as well as the University of San Francisco, the University of Puget Sound, and the National Institute for Trial Advocacy. She received her J.D. from Hastings College of the Law and her B.A. from Holy Names College (Oakland).



*Goodwin Liu*

ASSOCIATE JUSTICE

Justice Liu was appointed to the Supreme Court in 2011. He served as Professor of Law at the UC Berkeley School of Law (Boalt Hall), 2003-2011, and as Associate Dean of Boalt Hall, 2008-2010. His legal background also includes positions as an appellate litigator at O'Melveny & Myers, 2001-2003; Special Assistant to the Deputy Secretary, U.S. Department of Education, 1999-2000; and law clerk to Justice Ruth Bader Ginsburg at the U.S. Supreme Court, 2000-2001, and to Judge David Tatel on the U.S. Court of Appeals for the D.C. Circuit, 1998-1999. He received a J.D. from Yale Law School; a master's degree from Oxford University, where he was a Rhodes Scholar; and a B.A. from Stanford University. Justice Liu grew up in Sacramento and attended California public schools.



# The Justices of the California Supreme Court



**A Conversation with Abraham Lincoln  
150<sup>th</sup> Anniversary of the Emancipation Proclamation**

Court of Appeal  
Third District  
State of California

California State Fair & Exposition (Cal Expo)

The Court of Appeal, Third District, State of California, has developed a live, civic education and public outreach program, which will be held at the California State Fair & Exposition (Cal Expo), from July 12, 2013 - July 28, 2013. (<http://www.courts.ca.gov/3dca.htm>; <http://www.calexpo.com>) The live "Conversation with Abraham Lincoln" will be conducted on Saturday, July 13, 2013, at Center Stage.

The program builds on the court's experience from programs it did at Cal Expo in 2004 and 2005. In 2004, the court did a program commemorating the 50-year anniversary of *Brown v. Board of Education*. In 2005, the court presented a program for the centennial celebration of the California Court of Appeal. This kind of programming by the Third Appellate District may become an annual event at Cal Expo, with a different theme connected to the courts, civil liberties, and to the rule of law. The concept may be replicated in local county fairs by the state's 58 superior courts. More than 15 million people attend Cal Expo and these other fairs each year.

Fairs are special. Lincoln thought so, too. In 1859, he recognized the civic import of fairs when he said they are "becoming an institution of the country; they are useful in more ways than one; they bring us together, and thereby make us better acquainted, and better friends than we otherwise would be." (Presidential Address, Wisconsin State Agricultural Society, Milwaukee, Wisconsin, September 30, 1859.)

Norton Parker Chipman, the first presiding justice of the Third Appellate District, 1905-1921, <http://www.courts.ca.gov/2732.htm>, had a link to fairs. In the late 1800s, he became president of the State Board of Trade, precursor to the California Chamber of

Commerce, and worked for twenty years to promote the interests of California. He extolled the importance of country fairs and agriculture, and advocated the use of technology to increase yields. He was involved in the World's Fair.

California's trial and appellate judges are increasingly proactive with participating in, as well as conceiving and providing civic education and public outreach, narrowly and broadly, near, far, and in between. The Third Appellate District regularly encourages and enables interested people, especially students, to attend oral argument sessions to learn, first hand, what appellate justices do and how appellate courts operate, both in our Sacramento courtroom, the most beautiful in the state, and in high school gyms throughout the 23 counties in the Third Appellate District, the geographically largest in the state.

In the more than 10 years the Third Appellate District has conducted its outreach program, it has held at least one session of oral argument in high school gyms in most of its 23 counties. In recognition of this complicated civic education and public outreach program, in 2002, the Third Appellate District was awarded the Ralph N. Kleps Award for Improvement in the Administration of the Courts. (<http://www.courts.ca.gov/5131.htm>.)

Here is an outline of "A Conversation with Abraham Lincoln, 150th Anniversary of the Emancipation Proclamation." It is still in production, so please feel free to offer suggestions.

### **A Conversation with Abraham Lincoln**

The program will commemorate the 150-year anniversary of the Emancipation Proclamation, the Thirteenth Amendment, the Gettysburg Address and the 50-year anniversary of Martin Luther King's I Have a Dream Speech. The public will be informed about: (1) The process of drafting the Emancipation Proclamation, passing the Thirteenth Amendment, and the political and social undercurrent of the time, (2) Lincoln's relationship with Frederick Douglass, (3) Lincoln's relationship with Norton Parker Chipman, the first administrative presiding justice of the Court of Appeal, Third Appellate District (see below), (4) Chipman's relationship with Douglass, (5) King's speech and a comparison between it and the Gettysburg Address, and (6) the California courts and their role in civil rights in California.

The connection between Lincoln and the California courts is Norton Parker Chipman, our court's first administrative presiding judge. He was an abolitionist, Civil War officer and ultimately became a general in the Union Army. And he was a friend of Lincoln. After the war, he prosecuted the commander of the Confederacy's Andersonville prison camp for war crimes. Later, he was elected to Congress, with the help of Douglass, to represent the District of Columbia. After serving in Congress, he migrated to California, where he started an organization that evolved into the California Chamber of Commerce, served as a California Supreme Court commissioner, and was ultimately appointed to the newly established California Court of Appeal, Third Appellate District, as its first administrative presiding justice.

This year's program has three components, A Conversation with Abraham Lincoln, on Center Stage at Cal Expo, an opportunity to shake hands with Lincoln and talk with justices of our court at an exhibit in an exhibit hall, and a high school essay contest.

A Conversation with Abraham Lincoln will take place on the first Saturday of the State Fair, Saturday, July 13, 2013.



## **Stage Performance**

The conversation with Abraham Lincoln will be conducted by the Honorable Vance Raye, Administrative Presiding Justice of the Court of Appeal, Third Appellate District, who will interview Lincoln about the topics set forth above. Lincoln will, no doubt, express pleasure that Justice Raye, a descendent of Oklahoma slaves, now has Justice Chipman's old job.

## **Meet & Greet**

After the stage performance, Lincoln will walk to the Third Appellate District's exhibit in the California Building (Building A), accompanied by an honor guard of military or law enforcement personnel. Fairgoers will be invited to follow Lincoln and visit the exhibit, where they will have an opportunity to shake Lincoln's hand and talk with justices of our court.

Fairgoers will be given one or more take-aways, such as a copy of *Striving for Justice, Yesterday, Today and Tomorrow: A History of the California Courts of Appeal* (a booklet produced by the judiciary for the Centennial Celebration of the Court of Appeal), to-be-determined books on Lincoln, the Emancipation Proclamation, and, perhaps a Constitutional Rights Foundation publication. A coloring book on the Emancipation Proclamation published by the National Archives may be provided to children.

Justices of the court (and perhaps Lincoln) will sign the books as they talk to fairgoers. This part of the program partially replicates the program this court did in 2005 for the Centennial Celebration of the Court of Appeal and will provide a vehicle for enhancing the public's understanding of California's courts using the historically significant connection between Chipman, Lincoln and Douglass.

## **Mr. Lincoln**

Jim Getty, a Lincoln scholar who works and resides in Gettysburg, will portray Lincoln. Funding for his appearance comes from the Administration of Justice Fund, Administrative Office of the Courts.

This is Getty's website: <http://www.jimgetty.com>

These are links to Getty performances: <http://www.youtube.com/watch?v=wWrBnvJO5sE> and <http://www.youtube.com/watch?v=c8alzrdfJt8>.

## **The Exhibit**

The exhibit will feature a time line tracking the history of civil rights in the United States and California. In addition to featuring Lincoln, Douglass and Chipman, the Emancipation Proclamation, the 13<sup>th</sup> Amendment, the Gettysburg Address and King's *I Have a Dream Speech*, the exhibit will also include the following:

- Important United States and California court cases.
- Important federal and state legislation.
- Significant historical events.
- A comparison between the Gettysburg Address and King's I Have a Dream Speech.
- A video loop on the Emancipation Proclamation and other civil rights history.
- Historical information about California's African-American appellate court justices.

- Information about California's courts.
- High school essay contest winners and the essays or excerpts from the essays.
- Sponsor list.

### **Takeaways for Adults and Children**

On the following pages there are some photos of people lined up to speak with us at the 2005 program. At that program, we signed and distributed hundreds of copies of *Striving for Justice, Yesterday, Today and Tomorrow: A History of the California Courts of Appeal*. (<http://www.courts.ca.gov/documents/coa100booklet.pdf>) People seemed really happy to visit with the justices and to have something to take away with them. Justices and, perhaps, Lincoln, will again distribute copies of that excellent publication.

We also hope to distribute the National Archives coloring book, *The Emancipation Proclamation: Forever Free*, and the National Archives 150th Anniversary Commemorative Edition of the Emancipation Proclamation (containing the final and the first two drafts). (They be found, respectively, <http://www.archives.gov/publications/kids/emancipation-proclamation-coloring-book.pdf> at <http://foundationnationalarchives.org/EP150>.)

### **Youth**

As you can see in the photographs of the 2005 program on the following pages, people lined up to talk with the justices. Many of the people with whom the justices spoke were children. Hopefully, they were inspired to learn more about the law and, perhaps, to become interested in being justice system professionals. Lincoln may well draw even more families this year.

An essay contest for high school students will be conducted, in collaboration with Sojourn to the Past (<http://www.sojournproject.com>). The winning essay and photograph of the winning essayist and his or her teacher would be featured prominently at the exhibit. The grand prize will be a Sojourn scholarship. "Sojourn is a unique, transformative, and empowering academic immersion program that takes 11th and 12th grade students from diverse academic, racial, ethnic, and socio-economic backgrounds out of their schools on a ten-day moving classroom journey along the path of the Civil Rights Movement through five states in the American South." \$500, \$300, and \$200 cash prizes will be awarded to three other winners.

### **Conclusion**

We expect this program will be a wonderful civic education learning experience for fairgoers and enhance their confidence in California's justice system.

#### ***William J. Murray, Jr.***

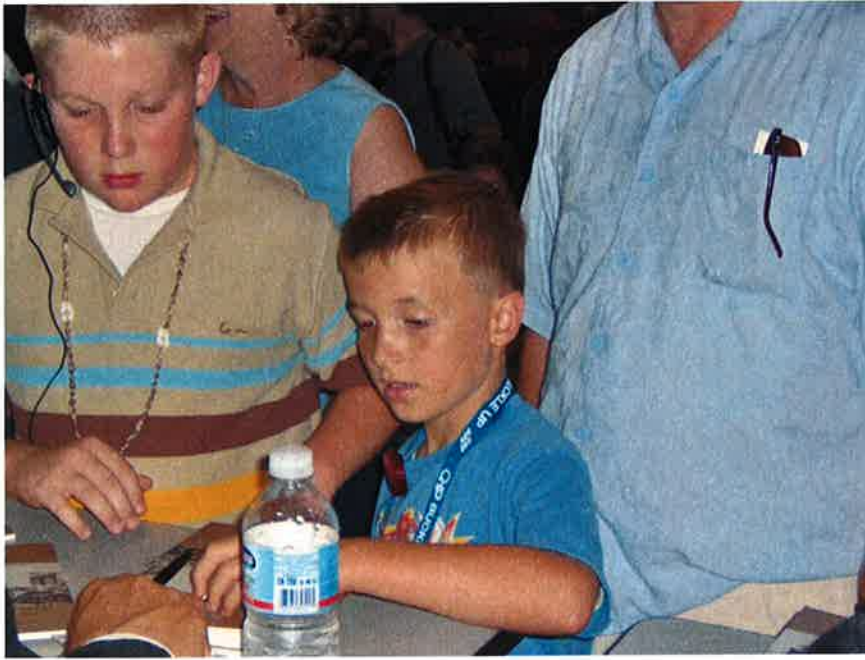
Associate Justice  
Court of Appeal, Third Appellate District  
621 Capitol Mall, 10th Floor  
Sacramento, California 95814  
Chambers: 916-654-0115















## Recent Topics

2002-2004 and 2007-2008  
Racism and Lawlessness in the South  
(*Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism*)



2005-2006  
World War II Japanese American  
internment (*Hirabayashi v. U.S.*  
(1943), *Yasui v. U.S.* (1943),  
*Korematsu v. U.S.* (1944), and  
*ex parte Endo* (1944))



2008-2009  
From *Tinker* to *Morse*:  
Student Speech - How Free?  
(*Tinker v. Des Moines* (1969),  
*Hazelwood v. Kuhlmeier* (1988),  
*Texas v. Johnson* (1989), and  
*Morse v. Frederick* (2007))

2009-2010 and 2010-2011  
Constitutional Rights on Campus:  
How Free? (*Tinker v. Des Moines*  
(1969), *Morse v. Frederick* (2007),  
*Layshock v. Hermitage* (2008)  
and *Safford v. Redding* (2009))

For more information, contact:  
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Established  
2001

A Commitment to Civic  
Education by Attorneys,  
Teachers and the Judiciary

Operation Protect and Defend is a program of Sacramento  
Law Foundation. Its steering committee includes  
representatives of federal and state courts, public and private  
law offices, law schools and diverse bar associations, as well  
as teachers from participating high schools.

*To all California judges, justices and lawyers:*

Before becoming a member of the California state bar or sworn in as a judicial officer, we each took an oath to support and defend the Constitutions of the United States and our state "against all enemies, foreign and domestic." While our country's democracy has always survived direct assaults, in the last several decades a deadly and pervasive domestic enemy has gained ground: ignorance and apathy - ignorance of American history and values, and apathy toward the rights and responsibilities of citizenship.

According to the U.S. Department of Education's National Assessment of Educational Progress (2006), three quarters of America's students do not receive an effective education needed to perpetuate a democracy. The California Survey on Civic Education (2005) reveals that less than half of California high school seniors agree that "Being actively involved in state and local issues is my responsibility." Such reports bring to mind the words of lawyer and educator Robert Maynard Hutchison, who warned: "The death of democracy is not likely to be an assassination or ambush. It will be a slow extension from apathy, indifference and undernourishment."

I believe that the privilege of admission to the bar and bench carries with it responsibilities that go beyond representing clients, adhering to the Code of Ethics or ensuring equal access to justice in the courtroom. I believe lawyers and judicial officers have a duty to serve the nation through fostering democratic principles.

As Justice Anthony Kennedy told a group of McClatchy High School seniors in 2001: "Democracy must be taught. It must be transmitted by us." I urge you to join us in protecting our Constitution and invigorating our democracy by working with educators to reach out to students and engage them in a dialogue on their citizenship rights and responsibilities.



Hon. Frank C. Damrell  
U.S. District Court  
Eastern District of California  
Founder, Operation Protect and Defend

Operation Protect and Defend targets average high school students and students most likely to benefit from additional civics and government programs. The project seeks to:

- connect students to the U.S. Constitution and American history;
- educate future voters and jurors;
- explore issues of U.S. citizenship and both its rights and responsibilities; and
- encourage students to become active citizens.



In 2009-2010, the participating schools include: Grant Union High School, Kennedy High School, Luther Burbank High School, McClatchy High School, Natomas Pacific Pathways Prep, Rio Americano High School, and Sacramento High School.

The judges, lawyers and teachers on the steering committee work together to design a curriculum, including selected readings and court opinions. The program has four main components:

1. Teacher-led introduction of the topic and Constitutional rights;
2. "Dialogue on America" - a lawyer-judge team goes into the classroom and engages students in a dialogue, discussing issues and questions raised by the curriculum;
3. "Story of America" - an essay contest (essays reviewed by a lawyer committee and a teacher committee; the finalist essays submitted to a panel of 11 federal and state judicial officers);
4. "Modern Masters of America Art Contest" and gallery reception; and
5. Law Day dinner in the spring where students whose essays are selected for prizes are honored.



SACRAMENTO LAWYER  
Community Service

## Operation Protect and Defend Begins its Fourth Anticipated Successful Year

By Heather Candy

The program, officially known as "Operation Protect and Defend - Lawyers and Judges Committed to Civic Education in the Public Schools," began as a pilot program during the spring of 2003. The program is an outgrowth from a concern expressed by U.S. District Judge Frank C. Damrell, Jr. in April 2002. Judge Damrell gave a speech in the United States Courthouse in which he cited the statistics showing that a significant percentage of high school and college students lack a basic understanding of the Constitution and American government. He believed there was a need to connect students in a real life manner to the Constitution and their government.

A small ad hoc committee of judges and lawyers began meeting to seek ways to address this disturbing trend. The committee was guided by the belief that lawyers and judges, who take an oath to "protect and defend" the Constitution of the United States as a condition of bar admission, have a special responsibility to educate future voters and jurors. The ad hoc, which included Judge Damrell, U.S. District Judge Morrison C. England, Jr., Third District Court of Appeal Presiding Justice Arthur Scotland, U.S. Magistrate Judge Kim Mueller, Joseph Genshlea of Weintraub, Genshlea, Chediak & Sproul, and Assistant U.S. Attorney Robin Taylor, began consulting with school superintendents, principals, teachers and students.

The ad hoc committee sought support from Sacramento County Bar Association and the Federal Bar Association, which enthusiastically sponsored the Program and provided representatives of various bar associations to form a 28-member steering committee. A teacher advisory committee, consisting of teachers from the Sacramento and San Juan Unified School Districts, also joined the Steering Committee to lend educational expertise in developing programs and facilitating the Program.

From the beginning, Operation Protect and Defend has sought to target average high school students rather than students in honors or advanced civics or history programs. The committee's rationale was that these students were more likely to benefit from additional programs related to civics and government. To reach this goal, the Steering Committee developed a three phase program. The first phase students are taught a curriculum created for the students by the Committee. The World War II Japanese American internment provides this year's topic. The second phase, students are encouraged to enter the Story of America essay contest, which is based on the curriculum. The prizes for the essay contest range from \$250 to \$1,000. The third phase, the Dialogue on America, consists of teams of judges, lawyers and law students who visit the participating classrooms to discuss the issues raised by the materials. The students whose essays are selected by the Steering Committee are recognized at the Law Day Awards Dinner.

During the first year of the Program the response by both students, lawyers and judges exceeded the organizers' expectations. The essay contest received nearly 300 essays from students. A lecture by author Mark Curriden, whose book *Contempt of Court* was utilized in the first two years' curriculum, was attended by approximately 600 students. Forty-five lawyers and 31 judges from the federal and state courts visited 37 government classes for the Dialogue on America sessions. This response has been equaled every year since.



U.S. District Judges Morrison England and Frank Damrell are two of the many judges who have participated in the Operation Protect and Defend program in its first three years.

In addition to the invaluable knowledge, expertise and experience the Bench and Bar provide to the schools, this Program affords judges and lawyers an opportunity to interact in a non-courtroom environment. The response from both judges and lawyers about this aspect of the Program has been overwhelming positive.

This year the Program will visit the following schools: Hiram Johnson High School; Kennedy High School; Luther Burbank High School; McClatchy High School; Rio Americano High School; Sacramento High School; and Valley High School during February and March of 2006. The students will complete their essays by April and will be awarded their prizes at the May 4, 2006 Law Day Dinner.

The continued success of the Protect and Defend the Constitution Program rests with the continued participation and generosity of its volunteers. Every year the Program seeks new volunteers. If you are interested in participating in the 2006 Protect and Defend the Constitution Program or have any questions please contact Alf Brandt at (916) 319-2761 or [Alf.Brandt@asm.ca.gov](mailto:Alf.Brandt@asm.ca.gov).

November / December 2005

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# *Students' Rights to Free Speech – How Free?*

## *Operation Protect & Defend – 2011 Program*

The first ten amendments to the United States Constitution provide our country's citizens with certain rights. The very first amendment provides:

*Congress shall make no law . . . abridging the freedom of speech, or of the press;*

The Founding Fathers considered this Constitutional right central to maintaining democracy. According to George Washington: "If the freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter." The right to free speech prevents governments at all levels from "abridging" Americans' freedom of speech, allowing for a robust political debate. The United States Supreme Court has a long history of upholding free speech and striking down laws that interfere with people's right to speak freely. The Court's authority to review and overturn laws is one of the Constitution's "checks and balances" among the three branches of government (executive, legislative, judicial).

This Operation Protect & Defend program focuses on student "rights" to free speech, examining the scope of student rights and how other public interests may allow schools and the government to limit student speech. The Supreme Court has balanced student free speech interests with other school-related public interests. This program relies on two Supreme Court decisions that address student speech, two federal appellate court decisions regarding on fake *My Space* pages, and a state appellate court decision related to cyber-bullying. These cases balance students' free speech rights against other governmental interests:

- *Tinker v Des Moines* (1969) upheld the right of an 8<sup>th</sup>-grader to wear a black armband to school to protest the Vietnam War, after the principal suspended her.
- *Morse v Frederick* (2007) limited a student's right to hold a banner promoting illegal drug use at a school event – often referred to as the "Bong Hits for Jesus" decision.
- *Layshock v. Hermitage School District* (2010) upheld a student's right to post a "lewd, profane and sexually inappropriate" *MySpace* profile page about his high school principal, which the student had created outside the classroom.
- *J.S. Ex Rel. Snyder v. Blue Mountain School District* (2010) limited a student's right to post a fake a *MySpace* profile page created outside the classroom about a middle school principle because the profile threatened to cause a substantial disruption at school.
- *D.C. v. R.R.* (2010) allowed a cyber-bullying victim to sue the bully, despite the bully's claim of First Amendment protection, because the cyber-posts constituted "true threats."

These cases demonstrate that the rights that our Constitution ensures often come with responsibilities, requiring courts to balance protected public interests. The Court has allowed governments to regulate the "time, place and manner" of speech, to protect public interests such as public safety. While governments may not regulate the content of speech generally, such content regulation is allowed at school to prevent disruption of others' education. When there is no disruption, the Supreme Court may uphold students' free speech rights, such as Mary Beth Tinker's armband against the Vietnam War.

When the Supreme Court applies the right to free speech to students, other concerns may limit the speech of students both in and out of school. These concerns include preventing interference with other students' education and a school's rights to oppose illegal drug use. While the Supreme Court consistently acknowledges that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," exercise of their free speech rights may not "materially and substantially disrupt the work and discipline of the school." The Supreme Court considers each case based on its unique facts, applies the law and its previous decisions (called "precedents"), and often exercises its collective judgment in balancing free speech rights with other Constitutional or public interests.



Speech outside school and school activities may get more First Amendment protection. But what happens, in today's networked world, where outside speech affects school activities, such as cyber-bullying of school officials or between students on home computers? Students – with or without computers – may encounter similar consequences from what happens to their peers on *Facebook* or on campus. What is the proper role and responsibility for schools to protect their officials or their students from verbal bullying, regardless whether on-line or in-person? In some cases, student speech may be so threatening, dangerous or harmful that it may be treated as the basis for a civil lawsuit or even criminal sanctions, outside of school. Courts may then need to balance the speaker's free speech rights with the harm – or potential harm – to others.

Supreme Court decisions often reflect the debate over balancing competing public interests. While the Court appoints one member to write the official Court opinion, its adoption may depend on "conurrence" opinions that agree with the result but present different rationale for reaching that result. Other justices may disagree completely and write "dissent" opinions. Before the Court can consider and resolve disputes regarding free speech (or other constitutional rights), a plaintiff must challenge a government's action that the plaintiff thinks limits free speech at school. The challenge includes filing a lawsuit against the school and/or the official limiting speech.

When it comes to constitutional rights controversies in schools, the Supreme Court applies the rules set out in the Constitution – as interpreted by prior Court decisions, called legal "precedent." The Court often asks and answers this question in these school cases: Is the limitation on constitutional rights reasonable, given "the schools' custodial and tutelary responsibility" and their duty to educate? Courts must also ask whether the benefit derived from the free exchange of ideas is "clearly outweighed by the social interest in order and morality."

### **Web Resources**

*Wall Street Journal* article regarding student speech at:

[http://interactivo.wsj.com/article/SB122411642705338721.html?mod=todays\\_us\\_opinion](http://interactivo.wsj.com/article/SB122411642705338721.html?mod=todays_us_opinion)

CA law protecting student speech on college campuses. Find information on AB 2581 (2006) at:

<http://www.leginfo.ca.gov>

Webpage Regarding Speech of Public School Students

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/studentspeech.htm>

Website for Finding All United States Supreme Court Decisions

<http://www.law.cornell.edu/supct/>

### **Vocabulary**

- Abridge:
- Appeal:
- Bill of Rights/Constitutional Rights:
- Checks and Balances:
- Clear and Present Danger:
- Concurrence:
- Dissent:
- *En Banc* Rehearing:
- First Amendment:
- Fourth Amendment:
- *In Loco Parentis*:
- Legal Precedent:
- Public Figure:
- Symbolic Speech:
- Time, Place and Manner:



## Student Speech: Political Cartoons



By David Horsey, Published April 29, 2004 in the *Seattle Post-Intelligencer*  
Reprinted by permission

**Note Regarding Cartoon:** In 2004, a school superintendent reported a Prosser (WA) High School student, who had shown his artwork to his art teacher, to the Secret Service for threatening the President. One drawing "showed a man in what appeared to be Middle Eastern-style clothing, holding a rifle. He was also holding a stick with an oversize head of the President on it," Associated Press reported. "Another pencil-and-ink drawing portrayed Bush as a devil launching a missile, with a caption reading, 'End the war on terrorism.' "



Reprinted by Permission – *Sacramento Bee*

**Note Regarding Cartoon:** This cartoon responded to the Supreme Court decision in *Morse v Frederick* (below), in which the Supreme Court upheld a principal's right to discipline a student and take away his banner that she reasonably viewed as advocating illegal drug use against school policy.

### CRITICAL THINKING QUESTIONS

1. What prior knowledge is needed to understand the cartoon?
2. What is the subject matter of the cartoon?
3. What is the perspective of the cartoonist on this subject?





## How to Brief a Case

In preparing for class and the professor's questions, law students read court decisions and prepare a short summary – or brief – of the decisions. Briefing a case helps the student think through the case's key issues and decisions on those issues (*i.e.* "holdings"). Here's a simple way to summarize a case. In preparation for class, you need only give yourself reminders about these issues, and you do not need to write complete sentences.

**State the procedure** – Where did this case come from? Was the case previously heard in state or federal courts? What were the rulings of the lower courts? Who won? Who lost? The procedural history of a case is a quick statement about the path the case has taken in the courts.

**Name the Parties** – Who is the plaintiff? Who is the defendant?

**State the Facts** – Write down the facts of what happened to the parties. What is the story between them? Who did what to whom? What happened of legal significance, that is, what happened that is relevant to deciding legal issues?

**State the Issue (or issues)** – What are the legal/constitutional issues that the court must decide in order to arrive at a decision? What rights/amendments were allegedly violated?

**State the Holding** – What does the court hold or decide? How many justices are in the majority opinion? What is the “rule” that the court comes up with in answer to the legal issues posed?

**State the Court's Reasoning or Rationale** – Why does the court decide the way it does? What is the logic or rationale of its holding? What is its analysis?

**State the Dissent** – If the decision was not unanimous, how many justices dissented and what was their reasoning for disagreeing with the majority opinion of the court? What future challenges might the court face as a result of the disagreement over the decision?

### Note Regarding Court Decision "Citations"

You may notice, as you read court decisions, that numbers and letters follow names of court decisions. These are called "citations," which tell you how to find the decision in law books. The first number is the volume where the decision appears. The letters show which “reporter” – or law book series. (The Supreme Court's published decisions appear in several reporters, but usually are cited to the Court's own reports – “U.S.”) The final number shows the page number where the decision starts. On the Internet, you can often find the case by doing a search with the case citation. You also may find these citations on the Internet, at the Supreme Court's website for example ([www.supremecourt.gov](http://www.supremecourt.gov)).



# TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

393 U.S. 503 (1969)

## BACKGROUND OF THE CASE

John Tinker, his sister Mary Beth, and Christopher Eckhardt were all students in Des Moines, Iowa when they helped plan a protest against the United State's involvement in Vietnam. John and Christopher attended a public high school at the time and Mary Beth a public junior high school. The students, their parents and others met in December 1965 to brainstorm ways to publicize their protest. It was decided that in addition to fasting, John, Mary Beth and Christopher would wear black armbands to school on December 16<sup>th</sup> and New Year's Eve to communicate their support of a truce.

Having learned of the plan, school authorities announced on December 14<sup>th</sup> that any student wearing an armband to school would have to remove it or face suspension. Mary Beth and Christopher wore their armbands to school on December 16<sup>th</sup> and John wore his on the 17<sup>th</sup>. All three students were consequently suspended and could not return to school until they would come back without the armbands.

Through their parents, John, Mary Beth and Christopher filed a complaint in district court seeking an injunction to restrain the school authorities from disciplining the students and nominal monetary damages. Although no disruption of school was intended or took place, the district court dismissed the complaint following an evidentiary hearing, holding that the school authorities' actions were reasonable based on their fear of disturbance of school discipline. After the ruling was affirmed by a higher appellate court, the U.S. Supreme Court agreed to hear the case on appeal, granting "certiorari."



## **CONSTITUTIONAL ISSUE PRESENTED**

Was the wearing of armbands to school as a political protest protected by the First Amendment's guarantee of freedom of speech?

## **THE COURT'S DECISION**

In a 7 to 2 decision, the Court held that the students' form of expression was protected by the First Amendment. The Court began by recognizing that the wearing of armbands under these circumstances was closely related to "pure speech" as it was a silent, passive expression of opinion which did not interfere with the rights of other students or disrupt classes. While acknowledging school officials' authority to control conduct in schools, the Court held that the prohibition could not be justified without a showing that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Although school authorities had feared disorder on campus due to the societal controversy surrounding Vietnam, the Court was clear that a mere fear of disturbance "...is not enough to overcome the right to freedom of expression."

The Court also found it relevant that the school authorities did not prohibit the wearing of all political symbols, noting that students in some of the schools wore political buttons and some even wore traditional Nazi symbols. The selective prohibition of political or controversial symbols was also held to be unconstitutional.

Recognizing that students are "persons" under our Constitution, the Court directed that school officials "do not possess absolute authority over their students", and that unless there is a constitutionally valid reason to regulate their speech, "students are entitled to freedom of expression of their views."

## **CRITICAL THINKING QUESTIONS**

- What if the school authorities had prohibited all political and/or controversial symbols – could they have then constitutionally banned the armbands?
- Would the decision have been different if school authorities could prove that students would be arguing in the hall ways if anyone wore a black armband to school? What if it would cause physical fights on campus?
- Does the *Tinker* decision mean that students can say anything they want to at school?



## Mary Beth Tinker: The Real Story

Just before Christmas in 1965, a group of students in Des Moines Iowa, including my brothers and sisters and I, and a boy named Chris Eckhardt, wore black armbands to school to mourn the dead in Vietnam. I was thirteen and in eighth grade. For months, we had watched Vietnamese villages burn on the nightly news – the screams of children, soldiers in body bags. We wanted peace. We had no idea that our small action would lead us to the Supreme Court, or that the ruling in *Tinker v. Des Moines* would become a landmark for students' rights. But that is how history is made.

The year before, my mother and my father, who was a Methodist minister, went to Ruhlville, Mississippi for "Freedom Summer." When they returned, they told us stories about courageous people who were threatened, shot, even killed, for standing up for the right to vote. These people became my role models. I admired how they stood up for what they believed in, for what was right, for democracy. And I admired my parents for putting their Christian beliefs into action. I had seen so many who did not.

On the news, children in Birmingham and other cities were attacked with dogs and fire hoses just for wanting good schools, while I went roller skating with my friend, Connie, made fudge at her house, or had slumber parties. We wanted to do more, and would join protestors at the capital, picketing for racial justice and singing freedom songs. There was hope, like now.

But by Christmas of 1965, about 1000 soldiers had been killed in the Vietnam War. A lot of people thought it was patriotic to support the war, but some believed we should try peace. Senator Robert Kennedy proposed a Christmas truce. By then, my parents had joined the Quakers, and my brother and I attended a Unitarian youth group. We thought the country should try Senator Kennedy's Christmas truce.

Some of the older kids in our youth group got the idea of wearing black armbands to support the truce, and wrote an article about that in the Roosevelt High School newspaper. When the principals in Des Moines learned about our plan, they called an emergency meeting, deciding that any student wearing a black armband to school would be suspended.

After that, we weren't sure what to do. We had learned about the Bill of Rights and the First Amendment in school, and we felt free speech should apply to us, too. Plus, we had examples of brave people like the ones in Ruhlville and Birmingham. Some of us decided to go ahead and wear the armbands. About five of us were suspended.

That might have been the end of the story, if it were not for the American Civil Liberties Union, whose mission is to stand up for the Bill of Rights and the 13th, 14th, 15th and 19th Amendments. They provided a lawyer, Dan Johnston, who helped us win our case at the Supreme Court on February 24, 1969, by a vote of 7-2. It was a victory for all students.

I was scared the day I wore the armband to school, but I knew I had to speak up. The world seemed upside-down, but I had courageous role models to show me how to stand up for what I believe. If you look around, there are many others like that, whether in your home, your school, your neighborhood, your town or even across the world. You can join them to change the world, and, when you do, your life will be meaningful and very interesting. It certainly has been for me!

*-Mary Beth Tinker, 1/28/09, Washington, DC*





## Your Notes: *Tinker*



(The banner at issue)

# MORSE *et al.* v. FREDERICK

551 U.S. 393

Certiorari to the United States Court of Appeals for the Ninth Circuit

Argued March 19, 2007 – Decided June 25, 2007

## BACKGROUND OF THE CASE

On January 24, 2002, students of Juneau-Douglas High School in Juneau, Alaska were allowed out of class to see the Olympic torch relay. Joseph Frederick, a student, joined friends off school grounds but across from the high school. Frederick and his friends waited for TV cameras covering the event, then displayed a banner reading "BONG HiTS 4 JESUS". The school's Principal, Deborah Morse, saw them, ran across the street, and took the sign after Frederick refused to remove it as ordered. Frederick was suspended for violating the school district's anti-drug policy. He appealed to the superintendent, who upheld the suspension with a reduction of time off from school. Frederick then appealed to the Juneau School Board, which also upheld the suspension.

Frederick sued Morse and the school board, claiming that they violated his federal and state constitutional free speech rights by taking down the sign and suspending him. The U.S. District Court for the District of Alaska, where the civil rights suit was brought, ruled that Morse and the school board had not violated Frederick's First Amendment rights. The 9th US Circuit Court of Appeals reversed the federal district court's decision, ruling that, despite occurrence during a school-supervised event, Morse taking the sign violated Frederick's free speech rights. The school board petitioned the United States Supreme Court to review the 9<sup>th</sup> Circuit's decision.

## CONSTITUTIONAL ISSUES PRESENTED

Was the display of the banner school speech? If it was school speech, did the banner advocate or promote illegal drug use? Are schools allowed to take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use?

## THE COURT'S DECISION

Chief Justice *Roberts* delivered the majority opinion of the Court. Justices *Scalia*, *Kennedy*, *Thomas*, and *Alito* joined. Justices *Thomas* and *Alito* filed separate concurring opinions. Justice *Breyer* concurred in part and dissented in part. Justice *Stevens* filed a dissenting opinion, in which Justices *Souter* and *Ginsburg* joined.



Chief Justice Roberts concluded that the school officials did not violate the First Amendment by confiscating the banner and suspending Frederick. The Court ruled that the banner was displayed during a school event, making this "school speech" as opposed to speech in public. It also concluded that, although the banner's message was "cryptic," the principal reasonably concluded that it promoted illegal drug use. The opinion discussed previous U.S. Supreme Court rulings that held the First Amendment rights of students in school are narrower than those of adults outside of the school environment.

The opinion cited the compelling interest of government (in particular, schools) to deter illegal drug use by students. The Court also noted "peer pressure is perhaps 'the single most important factor leading school children to take drugs.'" The Court found the banner to be a type of peer pressure and ruled that Principal Morse acted to address this concern. The majority opinion distinguished Morse's actions from that of school officials in *Tinker* when it stated that a failure to act against the banner:

would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. [The First Amendment] does not require schools to tolerate at school events student expression that contributes to those dangers.

### **CONCURRENCES**

Justice Thomas concurred in the result but argued that students in public schools do not have a right to free speech and that *Tinker* should be overturned. Thomas cited the doctrine of *in loco parentis*, meaning "in the place of the parent", in his opinion. He opined that, because parents entrusted the care of their children to teachers, teachers have a right to act in the place of parents during school hours.

Justice Alito, joined by Justice Kennedy, agreed with the majority opinion but only to the extent that:

"(a) [I]t goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

### **CONCURRENCE IN PART AND DISSENT IN PART**

Justice Breyer concurred in part and dissented in part, arguing that the Court should not have addressed the First Amendment question because of "qualified immunity," which requires courts to enter judgment in favor of a government employees accused of violating individual rights unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Breyer would have simply issued a narrow decision indicating that Morse had qualified immunity.

### **DISSENT**

Justice Stevens, in a dissent joined by Justices Souter and Ginsburg, argued that "the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed." Stevens wrote:

"[T]he school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use" ... cannot justify disciplining Frederick for his attempt to make an



ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.”

Stevens criticized the majority decision because it “trivializes the two cardinal principles upon which *Tinker* rests,” since it “upholds a punishment meted out on the basis of a listener’s disagreement with her understanding (or, more likely, misunderstanding) of the speaker’s viewpoint.” Stevens also challenged the majority’s finding that the banner was a serious call to drug use that would persuade students, labeling the finding “most implausible.”

### **CRITICAL THINKING QUESTIONS**

- What if this had occurred on a day off from school?
- Would it make a difference if it was a day off, but on school property?
- Would the decision have been different if the sign asked “Would Jesus take a bong hit?”
- Does the *Morse* decision prevent students from expressing *any* opinions about drug use at school?

### **EPILOGUE**

The Supreme Court decision did not address all of the causes of action in the suit. In November 2008, the school district paid Frederick \$45,000 to resolve the case, including state claims under Alaska’s Constitution.



## The Socratic Seminar

Law students generally learn about the law through the "Socratic Method," which involves students reading a court decision and the professor asking questions that require students to think about and explain the rationale and conclusion of the court decision. This teach-by-questions method originated with the ancient Greek philosopher and teacher, Socrates.

### "Socratic Method" – Guidelines for Students

1. Refer to the text when needed during the discussion. A seminar is not a test of memory. You are not "learning a subject." Your goal is to understand the ideas, issues, and values reflected in the text.
2. It's OK to "pass" when asked to contribute.
3. Do not participate if you are not prepared.
4. Do not stay confused. Ask for clarification.
5. Stick to the point currently under discussion. Make notes about ideas you want to come back to, for discussion.
6. Don't raise hands if possible....just take turns speaking.
7. Listen carefully.
8. Speak up so that all can hear you.
9. Talk to each other, not to the teacher.
10. Discuss ideas rather than each other's opinions.
11. You are responsible for the seminar, even if you don't know it or admit it.
12. It is not a "debate." You are not trying to "win" in this discussion. Just share ideas and broaden your thinking.



## The Socratic Seminar: *Tinker & Morse*

After reading the brief summaries of *Tinker v. Des Moines* and *Morse v. Frederick*, answer the following questions in writing before beginning the seminar. Your answers should prepare you for class discussion and make it possible for you to contribute.

1. Consider the *Tinker* case. If a student may wear an armband or engage in some type of symbolic expression of her political views in a classroom, is she also within her rights to speak her views or circulate pamphlets in class? Why or why not?
2. Chief Justice Earl Warren argued at the Court's conference in *Tinker* that school officials in Des Moines had picked out only one message to censor and thus violated the "equal protection" clause of the 14<sup>th</sup> Amendment. Do you agree with this argument? Explain.
3. In the *Morse* case, Justice Thomas agreed with the decision but went on to say that "students in public schools do not have a right to free speech and that *Tinker* should be overturned." He cited the doctrine of *in loco parentis*, which means "in the place of the parent." Do you agree or disagree that teachers have a right to act in the place of parents during school hours and thus *Tinker* should be overturned?





## Post-Socratic Seminar: Write-up questions



# Layshock v. Hermitage School District

593 F.3d 249

United States Court of Appeals, Third Circuit

Argued December 10, 2008 -- Decided February 4, 2010

*Rehearing en Banc Granted, Opinion Vacated April 9, 2010*

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# J.S. *ex rel.* Snyder v. Blue Mountain School District

593 F.3d 286

United States Court of Appeals, Third Circuit

Argued June 9, 2009 -- Decided February 4, 2010

*Rehearing en Banc Granted, Opinion Vacated April 9, 2010*

## OVERVIEW

Both the *Layshock* and *Blue Mountain* cases involve Pennsylvania students who were suspended for creating fake MySpace profiles on home computers during non-school hours to mock their school principals. The students and their parents sued their respective school districts in federal district court in Pennsylvania, claiming their punishments violated their First Amendment rights. The district courts issued conflicting rulings, with the court siding with the student in *Layshock* and with the school district in *Blue Mountain*. The losing parties appealed the decisions to the United States Court of Appeals for the Third Circuit. The three-judge appellate panels for each case affirmed the District Courts' rulings, leaving what appears to be a conflict in the law. The Third Circuit has now granted an "en banc" hearing in each case, which means that all judges on the Third Circuit (rather than a three-judge panel) will rehear the cases to address the apparent conflict.

## FACTUAL BACKGROUND

***Layshock* and *Blue Mountain* shared many similar facts.** In both cases, the high school student made fun of the school principal by faking a *MySpace* profile with false information about the principal's drinking, drug use, and/or sexuality. The profiles used lewd and offensive language, and suggested illegal behavior. Both students invited other students to view the profiles. Other students viewed the profile at school, leading to some commotion in classrooms. Principals suspended both students for their creation of the fake profiles, and the parents sued the school for violation of their First Amendment rights.

**The key factual issue distinguishing the two cases was disruption at school.** In *Layshock*, the student accessed the profile from a computer in Spanish class and showed the profile to other classmates. The Spanish teacher was unaware of their activity. Once, a teacher saw students congregating and giggling in his computer lab class while looking at the profile, and the teacher told the students to shut it down. After teachers were directed to send all students who might have information about the profiles to the office, approximately 20 students were referred to the office because "they had made conversation, made a joke, made a disruption in class [about the profiles], that the teacher had to redirect."



In *Blue Mountain*, the school district argued that the profile disrupted school because: (1) two teachers had to spend a few minutes quieting their class while students talked about the profile; (2) one guidance counselor had to proctor a test so another administrator could sit in on the meetings between the principal and the students; and (3) two students decorated the students' lockers to welcome them back when they returned from their suspension, which led to a large gathering of students in the hallway. Also, the principal said he noticed a severe deterioration in discipline in the school, particularly among eighth graders, which he attributed to a new culture of students rallying against the administration.

### **CONSTITUTIONAL ISSUE PRESENTED**

Did the schools' punishment of the students for their role in creating the MySpace profiles violate the free speech protection of the First Amendment?

### **THE DISTRICT COURTS' DECISIONS**

**The two federal District Court judges came to opposite conclusions as to the First Amendment protection afforded the students**, based on the school disruption. In *Layshock*, the District Court held that the student's suspension violated his First Amendment rights because there was no evidence that Justin engaged in that speech while in school. While the profile was "lewd, profane, and sexually inappropriate," there was no "sufficient nexus between [the student's] speech and a substantial disruption or the school environment." "The actual disruption was rather minimal – no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."

In contrast, in the *Blue Mountain* case, the District Court held that the school district did *not* violate the student's First Amendment rights by disciplining her. While the court acknowledged that the student created the profile at home, the school district acted appropriately "because the lewd and vulgar off-campus speech had an effect on-campus."

### **THE APPELLATE COURTS' DECISIONS**

In both cases, the losing parties appealed to the Third Circuit Court of Appeals to challenge the district courts' rulings, and **the Third Circuit 3-judge panels upheld the different lower court decisions**. The *Layshock* court discussed the importance of 1<sup>st</sup> Amendment protections for student speech. It then concluded the school district had violated those rights because there was no school disruption, as the school district had failed to appeal the lower court's factual finding of no-disruption. Nevertheless, on the very same day, the three-judge panel for *Blue Mountain* affirmed that the school district had acted appropriately in punishing the student. That court concluded that, while the profile had not yet caused a substantial disruption at the school, it *threatened* to do so. Therefore the school district did not offend the student's First Amendment free speech rights under *Tinker* when it punished her.

Given the conflict between the two Third Circuit decisions, the Third Circuit vacated the decisions on April 9, 2010 and granted an "en banc" hearing, which means that all judges on the Third Circuit (rather than a three-judge panel) will rehear the cases to address the apparent conflict.



## CRITICAL THINKING QUESTIONS

- Is there a way to distinguish the *Layshock* and *Blue Mountain* cases? The appellate court in *Blue Mountain* noted in a footnote that they are aware of the *Layshock* decision. But the court said the cases were distinguishable because the school district in *Layshock* failed to establish that there was a sufficient connection between the student's speech and a substantial disruption of the school environment. Is this a proper distinction? Could other facts distinguish the two cases?
- Was the *Layshock* court correct in holding that there was no sufficient nexus between the fake MySpace profile and a substantial disruption of the school environment to permit the school district to regulate the student's conduct? Was it correct for the *Blue Mountain* court to hold that punishment of the students was proper because the profiles *threatened* to cause a substantial disruption?
- Are these cases different from *Tinker*, in that *Tinker* involved political speech to make a statement about the students' opposition to the Vietnam War and these cases involved no political, and therefore, no protected speech under the First Amendment? Arguably, the profiles did not contain critiques or disapproval of the principals' performance and simply demeaned them for no apparent purpose.
- Could either of the principals sue the students and their parents for "defamation" or "libel" (i.e., telling lies about someone)? That question raises other First Amendment issues: Are the principals "public figures" who cannot sue because they have chosen to be in the public spotlight and therefore must accept public criticism? Would a reader of the MySpace profiles understand that they were an attempt at humor and not asserted as truth?
- Is there any similarity between the banner in the "BONG HiTS 4 JESUS" case and the principal profile in the *Layshock* case, in that the profile could also be viewed as violating the campus policy by promoting illegal drug use?
- California just passed a law that makes impersonating another person on-line a criminal offense. Senate Bill 1411 (Simitian), Chapter 335 of the Statutes of 2010, provides:  
*528.5. (a) Notwithstanding any other provision of law, any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense [subject to a fine of up to \$1000 and/or up to 1 year in jail].*  
The bill's author, Senator Joe Simitian, indicated that the bill responded to the 2010 suicides by victims of cyber-bullying. Do you think this kind of cyber-bullying should be a criminal offense? (You can find more information about SB 1411 at [www.leginfo.ca.gov](http://www.leginfo.ca.gov).)



# D.C v. R.R.

182 Cal. App. 4th 1190

Appeal to the Court of Appeal, Second District

April 8, 2010

## **BACKGROUND OF THE CASE**

A 15-year-old high school student, D.C., was pursuing a career in entertainment and maintained a website for that purpose. The site allowed any member of the public to post comments in a “guestbook.”

Several students who attended the same private school as D.C., Harvard-Westlake School in Los Angeles, visited the site and posted comments on the “guestbook.” Approximately thirty-four comments contained threatening language and derogatory comments about D.C. Twenty-three of those comments falsely identified D.C. as a homosexual and made negative remarks relating to that identification. One 17-year-old student, R.R., wrote: “Hey [D.C.], I want to rip out your f\*\*\*\*\*g heart and feed it to you. I heard your song while driving my kid to school and from that moment on I’ve . . . wanted to kill you. If I ever see you I’m . . . going to pound your head with an ice pick. F\*\*k you, you d\*\*k-riding p\*\*\*s lover. I hope you burn in hell.”

After D.C.’s father read the comments, he immediately informed Harvard-Westlake of the problem as well as the Los Angeles Police Department. On the advice of police, D.C. withdrew from Harvard-Westlake. D.C. and his family moved to Northern California and a different school.

On April 25, 2005, D.C., his father, and his mother sued the students who posted the negative comments, their parents, the school, the school’s board of directors, and three school employees.

R.R. and his parents moved to dismiss the charges, claiming that R.R.’s posted message was protected speech under the First Amendment. Specifically, R.R. asserted that while he had seen D.C. at school from a distance, he never had verbal or physical contact with him. A fellow student had told R.R. to “check out” D.C.’s website. R.R. viewed the comments by other members of the site, thought they were “funny,” and determined that it was a competition to see who could make the most outrageous comments. He explained that his motivations in sending the email “had nothing to do with any perception of [D.C.’s] sexual orientation, and certainly did not reflect a desire to do him physical harm.” Rather, he thought the message was “fanciful, hyperbolic, jocular, and taunting, and was motivated by [D.C.’s] pompous, self aggrandizing, and narcissistic website.” He also sought to win the “one-upmanship” contest that was taking place on the website. R.R. admitted that he later was ashamed of his comment. The trial court denied R.R.’s motion to strike the claims against him. R.R. and his parents appealed to the California Court of Appeal.

## **CONSTITUTIONAL ISSUE PRESENTED**

Were the comments made by R.R. on the website protected by the First Amendment such that R.R. and his parents would not be liable for civil penalties? Or were the comments made by R.R. unprotected “true threats”?





## **THE COURT'S DECISION**

The California Court of Appeal held that R.R.'s comments constituted true threats and were not protected by the First Amendment in order to prevent R.R. and his parents from civil liability.

The Court of Appeal first stated that the hallmark of the protection of free speech is to allow "free trade in ideas – even ideas that the overwhelming majority of people might find distasteful or discomforting." However, the protection is not absolute, and the content of speech may be restricted in a few limited areas where "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

One of these limited areas is where the speech at issue is a "true threat." A "true threat" encompasses those statements where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The speaker does not need to actually intend to carry out the threat because the prohibition on "true threats" protects individuals from the fear of violence and from the disruption created by such fear. A true threat is a serious one, not uttered in jest, idle talk, or political argument.

The Court of Appeal also noted that cyber-bullying is a "big deal" that has resulted in violence and suicide. Instances of cyber-bullying have increased dramatically in recent years.

The Court of Appeal held that the comment by R.R. constituted a true threat because a reasonable person would foresee that the comment would be interpreted by D.C. and his parents as a serious expression of an intent to inflict bodily harm. The comment conveyed the intent to inflict physical harm on D.C. three times. The content of the message, which was a series of grammatically correct sentences composed over at least several minutes, showed deliberation on the part of the author. It did not matter that the author didn't actually intend to kill or harm D.C.

The Court of Appeal also held that the content of the message demonstrated that R.R. intended to convey a threat because the comment described violent conduct R.R. wanted to commit, expressed feelings of anger and hatred, and indicated that R.R. would physically attack D.C. if he saw him. The Court of Appeal concluded that even if R.R. believed his comment was humorous, the Court could still conclude that he intended it as a threat. Even if an individual has a peculiar or distorted sense of humor, it "does not lessen the seriousness of the legal consequences of his acts."

## **CRITICAL THINKING QUESTIONS**

1. What is the role of the school in protecting students from cyber-bullying? Should the school have greater responsibility when the threat is against the principal (*e.g. Layshock*) or against a student?
2. Does it make a difference if the bullying comments arrive on the Internet, in writing, or in person? Should the type of communication affect its First Amendment protection?
3. When does a joke become a "true threat?" Is that determination based on the recipient's understanding or the joker's intent?



TANI G. CANTIL-SAKAUYE  
Chief Justice of California  
Chair of the Judicial Council

Judicial Council of California  
455 Golden Gate Avenue  
San Francisco, CA 94102-3688  
415-865-4200  
www.courts.ca.gov



TOM TORLAKSON  
State Superintendent  
of Public Instruction

California Department of Education  
1430 N Street  
Sacramento, CA 95814-5901  
916-319-0800  
www.cde.ca.gov/eo/

October 11, 2012

Dear County and District Superintendents, Charter School Administrators, and High School Principals:

*There is an increasing appreciation that we do need to know how our government works: national, state and local. . . . and that this is part and parcel of the things that every young person wants to know because they want to have an effect.*

United States Supreme Court Justice Sandra Day O'Connor (Ret.)

We recognize and value the important role of public schools in preparing students for participation in our democracy and have begun a partnership to support civic education in California. It is therefore with great pleasure that we invite you to apply for the new Civic Learning Award for California public high schools. The awards are designed to both celebrate successful efforts to engage students in civic learning and to identify successful models that can be replicated in other schools.

The Civic Learning Award program has three levels: Awards of Excellence, Distinction, and Merit. Winners will be selected by a panel of experts based on the depth and breadth of their civic learning courses/clubs/programs. Award of Excellence winners will receive a personal visit from Chief Justice Tani G. Cantil-Sakauye; Award of Distinction winners will be visited by an appellate court justice; and superior court judicial officers will provide recognition to schools receiving the Award of Merit. A plaque will also be provided to award-winning schools. In addition, selected schools may have the opportunity to meet with us in Sacramento on February 28, 2013.

We hope that you will take this opportunity to recognize the civic educators at your school and share the enclosed application with them. The application is also available online

<http://www.cde.ca.gov/eo/in/civiclearningaward.asp> and <http://www.courts.ca.gov/programs-lawrelated.htm>.

If you have questions, please contact Craig Cheslog, Principal Advisor to State Superintendent of Public Instruction Tom Torlakson, at 916-319-0554 or [ccheslog@cde.ca.gov](mailto:ccheslog@cde.ca.gov), or Deborah Genzer of the Administrative Office of the Courts at 415-865-8755 or [deborah.genzer@jud.ca.gov](mailto:deborah.genzer@jud.ca.gov).

Sincerely,

TANI G. CANTIL-SAKAUYE  
Chief Justice of California and  
Chair of the Judicial Council

TOM TORLAKSON  
State Superintendent of Public Instruction



# CIVIC LEARNING AWARD

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For California Public High Schools

Application and Overview

2012–2013

# Civic Learning Award Overview

## PURPOSE

"Every child in the state should receive a quality civics education, and judges, courts, teachers, and school administrators should be supported in their efforts to educate students about the judiciary and its function in a democratic society." (Judicial Council of Calif., *Commission for Impartial Courts: Final Report* (Dec. 2009), [www.courts.ca.gov/documents/cicfinalreport\(1\).pdf](http://www.courts.ca.gov/documents/cicfinalreport(1).pdf))

## OBJECTIVE

To celebrate schools' efforts to engage students in civic learning and to identify effective and replicable civic learning models.

## AWARDS FOR PUBLIC HIGH SCHOOLS\*

- **Civic Learning Award of Excellence.** Top-scoring schools receive a visit from the Chief Justice of California and a plaque.
- **Civic Learning Award of Distinction.** High-scoring schools receive a visit from an appellate court justice and a plaque.
- **Civic Learning Award of Merit.** Mid-scoring schools receive recognition from a superior court judicial officer and a plaque.

*\*Some selected schools may be invited to meet the Chief Justice and Superintendent of Public Instruction on February 28, 2013.*

## SELECTION PROCESS AND RESEARCH-BASED PRACTICES IN CIVIC LEARNING

The application process asks schools to describe their civic learning practices and programs, with an emphasis on those that incorporate research-based proven practices in civic education, as described in the *Guardian of Democracy: The Civic Mission of Schools* report from The Leonore Annenberg Institute for Civics of the Annenberg Public Policy Center at the University of Pennsylvania and the Campaign for the Civic Mission of Schools. A panel of experts will assess the applications according to both depth and breadth.

2012-2013 CIVIC LEARNING AWARDS TIMELINE	
Letter of invitation to schools	October 2012
Application deadline	December 14, 2012
Announcement of winners	February 28, 2013
School visits completed	By close of school year

## APPLICATIONS ARE AVAILABLE AT

[www.cde.ca.gov/eo/in/civiclearningaward.asp](http://www.cde.ca.gov/eo/in/civiclearningaward.asp)  
[www.courts.ca.gov/programs-lawrelated.htm](http://www.courts.ca.gov/programs-lawrelated.htm)

## Instructions and Selection Process

Thank you for your interest in applying for a civic learning award! Please complete steps 1 through 5 below.

### **Applications are due: December 14, 2012**

1. **Review the Six Research-Based Proven Practices in Civic Education, at pages 4–5.** The selection process for these awards will be based on an emphasis on these practices.
2. **Briefly describe up to three courses, clubs, and/or other educational programs at your school that incorporate at least one of the six civic learning proven practices (pages 7–8).** As the proven practices touch on various aspects of school life, from curricular to extracurricular, schools are invited to submit descriptions of more than one course/club/program. For each, the application requires a short written overview and completion of several fill-in-the-blank questions. Please copy pages 7 and 8 for each course/club/program to be included in application (up to three).
3. **Applicants are invited to attach up to two pages of supplemental material for each course/club/program. Please label the page with the school name and school district, as well as course/club/program title.** Examples of students' work are especially encouraged and may include excerpts from student writing and/or photos of student projects with explanatory captions. A link to a website or short video (up to 3 minutes maximum) will each be considered "one page." Please be sure that the proper permissions are on record for any images of students being shared. (Up to six pages of supplemental materials; two maximum for each course/club/program.)
4. **Complete the cover sheet with signatures (page 6.)**
5. **Mail, e-mail, or fax the application, plus the cover sheet and attachments, so that they arrive on December 14th, by 5:00 p.m., to:**  
  
Deborah Genzer  
Administrative Office of the Courts  
455 Golden Gate Avenue  
San Francisco, California 94132  
E-mail: [deborah.genzer@jud.ca.gov](mailto:deborah.genzer@jud.ca.gov)
6. **Selection Process:** A panel of experts will assess the schools according to the depth and breadth of their civic learning programs, as described in their application. Follow-up questions may be asked and a validation visit may be required.
7. **Winners will be announced on February 28, 2013.**

## Six Research-Based Proven Practices in Civic Education

These proven practices are provided by the *Guardian of Democracy: Civic Mission of Schools* report, from the Leonore Annenberg Institute for Civics of the Annenberg Public Policy Center at the University of Pennsylvania, the Campaign for the Civic Mission of Schools, the Center for Information & Research on Civic Learning and Engagement at Tufts University, the American Bar Association's Division for Public Education, and the National Conference on Citizenship. Full copies of the report may be downloaded at: [www.ncoc.net/guardianofdemocracy](http://www.ncoc.net/guardianofdemocracy)

**PROVEN PRACTICE #1: Provide instruction in government, history, law, and democracy.** Formal instruction in U.S. government, history, and democracy increases civic knowledge. This is a valuable goal in itself and may also contribute to young people's tendency to engage in civic and political activities over the long term. However, schools should avoid teaching only rote facts about dry procedures, which is unlikely to benefit students and may actually alienate them from politics.

**PROVEN PRACTICE #2: Discuss current local, national, and international issues and events in the classroom, particularly those that young people view as important to their lives.** When young people have opportunities to discuss current issues in a classroom setting, they tend to have greater interest in politics, improved critical thinking and communications skills, more civic knowledge, and more interest in discussing public affairs out of school. Conversations, however, should be carefully moderated so that students feel welcome to speak from a variety of perspectives. Teachers need support in broaching controversial issues in classrooms since they may risk criticism or sanctions if they do so.

**PROVEN PRACTICE #3: Design and implement programs that provide students with the opportunity to apply what they learn through performing community service that is linked to the formal curriculum and classroom instruction.** Service programs are now common in K–12 schools. The ones that best develop engaged citizens are linked to the curriculum and they:

- Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem;
- Allow students to engage in meaningful work on serious public issues, giving students a role in choosing and designing their projects;
- Provide students with opportunities to reflect on the service work;
- Allow students—especially older ones—to pursue political responses to problems consistent with laws that require public schools to be nonpartisan; and
- See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course.

**PROVEN PRACTICE #4: Offer extracurricular activities that provide opportunities for young people to get involved in their schools or communities.** Long-term studies of Americans show that those who participate in extracurricular activities in high school remain more civically engaged than their contemporaries even decades later. Thus, everyone should have opportunities to join high school groups, and such participation should be valued.



**PROVEN PRACTICE #5: Encourage student participation in school governance.** A long tradition of research suggests that giving students more opportunities to participate in the management of their own classrooms and schools builds their civic skills and attitudes. Thus, giving students a voice in school governance is a promising way to encourage all young people to engage civically.

**PROVEN PRACTICE #6: Encourage students' participation in simulations of democratic processes and procedures.** Recent evidence indicates that simulations of voting, trials, legislative deliberation, and diplomacy in schools can lead to heightened political knowledge and interest.

## Civic Learning Award Application Cover Sheet

Please include this cover sheet with your application.

School Name: \_\_\_\_\_

School Address: \_\_\_\_\_

*Street*

\_\_\_\_\_, CA \_\_\_\_\_

*City*

*ZIP code*

School District: \_\_\_\_\_

School District Address: \_\_\_\_\_

Superintendent Signature: \_\_\_\_\_

Principal Name: \_\_\_\_\_

Principal Signature: \_\_\_\_\_

Contact Name: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

Fax: \_\_\_\_\_

Best way to contact:    Phone \_\_\_\_\_ E-mail \_\_\_\_\_ Fax \_\_\_\_\_

Number of course/club/program descriptions enclosed: \_\_\_\_\_

Name of School: \_\_\_\_\_

Name of School District: \_\_\_\_\_

## Civic Learning Opportunity Description

You may submit a description of up to three different civic learning courses/clubs/programs. Please copy this form for each submitted course/club/program.

- This is civic learning course/club/program—description no. 1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_
- Name of course/club/program \_\_\_\_\_
- Grade level involved (*please check all that apply*): 9 \_\_\_\_\_ 10 \_\_\_\_\_ 11 \_\_\_\_\_ 12 \_\_\_\_\_
- Narrative description (up to approximately 400 words): *Please use the following space and include responses to the following prompts: What is the purpose of this civic learning course/club/program? What learning activities are students engaged in, especially those that incorporate any of the "proven practices" in civic learning? What are successful impacts and/or outcomes for students?*

- Please check all of following research-based practices that are incorporated into this course/club/program:

1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_ 4 \_\_\_\_\_ 5 \_\_\_\_\_ 6 \_\_\_\_\_ 7 Other (*please describe*): \_\_\_\_\_

- In this course/club/program, the number of students who have participated by the time they graduate is \_\_\_\_\_; percentage of students (may be estimated) is \_\_\_\_\_

- The duration of opportunity, (e.g., one 50-minute class period; one class period a week for one month, etc.) is \_\_\_\_\_

- Check the number of years that this opportunity has been offered:

1-2 \_\_\_\_\_ 3-4 \_\_\_\_\_ 5+ \_\_\_\_\_

- What, if any, method is used to assess or evaluate students' civic learning (*check all that apply*):

N/A: \_\_\_\_\_ written: \_\_\_\_\_ oral: \_\_\_\_\_ performance based: \_\_\_\_\_ other: \_\_\_\_\_

If other, please describe: \_\_\_\_\_

- Briefly describe any school or district policies that support this civic learning: \_\_\_\_\_

- \_\_\_\_\_ Please check here if you have attached up to two pages of supplemental materials for this course/club/program (please see instructions on page 3 for more detail).

## **Civic Learning Award Selection Committee Instructions**

Thank you so much for participating in the Civic Learning Award Selection Committee! Our committee has been split into groups A-D, and each group will evaluate 5-6 school applications. The applications and rubric used for evaluation are on the web: <https://ftp.jud.ca.gov/> The username is **eopguest** , and the password: **eop1 (case sensitive)**. Go to the Civic Learning Award folder.

### **Civic Learning Award Rubric**

- The 5-6 school applications your group will be evaluating are in your group folder.
- Use **one Civic Learning Award Rubric** for each school.
- Each school may have submitted up to three (3) course/programs/clubs as part of their total application. Please evaluate each. Complete pages 2-6 for the first course/program/club; pages 7-11 for the second course/program/club; and pages 12-16 for the third course/program/club. If there are no second or third programs submitted, please leave those pages blank. Please also use page 17 (e.g. the last page) to provide for additional comments.
- Each school may have submitted up to two pages (2) of supplemental materials as evidence of their course/program/clubs descriptions. Some schools have submitted links to short (3 min. maximum) videos. This media counts as one page of the supplement. Some of the media has been submitted in hard copy, as a CD's and/or thumb drive; if so, it will be noted in the application and you will receive these via mail.
- After evaluating all of the course/program/clubs, please complete the cover sheet, which includes tabulating the grand total for the school.
- Save a completed file for each school on your computer. Please use the following naming convention for the file: first word of school name-your last name (for example, Poway-Genzer). Please then upload each completed school file back onto the FTP site under your group, in the Completed Evaluations file.
- **Please complete and upload evaluations by January 15, 2013.**
- **Contact Debbie Genzer at [deborah.genzer@jud.ca.gov](mailto:deborah.genzer@jud.ca.gov) , 415-865-8755.**

### **Tips:**

- You may wish to read through all of the applications before starting to score.
- Step 1: This section is designed to evaluate the program/course/club with a focus on implementation of promising practices in civic learning. As such, you may want to see which civic education “proven” practices the school has checked off on the short answer page of their application.
- Step 2: This section focuses on the short answer questions provided by the school for a particular program/course/club.

# Civic Learning Award

## Final Score

Evaluator: \_\_\_\_\_

Group (Circle one):    A    B    C    D

Name of School: \_\_\_\_\_

Name of School District: \_\_\_\_\_

## SCORES

Civic learning course/club/program description no: 1 \_\_\_\_\_

Civic learning course/club/program description no: 2 \_\_\_\_\_

Civic learning course/club/program description no: 3 \_\_\_\_\_

Grand Total SCORE \_\_\_\_\_

Additional Comments: (Optional):



# Civic Learning Award Rubric

Please Use this Rubric to Rate Each Civic Learning Opportunity Description

Name of School: \_\_\_\_\_


Name of School District: \_\_\_\_\_



Civic learning course/club/program description no: 1 \_\_\_\_ 2 \_\_\_\_ 3 \_\_\_\_





Name of course/club/program \_\_\_\_\_

Evaluator: \_\_\_\_\_

Step 1: Evaluate the written description and the supplemental materials.						
Quality of Course/Club/	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No credit
1. What is the purpose of the course/ club/ program?	<div></div>	Clear and significant civic learning purpose that has a strong connection to the student learning activities and outcomes The description is part of required course with formal instruction	A solid civic learning purpose that has a connection to student learning activities and/or outcomes	A narrow civic learning purpose with a connection to the student learning activities and/or outcomes	General or vague civic learning purpose	None given
2. Proven Practice #1. Provide Instruction in Government, history, law and democracy	<div></div>	The description is part of required course with formal instruction	The description is part of an elective course with formal instruction	This description not part of an academic course, but it provides some formal instruction	Checked on the form only- no evidence	Not checked on form
3. Proven Practice #2: Discussion of current issues and events  Is this proven practice part of the learning activities? And if so, what is the quality?	<div></div>	Discussion of current issues and events with evidence of three of the following:  *Issues are local, national and/or international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with evidence for two of the following:  * Issues are local, national and/or international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with: evidence for one of the following: * Issues are local, national and/or international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Checked on the form only – no evidence provided	Not checked on the form

<p><b>4. Proven Practice #3:</b>  <i>Community service linked to the formal curriculum and classroom instruction (e.g. Service-Learning)</i></p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p><b>Service-learning with evidence of three or more of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students to reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of two of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students older to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of one of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Checked on the form only</b>          – no evidence provided</p> <p><b>Not checked on the form</b></p>
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<p><b>5. Proven Practice #4:</b> Offer extracurricular activities that provide opportunities for young people to get involved with their schools or communities.</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p><b>More than one</b> extracurricular activities with evidence of young people getting <b>moderately or substantively</b> involved with their school or community</p>	<p><b>At least one</b> extracurricular activities with evidence of young people to getting <b>substantively</b> involved with their school or community</p>	<p><b>At least one</b> extracurricular activities with evidence of for young people to get <b>moderately</b> involved with their school or community</p>	<p><b>Checked on form – no evidence provided</b></p>	<p><b>Not checked on the form</b></p>
<p><b>6. Proven Practice # 5:</b> Participation in School Governance</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p>Participation in school governance includes evidence of <b>substantive</b> participation in both: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>substantive</b> participation in one or the other: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>moderate</b> participation in either: *Management of students' own classrooms *Voice in governance of the school</p>	<p><b>Checked on the form – no evidence provided</b></p>	<p><b>Not checked on the form</b></p>

<b>7. Proven Practice #6.</b> <i>Encourage student participation in simulations of democratic processes and procedures.</i>  Is this proven practice part of the learning activities? And if so, what is the quality?		Participation in <b>one long term simulation</b> and/or three or more short term simulation might involve students researching and studying their roles over an extended period of time.	Participation in <b>two short term</b> simulations of democratic processes.	Participation on <b>one short term</b> simulation of a democratic process.	<b>Checked on the form – no evidence provided</b>	<b>Not checked on the form</b>
<b>8. Other Practices</b>  Do the learning activities include other practices?		One or more other practices are described and include a <b>description of how that practice leads to civic outcomes.</b>	One other practice is <b>more fully described</b> in the written description or supplement. For example, students meet with civic role models, such as the mayor, from whom they learn about current issues facing the city.	One other practice is <b>mentioned</b> in the written description or supplements with <b>limited detail</b> . For example, it may include one phrase such as “civic role models” or “teaching digital literacy.”	<b>Checked on the form – no evidence provided</b>	<b>Not checked on the form</b>
<b>9. Outcomes for students</b>		<b>Solid evidence of strong or significant</b> civic learning impacts for students	<b>Solid evidence of some</b> civic learning impacts or outcomes for students	<b>Little or limited evidence</b> of some civic learning impacts or outcomes for students	<b>Claim of civic impact, but no evidence provided</b>	<b>No evidence of civic learning impacts or outcomes</b>
<b>10. Total Step 1:</b> <b>Total</b>						

Short Answer Questions	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No Credit
11. # of Research Based-Practices Checked	<input type="text"/>	4+	3	2	1	0
12. # of students who have participated each year by the time they graduate	<input type="text"/>	1000+	249-999	20-249	10-20	Less than 10
13. % of students who participate by the time of graduation	<input type="text"/>	100%	50-75%	26-50%	3-25%	Less than 3%
14. No. of Years offered	<input type="text"/>	5+	3-4	1-2		Not checked
15. Duration of Opportunity	<input type="text"/>	Long term – 11 + class periods or the equivalent (such as once a week for a semester or every period for a month) or more	Mid-length – 6-10 class periods or the equivalent (such as once a week for 10 weeks, or every class period for two weeks)	Short term – 2 to 5 class periods or the equivalent (such as once a week for up to 5 weeks or every class period for a week)	Once (such as one class period or one event)	None
16. Method of assessment	<input type="text"/>	Three assessments checked	Two assessments checked	One assessment checked		None
17. Total Step 2: Total	<input type="text"/>					
18. Total step 1 and 2 GRAND Total	<input type="text"/>	Civic learning course/club/program description no: 1 ____ 2 ____ 3 ____				

# A Civic Learning Award Rubric

Please Use this Rubric to Rate Each Civic Learning Opportunity Description

Name of School: \_\_\_\_\_

Name of School District: \_\_\_\_\_


Civic learning course/club/program description no: 1 \_\_\_\_ 2 \_\_\_\_ 3 \_\_\_\_

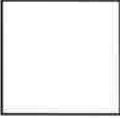
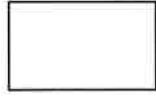
Name of course/club/program \_\_\_\_\_

Evaluator: \_\_\_\_\_

Step 1: Evaluate the written description and the supplemental materials.						
Quality of Course/Club/	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No credit
1. What is the purpose of the course/ club/ program?	<div></div>	Clear and significant civic learning purpose that has a strong connection to the student learning activities and outcomes The description is part of required course with formal instruction	A solid civic learning purpose that has a connection to student learning activities and/or outcomes The description is part of an elective course with formal instruction	A narrow civic learning purpose with a connection to the student learning activities and/or outcomes This description not part of an academic course, but it provides some formal instruction	General or vague civic learning purpose Checked on the form only- no evidence	None given Not checked on form
2. Proven Practice #1. Provide Instruction in Government, history, law and democracy	<div></div>	Discussion of current issues and events with evidence of three of the following: *Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with evidence for two of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with: evidence for one of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Checked on the form only – no evidence provided	Not checked on the form
3. Proven Practice #2: Discussion of current issues and events  Is this proven practice part of the learning activities? And if so, what is the quality?	<div></div>	Discussion of current issues and events with evidence of three of the following: *Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with evidence for two of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with: evidence for one of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Checked on the form only – no evidence provided	Not checked on the form



<p><b>4. Proven Practice #3:</b>  <i>Community service linked to the formal curriculum and classroom instruction (e.g. Service-Learning)</i></p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p><b>Service-learning with evidence of three or more of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students to reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of two of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students older to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of one of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Checked on the form only</b>          – no evidence provided</p> <p><b>Not checked on the form</b></p>
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<p><b>5. Proven Practice #4:</b> Offer extracurricular activities that provide opportunities for young people to get involved with their schools or communities.</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p><b>More than one</b> extracurricular activities with evidence of young people getting <b>moderately or substantively</b> involved with their school or community</p>	<p><b>At least one</b> extracurricular activities with evidence of young people to getting <b>substantively</b> involved with their school or community</p>	<p><b>At least one</b> extracurricular activities with evidence of for young people to get <b>moderately</b> involved with their school or community</p>	<p><b>Checked on form – no evidence provided</b></p>	<p><b>Not checked on the form</b></p>
<p><b>6. Proven Practice # 5:</b> Participation in School Governance</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p>Participation in school governance includes evidence of <b>substantive</b> participation in both: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>substantive</b> participation in <b>one</b> or the other: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>moderate</b> participation in either: *Management of students' own classrooms *Voice in governance of the school</p>	<p><b>Checked on the form – no evidence provided</b></p>	<p><b>Not checked on the form</b></p>

<b>7. Proven Practice #6.</b> <i>Encourage student participation in simulations of democratic processes and procedures.</i>  Is this proven practice part of the learning activities? And if so, what is the quality?	<div style="border: 1px solid black; width: 80px; height: 40px; margin: 0 auto;"></div>	Participation in <b>one long term simulation</b> and/or three or more short term simulation might involve students researching and studying their roles over an extended period of time.	Participation in <b>two short term</b> simulations of democratic processes.	Participation on <b>one short term</b> simulation of a democratic process.	<b>Checked on the form – no evidence provided</b>	<b>Not checked on the form</b>
<b>8. Other Practices</b>  Do the learning activities include other practices?	<div style="border: 1px solid black; width: 80px; height: 40px; margin: 0 auto;"></div>	One or more other practices are described and include a <b>description of how that practice leads to civic outcomes.</b>	One other practice is <b>more fully described</b> in the written description or supplement. For example, students meet with civic role models, such as the mayor, from whom they learn about current issues facing the city.	One other practice is <b>mentioned</b> in the written description or supplements with <b>limited detail</b> . For example, it may include one phrase such as “civic role models” or “teaching digital literacy.”	<b>Checked on the form – no evidence provided</b>	<b>Not checked on the form</b>
<b>9. Outcomes for students</b>	<div style="border: 1px solid black; width: 80px; height: 40px; margin: 0 auto;"></div>	<b>Solid evidence of strong or significant</b> civic learning impacts for students	<b>Solid evidence of some</b> civic learning impacts or outcomes for students	<b>Little or limited evidence</b> of some civic learning impacts or outcomes for students	<b>Claim of civic impact, but no evidence provided</b>	<b>No evidence of civic learning impacts or outcomes</b>
<b>10. Total Step 1:</b> <div style="border: 1px solid black; width: 80px; height: 40px; margin: 0 auto;"></div> <b>Total</b>						

Short Answer Questions	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No Credit
11. # of Research Based-Practices Checked	<input type="text"/>	4+	3	2	1	0
12. # of students who have participated each year by the time they graduate	<input type="text"/>	1000+	249-999	20-249	10-20	Less than 10
13. % of students who participate by the time of graduation	<input type="text"/>	100%	50-75%	26-50%	3-25%	Less than 3%
14. No. of Years offered	<input type="text"/>	5+	3-4	1-2		Not checked
15. Duration of Opportunity	<input type="text"/>	Long term – 11 + class periods or the equivalent (such as once a week for a semester or every period for a month) or more	Mid-length – 6-10 class periods or the equivalent (such as once a week for 10 weeks, or every class period for two weeks)	Short term – 2 to 5 class periods or the equivalent (such as once a week for up to 5 weeks or every class period for a week)	Once (such as one class period or one event)	None
16. Method of assessment	<input type="text"/>	Three assessments checked	Two assessments checked	One assessment checked		None
17. Total Step 2: Total	<input type="text"/>					
18. Total step 1 and 2 GRAND Total	<input type="text"/>	Civic learning course/club/program description no: 1 ____ 2 ____ 3 ____				

# Civic Learning Award Rubric

Please Use this Rubric to Rate Each Civic Learning Opportunity Description

Name of School: \_\_\_\_\_

Name of School District: \_\_\_\_\_

Civic learning course/club/program description no: 1 \_\_\_\_ 2 \_\_\_\_ 3 \_\_\_\_

Name of course/club/program \_\_\_\_\_



Evaluator: \_\_\_\_\_

## Step 1: Evaluate the written description and the supplemental materials.

Quality of Course/Club/	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No credit
1. What is the purpose of the course/club/program?	<input type="checkbox"/>	Clear and significant civic learning purpose that has a strong connection to the student learning activities and outcomes	A solid civic learning purpose that has a connection to student learning activities and/or outcomes	A narrow civic learning purpose with a connection to the student learning activities and/or outcomes	General or vague civic learning purpose	None given
2. Proven Practice #1. <i>Provide Instruction in Government, history, law and democracy</i>	<input type="checkbox"/>	The description is part of required course with formal instruction	The description is part of an elective course with formal instruction	This description not part of an academic course, but it provides some formal instruction	Checked on the form only- no evidence	Not checked on the form
3. Proven Practice #2: <i>Discussion of current issues and events</i>  Is this proven practice part of the learning activities? And if so, what is the quality?	<input type="checkbox"/>	Discussion of current issues and events with evidence of three of the following: *Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with evidence for two of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Discussion of current issues and events with: evidence for one of the following: * Issues are local, national and international * Students view issues as important to their lives * Discussions are carefully moderated so students are welcome to speak from a variety of perspectives	Checked on the form only – no evidence provided	Not checked on the form

<p><b>4. Proven Practice #3:</b>  <i>Community service linked to the formal curriculum and classroom instruction (e.g. Service-Learning)</i></p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>	<div data-bbox="186 1581 293 1677" data-label="Image"></div>	<p><b>Service-learning with evidence of three or more of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students to reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of two of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students older to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Service-learning with evidence of one of the following:</b></p> <ul style="list-style-type: none"> <li>* Consciously pursue civic outcomes, rather than seek only to improve academic performance or to promote higher self-esteem</li> <li>• Allow students to engage in meaningful work on serious public issues; give students a role in choosing and designing their projects</li> <li>• Students reflect on the service work</li> <li>• Allow older students to pursue political responses to problems consistent with laws that require public schools to be nonpartisan</li> <li>• See service learning as part of a broader philosophy toward education, not just a program that is adopted for a finite period in a particular course</li> </ul>	<p><b>Checked on the form only</b>          – no evidence provided</p>	<p><b>Not checked on the form</b></p>
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<p><b>5. Proven Practice #4:</b> Offer extracurricular activities that provide opportunities for young people to get involved with their schools or communities.</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p>More than one extracurricular activities with evidence of young people getting <b>moderately or substantively</b> involved with their school or community</p>	<p>At least one extracurricular activities with evidence of young people to getting <b>substantively</b> involved with their school or community</p>	<p>At least one extracurricular activities with evidence of for young people to get <b>moderately</b> involved with their school or community</p>	<p>Checked on form – no evidence provided</p>	<p>Not checked on the form</p>
<p><b>6. Proven Practice # 5:</b> Participation in School Governance</p> <p>Is this proven practice part of the learning activities? And if so, what is the quality?</p>		<p>Participation in school governance includes evidence of <b>substantive</b> participation in both: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>substantive</b> participation in one or the other: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Participation in school governance includes evidence of <b>moderate</b> participation in either: *Management of students' own classrooms *Voice in governance of the school</p>	<p>Checked on the form – no evidence provided</p>	<p>Not checked on the form</p>

<b>7. Proven Practice #6.</b> <i>Encourage student participation in simulations of democratic processes and procedures.</i>  Is this proven practice part of the learning activities? And if so, what is the quality?	<input type="checkbox"/>	Participation in <b>one long term simulation</b> and/or three or more short term simulation might involve students researching and studying their roles over an extended period of time.	Participation in <b>two short term</b> simulations of democratic processes.	Participation on <b>one short term</b> simulation of a democratic process.	Checked on the form – no evidence provided	Not checked on the form
<b>8. Other Practices</b>  Do the learning activities include other practices?	<input type="checkbox"/>	One or more other practices are described and include a description of how that practice leads to civic outcomes.	One other practice is <b>more fully described</b> in the written description or supplement. For example, students meet with civic role models, such as the mayor, from whom they learn about current issues facing the city.	One other practice is <b>mentioned</b> in the written description or supplements with <b>limited</b> detail. For example, it may include one phrase such as “civic role models” or “teaching digital literacy.”	Checked on the form – no evidence provided	Not checked on the form
<b>9. Outcomes for students</b>	<input type="checkbox"/>	Solid evidence of strong or significant civic learning impacts for students	Solid evidence of some civic learning impacts or outcomes for students	Little or limited evidence of some civic learning impacts or outcomes for students	Claim of civic impact, but no evidence provided	No evidence of civic learning impacts or outcomes
<div> <div>10. Total Step 1:</div> <div> <div>Total</div> <div> <input type="checkbox"/> </div> </div> </div>						

Short Answer Questions	Score	Outstanding (4)	Excellent (3)	Merit (2)	Basic (1)	No Credit
11. # of Research Based-Practices Checked	<input type="text"/>	4+	3	2	1	0
12. # of students who have participated each year by the time they graduate	<input type="text"/>	1000+	249-999	20-249	10-20	Less than 10
13. % of students who participate by the time of graduation	<input type="text"/>	100%	50-75%	26-50%	3-25%	Less than 3%
14. No. of Years offered	<input type="text"/>	5+	3-4	1-2		Not checked
15. Duration of Opportunity	<input type="text"/>	Long term – 11 + class periods or the equivalent (such as once a week for a semester or every period for a month) or more	Mid-length – 6-10 class periods or the equivalent (such as once a week for 10 weeks, or every class period for two weeks)	Short term – 2 to 5 class periods or the equivalent (such as once a week for up to 5 weeks or every class period for a week)	Once (such as one class period or one event)	None
16. Method of assessment	<input type="text"/>	Three assessments checked	Two assessments checked	One assessment checked		None
17. Total Step 2: Total	<input type="text"/>					
18. Total step 1 and 2 GRAND Total	<input type="text"/>	Civic learning course/club/program description no: 1 ____ 2 ____ 3 ____				

**Additional Comments:**

- 1) Please describe any noteworthy policy that supports civic learning.
- 2) Validation visits will not be conducted for all applications. Rather, the selection committee has the right to recommend a validation visit if there are questions about the verity of the program description and supporting materials. Please check here if you recommend that this school receive a validation visit \_\_\_\_\_

If recommended, please provide any further information that would assist those making a visit:

- 3) Please provide any additional information from this application that should be considered when making a final decision about an award.

**CHIEF JUSTICE TANI G. CANTIL-SAKAUYE**

*invites you to the*

**CIVIC LEARNING CALIFORNIA SUMMIT:  
MAKING DEMOCRACY WORK**

*featuring*

**U.S. SUPREME COURT  
JUSTICE SANDRA DAY O'CONNOR**

**SAVE  
THE DATE**

**FEBRUARY 28, 2013  
SACRAMENTO**

**BY INVITATION ONLY**  
*(Invitation with details to follow)*



**Chief Justice Tani G. Cantil-Sakauye**

invites you to attend the

## **Civic Learning California Summit: Making Democracy Work**

***Featuring U.S. Supreme Court Justice Sandra Day O'Connor***

I am pleased to extend this invitation to the Civic Learning California Summit, where U.S. Supreme Court Justice Sandra Day O'Connor will be our keynote speaker. As a capstone to her extraordinary career, she has been a national leader in addressing the civic education crisis in our country. This event will bring together education, labor, business and community leaders, law school deans, and elected officials to examine civic literacy in California. Together we will learn about civic learning successes, as well as barriers, and set our state on a path toward 21st century policies that enable all Californians to be civically engaged.

**Thursday, February 28, 2013**

**9:30 a.m.–12:30 p.m.\***

**Secretary of State Auditorium**

1500 11th Street, Sacramento, California

*Due to limited space, the summit is by invitation only, on a first-come, first-served basis.*

**To register, please use the attached registration form, and return it by close of business, January 25, 2013 to: Bernadine Adams, [Bernadine.adams@jud.ca.gov](mailto:Bernadine.adams@jud.ca.gov) or via FAX at 415-865-4330.**

**Speakers** include Justice Sandra Day O'Connor (Ret.); Chief Justice Tani G. Cantil-Sakauye; Secretary of State Debra Bowen; State Superintendent of Public Instruction Tom Torlakson; Judge Stacy Boulware Eurie; Thomas Saenz, President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF); Maria Elena Durazo, Executive Secretary-Treasurer of the Los Angeles County Federation of Labor (AFL-CIO); and Allan Zaremberg, President and Chief Executive Officer of the California Chamber of Commerce.

**Civic Learning Summit Steering Committee:** Hon. Tani G. Cantil-Sakauye, Hon. Judith D. McConnell, Hon. Frank C. Damrell, Jr. (Ret.), Hon. Joseph Dunn (Ret.), Mr. Craig Cheslog, Mr. David W. Gordon, Dr. Michelle M. Herczog, Hon. Curtis E. A. Karnow, Hon. Deanell Reece Tacha

\* Attendees will also receive an invitation to a reception, from 12:30 p.m.–2:30 p.m. at a different location, being planned by the Sacramento County Bar Association.

**CIVIC LEARNING CALIFORNIA SUMMIT: MAKING DEMOCRACY WORK**

February 28, 2013, 9:30 a.m.–12:30 p.m.

Secretary of State Auditorium, 1500 11th Street, Sacramento

Registration Form (fillable)

**Register by close of business, January 25, 2013.**

Registration is by invitation only, on a first-come, first-served basis.

Instructions: Type directly into the grey boxes; boxes will expand as you type.

First Name:	
Last Name:	
Title:	
Organization:	
Address (1):	
Address (2):	
City:	
State:	
Zip:	
Registration confirmation will be sent via e-mail.	
E-mail:	
E-mail 2 (Optional):	
Phone:	

E-mail or fax this registration form by close of business, January 25, to Bernadine Adams:

E-mail: [Bernadine.adams@jud.ca.gov](mailto:Bernadine.adams@jud.ca.gov)

Fax: 415-865-4330

Questions? Contact Deborah Genzer, [Deborah.genzer@jud.ca.gov](mailto:Deborah.genzer@jud.ca.gov), 415-865-8755.





**Sacramento County Bar Association  
and the Federal Bar Association**

*hosts a reception to honor*

**U.S. Supreme Court Justice  
Sandra Day O'Connor  
and to Promote Civic Education**



*Justice Sandra Day O'Connor will give a few thoughts  
on the importance of revitalizing civics education by  
inspiring students to understand and become active  
participants in our democracy.*

**February 28, 2013 • 12:30 – 2:30 pm  
Tsakopoulos Library Galleria  
828 I Street, Sacramento, CA 95814**





**Sacramento County Bar Association  
and the Federal Bar Association  
Sandra Day O'Connor Reception  
February 28, 2013 • 12:30 – 2:30 pm  
Tsakopoulos Library Galleria  
828 I Street, Sacramento, CA 95814**

**Registration form for Summit attendees only / free to this event**

Space is limited and on a first come, first serve basis

***Please RSVP before February 22nd to reserve your space***

Name \_\_\_\_\_ Email \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_

**For more information or questions, call the SCBA  
E-Mail, Mail, or Fax your RSVP to:  
Sacramento County Bar Association  
1329 Howe Avenue, Suite 100, Sacramento, CA 95825  
phone (916) 564-3780 • fax (916) 564-3787  
E-Mail: [reception@sacbar.org](mailto:reception@sacbar.org)**



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# LAW DAY 2013

Realizing  
the Dream

civility  
diversity  
dignity  
freedom  
liberty  
civil rights  
tolerance  
due process  
human rights  
gender equality  
inclusiveness  
respect  
fairness  
women's rights  
justice  
acceptance  
empathy  
voting rights

Equality for All

Address by

**Hon. Tani G. Cantil-Sakauye**  
**Chief Justice of California**

May 1, 2013

California Supreme Court Earl Warren Building  
San Francisco Civic Center



# Realizing the Dream: Equality for All

## LAW DAY COMMEMORATION 2013

President Dwight D. Eisenhower established the first Law Day in 1958 to mark the nation's commitment to the rule of law. In 1961, Congress issued a joint resolution designating May 1 as the official date for celebrating Law Day.

May 1, 2013, is the second annual commemoration of Law Day by the Chief Justice of California, Tani G. Cantil-Sakauye. The national Law Day theme for this year—Realizing the Dream: Equality for All—celebrates the 150th anniversary of the Emancipation Proclamation, issued by President Abraham Lincoln, and recognizes the fundamental importance of equality under the law in our democracy.

The program includes the presentation of the Chief Justice's Award for Exemplary Service and Leadership to the California High School Law Academies. This award honors an individual or organization deserving of special recognition by the state's highest judicial office.

In the more than 50 law academies that have been established in high schools throughout California, hundreds of teachers, mentors, and students are working together to advance understanding of and respect for our Constitution and democratic institutions, including the role of the courts in advancing and protecting equality under the law for all people. The academies educate, inspire, and empower California's students to contribute to society as responsible citizens by strengthening our communities and our justice system.

Thank you for being a part of Law Day 2013 in California.

## PROGRAM

### National Anthem

Mr. Mark J. Townsend III

### Welcome and Introduction of the Chief Justice

Hon. Goodwin Liu

Associate Justice of the California Supreme Court

### Address

Hon. Tani G. Cantil-Sakauye

Chief Justice of California

### Presentation of the

### Chief Justice's Award for Exemplary Service and Leadership to the California High School Law Academies

Ms. Ruthe Ashley

Chair, California Law Academy Strategic Task Force





# Fact Sheet

THE CENTER FOR INFORMATION & RESEARCH ON CIVIC LEARNING & ENGAGEMENT | [www.civicyouth.org](http://www.civicyouth.org)

## State Civic Education Requirements

By Surbhi Godsay, Whitney Henderson, Peter Levine, and Josh Littenberg-Tobias

Made possible by a grant from the S. D. Bechtel, Jr. Foundation

September 2012

This fact sheet summarizes state requirements related to civic education, which means learning about citizenship, government, law, current events, and related topics. Civic education is most directly addressed in courses labeled "civics," "government," or "U.S. government." Social studies is a broader category that also includes such disciplines as history, economics, and geography. However, standards and tests in the social studies often include content relevant to civics. Thus we examine requirements for the social studies with a special emphasis on provisions that relate explicitly or implicitly to civics and government.

What states *should* require is a complex and controversial matter, dependent on what constitutes good citizenship and how states should influence education.<sup>1</sup> This fact sheet, however, is a strictly factual analysis that is meant to inform debates about policy by summarizing the state requirements that are now in place.

We summarize state standards that define the content of social studies courses (focusing on the aspects of social studies standards that relate to civic education), state laws that require civics or social studies to graduate from high school, and state-mandated tests in civics or social studies. We also review the content, subject, and format of state assessments. Among our findings:

- All states have standards for social studies, a broad category that includes civics/government along with other disciplines such as history and geography. The theme of power, authority, and government is included in all 51 states' social studies standards (including the District of Columbia's). The theme of civic ideals and practices is found in every state's standard except Missouri's.
- Thirty-nine states require at least one course in American government or civics<sup>1</sup>

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<sup>1</sup> The state of Illinois requires students take US History *or* US History & Civics, and is not included in this total

- In the 2012-13 school year, 21 states require a state-designed social studies test. This is a similar number as in 2006 but a dramatic reduction compared to 2001, when 34 states conducted regular assessments on social studies subjects. Two states, Maryland and Florida, have recently instituted new social studies assessments, not yet required this year.
- Just nine states require students to pass a social studies test in order to graduate from high school: Alabama, Georgia, Mississippi, New Mexico, New York, Ohio, South Carolina, Texas, and Virginia. Georgia's assessment will be phased out but Maryland and Florida will add high-stakes tests.
- Eight states have statewide, standardized tests specifically in civics/American government: California, Indiana, Kansas, Kentucky, Missouri, Ohio, Virginia, and West Virginia. Of those, Ohio and Virginia are the only ones that require students to pass that test to graduate from high school.
- Social studies assessments have shifted from a combination of multiple-choice and performance tasks to almost exclusively multiple-choice exams since 2000.

The previous scan of state standards, requirements and laws relating to civic education was conducted more than five years ago.<sup>2</sup> In the past decade, education policy has changed rapidly, due, in part, to the No Child Left Behind Act of 2001 (NCLB), Race to the Top, and other federal policies. In 2008, CIRCLE found little change in the amount of time devoted to social studies, but more recent research suggests that states have shifted educational resources away from social studies toward subjects that are included on state-wide assessments.<sup>3</sup> The pendulum may be swinging back as several states are now reforming their requirements for civic education.

## Methodology

To collect and analyze this information, CIRCLE reviewed state laws, standards and requirements through state websites (frequently, from state department of education websites) or, in two cases, by contacting state officials. Two different teams conducted independent scans and the few discrepancies were resolved by fact-checking and discussions. The full data summarized in this fact sheet is available online at <http://www.civicyouth.org/wp-content/uploads/2012/10/CIRCLE-Bechtel-State-Civic-Education-Final.xlsx>. That spreadsheet also includes search terms and the codebook that we used to summarize state laws.

## Standards

Standards are official state documents that itemize what must be taught. They do not necessarily come with rewards or sanctions for compliance, but they influence curricula, textbooks, tests and other assessments, and education for teachers both before and during their teaching careers.

All states have social studies standards. Most states have standards that are specifically relevant to civics or government, as distinct from their history, geography, and economic standards.



We coded state social studies standards based on the National Curriculum Standards for Social Studies.<sup>4</sup> States are not required to use these standards, but it provides a conventional framework and widely recognized set of categories. For the main results, see Table 1.

Table 1: Frequency of State Standards, by General Category

Standard	Number of States with the Standard
Time, Continuity and Change	51
Power, Authority and Government	51
People, Places and Environment	50
Production, Distribution and Consumption	50
Civic Ideals and Practices	50
Science, Technology and Society	46
Global Connections	46
Culture & Diversity	44
Real World Application	42
Individuals, Groups, and Institutions	36
Individual Development and Identity	12

(Throughout this Fact Sheet, the District of Columbia is counted as a state, so the total is 51.)

We also searched for three additional elements relevant to civics that are common in state standards: understanding historic documents such as the Declaration of Independence, the United States Constitution, and the Gettysburg Address; studying contemporary US History; and developing civic skills (specifically, communication, deliberation, collective decision-making, critical analysis of information). The frequency of these standards is listed in Table 2.

Table 2: Frequency of Specific Civic Themes in State Standards

Standard	Number of States with the Standard
Historic Documents (Constitution, Bill of Rights, etc)	48
Civic Skills	41

Because most standards are long, complex, and distinctive documents that evolve over decades, an enumeration of general themes does not do justice to their variety. To give somewhat more flavor, we cite several examples of how civic skills are presented in standards:

- Alaska expects students to exercise political participation by discussing public issues, building consensus, becoming involved in political parties and political campaigns, and voting.
- Florida expects students to analyze trends in voter turnout and various forms of political communication, monitor current public issues in the state, and conduct a service project to further the public good.
- Hawaii expects students to distinguish information that is relevant or irrelevant, analyze and accept multiple perspectives and interpretations, debate positions on issues regarding rights and responsibilities, come to consensus on issues, take actions to gain larger community involvement on issues (e.g., in service learning project), work cooperatively, discuss and listen, support individual group members, share resources, make compromises, and take leadership roles.
- Maine expects students to develop research questions, apply research methods, synthesize information from varied sources, conduct fieldwork and interviews, communicate in oral/written/visual form, display critical reasoning and ethical reasoning skills, and develop individual and collaborative decisions considering multiple points of view
- New Mexico expects students to demonstrate the skills needed to participate in government at all levels, including: analyze public issues and the political system; evaluate candidates and their positions; debate current issues.

### Graduation Requirements

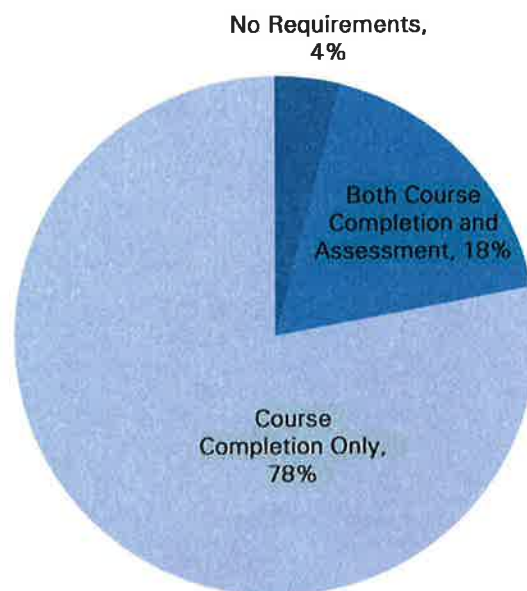
Forty-nine states (including the District of Columbia) require students to complete at least one social studies course during high school. The two exceptions are Colorado and Iowa. Iowa has a strong tradition of local control, so the lack of a statewide course requirement does not imply that civics is rarely taught there. The subject matter required by states varies, with U.S. history and civics/American government as the most commonly required courses.

- 43 states require U.S. history to graduate
- 39 states require civics/American government
- 28 states require world history to graduate
- 18 states require economics
- 15 states require geography

The states that do *not* require courses in civics or American government for graduation are: Alaska, Colorado, Delaware, Illinois, Iowa, Montana, Nebraska, New Jersey, Oregon, Rhode Island, and Washington.

Very few states require students to pass a social studies assessment in order to graduate from high school. In 2012-2013, only nine states had this requirement: Alabama, Georgia, Mississippi, New Mexico, New York, Ohio, South Carolina, Texas, and Virginia. Georgia's assessment will be phased out but Maryland and Florida will add tests. Other states have mandatory social studies tests, but passage is not required for high school graduation.

**Figure 1: State Social Studies Graduation Requirements**



#### **Number of years of social studies required to graduate**

Forty states require at least three years of social studies in order to graduate from high school. The exceptions are Colorado (no requirement), Idaho (2.5 years), Illinois (two years), Indiana (two years), Iowa (no requirement), Maine (2 years), Massachusetts (no year requirement), Montana, New Hampshire (2.5 years), North Carolina (two years), and Washington State (two years). In 39 states, civics/US government represents a mandatory course that counts toward the total course requirements in social studies.

[illegible]

The number of states requiring social studies tests or other assessments has decreased dramatically since the passage of No Child Left Behind. In 2001, 34 states conducted regular assessments on social studies subjects.<sup>5</sup> By 2006, the number had fallen to 21.<sup>6</sup> For the 2012-13 school-year, 21 states mandate a state-designed social studies assessment sometime before 12<sup>th</sup> grade (for public school students). The Maryland legislature passed a bill in 2012 that will reinstitute a mandatory test for the high school graduating class of 2017.<sup>7</sup> In Florida, under the Sandra Day O'Connor Civic Education Act, a middle school civics test is being piloted in 2012-13 and will become mandatory by 2013-14.<sup>8</sup> Thus the number of states with required tests is likely to rise to 23. On the other hand, Georgia plans to phase out its test by 2015 and other changes are possible. Figure 3 shows only the states with tests actually in place in 2012-13.

United States history is the most commonly assessed subject. Out of the 21 states with state assessments this year:

- o 15 states assess US history
- o 14 assess state history
- o 8 assess world history
- o 8 assess civics/American government
- o 6 assess economics
- o 5 assess geography

The states that have mandatory assessment specifically in civics/government are California, Indiana, Kansas, Kentucky, Missouri, Ohio, Virginia, and West Virginia. Insofar as state assessments cover civics or government, they generally emphasize the U.S. Constitution and the duties of different branches and levels of government. Far fewer states assess students on their understanding of how citizens can become involved in the democratic process or foreign, international, or global affairs.

- 20 states test the U.S. Constitution in some way on their assessment(s)
- 15 states test the role of government on their assessment(s)
- 11 states test the rights and responsibilities of citizens on their assessment(s)

- 5 states test the U.S. in world affairs on their assessment(s)

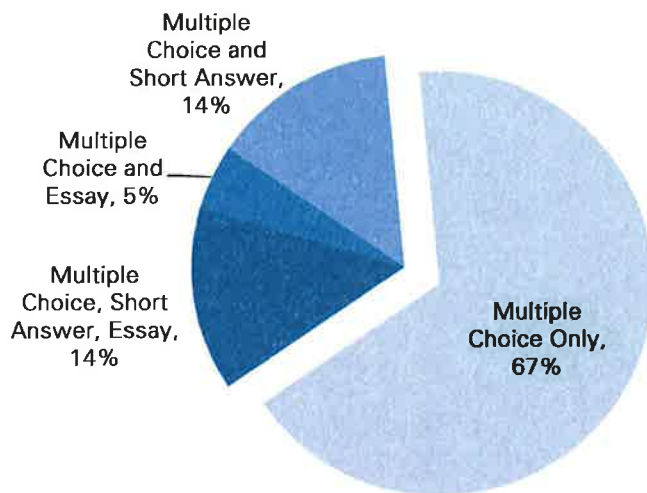
### Social Studies Assessments: Items

Social studies assessments have shifted from a combination of multiple-choice and performance tasks to almost exclusively multiple-choice exams. In 2001, of the 35 states that regularly assessed social studies, 31 used multiple choice items, 10 used essay items, and 14 used short-answer and other constructed-response items.<sup>9</sup>

For the 2012-2013 school-year:

- All 21 states that assess social studies use multiple-choice items in their assessments
- Just six states (29% of the ones that assess) use short-answer items in their assessments
- Just 4 states (19% of the ones that assess) use essays in their assessment

Figure 4: Types of Items on Social Studies Assessments



On April 27, 2012, the Tennessee legislature passed a bill that will require school districts to assess their students' knowledge of civics by giving them assignments that are "student-influenced" and that involve an "inquiry process structured around complex, authentic questions and carefully designed products and tasks." These assignments will be used (once in grades 4-8 and a second time in grades 9-12) in lieu of written tests to find out whether Tennessee's students can "demonstrate understanding and relevance of public policy, the structure of federal, state and local governments and both the Tennessee and the United States constitutions."<sup>10</sup> The Tennessee bill represents an important experiment, considering that all other states either do not assess civics at all or rely on highly conventional written tests.

### Opportunities for Engagement Outside the Classroom: Service Learning

Many educational researchers have argued that in order for students to develop the necessary civic skills, they need opportunities to engage in the community outside the classroom. Service-learning is one common way for students to connect school lessons to community issues, and vice-versa. Research on service-learning has shown that effective programs increase students' engagement and civic skills.<sup>11</sup> Currently, 20 states have state standards related to service-learning. However, in 2011, funding for the Learn and Serve America Act was entirely eliminated from the federal budget. This program had provided funding for service-learning programs in schools. The reduction in federal funding for service-learning programs may have reduced student access to service-learning programs.

Other ways of applying social studies and civics to community or public issues (such as creating media products, conducting research, or serving as interns) are not mandated in state laws and standards.

## Conclusion

Social studies courses such as history, civics, and economics provide students with the necessary civic skills and knowledge to be effective 21st century citizens. However, since the passage of No Child Left Behind, many states have shifted focus away from social studies and have dramatically reduced the number of social studies assessments. Although some states still currently assess social studies, the scope of the assessments has become increasingly narrow. States are, to a greater extent, using multiple-choice only tests that focus primarily on memorizing information, rather than demonstrating civic skills. Furthermore, assessments focus mostly on the history and geography of the United States; far fewer states assess students in world affairs or economics.

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## Notes:

<sup>1</sup> See, for example, Peter Levine, "Education for Civil Society," in David Campbell, Meira Levinson, and Frederick M. Hess (eds.), *Civics 2.0: Citizenship Education for a New Generation* (Cambridge, MA: Harvard Education Press, 2012), pp. 37-56.

<sup>2</sup> Tiffany Lennon, "Citizenship Education," Education Commission of the States Policy Brief, 2006. <http://www.ecs.org/clearinghouse/71/30/7130.pdf>

<sup>3</sup> Mark Hugo Lopez, Karlo Barrios Marcelo, and Peter Levine, *Getting Narrower at the Base: The American Curriculum After NCLB*, CIRCLE monograph, December, 2008 (via <http://www.civicyouth.org/new-circle-report-on-the-k-12-curriculum-in-the-era-of-nclb/>); Patricia Velde Pederson, "What is Measured is Treasured: The Impact of the No Child Left Behind Act on Nonassessed Subjects," *The Clearing House: A Journal of Education Strategies, Issues and Ideas*, vol. 80 no. 6 (July-August 2007), pp. 287-291.

<sup>4</sup> National Council for the Social Studies, *National Curriculum Standards for Social Studies: Chapter 2—The Themes of Social Studies*, <http://www.socialstudies.org/standards/strands#1>.



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<sup>5</sup> Stephen Buckles, Mark C. Schug, and Michael Watts, "A National Survey of State Assessment Practices in Social Studies," *The Social Studies*, vol. 92, no. 4 (2001), pp. 141-146.

<sup>6</sup> Lennon, p. 2.

<sup>7</sup> Michael Dresser, "Law Puts Social Studies Back in the Limelight: Bill Requires Social Studies to be Taught, Tested in Maryland Schools," *Baltimore Sun*, May 22, 2012, via <http://articles.baltimoresun.com>

<sup>8</sup> Sandra Day O'Connor Civics Education Act, via <http://floridacitizen.org/resources/other/justiceact>

<sup>9</sup> Buckles, Schug, & Watts, 2001

<sup>10</sup> Tennessee Senate Bill 2066, via <http://wapp.capitol.tn.gov>.

<sup>11</sup> Shelley Billig, Sue Root, and Dan Jesse, *The Impact of Participation in Service-Learning on High School Students' Civic Engagement*. College Park, MD, 2005: CIRCLE Working Paper 33. Via <http://www.civicyouth.org/circle-working-paper-33-the-impact-of-participation-in-service-learning-on-high-school-students-civic-engagement/>



# GUARDIAN OF DEMOCRACY

The Civic Mission of Schools



campaign summary

 **WASHINGTON**  
MEDIA GROUP, inc.

## Summary Report for the Campaign for the Civic Mission of Schools

Washington Media Group's (WMG) communications efforts on behalf of the Campaign for the Civic Mission of Schools (CMS), including its "Guardian of Democracy" report, covered the spectrum of activities and platforms—from online and print advertising, to social media, video production and earned media outreach. WMG created a compelling message and visuals for print and online advertising (see attached versions). WMG targeted education policymakers, school board members, superintendents, teachers, parents, opinion leaders and students.

As a result, CMS and its efforts to improve civic learning achieved broader press coverage than previous CMS efforts and, importantly, the *Guardian of Democracy* report was linked to sites across the Internet—significantly boosting awareness not only of the findings and policy remedies, but also of CMS itself.

### Advertising

CMS's advertising campaign was directed primarily at education opinion leaders and policymakers, urging them to take action to increase and improve civic education in our nation's schools. WMG devised several creative concepts for CMS's advertising campaign, settling on a "Future {office holder title}" theme. WMG created three print ads, "Future Supreme Court Justice," "Future President," and "Future Congressman," each featuring a different young student and a different quote about the importance of civic education and democratic participation. Most ads were half or one-third page dimensions, although we were able to secure a few full-page ads in less costly publications.

Advertisements appeared in the following publications:

- *Education Week*
- National School Boards Association - *American School Board Journal*
- American Association of School Administrators - *School Administrator*
- National Council for the Social Studies - *Social Education*
- American Federation of Teachers - *American Teacher* and *On Campus*
- National Conference of State Legislatures - *State Legislatures*
- California Council for the Social Studies - *Social Studies Review Journal*
- Association of California School Administrators - *Leadership Magazine*
- Association of California School Administrators - *EdCal*
- California School Boards Association - *California Schools*
- National Association of State Boards of Education - *The State Education Standard*

The ads ran from January through September, excluding the summer months, with a heavy emphasis on September, thereby coinciding with the 225<sup>th</sup> anniversary of the signing of the Constitution and traditional “back-to-school” awareness of educational issues. Also, in keeping with the funder’s directive, a special focus on key education policymakers in California was achieved through the selection of publications (as the list above suggests).

## Social Media

WMG created a Facebook page, Twitter page and a branded YouTube channel for CMS. The Facebook and Twitter pages are updated several times a week with relevant articles or mentions of CMS, its report, or related topics. The YouTube channel houses the video clips of Justice Sandra Day O’Connor and civics/history teachers filmed last fall. WMG then launched an advertising campaign on Facebook and with a modest budget, produced **6,635 new Facebook “likes.”** The CMS Facebook ads were seen by the target audience **nearly 70 million times** and generated nearly **13,500 clicks**. Not only did people “like” the page, they engaged with the posts, “liking” them, sharing them with friends, and commenting on them.

WMG is convinced that these social network participants represent a valuable resource of potential long-term followers of and advocates for the Civic Mission of Schools; they will receive all future messaging and status updates delivered through CMS’s Facebook page. This will be invaluable for directing messages to and activating the target audience about the importance of civics and asking them to take actions on CMS’s behalf.

The success of the campaign is due in large part to constant “optimization” of the online ads and target audience. WMG routinely split tested ads, including the imagery, copy, and the interests and demographics of the people targeted.

WMG crafted Facebook ads to deliver key messages to interested parties, using a clear call-to-action to engage users. Having split tested multiple combinations of unique ads, the following proved to be most effective:

### Civic Mission of Schools



“Like” this to help kids learn about Democracy and Rights in school - Your like will help!

Like · 6,742 people like this.

As mentioned earlier, the CMS’s Facebook Page currently has over **6,700 people who “like” it**. Over 98% of those “likes” came from this Facebook advertising campaign.



## Data

- Impressions - The number of times a CMS ad has been viewed: **68,877,761**
- Clicks - The number of times a CMS ad has been clicked on by our target audience: **13,429**
- Cost - The amount spent from 11/1/11 – 9/31/12: **\$11,252.95**
- Average Cost per Click (CPC) - The average cost each time a CMS ad is clicked on: **\$0.84**
- “Like” Conversions - The number of “likes” to the Facebook page generated from the ads: **6,635**
- Conversion Rate - The percentage of people who clicked on the ad and then “liked” the Facebook page (Conversions/Clicks): **49%**
- Average Cost per Acquisition (CPA) - The average cost for each “like” produced from an ad: **\$0.84**

The social media campaign recruited thousands of individuals who already had an interest in government, civics, history or social studies. These followers now have another way to engage with this issue and become valuable activists on behalf of CMS and its mission.

## Website Design and Maintenance

In September 2011, WMG launched a campaign centered around Constitution Day to publicize the release of CMS’s report, *“Guardian of Democracy: The Civic Mission of Schools.”* While the report garnered impressive coverage, the increase in traffic to the CMS website (where the report resided) caused the website to crash several times, making it impossible for curious visitors to download the report. As a result, WMG recommended to CMS that we design and develop a new website as part of the Bechtel grant. In addition to giving the new website a modern and fresh design, WMG created an “action center” where visitors could directly act on behalf of CMS. This included signing a petition, requesting a speaker, sharing a story, telling a friend about the campaign or writing a letter to a representative, using a customized search tool.

The new website also housed several video clips produced by WMG. These included interviews with Justice Sandra Day O’Connor and several history and civics teachers. WMG is currently in the process of further editing these clips in order to convert them into a three minute video for CMS, that can be used in future efforts.

WMG updated the CMS website several times a week with relevant news articles, mentions of CMS or the report, and messages from the president of CMS. These same articles were also placed on the Facebook and Twitter pages.

## Search Engine Marketing

WMG secured a Google Grant—a program that gives free advertising to eligible nonprofits—for CMS for up to \$10,000 a month for a search engine marketing campaign. WMG researched and generated thousands of keywords related to civic education and launched a Google Adwords campaign.

Search engine marketing is an effective way to target individuals who are already interested in the subject, and therefore searching for related content on Google. When anybody searches a term or keyword having to do with “civic education” or “teaching democracy,” a text ad appears above or below the search results, with a call to action and a link to the CMS website. For example, if somebody searches “civic education” in Google’s search engine, this text ad would appear:

[Teaching Civic Education](#)  
Discover How To Teach Students the  
Foundation of Democracy with Civics  
[www.CivicMissionOfSchools.org](http://www.CivicMissionOfSchools.org)

If someone else searches for “lesson plans” related to “democracy” or “government,” they would see this ad:

[Social Studies For School](#)  
Lesson Plans and Resources For  
Teachers On Gov, Democracy, more!  
[www.CivicMissionOfSchools.org](http://www.CivicMissionOfSchools.org)

For a search engine marketing campaign to be successful, the search query or keyword must relate to both the text ad and the content on the destination link (landing pages on CMS’s website). This guarantees that those targeted are those most likely to become supporters and activists for the organization and its mission. It also assures a client’s ads will appear in Google’s search results!

The Google search campaign generated **40,338 unique clicks**. This means over forty thousand of the most qualified and engaged prospects were sent to the Civic Mission of Schools website. CMS’s ads were seen **2,742,182 times** by the target audience of educators, policymakers and those looking for information and resources regarding civic education.

## Earned Media

WMG sought to bolster CMS's presence through the aforementioned website redesign, search engine marketing, print, online and Facebook advertising. As a result of these efforts, The Civic Mission of Schools and its "Guardian of Democracy" report were featured in a wide array of publications, ranging from national news sources to individuals' blogs.

Education publications, such as [ASCD SmartBrief](#) and [Edutopia](#), covered CMS, detailing the report and its implications for civic engagement. The [Los Angeles Times](#) referenced the findings of the report, specifically how "civics education, which used to be commonplace, has been undermined by other forces, including erosion of broad support."

A local news station in Massachusetts, [WWLP-22News](#), described the campaign's mission in detail, highlighting the "Guardian of Democracy," quoting Ted McConnell, and linking to CMS's website.

A [Huffington Post article](#) by Eric Liu says we need to "re-Americanize Americans" and instill our country with a culture of citizenship again. They name the Campaign for the Civic Mission of Schools as one of the groups working to do this.

The [National Conference on Citizenship](#) called the campaign a valuable resource for implementing civic education in Massachusetts, quoting the "Guardian of Democracy" report. Another even linked to the "[Civic Learning Database](#)" on the new website, calling this "wonderful list of online civic learning lesson plans and programs" a "great resource."

WMG helped CMS write and publicize a press [release](#) about the campaign's support of the 'Sandra Day O'Connor Civic Learning Act of 2011.' The bill would provide a competitive federal grants program to spur innovation in civic education in schools, especially those in underserved inner city and rural school populations. It would also expand NAEP in such a way that results of *The Nation's Report Card* might be disaggregated by state, thereby allowing for state by state comparisons of student proficiency on vital civics, history, geography and economics literacy. The American Enterprise Institute (AEI) Program on American Citizenship [wrote about the bill](#), linking to the CMS release, urging viewers to read its "informative endorsement of the bill."

Taking advantage of opportune events, WMG wrote several Op-Eds throughout the year, working to place them around significant American holidays. One—"Becoming Aware of Civic Unawareness"—was published under the byline of former (and perhaps future) Senator Bob Kerrey (D-NE) in *The Huffington Post* on Memorial Day 2012. Another was authored by San Jose Vice Mayor Madison Nguyen, titled "[Celebrate our Constitution on its 225th anniversary](#)," and published in the *San Jose Mercury News* on Constitution Day 2012.



September 17<sup>th</sup>, 2012 marked the 225<sup>th</sup> anniversary of the signing of the Constitution, thus providing a good “hook” for news stories about the need to reinvigorate civic education in our nation’s schools. WMG reached out to nearly 100 education reporters around the country, providing them with information about what CMS is doing to improve civic education in schools.

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### **Celebrating the 225<sup>th</sup> Anniversary of the Constitution by Promoting Civic Learning**

Washington, DC.—September 13, 2012— There are 54 days until the 2012 election. But how much do today’s young voters really know about the United States government, democracy, and what it means to be an engaged citizen?

Plenty of news reports cite waning enthusiasm for the election among young people. A July Gallup survey showed that only 58% of registered voters ages 18 to 29 said they will “definitely vote”. Compare this to the 78% of young voters who said the same before the 2008 election.

There will be events and celebrations commemorating the 225<sup>th</sup> anniversary of the signing of the Constitution all over the country, but perhaps the best way to observe this day is to encourage the youth to know about and to actively participate in the electoral process.

The **Campaign for the Civic Mission of Schools (CMS)** acknowledges Constitution Day by promoting civic awareness and engagement in schools. CMS offer practical guides and solutions for educators, policymakers, and all citizens:

**For Educators:** Our Civic Learning Online database is a free online resource providing information about effective programs and practices. The database is searchable by grade level and type of practice.

**For Policymakers:** At the federal level, CMS provides position statements and thought papers that advocate for concrete policy improvements and increased funding for civic learning. At the state level, CMS offers a database of profiles of the state policies for k-12 civic and service learning in individual states and offers a comparison feature of civic learning state policies. The National Conference of State Legislatures (NCSL) / Civic Education State Legislation Database captures brief summaries of legislative efforts to address civic learning including bill number, status and the bill sponsor. Users can search the database by year, state, bill status and keyword.

**For Media:** CMS provides a civic learning fact sheet, links to civic education programs available in all schools, a collection of op-eds by prominent Americans on the importance of this subject.

**For Parents and all Citizens:** The ‘Guardian of Democracy: the Civic Mission of Schools’ report outlines six proven practices that constitute well-rounded civic learning. CMS offers tips for parents to ensure that these practices are utilized in local schools.

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## Conclusion

The initial success of the public relations campaign can be measured in the number of stories and OpEds about the critical need for more and better civic learning in America’s schools and about CMS’s specific recommendations to improve civic education, the number of paid placements in target publications, the number of Facebook “likes,” the number of visitors who went to the CMS website as a result of the search engine marketing campaign, and mentions of the report or CMS in blogs and other online sources. The ultimate success of the campaign will be measured by policies and practices that improve the quality of civic learning at the state, local or school level. While WMG did not aspire to enact policy change in such a short period of time, we were pleased to see just that. Tennessee enacted legislation that would require every student in grades 4-12 in TN to complete at least one Classroom Based Assessment annually. This project-based assessment will be designed to show a student’s understanding of civic learning content, including the structure of federal, state and local government, the Constitution, and public policy. More recently, the Arizona Department of Education launched a program, *Excellence in Civic Engagement*, to measure students’ knowledge of government and ensure they have the skills necessary to be engaged and informed citizens. The program will apply the goals and recommendations from the *Guardian of Democracy* report.

The various communications mediums employed in this campaign complimented each other and helped amplify CMS’s core message. In the end, the report and the campaign received wide coverage in the media, education publications and online. The website proved invaluable in allowing key stakeholders and reporters access to the *Guardian of Democracy* report, CMS’s recommendations for improving civic learning, video clips of Justice Sandra Day O’Connor and teachers, and tools to take action on behalf of the campaign. Finally, the campaign recruited thousands of activists who all share CMS’s goal: to improve the quality of civic learning at all levels.

# Print Ads



Future  
Supreme Court Justice?

"The better educated our citizens  
are, the better equipped they will  
be to preserve the system of  
government we have..."

- Sandra Day O'Connor,  
Associate Justice of the  
U.S. Supreme Court

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"If a nation expects to be ignorant and free, it expects what never was and never will be."

- Thomas Jefferson

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- Lee Hamilton,  
Former Congressman (D-IN) (1965-1999)

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# Online Ads



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## Future Senator?

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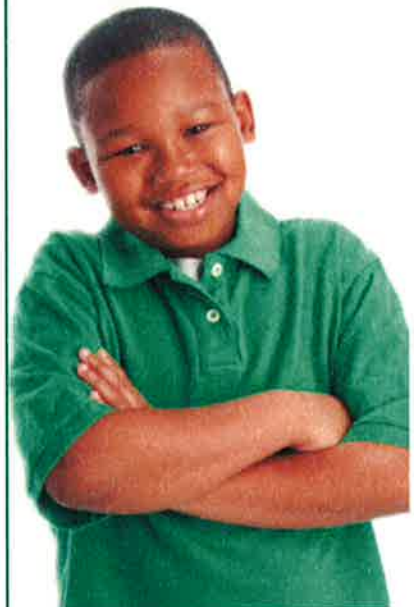
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# **Website Redesign**



## Help Us Restore Civic Learning

Our schools have the historic responsibility to prepare students for success in college and career as well as prepare students to be informed engaged citizens. Join us calling on local, state and federal education policymakers to ensure civic learning receives the needed time and attention to ensure all students receive the civic knowledge and skills necessary for informed and engaged participation in our democracy.

[Sign the Petition](#)**Take Action**

Join Us to improve civic learning

**Tell a Friend**

Spread the word, get others involved

**Stay Informed**

### CIVIC LEARNING IN THE NEWS

[SEE ALL POSTS](#)

#### Forums on Role of Higher Ed. in Society Begin

What is the role of Higher Education in Civic Learning? A series of forums will be held around the country within the...

September 13, 2012, 0 comment(s)

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#### The Southern Illinoisan: America needs high-quality civics education

As you celebrate Constitution Day on Sept. 17, ask your public school administrators about their civics education pro...

September 13, 2012, 0 comment(s)

[Like](#) 0 [Tweet](#) 0

#### Middle School Integrates Subjects into a "Learning Community"

Shoal River Middle School in Crestview, Fla., is piloting a project aimed at integrating social studies, language art...

**GUARDIAN OF  
DEMOCRACY**

The Civic Mission of Schools

[Download Now](#)[Civic Learning Online >](#)**Justice Sandra Day O'Connor (clip 1)**[CONTINUE TO VIDEO PAGE](#)

THE CAMPAIGN

EDUCATORS

POLICYMAKERS

MEDIA AND ALL CITIZENS

ACTION CENTER

NEWS

Take Action

## Action Center

We the People were empowered by the Founders of this nation with the ultimate power in our Republic. Civic Learning helps all students acquire the civic knowledge, skills and disposition to be informed and engaged participants in our self-governance.

If you value Civic Learning, we urge you to become engaged and let your voice be heard. There are a number of ways you can support high quality Civic Learning for all students. Here are immediate action steps you can take to restore the civic mission of our nation's schools:

### SIGN A PETITION

### REQUEST A SPEAKER

### WRITE YOUR REPRESENTATIVE

### SHARE YOUR STORY

### TELL A FRIEND

### Action Center

- Sign a Petition
- Request a Speaker
- Write Your Representative
- Share Your Story
- Tell a Friend

### Take Action

Join Us to improve civic learning

### Tell a Friend

Spread the word, get others involved

### Stay Informed

Email Address

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The Civic Mission of Schools

Download Now

Civic Learning Online »



## Civic Learning Online

Our educational resources provide educators, policymakers, and advocates with information they need to put civic learning in classrooms, schools, and districts.

Civic Learning Online provides a free, public resource for

- educators to identify civic learning resources they may adapt, adopt, or replicate
- policymakers to understand what's available and how civic learning can align with state frameworks
- advocates to find stories that can demonstrate the importance and impact of civic learning



Civic learning practitioners with expertise in civic learning methodology and pedagogy review each submission in light of its alignment to the competencies and six promising approaches described in the Civic Mission of Schools report.

All
Lesson Plans & Programs
Model Schools & Districts
Professional Development

FIND PROGRAMS BY:
Civic Learning Approach:
Location:
Grade:

Any
Any
Any

Clear Filters

Show 25 entries
Search:

Title	Civic Learning Approach	Location	Grades
A Salute to Our Flag	Guided Discussions of Issues and Current Events, Instruction in History, Government, Law or Democracy, Simulations of Democratic Processes	National	
Active Citizenship Today	Service-Learning and Community Service, Extracurricular Opportunities, Simulations of Democratic Processes	National	
Adventures in History and Law	Instruction in History, Government, Law or Democracy, Service-Learning and Community Service, Simulations of Democratic Processes	National	



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## Civic Mission of Schools Is on Facebook.

To connect with Civic Mission of Schools, sign up for Facebook today.

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GUARDIAN OF  
DEMOCRACY

## Civic Mission of Schools

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### Education

The Campaign for the Civic Mission of Schools is a coalition of over 70 national civic learning, education, civic engagement and business groups working to improve civic education in America's schools.

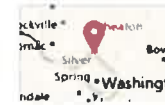
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### Highlights



**Civic Mission of Schools** shared a link.  
Yesterday · [View](#)

What is the role of Higher Education in Civic Learning? A series of forums will be held around the country within the next year to discuss the role of higher education in strengthening the economy, culture, and civic participation. "Shaping...[See More](#)



**Forums on Role of Higher Ed. in Society Begin**  
[blogs.edweek.org](http://blogs.edweek.org)

Caralee Johnson Adams has worked as a journalist for nearly 25 years, covering education, health,...

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[Jo Lynn Puehse](#), [Neal Camp](#), [Linda Hobson](#) and 9 others like this.



**Mike Roberts** <http://www.youtube.com/watch?v=XzhtMPUOUts&feature=share>

[CTIMMEDI](#) [How](#) [Dinner](#) [Lies](#)

### Also On

<http://www.civicmissionofschools.org/>

### Recent Posts by Others on Civic Mission of Schools

[See All](#)



**Angela L. Reynolds**

These types of programs are being excluded to add m...  
September 10 at 7:55pm



**Geoff Hoagland**

Fall semester of a presidential election year - there is ...  
August 23 at 6:13am



**Linn Hoskins Cook**

When I was in 7th grade we had Civics classes. We lear...  
August 18 at 6:57pm



**Cindy Gilbert-Fadel**

I don't think there is a shred of democracy in our publi...  
August 10 at 5:38pm

[More Posts](#)



## CivicMissionofSchool

@CivicEdNow

The Campaign for the Civic Mission of Schools is a coalition of over forty partner organizations working to improve civic education in America's schools.

Silver Spring, MD <http://www.civicmissionofschools.org/>

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### Tweets



CivicMissionofSchool @CivicEdNow

10 Sep

Middle school pilots project to integrate subjects, helping students see real world applications of lessons. [crestviewbulletin.com/news/shoal-183...](http://crestviewbulletin.com/news/shoal-183...)

Expand



CivicMissionofSchool @CivicEdNow

7 Aug

Read about the vital necessity of ensuring a well rounded education (including civic learning) for every student. [ascd.org/news\\_media/lis\\_...](http://ascd.org/news_media/lis_...)

Expand



CivicMissionofSchool @CivicEdNow

20 Jul

Over 97% of Immigrants passed the US Naturalization Test. 1/3 of native-born Americans flunked. #CivicEd can fix that! [bit.ly/LseHGY](http://bit.ly/LseHGY)

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CivicMissionofSchool @CivicEdNow

19 Jul

"There is an increasing appreciation that we do need to know how our government works: national, state and... [fb.me/1OchUGmtu](http://fb.me/1OchUGmtu)

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CivicMissionofSchool @CivicEdNow

18 Jul

It's encouraging that both President Obama and Mitt Romney are talking about the importance of education in... [fb.me/1uH2cuBzV](http://fb.me/1uH2cuBzV)

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16 Jul

Despite anemic civic education programs and dismal test results, there is a growing interest among citizens in... [fb.me/CGeDpF5a](http://fb.me/CGeDpF5a)

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Civic Mission of Schools

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### About Civic Mission of Schools

The Campaign for the Civic Mission of Schools is a coalition of over 70 national civic learning, education, civic engagement and business groups committed to improving the quality and quantity of civic learning in American schools. The Campaign's ...

more

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Latest Activity

Apr 18, 2012

Date Joined

Oct 25, 2011

Location

Silver Spring, MD

Country

United States

*Civic Education Web Resources*

**Annenberg Classroom.** Civic education resources for teachers:

[www.annenbergclassroom.org/](http://www.annenbergclassroom.org/)

**Appellate Experience Program:** Lesson plans for students visiting an appellate court. <http://www.crf-usa.org/appellate-court-experience/appellate-court-experience.html>

**American Bar Association.** Law Day resources and more from the ABA Division for Public Education: [www.abanet.org/publiced/](http://www.abanet.org/publiced/)

**California Judicial Branch.**

Civics Education. Free searchable database of civic education lesson plans: <http://www.courts.ca.gov/programs-lawrelated.htm>

Supreme Court Special Sessions. Outreach sessions of the California Supreme Court.

<http://www.courts.ca.gov/2952.htm>

Your Constitution: The Power of Democracy. Chief Justice Tani Cantil-Sakauye's effort to increase civic learning.

<http://www.courts.ca.gov/20902.htm#ad-image-0>

**Campaign for the Civic Mission of Schools.** A national coalition of organizations committed to improving the quality and quantity of civic learning:

[www.Civicmissionofschools.org](http://www.Civicmissionofschools.org)

**CourtsEd.** Features an national on-line First Amendment Cartoon contest. <http://www.courtsed.org/>

**Center for Civic Education.** Civic and citizenship education, law-related education, and international exchange programs resources: [www.civiced.org/](http://www.civiced.org/)

**Constitutional Rights Foundation.** U.S. Constitution curriculum materials, free civic education lesson plans, and newsletters online: [www.crf-usa.org/](http://www.crf-usa.org/)

**Discovering Justice.** A civic outreach program that pairs one justice official—a judge or a lawyer—with a classroom: [www.discoveringjustice.org/](http://www.discoveringjustice.org/)

**Justice Learning.** Text, audio, and multimedia resources for teachers, including lesson plans for legal and civil justice issues: [www.justicelearning.org/](http://www.justicelearning.org/)

**Justice Teaching.** Programs that prepare students to value the justice system, realize the power of their own voices, and embrace civic responsibility: [www.justiceteaching.org](http://www.justiceteaching.org)

**Law for Kids.** Educational resources about law designed especially for kids. Complex youth laws are explained in plain English: [www.lawforkids.org/](http://www.lawforkids.org/)

**iCivics.** Spearheaded by retired Justice Sandra Day O'Connor, a Web-based education project designed to reinvigorate civics learning inside and outside the classroom: [www.icivics.org/](http://www.icivics.org/)

**State Bar of California.** Free legal guides on *Kids and the Law*, [www.calbar.ca.gov/Public/Pamphlets/KidstheLaw.aspx](http://www.calbar.ca.gov/Public/Pamphlets/KidstheLaw.aspx) and *When You Become 18*, [www.calbar.ca.gov/Public/Pamphlets/WhenYouBecome18.aspx](http://www.calbar.ca.gov/Public/Pamphlets/WhenYouBecome18.aspx)

*Civic Education Web Resources*

**Street Law.** Resources to help educators teach law, democracy, and human rights: [www.streetlaw.org/en/index.aspx](http://www.streetlaw.org/en/index.aspx)

**US Courts.** Educational resources about the federal judicial system: [www.uscourts.gov/understand03/](http://www.uscourts.gov/understand03/)