The Supreme Court of Canada & High Court of Australia

Sunday, July 13, 2014 **2:30 p.m. – 4:00 p.m.** **James River Salon C**

Speakers: Roger Bilodeau, Registrar
Supreme Court of Canada
Andrew Phelan, Chief Executive & Principal Registrar
High Court of Australia

Roger Bilodeau, Registrar

Roger Bilodeau is a native of Ste-Agathe, Manitoba. He received his secondary level education and a Bachelor of Arts degree from the Collège Universitaire de St-Boniface (Manitoba). He studied common law in French and received his law degree (LL.B.) from the Université de Moncton in 1981. In 1987, he completed graduate studies in law (LL.M.) at Duke University in Durham, North Carolina.

He has been admitted to the Law Society of Manitoba (1982), the Law Society of New Brunswick (1986) and the Law Society of Upper Canada (2004). He has been a member of the Canadian Bar Association since 1978. From 1981 to 1984, he practiced law in St-Boniface, Manitoba.
From 1984 to 1999, he was a professor of law at the Faculté de droit de l'Université de Moncton. He has published several articles and given numerous conferences, both in Canada and internationally, mainly in the areas of public law and language rights.

He joined the Moncton office of the law firm Patterson Palmer in 1998, in addition to his teaching duties at the Faculté de droit de l'Université de Moncton.

From July 1999 to October 2003, he served as Deputy Attorney General and Deputy Minister of Justice for New Brunswick. In 1999, he was appointed Queen's Counsel, in New Brunswick.
From November 2003 to April 2004, he pursued various professional activities as part of the Sabbatical Leave Program for New Brunswick Deputy Ministers. Among other matters, he made various presentations at a conference on federalism in Russia.

From August 2004 to mid-October 2006, he practiced law at the Ottawa office of Heenan Blaikie LLP.

In mid-October 2006, he left Heenan Blaikie to pursue his law practice as a sole practitioner (in Ottawa), in the areas of public law and administrative law, as well as international development work regarding legal structures and governance issues in countries in transition.
Among his mandates, he was one of the senior counsel to the Commission of Inquiry into Air India Flight 182.

He also worked with a Canadian consortium on a capacity-building project aimed at strengthening democratic governance in Iraq, focusing on the management of language diversity and the protection and the promotion of human rights, as well as women's political participation. In 2005, he traveled to Rwanda to act as a foreign expert in the delivery of a practical skills training program (in both English and French) for Rwandan lawyers and judges. He also made various presentations in Vietnam on the topics of Decentralization and Regional Development for the benefit of Vietnamese civil servants.
During the course of his career, he has presented cases in both official languages in all Manitoba and New Brunswick courts, the Supreme Court and the Provincial Court of Nova Scotia, as well as in the Federal Court of Canada (Trial Division).

Since March 2009, he occupies the position of Registrar of the Supreme Court of Canada.

Andrew Phelan, Chief Executive & Principal Registrar

Andrew Phelan was appointed to a five year term as the Chief Executive & Principal Registrar of the High Court of Australia by the Governor-General of Australia on the recommendation of the Justices of the Court in July 2007. He was reappointed in July 2012 for a further term of five years.

Prior to his appointment to this Office, Andrew was Executive Director of the Australian Crime Commission, with particular responsibilities for intelligence-sharing between law enforcement and national security agencies as well as for the Commission's support operations. From 1998 until 2003, he was a General Manager of the Family Court of Australia. From 1986 until 1998, he held a number of Australian government senior executive legal, international treaty negotiation and general management positions.

Andrew trained as a detective with the New South Wales Police in 1981 and conducted a number of nationally-significant corporate crime investigations during the early 1980s. In 1986, he directed the investigation into the conduct of a High Court Justice by a special Parliamentary Commission of Inquiry, the only such inquiry ever held.

Andrew served as a Councillor, and remains a member, of the Australasian Institute of Judicial Administration. In 2002, he was awarded an Australian Government Senior Executive Fellowship on justice themes, which he used to visit courts in a number of countries, including the USA; he subsequently published on judicial performance and reform initiatives in India and the USA. He has been the Secretary of the Council of Chief Justices of Australia and New Zealand since 2007.

Andrew has degrees in Arts (Hons), Laws and Business and was admitted to practise as a Solicitor of the Supreme Court of New South Wales in 1978. He is married to Monica and they have three adult children, two of whom have undertaken tertiary studies in the USA.

The Supreme Court of Canada
La Cour suprême du Canada

Office of the Registrar
Bureau du registraire

June / Juin 2014

1

Outline/Sommaire

- **Supreme Court of Canada (SCC)**
  (judges, mandate, statistics)
- **SCC Building**
- **Office of the Registrar of the SCC**
- **La Cour suprême du Canada (CSC)**
  (juges, mandat, statistiques)
- **L'édifice de la Cour**
- **Bureau du registraire de la CSC**

2

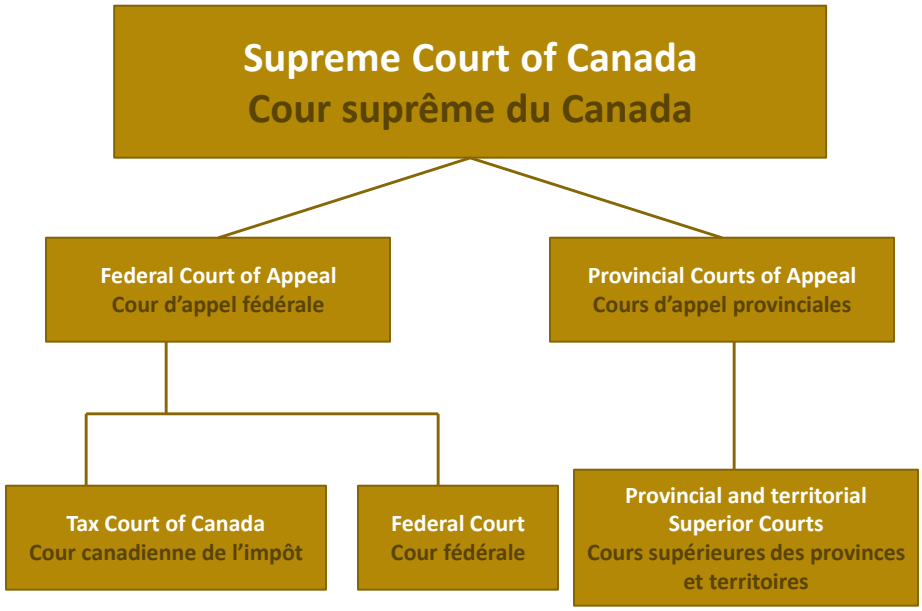
Canada's System of Government
Le système de gouvernement du Canada

The Queen
(represented in Canada by the Governor General)
La Reine
(représentée au Canada par le gouverneur général)

- **Executive Branch** / **Pouvoir exécutif**
  - **Prime Minister and Cabinet** / **Premier ministre et cabinet**
- **Legislative Branch** / **Pouvoir législatif**
  - **Senate** / **Sénat**
  - **House of Commons** / **Chambre des communes**
- **Judicial Branch** / **Pouvoir judiciaire**
  - **Supreme Court of Canada** / **Cour suprême du Canada**
    - **Federal Courts** / **Cours fédérales**
    - **Provincial Courts** / **Cours provinciales**

3

4



5

Canadian Court System
Le Système judiciaire canadien

6

Canadian Court System
Le Système judiciaire canadien

Provincial and territorial courts:

- provincial/territorial governments have jurisdiction over both the constitution, organization and maintenance of, and the appointment of judges to the provincial courts. These courts have defined jurisdiction in civil and criminal matters.

Les cours provinciales et territoriales :

- les gouvernements provinciaux et territoriaux ont compétence à la fois sur la création, l'organisation et le maintien des cours provinciales, ainsi que sur la nomination des juges de ces tribunaux. Ceux-ci possèdent une compétence limitée en matière civile et criminelle.

7

Canadian Court System (cont'd)
Le Système judiciaire canadien (suite)

Provincial and territorial superior courts:

- Authority is shared between the provincial and federal governments; the provinces have jurisdiction over the constitution, organization and maintenance of these courts, while the federal government has authority to appoint the judges. These courts have general jurisdiction.

Les cours supérieures provinciales et territoriales :

- Le pouvoir à l'égard de ces tribunaux est réparti entre les provinces et le fédéral, les premières ayant compétence sur leur constitution, leur organisation et leur maintien, le second sur la nomination des juges de ces tribunaux, qui disposent d'une compétence générale.

8

Canadian Court System (cont'd)
Le Système judiciaire canadien (suite)

Federal Courts:

- Created by a law, Federal Courts have jurisdiction over subject matters regulated by federal legislation, such as court martial, immigration, citizenship, admiralty, customs, revenue, federal labour matters.

Les Cours fédérales :

- Créées par une loi, les Cours fédérales ont compétence sur des matières régies par des lois fédérales, par exemple l'immigration, la citoyenneté, l'amirauté, les douanes, l'impôt sur le revenu et les relations de travail fédérales.

9

Canadian Court System (cont'd)
Le Système judiciaire canadien (suite)

The Supreme Court:

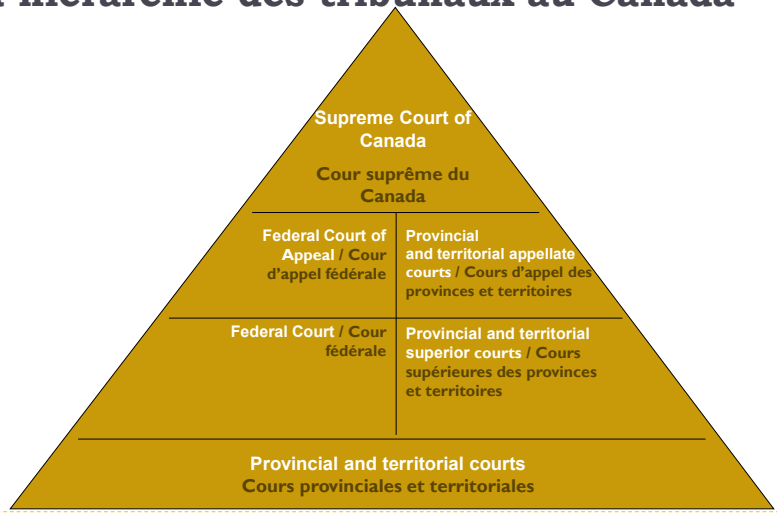
- is the final general court of appeal for Canada, the last judicial resort for all litigants, whether individuals or governments.

La Cour suprême :

- est la cour générale d'appel de dernier ressort du Canada, le tribunal de dernier recours auquel peuvent s'adresser les parties à un litige, qu'il s'agisse de particuliers ou de gouvernements.

10

The Hierarchy of Courts in Canada
La hiérarchie des tribunaux au Canada



11

The Supreme Court of Canada
La Cour suprême du Canada

- Created in 1875 by the *Supreme Court Act.*
- Canada's final court of appeal.
- Hears appeals from the decisions of the highest courts of final resort of the provinces and territories, as well as from the Federal Court of Appeal and the Court Martial Appeal Court of Canada.
- As it is a general court of appeal, the Supreme Court of Canada can hear cases in all areas of the law.

- Créée en 1875 par la *Loi sur la Cour suprême.*
- Cour d'appel de dernier ressort au Canada.
- Entend les appels des décisions rendues par le plus haut tribunal des provinces et territoires, ainsi que par la Cour d'appel fédérale et la Cour d'appel de la Cour martiale du Canada.
- Dotée d'une compétence générale, la Cour suprême du Canada peut entendre des affaires dans tous les domaines de droit.

12

History/Histoire
1875 - 1949

- SCC did not originally have the status of a court of last resort in the Canadian justice system.
- SCC's decisions could be appealed to the Judicial Committee of the Privy Council in England.
- This right of appeal was abolished in criminal cases in 1933 and in other cases in 1949.

- La CSC n'a pas toujours été la cour de dernier ressort dans le système judiciaire canadien.
- Les parties pouvaient faire appel de ses décisions devant le Comité judiciaire du Conseil privé en Angleterre.
- Ce droit d'appel a été aboli en 1933 pour les appels criminels et en 1949 pour les appels civils.

13

Constitutional Status/Statut constitutionnel

- The patriation of the constitution in 1982 recognized that the essential features of the SCC form part of the Constitution of Canada and can only be changed by invoking the amendment procedures in Part V of the *Constitution Act, 1982*.
- Protected features:
  - Existence
  - Composition
  - Jurisdiction
  - Independence

- Le rapatriement de la constitution en 1982 a reconnu que les caractéristiques essentielles de la CSC font partie de la Constitution du Canada et ne peuvent être changées qu'en conformité avec les procédures de modification prévues à la partie V de la *Loi constitutionnelle de 1982*.
- Caractérisques protégées:
  - Existence
  - Composition
  - Juridiction
  - Indépendance

14

Judges/Juges

- The Court was originally composed of six judges when it was created in 1875. In 1927, this number was raised to seven and in 1949 the Court reached its present total of nine members.
- La Cour comptait initialement six juges lors de sa création en 1875. Ce nombre a été porté à sept en 1927, puis, en 1949, la Cour a atteint son effectif actuel de neuf juges.

15

16

17

18

Appointed by the Governor in Council	The Judges	Nommés par le gouverneur en conseil
Superior court judges or lawyers with at least 10 years standing at the bar of a province; 3 judges must be from Quebec		Juges d'une cour supérieure ou avocats inscrits au barreau d'une province cependant au moins dix ans; 3 juges doivent provenir du Québec
Cease to hold office upon the age of 75 years		Cessent d'exercer leur charge à 75 ans
Should the Governor General die, become incapacitated, or be absent from the country for a period of more than one month, the Chief Justice would become Administrator of Canada and exercise all the powers and duties of the Governor General		En cas de décès ou d'incapacité du gouverneur général, ou en son absence du pays pour une période de plus d'un mois, le Juge en chef devient l'administrateur du Canada et exerce les pouvoirs et les attributions du gouverneur général.
	Les juges	

19

The Chief Justice/Le Juge en chef

- The Right Honourable Beverley McLachlin, the first woman to hold this position, was appointed Chief Justice of Canada on January 7, 2000.

  Since September 2013, she is the longest serving Chief Justice of Canada.
- La très honorable Beverley McLachlin, qui est d'ailleurs la première femme à occuper le poste de Juge en chef du Canada, a été nommée le 7 janvier 2000.

  Elle est devenue, en septembre 2013, la personne ayant occupé ce poste pendant la période la plus longue.

20

The Chief Justice/Le Juge en chef

- The Chief Justice is also chairperson of the Canadian Judicial Council and in addition, chairs the committee which advises the Governor General on awards of membership in the Order of Canada.
- Le Juge en chef préside aussi le Conseil canadien de la magistrature ainsi que le comité chargé de recommander au gouverneur général la nomination des récipiendaires de l'Ordre du Canada.

21

Canadian Judicial Council
Conseil canadien de la magistrature

- Created under the *Judges Act.*
- Mandate
  - to promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in all the superior courts of Canada; and
  - to review any complaint or allegation against a superior court judge.

- Créé par la *Loi sur les juges*
- Mandat :
  - promouvoir l'efficacité, l'uniformité et la responsabilité, et améliorer la qualité des services judiciaires dans toutes les Cours supérieures du Canada;
  - enquêter sur les plaintes ou allégations formulées à l'égard des juges des cours supérieures.

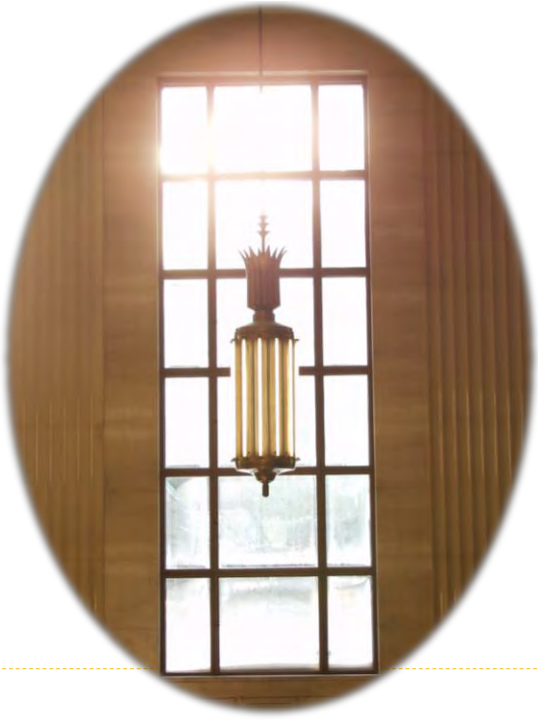
22

Canadian Judicial Council (cont'd)
Conseil canadien de la magistrature (suite)

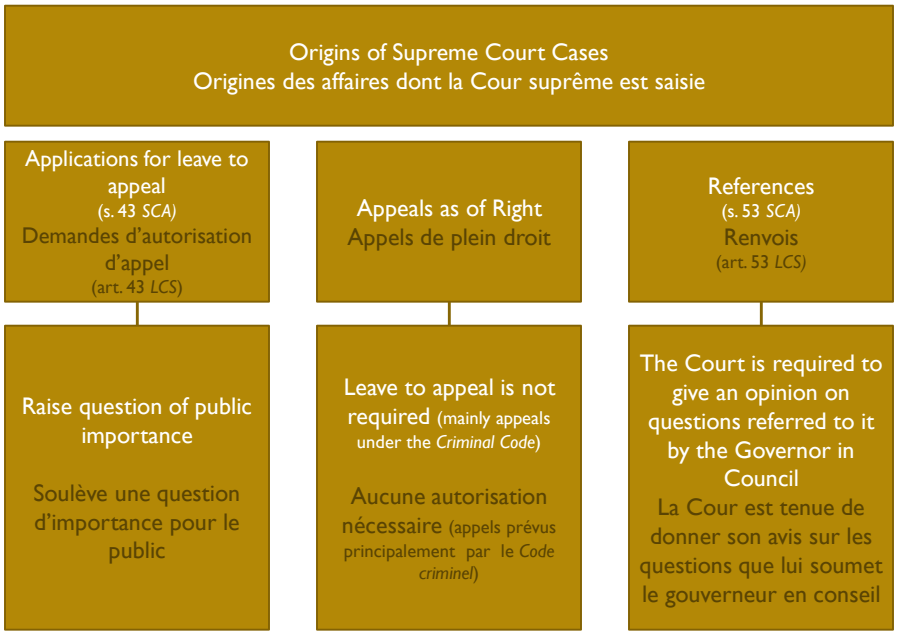
- CJC chaired by the Chief Justice of Canada.
- Includes the Chief Justices and Associate Chief Justices of all of Canada's superior courts, the senior judges of the territorial courts, as well as the Chief justice of the Court Martial Appeal Court of Canada.

- Organisme présidé par le juge en chef du Canada.
- Est composé des juges en chef et des juges en chef associés de toutes les cours supérieures du Canada, les juges principaux des cours territoriales et le juge en chef de la Cour d'appel de la Cour martiale du Canada.

23



24



25

Leave to Appeal
Demandes d'autorisation d'appel

- The SCC receives on average 500-600 applications for leave to appeal per year.
- Approximately 30% of these applications are filed by unrepresented litigants.
- Approximately 10 per cent of leave applications are granted per year.
- Leave granted: based on the Court's assessment of the public importance of the legal issues raised in the case in question.

- La CSC reçoit en moyenne 500 à 600 demandes d'autorisation d'appel par année.
- Environ 30% de ces demandes sont déposées par des justiciables non-représentés.
- Environ 10% de ces demandes sont accordées chaque année.
- La demande est accordée en fonction de l'importance pour le public des questions de droit que soulève l'affaire.

26

Appeals as of Right
Appels de plein droit

- In certain cases, the right to appeal is automatic and leave is not required.
- Examples:
  - criminal cases where one judge in the court of appeal has dissented on a point of law
  - as provided by specific legislation, such as the *Canada Elections Act*

- Dans certains cas, le droit d'appel est automatique et aucune autorisation n'est requise.
- Exemples :
  - affaires criminelles où un juge de la cour d'appel a exprimé sa dissidence sur une question de droit
  - droit d'appel expressément prévu par une loi, par ex. la *Loi électorale du Canada*

27

Section 53 - References
Article 53 - Renvois

- The Governor in Council may refer important questions of law to the Supreme Court, such as in regard to the constitutionality or interpretation of legislation.

- Le gouverneur en conseil peut demander l'avis de la Cour sur des questions de droit importantes touchant par exemple la constitutionnalité ou l'interprétation d'un texte de loi de juridiction fédérale.

28

SCC in Session
L'audition des appels

- Court has 3 sessions per year.
- Hears 65-80 cases per year.
- The usual coram is 5, 7, or 9 judges.
- The courtroom is open to the public.
- Simultaneous English-French translation.

- La Cour tient trois sessions par année.
- Elle entend 65 à 80 appels par année.
- Elle siège habituellement en formations de 5, 7 ou 9 juges.
- Ses audiences sont publiques.
- Les débats sont interprétés simultanément en anglais ou en français.

29

SCC in Session (cont'd)
L'audition des appels (suite)

- Since 1985, litigants can present oral arguments from remote locations by means of a videoconference system.
- Parties: 60 minutes
- Interveners: 5-10 minutes
- Hearings broadcast live on Website.

- Depuis 1985, les parties peuvent plaider à distance grâce à un système de vidéoconférence.
- Les parties disposent de 60 minutes
- Les intervenants de 5 à 10 minutes
- Diffusion en direct des audiences sur le Web.

30

Judgments/jugements

- May be rendered orally at the end of the hearing. Most are reserved at end of hearing to enable the judges to write considered reasons.
- Decisions need not be unanimous; a majority may decide, with dissenting reasons given by the minority.
- The Court's decisions are rendered simultaneously in English and French, and published in both official languages in the Reports.
- Judgments are released throughout the year, except in August, and made available in electronic format the day of their release.

- La Cour rend parfois jugement oralement à l'issue de l'audience, mais le plus souvent met l'affaire en délibéré pour permettre aux juges de rédiger une opinion soigneusement motivée.
- Les décisions n'ont pas besoin d'être unanimes; elles peuvent être rendues à la majorité et accompagnées d'opinions dissidentes.
- Les décisions de la Cour suprême sont rendues simultanément en français et en anglais, puis publiées dans les deux langues officielles dans le Recueil.
- La Cour rend jugement toute l'année, sauf en août, et ses décisions sont disponibles électroniquement dès leur dépôt.

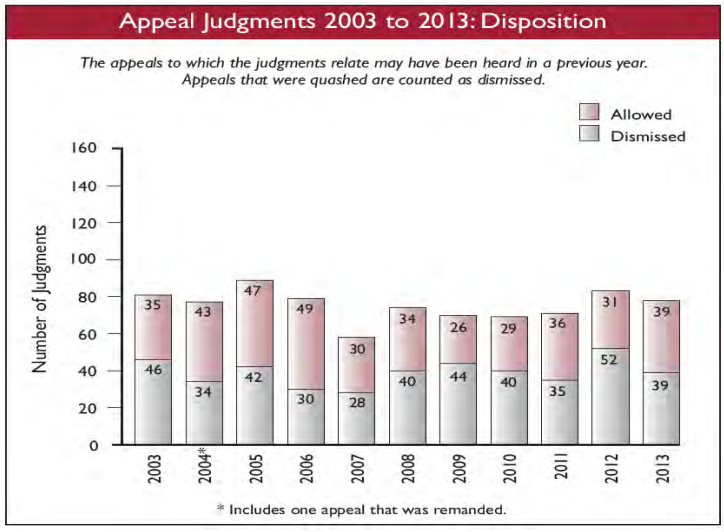
31

Statistics 2013 Statistiques

Cases Filed	Applications for leave to appeal Notices of appeal as of right	491 18	Demandes d'autorisation d'appel Avis d'appel de plein droit	Dossiers déposés
Applications for Leave	Granted	46	Accueillies	Demandes d'autorisation
Appeals Heard	Total Number	75	Nombre total	Appels entendus
Appeal Judgments	Total Number	78	Nombre total	Jugements sur appels

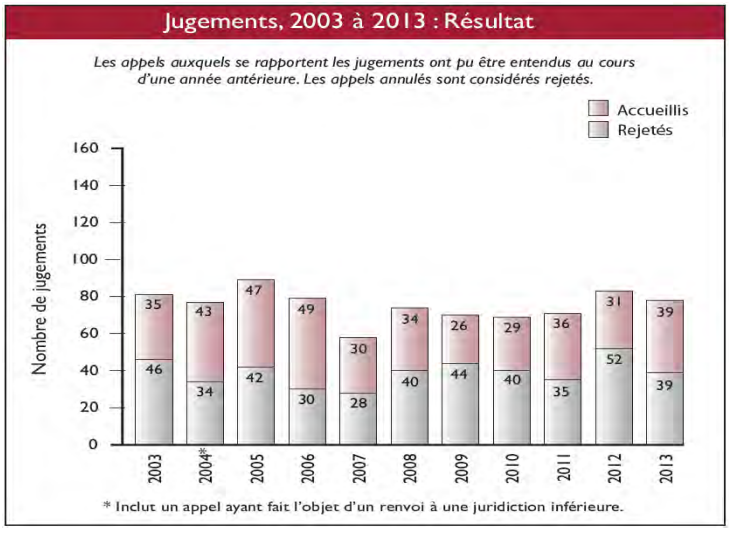
32

Statistics: Appeal disposition



33

Statistiques: Appels entendus résultat



34

Statistics: Average times
Statistiques : Délais moyens

- Filing of leave application to a decision to grant or dismiss a leave application:
  4.4 months
- Leave granted to hearing date: 9.0 months
- Hearing to release of decision: 6.3 months

- Entre le dépôt de la demande et la décision sur la demande: 4,4 mois
- Entre la date de l'autorisation et l'audience : 9 mois
- Entre l'audience et le jugement : 6,3 mois

35

Paper and Electronic Formats
Formats papier et électronique

36

Judges: Extra-judicial responsibilities
Juges : fonctions extrajudiciaires

- Participation in multilateral judicial events involving judges of other courts.
- Participation as Canadian judicial representatives at international events.
- International Role: Exchanges and visits with foreign courts or officials on constitutional issues, judicial education and court reform in order to reinforce the rule of law and foster democratic development.

- Participer à des activités judiciaires multilatérales avec des juges d'autres cours.
- Participer à des rencontres internationales en qualité de membres de la magistrature canadienne.
- Rôle international : participer avec des juges ou d'autres représentants étrangers à des échanges et visites portant notamment sur des questions d'ordre constitutionnel, la formation de la magistrature et la réforme des tribunaux afin de renforcer la primauté du droit et de favoriser le développement de la démocratie.

37

International Conference hosted by the SCC
Congrès international accueilli par la CSC

38

The Court Buildings
Les édifices de la Cour

- The Court first sat in the Railway Committee Room in the Parliament Buildings, then in several other rooms as they became available.

  In 1882, the Court moved to its own small building at the foot of Parliament Hill on Bank Street.

- Les premières audiences de la Cour ont eu lieu dans la salle du Comité des chemins de fer de la Chambre des communes, puis dans diverses autres salles, au gré de leur disponibilité.

  En 1882, la Cour s'est installée dans un petit édifice situé au pied de la colline du Parlement, rue Bank.

39

SCC Building today
L'édifice actuel

- Designed by Ernest Cormier, the Montreal architect, in an art deco style.

  Queen Elizabeth laid the cornerstone of the new building in the presence of her husband King George VI, on May 20, 1939.

- A été conçu dans un style art déco par l'architecte montréalais Ernest Cormier.

  La Reine Élizabeth a posé la pierre angulaire du nouvel édifice en présence de son mari, le Roi George VI, le 20 mai 1939.

40

SCC Building today (cont'd)
L'édifice actuel (suite)

- Due to delays caused by World War II and the use of the building for wartime needs, the Court did not move into the building until January 1946.
- Par suite de retards imputables à la Seconde Guerre mondiale et à l'utilisation de l'édifice dans le cadre de l'effort de guerre, la Cour n'a emménagé dans celui-ci qu'en 1946.

41

Courtroom/Salle d'audience

42

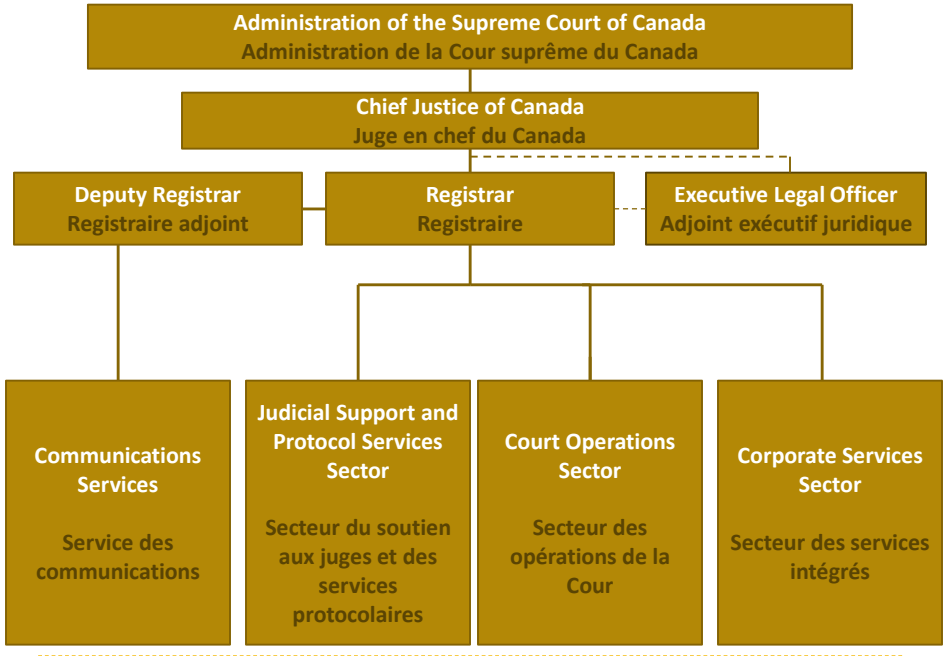
Judges' Conference Room
La salle de délibérations des juges

Office of the Registrar of the Supreme Court of Canada
Bureau du registraire de la Cour suprême du Canada

- The Registrar, a Governor in Council appointee, heads the Office of the Registrar of the Supreme Court of Canada.
- The Office is the administrative body which provides all necessary services and support for the Court to process, hear and decide cases.
- Its role is to ensure "the administration of Canada's final court of appeal is effective and independent".
- The Office has 200 employees.

- Le registraire, qui est nommé par le gouverneur en conseil, dirige le Bureau du registraire de la Cour suprême du Canada.
- Le Bureau fournit à la Cour tous les services et l'appui dont elle a besoin pour traiter, entendre et trancher les affaires qui lui sont soumises.
- Son rôle consiste à s'assurer que « l'administration du tribunal de dernier ressort du Canada est efficace et indépendante. »
- Le Bureau compte 200 employés.

45



46

The Registrar
Le registraire

- Heads the Office of the Registrar
- Exercises quasi-judicial powers
- Participates in outreach activities
- Responsible for the application of the *Judges Act* vis-à-vis the judges of the Supreme Court

- Dirige le Bureau du registraire
- Exerce des pouvoirs quasi judiciaires
- Participe à des activités de relations externes
- Est responsable de l'administration de la *Loi sur les juges* dans son application aux juges de la Cour suprême

47

Registrar: Outreach
Registraire : Relations externes

- HoCA
- IACA
- CCCT
- CIAJ
- ARJD
- CBA and Federation of Law Societies
- Commonwealth
- Francophonie: ACCPUF and AHJUCAF
- Meeting official delegations
- Presentations on the SCC

- CATJ
- IACA
- CCTJ
- ICAJ
- ARJD
- ABC et Fédération des ordres professionnels de juristes du Canada
- Commonwealth
- Francophonie : ACCPUF et AHJUCAF
- Délégations officielles
- Présentations au sujet de la CSC

48

Court Operations Sector
Le Secteur des opérations de la Cour

- Sector responsible for all aspects of case management, from initial filing to final judgment on an appeal.
- Consists of:
  - Law Branch
  - Reports Branch
  - Registry Branch
  - Library and Information Management Branch

- Est responsable de tous les aspects de la gestion des instances, et ce, du dépôt de l'acte introductif d'instance jusqu'au jugement final sur appel.
- Est composé de
  - la Direction générale du droit
  - la Direction générale du recueil
  - la Direction générale du greffe
  - la Direction générale de la bibliothèque et de la gestion de l'information

49

Library/La bibliothèque

- Holds an extensive collection of statutes, law reports, periodicals from major common and civil law jurisdictions.
- Possède une vaste collection de textes de loi, de recueils de jurisprudence et de périodiques provenant des principaux pays de common law et de droit civil.

50

Judicial Support and Protocol Services Sector
Le Secteur du soutien aux juges et des services protocolaires

- Responsible for the delivery of all judicial support services to the Chief Justice of Canada and the eight puisne judges of the Supreme Court of Canada, including protocol and judges' dining room services, the development and delivery of integrated judicial support programs and services, judicial administration, as well as the judges' Law Clerk Program.
- Est responsable de la prestation de tous les services requis pour appuyer le Juge en chef et les huit juges puînés de la Cour suprême du Canada, notamment les services protocolaires, les services relatifs à la salle à manger des juges, l'élaboration et la mise en œuvre de programmes et de services de soutien judiciaire intégrés, l'administration judiciaire et le programme des auxiliaires juridiques.

51

Corporate Services Sector
Le Secteur des services intégrés

- Administrative and operational support for all the Court's judges and staff.
- Responsible for: strategic, business and resource planning; corporate reporting; finance; accommodation; human resources, security; IT services; as well as business continuity planning.
- Assure le soutien administratif et opérationnel requis aux juges et au personnel de la Cour.
- Est responsable notamment de la planification stratégique et de la planification des opérations et des ressources, des rapports généraux, des ressources humaines, de la sécurité, des services de TI, ainsi que de la planification de la continuité des activités.

52

Communications Services
Le Service des communications

- Develops and implements communications strategies, plans and programs to increase public awareness and understanding of the Supreme Court of Canada.
- Welcomes 45,000 visitors to the Court each year.
- Is responsible for internal communications within the Court.

- Élabore et met en œuvre des stratégies, plans et programmes de communication afin de faire mieux connaître la Cour suprême du Canada.
- Accueille 45 000 visiteurs chaque année.
- Est responsable des communications internes à la Cour.

53

Visits to the SCC
Les visites

- When the Court is in session, it is possible for the public to sit in on the hearing of an appeal.
  Guided tours are offered throughout the year.

- Lorsque la Cour siège, le public peut assister aux audiences.
  Des visites guidées sont offertes pendant toute l'année.

54

SCC website
Le site Internet

- The web site provides access to the Court's judgments, the schedule of hearings as well as a wealth of other information related to the Court's activities. It is also possible to take a virtual tour of the building. Address: http://www.scc-csc.gc.ca/
- Le site Internet donne accès aux jugements de la Cour, au calendrier des audiences et à une foule d'autres renseignements sur les activités de la Cour. Il est de plus possible d'effectuer une visite virtuelle de l'édifice. Adresse : http://www.scc-csc.gc.ca/

55

Mascot/Mascotte: Amicus

56

Australian Constitution

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

i. shall be appointed by the Governor-General in Council;
ii. shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
iii. shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges)* 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

i. of any Justice or Justices exercising the original jurisdiction of the High Court;
ii. of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
iii. of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

i. arising under any treaty;
ii. affecting consuls or other representatives of other countries;
iii. in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
iv. between States, or between residents of different States, or between a State and a resident of another State;
v. in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

i. arising under this Constitution, or involving its interpretation;
ii. arising under any laws made by the Parliament;
iii. of Admiralty and maritime jurisdiction;
iv. relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

i. defining the jurisdiction of any federal court other than the High Court;
ii. defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
iii. investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

'The Keystone of the Federal Arch'

Presentation to the National Conference of Appellate Court Clerks of the USA
by

Andrew Phelan
Chief Executive & Principal Registrar
High Court of Australia

CONTENTS OF THE PRESENTATION

1. Background – Australian geography, some socio-economic features and colonial development
2. Origins of the Australian legal system
3. Federation in 1901: the *Australian Constitution*
4. The development of the Australian judicial system from Federation
5. The High Court of Australia:
   a. the Justices
   b. jurisdiction and processes
   c. Court administration
   d. the High Court building in Canberra

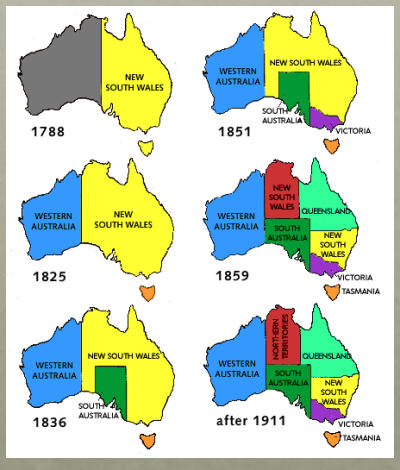
BACKGROUND


INDONESIA
PAPUA NEW GUINEA
SOLOMON ISLANDS
INDIAN OCEAN
SOUTH PACIFIC OCEAN
NORTHERN TERRITORY
QUEENSLAND
WESTERN AUSTRALIA
SOUTH AUSTRALIA
NEW SOUTH WALES
AUSTRALIA
EDITION 1
SOUTHERN OCEAN
TASMAN SEA
TASMANIA

DEVELOPMENT OF THE AUSTRALIAN COLONIES - TIMELINE

- **1770** Captain Cook took possession of eastern coast of Australia on behalf of British Crown
- **1788** New South Wales established as penal/military settlement (Governor's commission included all islands in the Pacific Ocean, including New Zealand).
- **1823** Civil Government established in New South Wales, which became a colony. Supreme Court of New South Wales established.
- **1825** Van Diemen's Land proclaimed a colony (renamed Tasmania in 1856)
- **1829** Swan River Colony proclaimed (renamed Western Australia 1832)
- **1836** South Australia proclaimed a colony
- **1840** New Zealand annexed to New South Wales (separated 1841)
- **1850** Imperial *Australian Constitutions Act (No 2)* gave colonies power to draw up their own Constitution Bills (to be reserved to Royal Assent)
- **1851** Victoria proclaimed a colony
- **1858** Queensland proclaimed a colony
- **1899** The last Colonial Constitution enacted (Queensland)

DEVELOPMENT OF THE AUSTRALIAN COLONIES - BOUNDARIES



ORIGINS OF THE AUSTRALIAN LEGAL SYSTEM

ORIGINS OF THE AUSTRALIAN LEGAL SYSTEM

- By 1900, there were six British colonies of Australia, each:
  - with its own constitution (a colonial law, albeit approved by the Queen);
  - with a system of responsible, representative government;
  - operating under the Rule of Law;
  - having a reasonably well-developed legal system, based on inherited English common law;
  - with a judicial system:
    - comprising a superior court, called a supreme court, able to interpret the Colony's constitution, as well as subordinate courts;
    - reflecting the integrating improvements brought about by the Judicature Acts;
    - with an ultimate right to appeal from the supreme court to the Privy Council in London; and
    - in which decisions of the English courts were influential, and authoritative in the case of the Privy Council.

ORIGINS OF THE AUSTRALIAN LEGAL SYSTEM (2)

- Each of the colonial supreme courts had well developed jurisprudence supported by an independent legal profession based on English traditions and originally staffed from the English profession. The first law school opened within the University of Sydney in 1859.
- The desire to become a federation was not a revolutionary step. It was more a matter of common sense and efficiency. There was no individual rights imperative.
- The text of the Australian Constitution was drafted at a series of conventions held during the 1890s, attended by representatives of the colonies. The terms were then approved in referendums held in each of the colonies.

ORIGINS OF THE AUSTRALIAN LEGAL SYSTEM (3)

- The question whether to establish a local 'supreme court', as the highest appellate court for Australia and to interpret the constitution, was controversial. It was bound up with the question whether to abolish appeals to the Privy Council.
- The principles and drafting of the *Australian Constitution* were informed by US constitutional theory and practice. The principles enunciated by US Chief Justice John Marshall (1801-35) influenced key proponents of Australian federation, several of whom subsequently became High Court Justices.
- The *Australian Constitution* was then passed as part of a British Act of Parliament in 1900, and took effect on 1 January 1901.

FEDERATION IN 1901 THE *AUSTRALIAN CONSTITUTION*

THE AUSTRALIAN CONSTITUTION – FUNDAMENTAL ELEMENTS

- With the enactment of the *Australian Constitution*, the **colonies became Australian States** and a **new entity, the Commonwealth of Australia** (manifest in separate executive, legislative and judicial powers) was created.
- **Separation of Powers**: Chapters I, II and III of the Constitution conferred the legislative, executive and judicial powers of the Constitution on three different bodies established by the Constitution – the Parliament (Chapter I), the Executive Government (Chapter II) and the Judicature (Chapter III).
- **Constitutional monarchy**: the Head of State of Australia was (and remains) an unelected monarch (now the Queen of Australia) whose functions are regulated by the Constitution. The executive power of the Commonwealth became vested in the Queen, to be exercised by the unelected Governor-General as her representative (s61).

THE AUSTRALIAN CONSTITUTION – FUNDAMENTAL ELEMENTS (2)

- **Responsible Government**: the Governor-General acts in accordance with the advice of Commonwealth Ministers. Under this principle, the Crown (represented by the Governor-General) acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament. It is for this reason that s64 of the Constitution requires Ministers to be, or become, members of Parliament.
- **Representative Government**: that is, government by representatives of the people who are chosen by the people. Consistently with this principle, s7 and s28 of the Constitution require regular elections for the House of Representatives and the Senate, and s7 and s24 require members of the Commonwealth Parliament to be directly chosen by the people.

THE AUSTRALIAN CONSTITUTION – FUNDAMENTAL ELEMENTS (3)

- **Federation**: the Australian Constitution expressly guarantees the continuing existence of the States and preserves each of their constitutions. However, the States are bound by the Australian Constitution, and the constitutions of the States must be read subject to the Australian Constitution (s106 and s107).
- **Federal relations**: although the State Parliaments can pass laws on a wider range of subjects than the Commonwealth Parliament, the Commonwealth is the more powerful partner in the federation. One of the principal reasons for this is s109 of the Constitution which provides that if a valid Commonwealth law is inconsistent with a law of a State Parliament, the Commonwealth law operates and the State law is invalid to the extent of the inconsistency.

THE AUSTRALIAN CONSTITUTION – FUNDAMENTAL ELEMENTS (4)

- **Judicial review**: the establishment of the High Court, among other things to decide disputes about the meaning of the Constitution.
- **Rights**: the Australian Constitution has no Bill of Rights. Some express protections, are given by the Constitution against legislative or executive action by the Commonwealth, but not by the States. Examples are s51(xxxi) (acquisition of property must be 'on just terms'), s80 (trial by jury is required in relation to indictable offences), and s116 (a right exists to exercise any religion).

THE AUSTRALIAN CONSTITUTION – FUNDAMENTAL ELEMENTS (5)

- **Implied rights**: The High Court has recognised some implied restrictions on legislative power derived from the fundamental system of government established by the Constitution. For example:
  - Because of the separation of powers effected by the Constitution, only a court may exercise the judicial power of the Commonwealth. Moreover, no legislature (Commonwealth or State/Territory) may impose on a court functions which are inconsistent with the exercise of the judicial power of the Commonwealth.
  - Because of the principle of representative government effected by the Constitution, the High Court has held that there is an implied right to freedom of communication on political matters.

JUDICIAL POWER OF THE COMMONWEALTH

Chapter III—The Judicature

- **Creation of the judicial power and courts**
  - 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction..'
- **Appellate jurisdiction** (*Constitution*, s73)
- **Original jurisdiction**
  - *Constitution*, s75
  - Pursuant to s76 of the *Constitution*, where the Parliament has made laws conferring original jurisdiction on the High Court.

JUDICIAL POWER OF THE COMMONWEALTH

- Language of Chapter III of the Australian Constitution is similar to that in Article III of the United States Constitution.
- The principle of 'judicial review' espoused in Marbury v Madison 5 US 137 is accepted as 'axiomatic' by the High Court of Australia.
- However, in contrast to the Supreme Court of the United States, the High Court is empowered by the appellate provisions in s73 of the Constitution to decide matters exclusively regulated by State law. But there is no 'Bill of Rights'.
- The word 'matter' is used in Chapter III of the Constitution to define the High Court's jurisdiction. The Court will not give advisory opinions or consider abstract questions.

DEVELOPMENT OF THE AUSTRALIAN JUDICIAL SYSTEM FROM FEDERATION

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION

- In 1903, with the enactment by the Commonwealth Parliament of the *Judiciary Act* 1903 (Cth), the High Court of Australia came into being.
- State Supreme Courts were also invested with Federal jurisdiction, as permitted by s77(iii) of the *Constitution*.
- The initial members of the High Court were strongly influenced by US jurisprudence in constitutional questions (noting that English courts did not have a similar tradition). With their retirement, and the national changes arising from WW1 (and emergent assumption from Britain of responsibility for foreign relations), the balance of power began to shift to the Commonwealth.

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (2)

- Watershed High Court decision: *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129:

  'But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution.'

- The Court found that the States and their instrumentalities were subject to Commonwealth legislation constitutionally applicable to them. The previous 'implied immunities' doctrine, stemming from early 19th Century US decisions, was overturned.

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (3)

- The Imperial *Statute of Westminster* was passed in 1931. The Act (and its adoption in each dominion) established legislative equality between the self-governing dominions of the then British Empire and the UK, thereby marking the effective legislative independence of these countries, including Australia and Canada.
- Dominions also took responsibility for their international relations.
- These developments reinforced the trend towards 'repatriation' of the Australian Constitution to Australia.

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (4)

- The Court's decisions were informed by global events and the practical need for strong, decisive national government, especially in war time.
- The Commonwealth introduced federal income taxes in 1915, to fund the huge Australian involvement in WW1. From then until 1942, both the Commonwealth and the States levied income taxes. In 1942, the Commonwealth assumed responsibility for levying all income taxes (to fund war efforts), bringing about a fundamental shift in power, which has endured.

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (5)

- Post WW2, increasing centralisation of political power in Australia produced a plethora of Federal laws, often bestowing rights on individuals and corporations, which led to a massive growth in administrative law.
- New federal courts and other review processes were established in the 1970s – the Federal Court of Australia (with new judicial review laws), the Family Court of Australia, the Ombudsman and various Tribunals. The final part of the jigsaw was the creation of the Federal Magistrates Court in 2000, renamed the Federal Circuit Court in 2013.

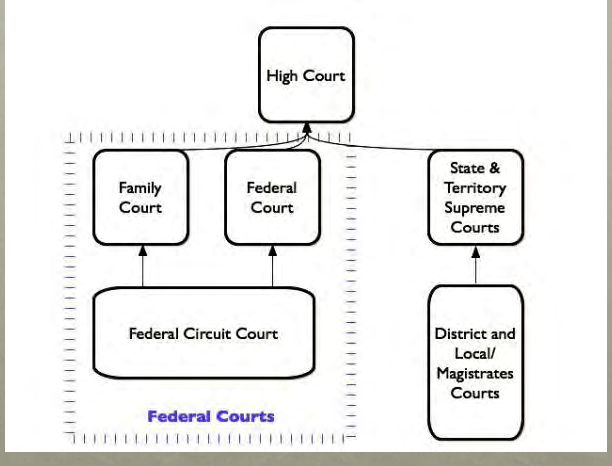
DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (6)

- Because ss 71 and 77 of the Commonwealth Constitution contemplate the use of the State courts as repositories of federal jurisdiction, the High Court has developed a doctrine that their institutional integrity must be protected from laws that would compromise the constitutional scheme - *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
- The Federal Court of Australia was given concurrent original jurisdiction by s39B, *Judiciary Act* 1903 (Cth).

DEVELOPMENT OF AUSTRALIAN JUDICIAL SYSTEM AFTER FEDERATION (7)

- From three Federal judges in 1903 (the initial justices of the High Court), there are over 150 Federal judges today, including the seven on the High Court.
- Formally, the Australian courts do not form a unified system, but the High Court, by its active role as the ultimate appellate court and its decisions on the institutional integrity of the Supreme Courts, has led to the development of the principle that 'Australian Courts together constitute a national judicial system operating within a federal framework.' (see www.ccjanz.gov.au).

AUSTRALIAN APPELLATE HIERARCHY



AUSTRALIAN STATE & TERRITORY COURTS

New South Wales	Victoria	Queensland
• Supreme Court of New South Wales • District Court of New South Wales • Local Court of New South Wales	• Supreme Court of Victoria • County Court of Victoria • Magistrates' Court of Victoria	• Supreme Court of Queensland • District Court of Queensland • Magistrates Court of Queensland
South Australia	**Western Australia**	**Tasmania**
• Supreme Court of South Australia • District Court of South Australia • Magistrates Court of South Australia	• Supreme Court of Western Australia • Family Court of Western Australia • District Court of Western Australia • Magistrates Court of Western Australia	• Supreme Court of Tasmania • Magistrates Court of Tasmania
Northern Territory	**Australian Capital Territory**	**Norfolk Island**
• Supreme Court of the Northern Territory • Magistrates courts	• Supreme Court of the Australian Capital Territory • Magistrates Court of the Australian Capital Territory	• Supreme Court of Norfolk Island • Norfolk Island Court of Petty Sessions

APPEALS TO THE QUEEN IN COUNCIL

- As with all former British colonies and dominions, Australia initially maintained a right of appeal to the Judicial Committee of the Privy Council. This was included in s74 of the *Australian Constitution*. Some High Court Justices were also appointed to the Privy Council.
- The High Court has never been overshadowed by the Privy Council, from the start asserting its (rather than the Privy Council's) influence over Australian courts through appeals. The High Court never accepted that the Privy Council had the experience or expertise to interpret the Australian Constitution.

APPEALS TO THE QUEEN IN COUNCIL (2)

- Appeals from Australian Federal Courts to the Privy Council were abolished by Commonwealth of Australia legislation in 1968 and 1975 (as permitted by s74 of the *Australian Constitution*). The *Australia Act* 1986 (actually simultaneous laws of Britain and Australia) eliminated the remaining possibilities for the UK to legislate with effect in Australia, for the UK to be involved in Australian government, and for an appeal from any Australian State court to the Privy Council.

APPEALS TO THE QUEEN IN COUNCIL (3)

- S74 of the *Australian Constitution* still has provision for the High Court to permit an appeal to the Privy Council, but the Court will never do so, holding in 1985 that its jurisdiction 'has long since been spent' and is obsolete.
- The High Court's terse and very short decision in *Kirmani v Captain Cook Cruises Pty Ltd (no2)* (1985) 159 CLR 461 gives a clear message! See http://www.austlii.edu.au/au/cases/cth/HCA/1985/27.html.

THE HIGH COURT OF AUSTRALIA

a. the Justices
b. Jurisdiction and processes
c. Court administration
d. the High Court building in Canberra

THE HIGH COURT

Justices

APPOINTMENT OF JUSTICES

- The appointment of Federal Justices is regarded as an entirely Executive prerogative (ie there is no Parliamentary oversight other than in questions of removal). The numbers of judges in the High Court and any other federal court are for Parliament to prescribe (*Constitution*, s79).
- There have been 12 Chief Justices and 42 Justices since the Court was established in 1903. Appointments to the High Court have generally been from members of other Australian courts and from the Bar.

APPOINTMENT OF JUSTICES

- Size of the High Court:
  - 1903 -1906: 3 Justices
  - 1906 -1913: 5 Justices
  - 1913 - 1933: 7 Justices
  - 1933 - 46: 6 Justices (Depression economy measure)
  - 1946 - current: 7
- Appointment was for life until a Constitutional amendment in 1977 imposed a retirement age of 70.

THE CURRENT HIGH COURT BENCH

(L to R) Gageler J, Kiefel J, Hayne J, French CJ, Crennan J, Bell J, Keane J

THE BENCH IN 2013

Standing: Gageler J, Bell J, Crennan J, Keane J, Hayne J
Sitting: French CJ and Kiefel J

THE BENCH IN 1964

Windeyer J, Taylor J, McTiernan J, Dixon CJ, Kitto J, Menzies J and Owen J

CHIEF JUSTICES – 1952 AND 1996

HIGH COURT IN 1903

The three original Justices (Griffith CJ, Barton J and O'Connor J) take the Oath of Office in the Banco Court of the Supreme Court of Victoria.

HIGH COURT IN 1982

Sitting in Adelaide

Deane J, Wilson J, Mason J, Gibbs CJ, Murphy J, Brennan J and Dawson J

HIGH COURT IN 2003

Argument in the appeal *Purvis v New South Wales* (2003) 217 CLR 92.

THE HIGH COURT

Jurisdiction and Processes

APPELLATE PROCESSES

- An appeal may be brought to the High Court from a judgment of State or Territory Supreme Court (exercising State, Territory or Federal jurisdiction), or the Federal or Family Court, only by special leave of the High Court.
- The judgment sought to be appealed must be of the lower court's appellate or 'Full' court.
- If special leave is granted, in whole or part, the matter will proceed to a hearing of the appeal.

SPECIAL LEAVE

- Special leave processes are regulated by Part 41 of Chapter 4 of the *High Court Rules* 2004.
- While applications for special leave may be heard and determined by a single Justice or a Full Court (s21(1) *Judiciary Act* 1903 (Cth)), in practice applications are always determined by panels of two or three Justices.
- The Rules permit the Court to dispose of an application by an unrepresented person without an oral hearing.

SPECIAL LEAVE (2)

- Any two Justices may determine any application (whether the applicant is represented or not) without a hearing. The Court maintains three panels of two Justices each, to consider applications on the papers, although on occasion a panel will refer an application into a list for oral hearing.
- Decisions to refuse special leave without an oral hearing are pamphleted (with brief reasons), handed down by the panel in open court and published online. See 2014 dispositions here: http://www.austlii.edu.au/au/cases/cth/HCASL/2014/.

SPECIAL LEAVE (3)

- The Court will rarely grant special leave without an oral hearing on an application, although it may do so. The Court has its own internal guidelines for deciding whether an application may have an oral hearing.
- Oral hearings of applications for special leave take place in lists before two or three Justices, generally on the second Friday of most sittings periods, simultaneously in Sydney and either Melbourne or Canberra. Hearings will often include video-linkages to hear counsel appearing in other Australian capital cities.
- Applicants have 20 minutes to make their case, with respondents also having 20 minutes if called upon; applicants have 5 minutes to respond.

SPECIAL LEAVE (4)

- The Court may grant or refuse special leave (or grant in part, or in respect of specific issues), refer in to an expanded Court to be heard as if on appeal (uncommon), or allow the appeal (rare). (Regarding the last, three Justices are required to determine an appeal from a State Supreme Court).
- Criteria for grant of special leave are set out in s35A *Judiciary Act* 1903 (Cth):
  - broad discretion;
  - question of law of public importance;
  - differences of opinion between intermediate courts of appeal;
  - interests of the administration of justice requires High Court consideration.

SPECIAL LEAVE (5)

- Proceedings are recorded; decisions are not pamphleted, but transcripts are published online (see an example here: http://www.austlii.edu.au/au/other/HCATrans/2014/138.html.

APPEALS

- Appeal processes are regulated by Chapter 4 of the *High Court Rules* 2004.
- If an appeal relates to a matter arising under the Constitution or involving its interpretation, an Attorney-General of the Commonwealth, State or Territory may intervene as of right.
- Others with an interest may, in the discretion of the Court, intervene or appear as amicus curiae; this is rare.
- Hearings of appeals are normally before five Justices.
- Argument is not time-limited.
- See a typical appeal, raising Constitutional questions, at http://www.hcourt.gov.au/cases/case_a18-2012.

PROCEEDINGS IN THE ORIGINAL JURISDICTION

- Chapter 2 of the *High Court Rules* 2004 regulates processes for seeking:
  - mandamus, prohibition, certiorari, habeas corpus, quo warranto (commenced with an application for an order to show cause);
  - removal of a cause or part of a cause under s40 of the *Judiciary Act* 1903 (Cth) (commenced with an application for removal);
  - to dispute the validity of an election or return;
  - other mainly Constitutional relief (eg a declaration that a law is invalid) (commenced by the issue of a writ of summons).

PROCEEDINGS IN THE ORIGINAL JURISDICTION (2)

- Steps in the proceedings after initiation are generally subject to direction by a Justice or the Court.
- Matters commenced in the original jurisdiction will typically be remitted unless there are important questions of constitutional interpretation/ principle raised.
- Facts relevant to the determination of questions of law need to be agreed by the parties and evidence of those facts is received by affidavit. Factual disputes may lead to a matter, or part of it, being remitted to a lower court for trial under s44 *Judiciary Act* 1903 (Cth).

PROCEEDINGS IN THE ORIGINAL JURISDICTION (3)

- Hearings are normally before all available Justices, typically seven.
- Argument is not time-limited.
- See a typical matter in the original jurisdiction at http://www.hcourt.gov.au/cases/case_s154-2013.

WHERE HEARINGS TAKE PLACE

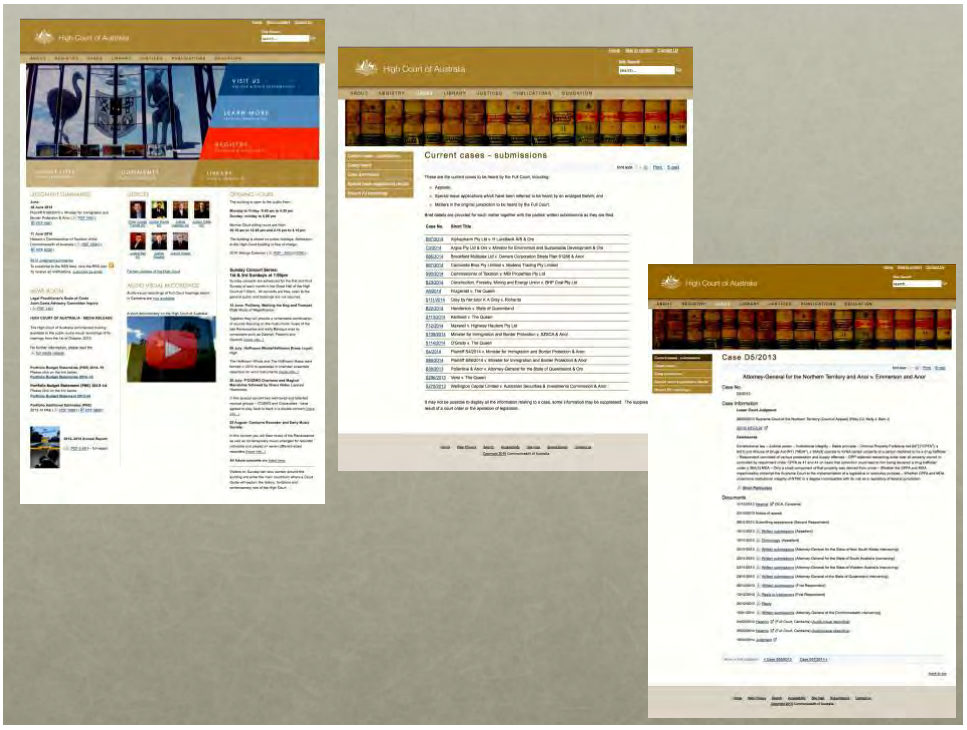
- 1903-1980: the *Judiciary Act* 1903 (Cth) provided that 'the principal seat of the High Court shall be at the seat of Government'.
- From 1980: the *High Court of Australia Act* 1979 (Cth) provided that from a date fixed by proclamation, 'the seat of the High Court shall be the seat of Government in the Australian Capital Territory.'
- 'Seat' is a looser concept than in either the USA or Canada.
- The Court has had its 'seat' (in the sense of its prime place for hearings) in its building in Canberra sine 1980, but it continues to sit elsewhere and none of the Justice resides at the seat of the Court.

WHERE HEARINGS TAKE PLACE (2)

- Most Full Court appeals and hearings in the Court's original jurisdiction are heard at the seat of the Court in Canberra, but the Court continues to hear matters on circuits outside Canberra as workloads dictate.
- Full Court special leave lists are routinely heard in Sydney (ten times per year) and (about four times a year) in each of Melbourne and Canberra. Sometimes the special leave sittings occur elsewhere, on circuit.
- Single justice matters may occur in any capital city.
- Audio visual means are routinely used in special leave and directions hearings. A list may switch from one State to another.

HIGH COURT OF AUSTRALIA ONLINE PRESENCE

- Website: www.hcourt.gov.au.
- No social media presence.



THE HIGH COURT

Court Administration

ADMINISTRATION OF THE COURT

- 1903-1979: the Attorney-General's Department provided for the High Court's administration from funds appropriated to the Department for that purpose.
- From 1980, with the enactment of the *High Court of Australia Act* 1979 (Cth), the Court ('the Justices or a majority of them') was given responsibility for its own administration.
- Funds for the Court are appropriated direct to the Court by Parliament, but through the Attorney-General's Portfolio. Constitutionally, the Executive controls the introduction into Parliament of money bills and the Court must therefore work with the Attorney-General in the development of budgets.

ADMINISTRATION OF THE COURT

- Day-to-day administration is performed by the Chief Executive and Principal Registrar (CE&PR), who is appointed by the Governor-General on the recommendation of the Court.
- The CE&PR represents the Court in Senate Estimates.
- The CE&PR employs staff of the Court, on terms and conditions set by the Court. Court staff are not covered by laws governing the public service.
- The CE&PR is responsible for banking, expenditure and assets, including the building. The Court is not covered by laws governing public sector expenditure.

ADMINISTRATION OF THE COURT

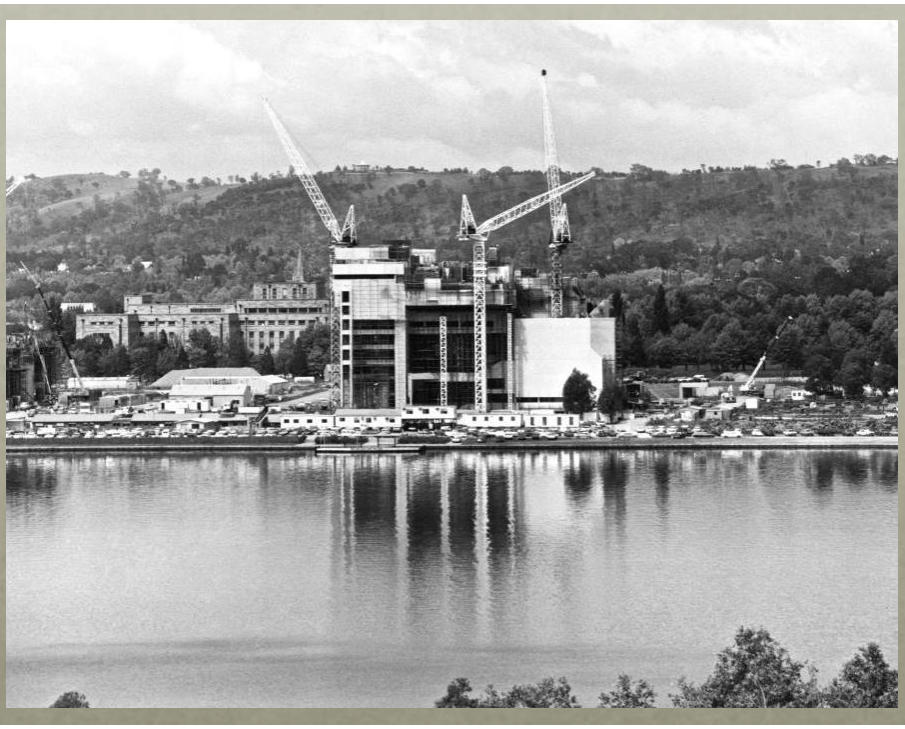
HIGH COURT BUILDING

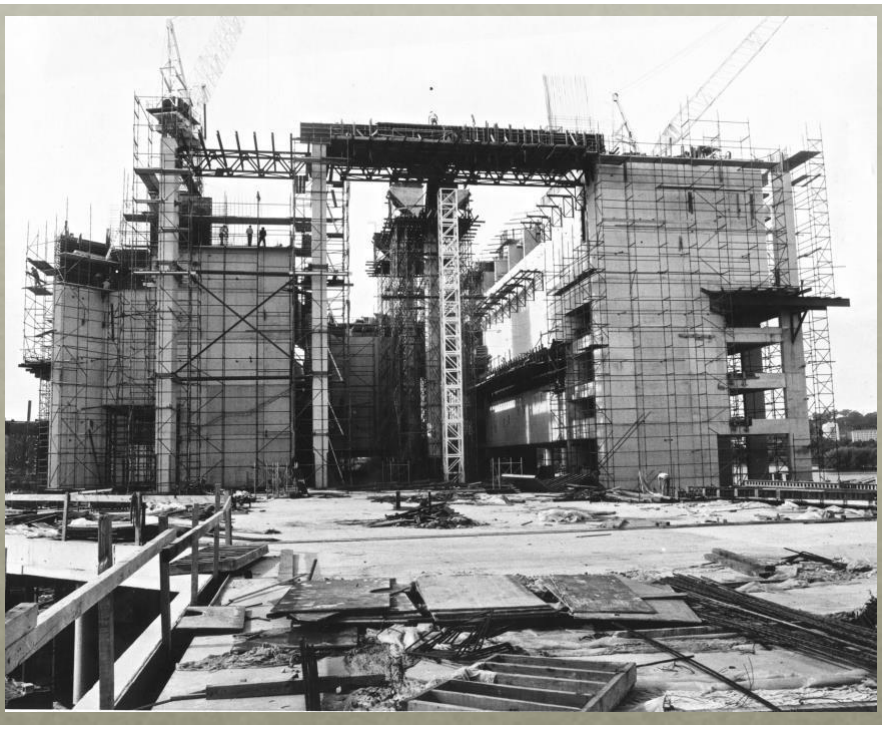
THE HIGH COURT BUILDING

- A symbolic location was chosen in the Parliamentary Triangle of the National Capital, visual from but independent and separate from, the Parliament.
- The building was designed in the 1970s following a national competition; opened by The Queen on 26 May 1980.
- The building is arranged on 11 levels and rises 41m. It houses three courtrooms, Justices' Chambers and support facilities. The building is primarily constructed from 18,400m^3 of bush-hammered, in situ reinforced, off-white concrete as a monolithic structure. The huge (4,000m^2) areas of glazing are supported on tubular steel frames as structural back up.

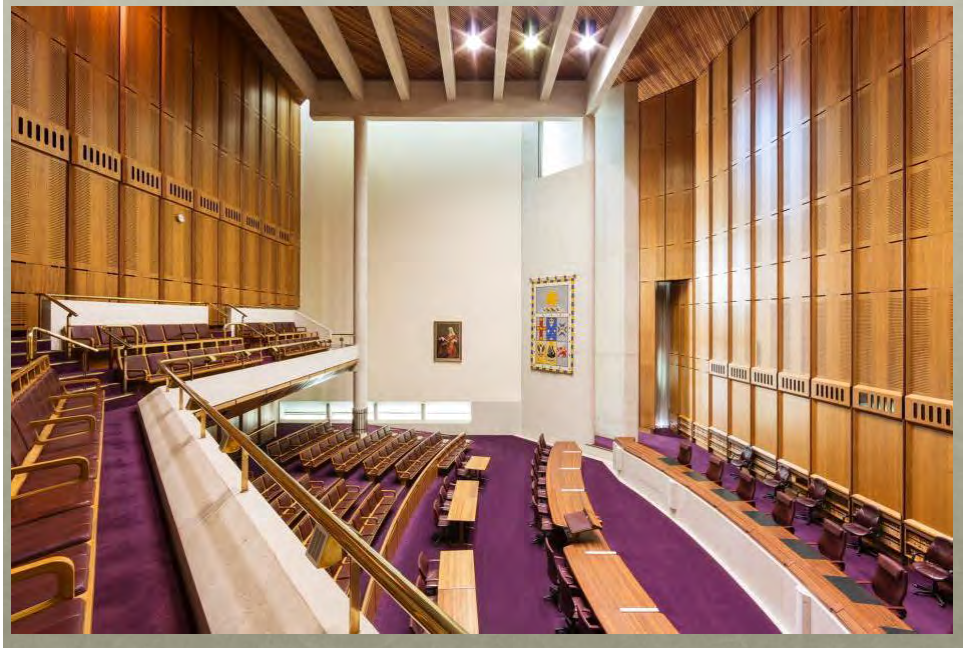
THE HIGH COURT BUILDING (2)

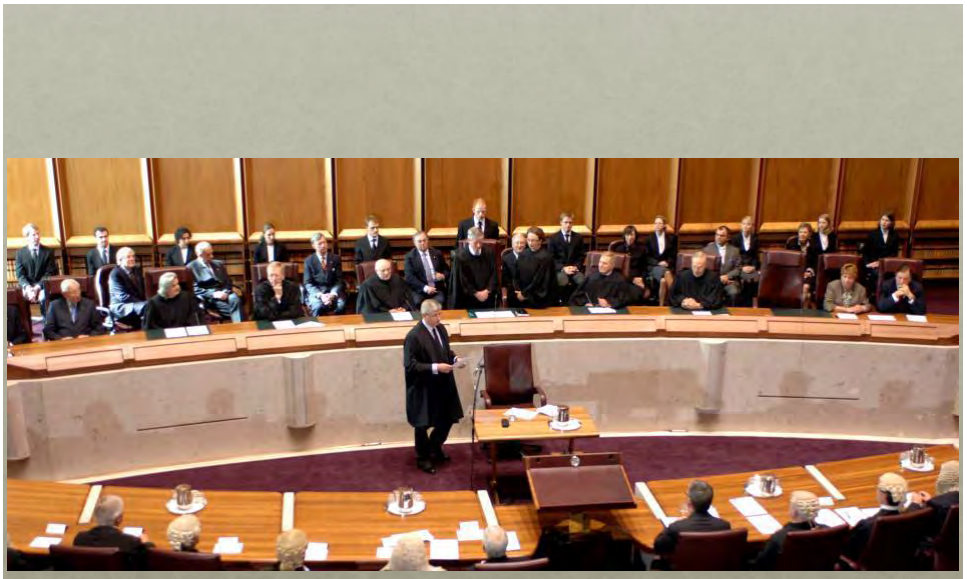
- The building is one of the most significant examples in the world of late-Brutalist architecture.
- More detailed architectural information may be found here: http://www.architecture.com.au/docs/default-source/act-notable-buildings/full-citation.pdf?sfvrsn=0.
- The building is owned by the Court and appears on its balance sheet with a value of about $AUD200m.
- Security is risk-based.
- The building receives a large numbers of visitors.
- Visits by school children are encouraged, including sitting in in hearings.

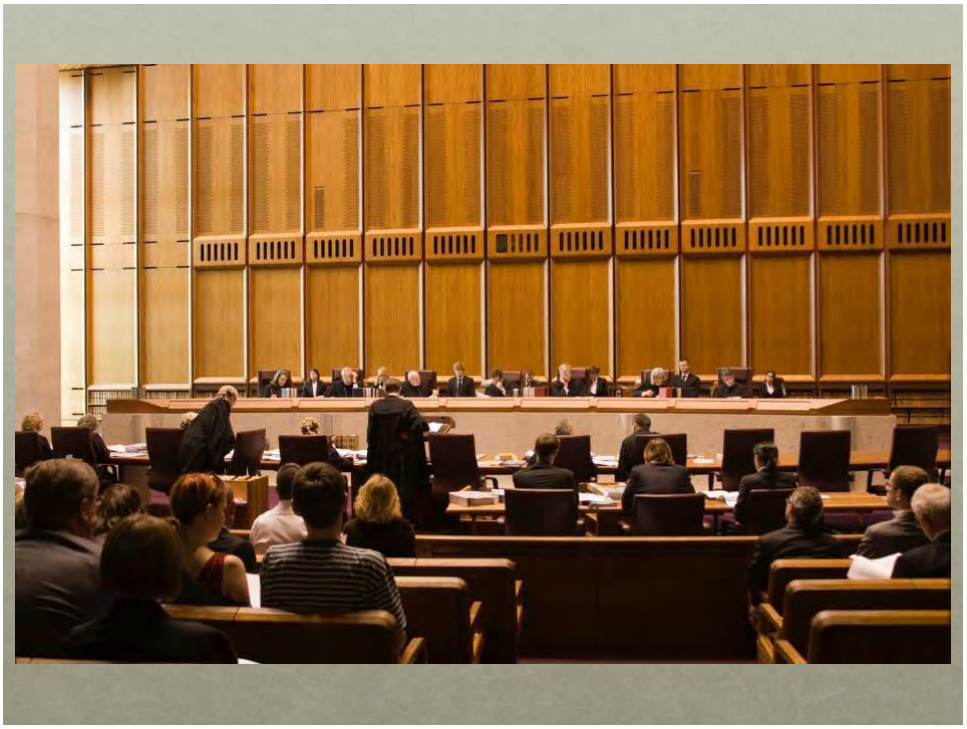


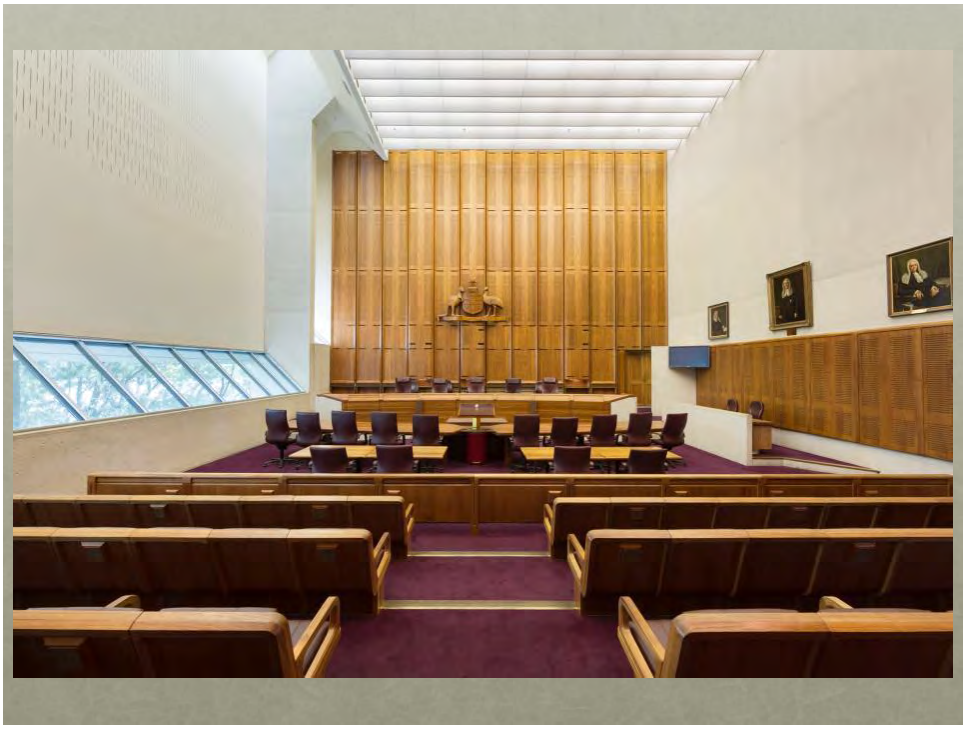


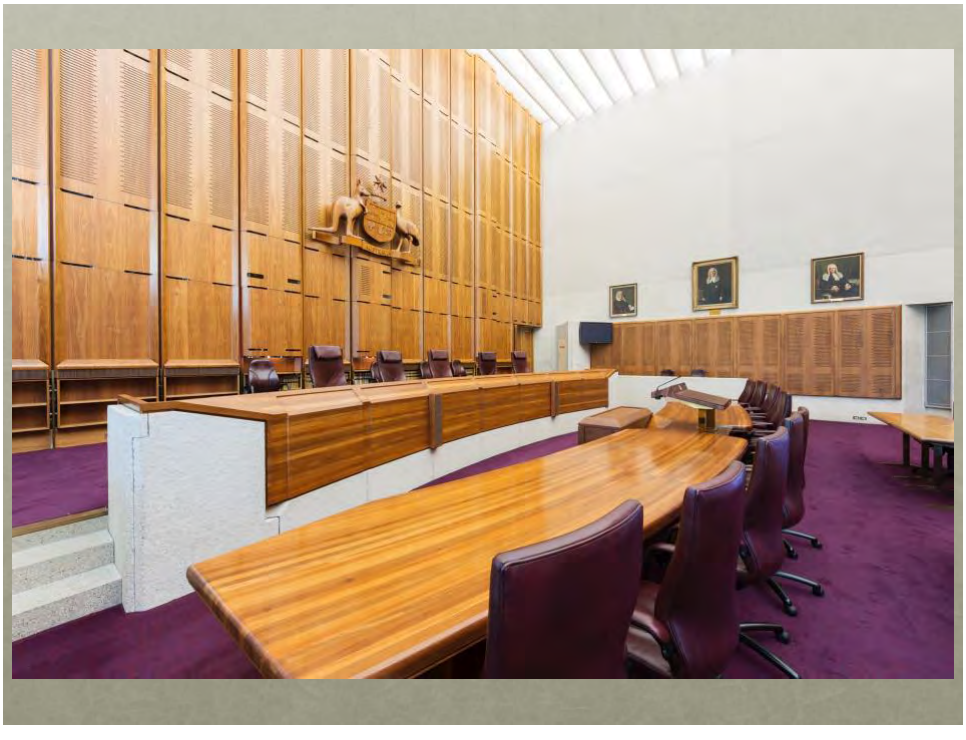

HIGH COURT OF AUSTRALIA

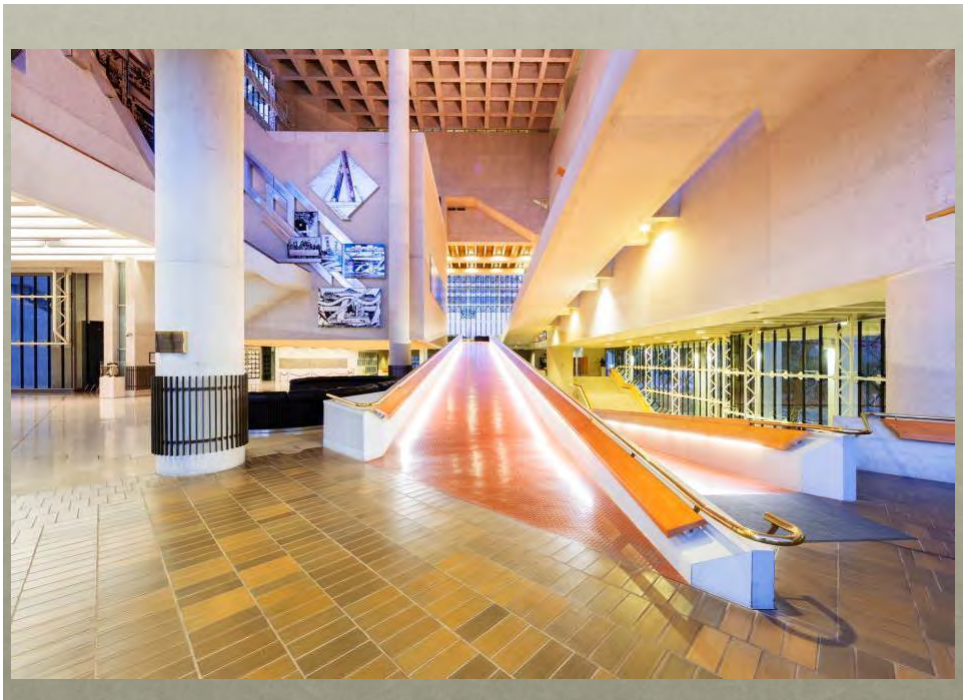


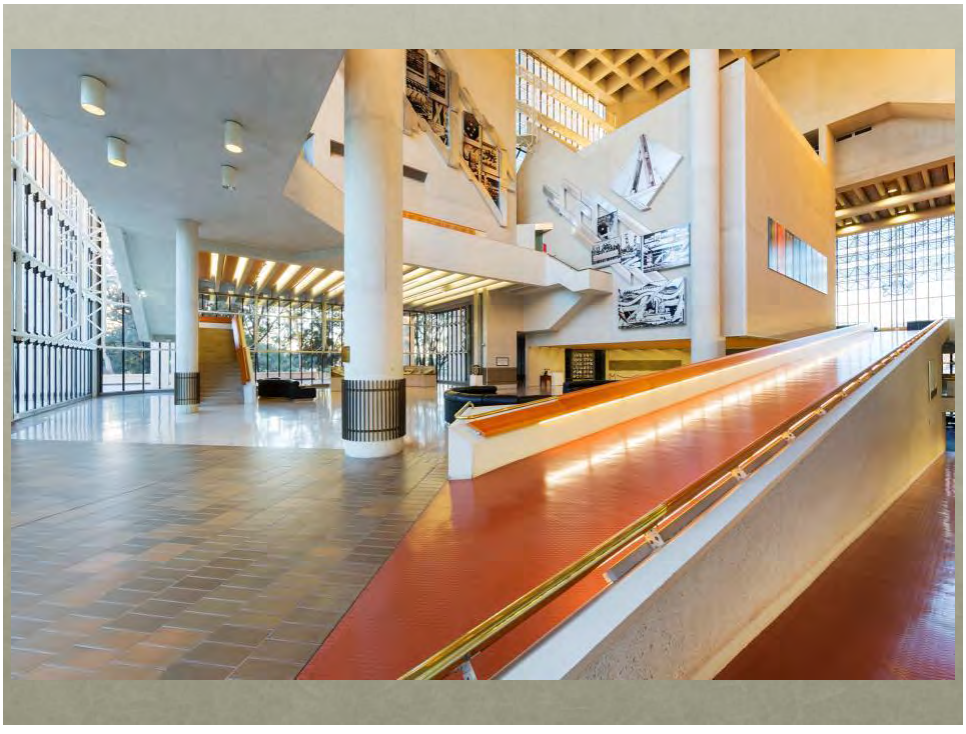


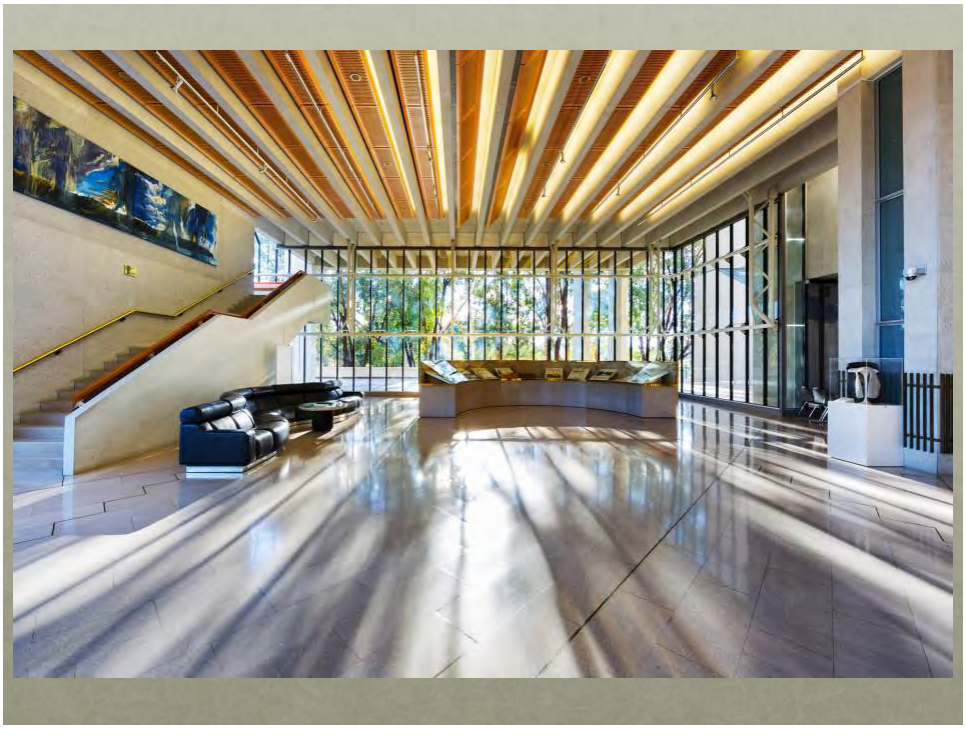


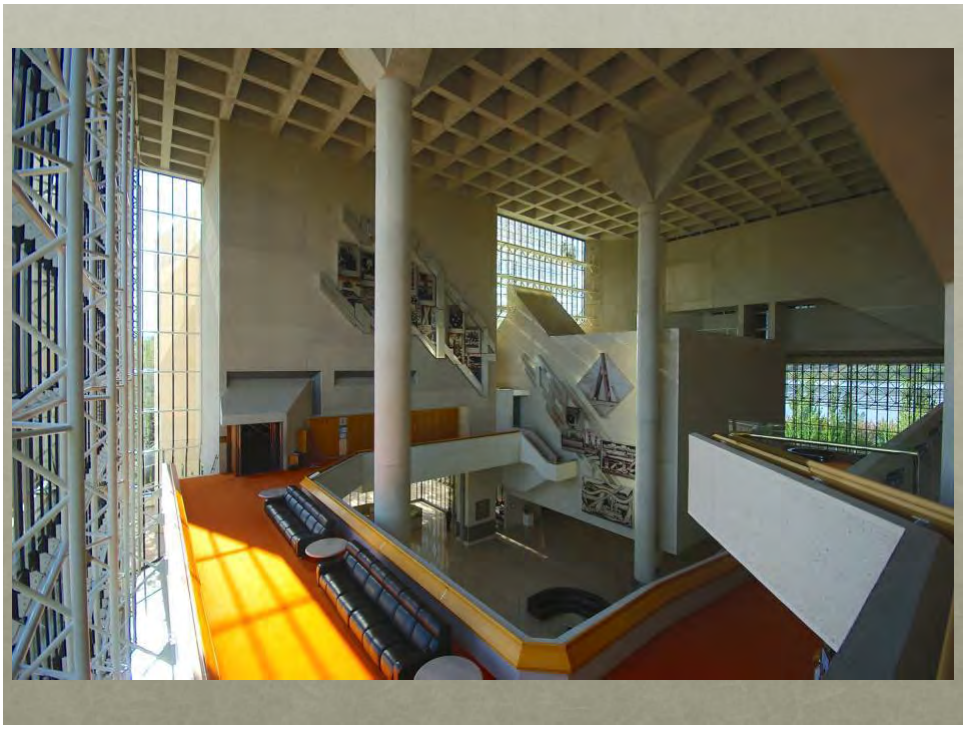













AUSTRALIA


AUSTRALIA

ARTWORKS

ARTWORKS (2)

Thomas Jefferson v. John Marshall Debate

Monday, July 14, 2014 **8:30 a.m. – 10:30 a.m.** **James River Salon C**

Speakers: Steven Edenbo, Thomas Jefferson
Thomas Jefferson Interpretation
Mark Greenough, John Marshall
Richard Cheatham Living History Associates, Ltd.

Steven Edenbo, Thomas Jefferson

Steven Edenbo has studied and portrayed Thomas Jefferson since 1999. In addition to constant independent study, he researched Jefferson as a resident fellow at Monticello's International Center for Jefferson Studies in Charlottesville, Va. He appears before audiences as small as 2 or 3 people attending a private dinner with Mr. Jefferson, to audiences numbering in the thousands. His key notes and one-man shows bring Jefferson's leadership and vision to the forefront at corporate symposiums, teachers' seminars, schools, colleges & universities, historical & patriotic organizations, as well as many other groups & events throughout the United States.

He appears regularly at such venues as The National Archives in Washington, D.C. and Independence Hall in Independence National Historical Park, Philadelphia. Steve has been featured on the History Channel and has matched wits with Stephen Colbert on Comedy Central's "The Colbert Report". He has shared Jefferson's life & legacy at the Jefferson Memorial in Washington, D.C., across the U.S. and in England.

Steve's clientele includes The Smithsonian Institution, the Sons and Daughters of the American Revolution, The American Legion, the VFW, the US Mint, The University of Virginia's Darden School of Business & the University of Virginia itself, the National Governors Association, Thomas Jefferson University Hospital, as well as numerous other corporate, private, and public clients.

Mark Greenough, John Marshall

Mark Greenough is an ardent advocate for bringing history to life in the modern world. He is a co-founder and director of Living History Associates, Ltd., a speaker's bureau established in 1986. Since 2002 Mark has worked full time for the Commonwealth of Virginia as Historian and Supervisor of visitor services at the State Capitol, a national historic landmark and meeting place for America's oldest legislative assembly. Five of Virginia's written state constitutions have been created in Virginia's historic Capitol and the U. S. Bill of Rights became law of the land by action of the General Assembly meeting there in December of 1791. Mark's publications include three articles about the history of Virginia's historic Capitol (designed by Thomas Jefferson in 1785) and Capitol Square.

For over thirty years Mark has worked in the field of public history as an author, exhibit curator, character interpreter and dynamic speaker. He was a first-person living history interpreter for the National Park Service from 1980 to 1985 and on the library staff of the Virginia Historical Society from 1986 to 1987. Mark has worked as an historical and technical advisor for numerous television productions involving historical subject matter, including "Founding Fathers" and "Founding Brothers." Mark has a B.A. in History (1984) from the University of Santa Clara and additional graduate coursework in historical archeology, American material culture, and historiography at the College of William and Mary.

As a serious scholar on John Marshall, Mark has professionally portrayed the Great Chief Justice and "Expounder of the Constitution" for more than eleven years to a wide audience, including two sitting members of the U. S. Supreme Court.

International Comparative Appellate Processes

Monday, July 14, 2014 **10:45 a.m. – 12:00 p.m.** **James River Salon C**

Speaker: Jeff Apperson, Vice President
The National Center for State Courts International

Jeff Apperson, Vice President

Jeff Apperson is a court management professional dedicated to the effective administration of justice nationally and internationally, a lifetime goal that is reflected in his career. He has worked actively, on behalf of citizens of the United States and World, to promote and enhance access to forums that would protect the vulnerable, provide conflict resolution with dignity and fairness, and facilitate equal protection under law.

Jeff served as the Clerk of the United States Bankruptcy and District Courts for the Western District of Kentucky for 27 years. He also served as an attorney advisor to the U.S. Courts as a member of the Inspector General's Office and as Chief of Court Management for the United Nations International Criminal Tribunal for the Former Yugoslavia. He has held the position of Vice President for International Relations of the National Center for State Courts since January 2011. In this role, he has overseen the management of United States rule of law projects for Bangladesh, Iraq, Serbia, Kosovo, South Africa, Honduras, Columbia, Uganda, Nigeria, Belize, Guatemala, Panama, the Caribbean Basin, and Egypt.

He has travelled to over 60 countries in various capacities, giving speeches on rule of law topics in the supreme courts of Pakistan, Indonesia, Brazil, the Caribbean Court of Justice and the International Court of Justice in The Hague, among others. Jeff co-founded and served as president and CEO of the International Association for Court Administration (IACA). During his service with IACA, he managed nine international conferences dedicated to improving court management, access to justice and institutional transparency in Slovenia, Ireland, Italy, Turkey, Trinidad, Indonesia, the UAE, The Hague, and Argentina and helped establish the International Journal for Court Administration.

Jeff graduated from Samford University Law School and was a member of the Alabama Bar Association and United States Supreme Court Bar.

ABOUT US

THE HIGH SUPREME COURT - YARGITAY

The Republic of Turkey is a democratic, secular and social state governed by the rule of law. The constitutional order of the Turkish Republic is based on the principle of separation of powers.

Judicial power, one of the equal three powers, legislative power, executive and judicial power, shall be exercised by independent courts on behalf of the Turkish Legislative and Executive organs and the administration shall comply with the decisions of the judicial organs. No organ, authority, officer or individual may give any order or instruction to the courts or judges relating to the exercise of judiciary power and may not send them circular notes or make recommendations or suggestions.

The Supreme Court (Yargitay), the supreme court in charge of reviewing the decisions and judgements given by courts of justice from the point of conformity to the law, is to ensure the unification by the legal practice and to illuminate the interpretation of provisions of codes.

The Supreme Court was established in 1868 before the Republic of Turkey in the context of Ottoman reformation. The formation and manner of working of this Court have been regulated by the special code. This Code ,being stil in force, is the Code of Supreme Court dated 1983, numbered 2797. According to the division of work, the Court is divided into civil and criminal chambers. There are 23 civil and 15 criminal chambers. Quorum for meeting of a chamber is five person, four of which are member-judges an done is the president of the chamber. Judgments are made by majority of vote. All presidents and judge-members of civil chambers form the Assembly of Civil Chambers and all presidents and judge-members of criminal chambers constitute the Assembly of Criminal Chambers, General Board of Civil and Criminal Department, conclude appellate review on the lower court's judgement, in case the decision of the lower court does not comply with that of the chamber, persisting in its own decision.

General boards of every two divisions, both civil and criminal, has undertaken the functioning of unification of judgments, which binds all other courts and chambers of the Supreme Court. In the Supreme Court, in total 387 high judges consisting of the first president of the entire court, two vice president, chief prosecutor, vice chief prosecutor, 38 head of chamber and other high judges; 812 judge-rapporteur whose duty is to carry out preliminary preparation and to explain case-file to the judge-members of this Court and 200 prosecutor of the Court work in the Supreme Court. One of judge-members is selected by the first president of the Court as a General Secretary.

In the civil chambers, average case (2006 - 2010) file number coming to these chambers annualy is 350.000 and duration of handling the case file changes from two months to three months. In the criminal chambers, on average 250.000 case files are concluded annualy. Because of the fact that criminal case files are examined by prosecutors of the Supreme Court before the chambers and these prosecutors prepare and submit a written recommendation concerning the appeal to the chambers, duration of handling the criminal case file is more longer than that of civil case file. However, duration of handling the file in criminal chambers is very close to that of civil chambers.

In our country there is a two- level judiciary system. According to this system, the decisions of first instance courts are evaluated by the Supreme Court on the aspects of the lawfulness of the implementation and the act of proving.

The establishment of the judiciary as a three level system in which the Court of Appeal takes place was carried out in our country for some time but it was abolished in 1924 because of the acceptance of these courts as the obstacle of the rapid processing of justice on the conditions of that days as the process of applying the western law system was accepted. But nowadays it has been planned to establish three-level judiciary system again.

Today the conditions of the early years of the Republic has been changed and there is a necessity to harmonise our domestic legislation with the European Union Law System on the way going to the membership of the European Union. In western countries, the supreme courts corresponding to our Supreme Court have duty as a ' jurisprudence court' and according to this role, they only deal with points of laws and they don't deal with the point of facts.

But the Supreme Court both makes the unification of judgements and supervises the evidentiary of facts of the crimes by evaluating the decisions of first instance courts.

Nowadays the world is in a process of a fast development and change. By the same way Turkey has also important advances in economic, social cultural and law areas. Our country preferred the acceptance of the Western Law System by the establishment of the Republic in 1923 and took place among those countries as a self-respecting member. To protect the human rights and freedoms properly and to provide the balance of the society -without making a concession from the uniform structure of the State- some changes and arrangements have been made in our positive law and also the studies are going on to apply new laws on the issues where no regulation takes place on the integration process with European Union. Because of these reasons, the need of a reform in judiciary which responds to the changing

conditions is believed by competent authorities and it is emphasized in the annual government programmes. It must be clarified with a great importance that in a democratic state which is based on the rule of law an independent, efficient and rapid judiciary is the assurance of the state and the society.

Idil Elveris

CHAPTER 11 TURKEY[*+]

1. Introduction

1.1. Basic demographic information

Turkey is a republic established in 1923 from the remnants of the Ottoman Empire. It is located in a peninsula straddling from the eastern Balkans to the Caucasian mountains in an East-West direction and from the Black Sea in the north to the Mediterranean Sea, Syria and Iraq in the south. The vastness of its territory is illustrated by the fact that its area is the size of both France and UK. Since 1950, parliamentary democracy has persisted, despite three regime breakdowns in 1960, 1971 and 1980,[1] and a short lived military rule.

Turkey has been a member of the Council of Europe since 1949, a member of NATO since 1952 and has involved itself in European integration by becoming an associate member in 1963.[2] It has had a customs union arrangement with the European Union (EU) since 1995. The possibility of full membership was offered to Turkey in 1999 by EU Council's decision in Helsinki. In December 2004, Turkey was found to have met the Copenhagen criteria and membership negotiations began on 3 October 2005.

The latest census in Turkey was held on 31 December 2007, showing a population just over 70 million, with slightly more males than females.[3] Almost one in every five persons lives in Istanbul and the population is concentrated in the coastal areas of the West and Northwest of the country, as well as the Aegean and Mediterranean coasts. The median age of the population is 28.3. It is estimated that

[*] This country report has been reviewed by Asuman Aytekin İnceoğlu, assistant professor at İstanbul Bilgi University Faculty of Law.

[+] The report was written with substantial contributions from Asuman Aytekin Inceoğlu and Barış Erman members of the Faculty of the Istanbul Bilgi University School of Law.

[1] Keyman & Onis 2007, p. 15.

[2] Keyman & Onis 2007, p. 61.

[3] <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=3894>.

about 17 % of the population is Kurdish, representing the largest ethnic minority. There are smaller Arabic, Assyrian, Roma, Christian and Jewish populations.

1.2. The nature of the criminal justice system

The Turkish criminal justice system is inquisitorial in nature. It has to a large degree been influenced by continental European models. In fact, the Penal Code and Code of Criminal Procedure (CCP) which were in place until 2005 were taken from Italy[4] and Germany respectively. The main principles of the criminal justice system are as follows: no prosecution without trial;[5]the search for the factual truth;[6] the principle of immediacy;[7] compulsory prosecution;[8] the free evaluation of evidence;[9] and *in dubio pro reo*.

In 2005, both the Penal Code and the CCP were replaced *in toto*. While various criminal law systems and domestic needs were evaluated during the preparation of both the new Criminal Code and new CCP, the German influence is still strong, particularly in terms of the latter. The main goals of the changes made to the CCP were to achieve a speedy trial, to strengthen the rights of the accused and the defence, and to introduce new investigative methods in order to establish a balance

4 The law was adopted with some changes, including the Ottoman Penal Code, while Italians also changed their code in 1930. Any changes in the law followed the 'new' Italian Code, called the 'Rocco Code'. For further information on this, see Centel, Zafer & Cakmut, 2008, p. 35.

5 Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 139-140. Art. 225 of the CCP also provides that judgment can be rendered only on the defendant and the actions mentioned in the indictment.

6 As the goal is to reach the truth, the judge can look for evidence on his/her own and add this to the process. However, the evidence must be obtained by lawful means, since looking for the truth is not a goal *per se*, Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p.137-139. This point was confirmed in an interview with attorney 1. A total of eight interviews were conducted in order to draft this report between 23 August and 7 September 2009. All interviews were held in Istanbul, two of which were with police officers, two with prosecutors and four with criminal defense attorneys. A breakdown of the interviews can be found at the end of this report in the appendix. In that regard, the claims and defence of the parties are also not binding on the judge. The judge is not even bound by the admissions of the defendant; art. 225/2 CCP (Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p.137-139).

7 Art. 217/1 and 188/3 CCP. As a result of this principle, except in cases provided for by law, the judge cannot merely read previous witness statements in the hearing, since witnesses must be heard in person by him/her; art. 210 CCP. Recently, particularly in cases involving the fight against organized crime, resort to the use of secret investigators, hearsay evidence concerning witnesses and anonymous witnesses has caused some debate (Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, s.140-141).

8 This principle sets out the prompt initiation of the investigation upon receipt of information that an offence has been committed (art. 160/1 CCP), and the filing of an indictment and continuing the prosecution when the suspicion is strong and the conditions for filing a case are fulfilled.

9 This principle sets out that everything can be used as evidence that is going to help resolve the dispute and will assist the judge to form an opinion, unless the evidence is unlawfully obtained; art. 217/1 CCP.

between freedom and security. To achieve these goals, the following reforms were introduced: intermediary appellate courts were re-established, compensation claims arising from private law disputes are to be heard in civil courts, parties may address witnesses directly and ask them questions without the intervention of the presiding judge, victim-offender mediation has been adopted in the criminal justice system, new investigative methods and precautionary measures have been introduced, including judicial control and interception of telecommunications, and special types of search and seizure.

Both laws have been hailed as significant reforms within the EU accession process, but criticism has been common.[10] It has been argued that concepts were taken from different countries and systems, giving rise to a lack of coherence in the Codes. Further, both Codes were prepared in seven months and did not allow ample opportunity for discussion.[11] For instance, victim-offender mediation was presented solely as a diversion mechanism – a time saver – rather than an idea based on restorative justice. Hence, it was not properly understood by practitioners. Neither was the necessary infrastructure to make it work thought about,[12] or its use promoted to the public. It is no wonder that it has not served its intended purpose.[13]

Likewise, the mandatory rights to counsel and probation have not fulfilled their expected benefits. For crimes committed prior to 2005, the old Criminal Code continues to apply, creating confusion. Further, the retroactivity in the *bonam partem* principle is applied to include revision of judgments that are already being executed, thus creating extra work for courts.

Promulgation of both Codes was accompanied by seminars for judges, but these did not necessarily address all of the judges' needs.[14] The police also reacted to the introduction of the new Codes. Some even claimed that, with all the rights that defendants now had, it was no longer possible to catch anybody.[15] For instance, the police had to take all apprehended persons directly to the prosecutor. Neither did the police want to do that nor – given their workload – did prosecutors wanted to interrogate everyone, in order to determine whether to seek detention or release.[16] The media reported the views of the police, including claims that their authority

10 Attorney interviews, as well as academic resources, point out to this fact. An attorney has described the crime control model adopted in the Code as outdated and unsatisfactory for the needs of the society, (interview with attorney 1).

11 Centel & Zafer, 2005, p. 40. Interviews with attorney 1 and attorney 2.

12 Kalem 2008, p. 88, 107.

13 Inceoglu, Aytekin & Karan 2008, p. 45.

14 'I am the only brave one to escape the seminar because they are talking about the theory of crime. Do you know how many years I have been a judge? Don't you tell me about the theory of crime!'; 'We go to seminars but they do not really help! The Education Division [of the Ministry of Justice] just puts what ever is in the Official Gazette into fliers. Nothing is being done by experts'; comments of judges and from the unpublished part of the author's research notes taken in the course of the research concerning criminal legal aid.

15 <http://www.tumgazeteler.com/?a=1792621>.

16 Interview with attorney 3.

was being compromised.[17] Partly to address these concerns, the law was changed, obliging the police to inform the prosecutor and take instructions from him/her.[18]

The police are now obliged to immediately inform the prosecutor about any person apprehended and all other appropriate circumstances. Thereafter, the prosecutor may order the police to detain or release the person. Accordingly, the detainee will be taken to the prosecutor only in the exceptional case of this being ordered by the prosecutor.[19] However, apprehended minors must be brought before a specialized prosecutor, who will conduct the investigation personally.[20]

Turkey is a signatory to the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) affects Turkish legislation, as well as practice.[21] In 2004, an amendment made to the Turkish Constitution elevated the ECHR (along with other international agreements that concern fundamental rights) to the level of directly applicable law. Further, the Constitution specifically provides that, if there is a conflict between international agreements concerning fundamental rights and freedoms duly put into effect and domestic laws, the provisions of the former shall prevail. In addition, judgments of the ECtHR on criminal matters will constitute a ground for renewal review of criminal proceedings, if the ECtHR has found that the judgment of a local court convicting a defendant has been rendered in violation of the ECHR. In that case, the applicant is entitled to a retrial within one year.[22]

While these regulations are important, further changes in the laws may be necessary.[23] The number of applications against Turkey before the ECtHR is very high. Further, Turkey is mostly found to be in violation of the right to a fair trial.[24] Between 1998 and 2008, Turkey was found to have violated the right to a fair trial 528 times,[25] followed by violations concerning protection of property (453); the right to liberty and security (340); the length of proceedings (258); and the right to an

17 Interview with attorney 4.

18 Art. 90/5 CCP.

19 Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 394.

20 Art. 15 of the Law on the Protection of Children.

21 When the army had a free rein in the 1990s in the Southeast of Turkey, this led to widespread human rights abuses, which were brought before the ECtHR. The government lost cases that related to extra judicial killings, the right to life, torture and inhuman treatment, to name but a few. Today, with the changing atmosphere following the capture of the PKK leaders, life in the region has been normalised, and martial law has been lifted, although sporadic attacks continue.

22 Code of Civil Procedure, art. 311.1 (f) and 2. In addition, the decision of the ECtHR must have been rendered after 4 February 2003, and must be final.

23 Possible remedies sought in relation to irregularities by governmental authorities and the police are described in 2.1.4.

24 Prime Ministry Human Rights Report 2008, see <http://www.siviltoplumakademisi.org.tr/haberler/son-haberler/446-2008-nsan-haklar-raporu-ackland>, <http://www.zaman.com.tr/haber.do?haberno=869531>, <http://www.tumgazeteler.com/?a=4290961>.

25 Annual Report 2008 of the European Court of Human Rights, Council of Europe, p.139.

effective remedy (180).[26] The high number of applications and violations suggest serious problems with the justice system and access to justice, prompting the government to consider introducing the right for individuals to apply directly to the Constitutional Court.[27]

It is difficult to conclude that the new Criminal Code and CCP have meant that the system favours the defendant.[28] Critical problems remain, such as backlog and delay, particularly effecting detained defendants. The time between detention and the first hearing sometimes lasts for months.[29] It is common that 3-4 months pass between hearings. Overcrowding in prisons has grown. The media and human rights organizations continue to report police violence.

Further, it is difficult to say that the EU harmonization process has made the police more accountable. The number of policemen found guilty for torture and bad treatment is minimal, and deaths in police custody,[30] by not obeying 'stop' orders by the police,[31] or in prison,[32] still occur. At the same time, a policeman who shot and killed a cyclist for not obeying the 'stop' order was sentenced to 16 years pending appeal, the highest ever sentence for such an offence.[33]

Nevertheless, in order to start criminal action against public servants, the permission of their superiors should be sought. While permission is increasingly given, obtaining it makes the process longer, as it adds another hurdle in the already long path to seek justice.[34] The fact that the Minister of Justice has, for the

26 The remainder of the cases concern the freedom of expression (169); inhuman or degrading treatment (144); lack of effective investigation (116); the right to life/deprivation of life (64); lack of effective investigation (48); the right to respect for privacy and family life (44), see <http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf>. One can note that some of these concern the right to an effective defence. Freedom of assembly and association (28); other articles of the ECHR (27); prohibition of torture (20); the right to free elections (5); no punishment without law (4); the right to education (3); the prohibition of discrimination (2); the freedom of thought conscience and religion (1).

27 <http://www.frmtr.com/hukuk/2677962-anayasa-mahkemesi-aihm-gibi-calisacak.html>. Even the President of the Court has suggested the same: see <http://yenisafak.com.tr/Politika/Default.aspx?t=13.12.2007&i=87242>.

28 Attorneys interviewed think that some changes have been goodand some bad.

29 This caught public attention, due to a famous singer being detained pending the first hearing 218 days thus far; <http://www.sabah.com.tr/Gundem/2009/08/19/deniz_seki_aihme_basvurdu>.

30 <http://bianet.org/konu/festus-okeyin-oldurulmesi>.

31 <http://www.haberturk.com/haber.asp?id=147935&cat=200&dt=2009/05/20>. Similarly, a father and son of 13 years were killed by the police in southeastern Turkey; see the report of a human rights advocacy group: <http://www.ihd.org.tr/index.php?option=com_content&view=article&catid=34:el-raporlar&id=132:ahmet-kaymaz-ve-ur-kaymazin-yam-hakkinin-lal-edddlarini-arairma-celeme-raporu>. The policemen were acquitted.

32 <http://www.ntvmsnbc.com/id/24938906>.

33 <http://www.sabah.com.tr/Gundem/2009/08/21/polise_16_yil_hapis>.

34 Interview with attorney 1.

first time, apologized for the death of an inmate, also shows that the improvement is more visible in prisons than in the police.[35]

Wide use of phone tapping as part of the interception of communications, and disproportionate grounds for search and seizures continue. Decisions of the Court of Cassation address substantive criminal law issues much more than criminal procedure, and therefore do not focus on irregularities.[36] Recently, the government changed the regulations on interception of communications in order to counter allegations of unlawfulness.[37] However, the worries did not subside and, in fact, Istanbul's head prosecutor has recently discovered that his calls were being recorded, and some 55 other judges and prosecutors were being tapped under orders from the Justice Ministry.[38] In 2009, the number of judgments involving phone tapping was 23,852.[39]

For 2009, the total amount of the criminal legal aid budget is approximately 5.546.827 Euro,[40] while the funds allocated for the police in 2007 and 2008 was slightly over 3 billion Euro.[41] In other words, the funds available for legal aid do not even amount to one per cent of the police budget. Attorneys providing legal aid get paid months late, triggering protests and, in the Istanbul Bar's case, a strike since June 2009 to date.

Turkey is highly centralized and the police constitute part of the Ministry of Internal Affairs. In that sense, it operates under the auspices of the General Directorate of Security, which has authority over the national police. However, in rural areas, the Gendarmerie is in charge, although some suburban districts of Istanbul also fall within their jurisdiction. While geographically the Gendarmerie seems to cover more areas, the areas under police control have a far greater population. Investigations conducted by the Gendarmerie and the police are said to be different, with the latter acting more in conformity with the law, as it is more

35 However, prisons have again made the headlines with the non-release of two gravely ill inmates, on the basis of reports by the Institute of Forensic Medicine that considered their condition 'fit'. The Institute has been the subject of fierce criticism lately, and when one of the inmates later died, the President ordered an auditing of the Institute; see: <http://www.hurriyet.com.tr/gundem/12109809.asp?top=1>.

36 Interview with attorney 3.

37 See <http://www.mevzuatlar.com/sy/resmiGazete/rga/09/08/07080901.htm>.

38 'Turkey's phone-tapping scandal, Who's on the phone?', *The Economist*, 21 November 2009, vol. 393, No. 8658, p. 34.

39 'Sizi Dinledik! Sesinizi Çok Beğendik...', Güncel Hukuk, Aralık 2009/12-72, p. 26-31.

40 The amount is 11,093,654.20 Turkish liras; see table at <http://www.barobirlik.org.tr/calisma/duyuru/pdf/2009_cmk_cari_gider.pdf>. The government funds allocated for criminal legal aid have seen an almost four fold increase in 2006 as compared to 2005, reaching almost 66,700,000 Euro. This was due to the vast expansion of the scope of the mandatory legal aid. However, as the funds ran out, the scope of mandatory legal aid was limited. This will be discussed in detail in 1.5.

41 Emniyet Genel Müdürlüğü 2008 Faaliyet Raporu, p. 71 and Emniyet Genel Müdürlüğü 2007 Faaliyet Raporu, p. 98.

educated, organized and confident.[42] Recently, calls have been made for abolition of the Gendarmerie.[43] In addition, the Gendarmerie is a military unit, while administratively it is under the control of the Ministry of Internal Affairs, leading to conflicts in terms of accountability.

1.3. The structure and the processes of criminal justice system

The first stage of the criminal justice process is the investigation stage and the person who is subject of the inquiry is called a suspect. Criminal proceedings may be initiated following the complaint of the person who has been the victim of a crime, or who has been affected by the crime (for example, if the victim is dead his/her family), or *ex officio* by the prosecutor. If the victim chooses to first go to the police, the police inform the prosecutor of the crime. If, however, the victim chooses to first go to the prosecutor, he/she directs the inquiry to the respective division of the police, be it narcotics, murder or otherwise.[44] Prosecutors have stated that police officers working for specialized divisions were more professional (and easier to work with) than the regular police officers located in neighbourhoods.[45]

Citizens make their complaints mostly by going to the police. A much smaller proportion first goes to the prosecutor.[46] In large towns, the 'prosecutor of initial complaints' refers the complaints to investigating prosecutors, while in smaller places, one prosecutor performs both functions. One prosecutor mentioned that, in cases of crimes such as forgery or threat, the police direct victims to go through the prosecutor.[47] Felonies (such as murder, drugs) should be directly investigated by the prosecutor but, even in those cases, the assistance of the police is sought.[48] It should be noted here that the prosecutor does not have his/her own staff to undertake the investigation, but instead rely on the police. In matters other than criminal investigations, the police report to their superiors and not to the prosecutor.[49]

Therefore, the prosecutor only has limited control of the police, because the judicial police cannot remain on duty for a prolonged time, due to new assignments from their superiors. Nevertheless, when the police conduct an investigation, the

42 Interview with attorney 1. The same attorney explains that, in the Gendarmerie, while officers are educated, they are not conducting the investigation. Sergeants are in charge, and they try to have their own legal rules in an order-command structure.

43 Almanac Turkey 2006-2008: Security Sector and Democratic Oversight released by the Turkish Economic and Social Studies Foundation (TESEV), p. 217, 228. For the pdf version, see <http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/almanak2008_02_07_09.WEB%20icin.pdf>.

44 Interview with police officer 1.

45 Interviews with prosecutor 1 and prosecutor 2. Working with the specialist divisions of the police seems to allow prosecutors to develop a face-to-face and day-to-day interaction with the police, and hence direct the investigation, whereas if police from the police stations are involved, this is mostly done over the phone.

46 Interview with prosecutor 1. In the courts, citizens apply to the so called prosecutor of initial complaints (*müracaat savcısı*).

47 Interview with prosecutor 2.

48 Interview with prosecutor 1.

49 Art. 164/3 CCP.

prosecutor must get involved, since the police must act according to the instructions of the prosecutor.[50] Indeed, the prosecutor asks the police to carry out various actions. For instance, the police are asked to take the statement (interview) of the victim, witness and the suspect, or obtain the final medical report (if there is bodily harm).[51] One prosecutor added that he often reminds the police to immediately contact him, should they need an order for search and seizure.[52]

The police in Turkey have two functions. The first is administrative, in the sense of crime prevention and law enforcement, while the other is judicial. In other words, the primary function of the police is proactive, while the secondary function is reactive (after the commission of crimes). Indeed, the difference is also reflected in two core pieces of legislation: The Law on the Responsibilities and Jurisdiction of the Police (of 1934), as well as the CCP. While the former is more about the administrative function of the police (when to use a gun, or what actions it is authorized to do in general), the latter deals more with what it can do at what stage in the performance of the judicial function.[53]

This duality means that the police have different superiors depending on the function it performs. The prosecutor is the head of investigation in Turkey and therefore, when performing judicial functions, the police (as well as the Gendarmerie, Customs Control and Coast Guard) are to follow the order and instructions of the prosecutor when carrying out an investigation. It has been asserted that these units sometimes conduct investigations that are 'rubber stamped' by the prosecutor.

Administratively, these units are not subject to the oversight of the prosecutor. They remain employees of their respective organisations. Nevertheless, for crimes involving longer processes, such as tapping and similar, the police work closely with the prosecutor.[54]

While the law says the opposite,[55] in practice, when evaluating the success of a police officer, the good performance of judicial functions does not seem to be taken into account.[56] Further, although there is a regulation on the judicial police, there is in fact no separate judicial police as an entity that works under the authority of the prosecutor. In other words, the prosecutor has no say in deciding who will be working under him/her. This is instead determined by the hierarchy within the police force. In fact, the establishment of the judicial police has long been debated in Turkey. According to one attorney, the police do not want its establishment as this would mean loss of power for them.[57] The current structure allows them to have a

50 Interview with prosecutor 2.
51 Art.13(G) of the Act on the Responsibility and Jurisdiction of the Police.
52 Interview with prosecutor 1.
53 Interview with police officer 1.
54 Interview with police officer 1.
55 Art. 11 of the Regulation on Judicial Police.
56 In other words, the prosecutor writes an evaluative report that is not even sent to the direct superiors of the officer; Arslan, p. 8. One prosecutor refered to this as a problem, interview with prosecutor 2.
57 Interview with attorney 4.

role in every investigation, and they want judges and prosecutors to continue to rely on them.

The police have apprehension powers without a warrant if the person is caught *in flagrante delicti* and, in addition, is considered likely to abscond, or his/her identity cannot be instantly determined. In 2007, there were a total of 444,587 arrests made by the police for crimes against property and person.[58] This does *not* include arrests made for organized crime (6,191), narcotics (38,454), cyber crimes (1,287), terror (2,256) and other crimes (6,879). The police must inform the prosecutor when they detain a person. The prosecutor can order the police to release him/her. A person who is not released within 24 hours must be brought before the judge for interrogation. This period may be extended up to 36 hours to allow time for travelling.[59]

If a warrant for apprehension is issued by a court, but the suspect is detained within the jurisdictional boundaries of another court, the latter may arrest him/her temporarily, prior to the suspect being sent to the court issuing the warrant. The detainee must be brought before the court within a maximum of 24 hours following the apprehension.[60] However, a problem arises from the application of this rule. The arrest is based on the warrant issued by another court, and the judge in whose geographical boundaries the suspect is found does not have access to the case file in order to evaluate the conditions for a lawful arrest. In addition, the maximum period of time for the accused to be brought before the court issuing the warrant has not been defined by law.[61]

As a result, the accused may be deprived of his/her liberty for an extended period, without having precise information about the contents of the charges against him/her.[62] Indeed, one of the interviewed attorneys pointed out that the judge dealing with the actual arrest has no information or documents, other than a one page warrant, thereby effectively depriving him/her of the possibility of evaluating the release, even if the suspect defends him/herself by saying that he/she was abroad at the time and can demonstrate this by showing his/her passport.[63]

The prosecutor decides whether or not to issue an indictment based on the evidence collected, including the statement of the accused. If he/she finds that the evidence collected is not sufficient, or that no trial may be conducted due to other legal restrictions, no indictment will be filed, and the detainee, if still under custody,

58 Emniyet Genel Müdürlüğü 2007, Faaliyet Raporu, p. 135.

59 An exception to this rule is art. 251/5 CCP, which provides that the period of detention for offences listed under art. 250 (offences under the competence of Specialized Aggravated Felony Courts) is 48 hours, with a possible extension up to 60 hours due to time for travelling. In both cases, these periods are subject to an additional extension, where the crime is allegedly committed by more than two offenders. This additional period can be ordered by the prosecutor for 24 hours at a time, and may not be longer than 4 days in total (art. 91/3 CCP).

60 Art. 94 CCP.

61 Nuhoğlu 2009, p. 186.

62 Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 400, note 74.

63 Interview with attorney 3.

must be released. This decision is subject to revision by the presiding judge of the nearest aggravated felony court.[64]

If, after the interrogation, the prosecutor has a strong suspicion that a crime has been committed, he/she will refer the suspect to the judge with a request for pre-trial arrest. In that sense, arrest is a precautionary measure rendered by the judge during the investigation, or by the court of first instance during prosecution (after the approval of the indictment). Pre-trial arrest can be ordered when there is a strong suspicion that a crime has been committed and there is a reason for arrest.[65] Reasons for arrest are as follows: if the suspect or defendant is likely to abscond, hide, or there are circumstances creating that suspicion; if the suspect or defendant's actions create strong suspicion that he/she will destroy, hide or change evidence, or attempt to pressure witnesses, victims or others.

Further, the law provides a catalogue of crimes, where a reason for arrest 'may be presumed'. This is a widely criticised provision. It has been claimed that judges, without looking for strong suspicion, automatically decide to detain when the crime falls within the 'catalogue'. These crimes include murder, production and trade of drugs and sexual offences.[66]

Alternatively, there may be sufficient evidence to file an indictment, but no need for pre-trial arrest. This is usually the case where the crime for which the suspect is to be charged does not fall within the catalogue, such as petty theft or property damage.

In any case, the judge or court will order the arrest following a hearing, where the defendant is present.[67] In addition, the law provides for mandatory defence counsel for the arrest hearing.[68] However, an attorney stated that the mandatory counsel provided serves mostly as an 'alibi' proving that the suspect has not been subject to inhuman treatment, rather than engage in a proper defence since there is no real possibility to communicate with the suspect in the infrastructure at the court house.[69]

At the end of the investigation, if the prosecutor decides that there is sufficient evidence to press charges, he/she prepares an indictment and submits it to the court. It should be noted that the legal determination for filing an indictment is less stringent (a sufficient level of suspicion),[70] than the one required for an arrest (strong suspicion).[71] The court may reject the indictment, but this must be done within 15 days of its presentation.[72] If rejected, the prosecutor may correct the indictment and present it again, or file an objection.[73] It is important to mention that

64 Art. 172 CCP. An amendment to the CCP gave the prosecutor the power to postpone the filing of the prosecution under certain conditions.
65 Art. 100 CCP.
66 Art. 100/2 CCP.
67 Art. 101 CCP.
68 Art. 101/3 CCP, Nuhoğlu 2009, p. 182.
69 Interview with attorney 3.
70 Art. 170 CCP.
71 Art. 100 CCP.
72 Art. 174/3 CCP.
73 Art. 174/4-5 CCP.

no hearing takes place during the approval or the rejection of the indictment. As a result, the charge is not determined following a three party hearing, and the defendant or the defence lawyer will have no opportunity to question the indictment before the court.[74] When the indictment is accepted by the court, the person is no longer called a suspect, but rather is a criminal defendant.

The pre-trial period is reserved for the preparation of the trial. This period extends from the approval of the indictment by the court until the beginning of the first hearing, the date of which is determined by the court, according to its own schedule.[75] The prosecutor formally notifies the defendant of the indictment and the date for the first hearing.[76] During this period, no witnesses or experts will be heard, except in cases where these persons are not likely to be able to appear before the court during the trial – for example, where the witness is terminally ill.[77] In addition, evidence gathering procedures may be completed or repeated, if need be.[78]

The hearing can only begin when all required persons (the judges, prosecutor,[79] clerk, and, in cases where counsel is mandatory, the defence lawyer) are present.[80] As a rule, the defendant must also be present during all hearings. The defendant may, however, be excused, if he/she has already provided a statement, if his/her attorney makes a request to that effect,[81] or if the defendant is transferred to a prison facility outside the province of the court due to necessity or health or disciplinary reasons.[82] In any of these cases, the proceedings may commence, but shall not be concluded, unless the defendant has been interrogated by the court, or the court can acquit the defendant based on evidence in the file,[83] except in situations where the sentence to be given consists of seizure of property and/or a fine, in which case the trial may be conducted and the sentence given *in absentia*.[84]

The law provides that statements obtained by the police in the absence of a lawyer cannot be accepted as a basis for conviction, unless it is confirmed by the suspect or criminal defendant before a judge or the court.[85] It must be noted that no indication of duress is needed for this provision to be applied, and a simple statement by the defendant before the judge would suffice to negate the evidence

74 Yenisey 2009b, p. 248.
75 Art. 175 CCP.
76 Art. 176 CCP.
77 Art. 180, 181 CCP.
78 Art. 181/2 CCP.
79 Except before a 'court of peace', according to art. 188/2 CCP.
80 Art. 188/1 CCP.
81 Art. 196/1 CCP.
82 This may particularly be the case where the defendant has been transferred to another prison due to illness or as a disciplinary measure. In this case, he/she is accused by judicial notice, according to art. 196/5 CCP.
83 Art. 193/2 CCP.
84 Art. 195 CCP.
85 Art. 148/4 CCP.

obtained from a police interrogation in the absence of a lawyer. In this case the evidence will be considered unlawful, and will be declared inadmissible.[86]

In fact, police abuse has, over time, established a pattern of confessing at the police station and denial in court.[87] Therefore, the introduction of this provision through the new CCP of 2005 was one of the measures taken by the legislature to restrict possible unlawful interference by the police.[88] After the entry into force of the new CCP, the Turkish Court of Cassation no longer requires a positive indication of duress, even when this constitutes a reason for the defendant to retract his/her previous statement at the police (10th Chamber for Penal Affairs of the Court of Cassation., 23 January 2006, E. 2005/1716, K. 2006/19).

It must be noted, however, that the judgment of ECtHR of *Salduz* v. *Turkey*[89] refers to the provisions of the previous CCP. The current law has abolished most of the points of concern in that case, rendering inadmissible any statement made before the police if not given with the presence of a lawyer. Attorney interviews have raised problems with the way these rights are used in practice. These are explained in 2.2.2

Precautionary measures, such as search, seizure and the interception of (tele)communications,[90] can be utilised during the investigation phase.[91] The latter has been very controversial, due to recent events in Turkey (described in 1.2), and is possible by way of listening to communications, recording, determination and evaluation of signals.[92]

In order to intervene in communications, there must already be an investigation or prosecution for a crime specified by the law.[93] Secondly, there must be a strong suspicion that one of those crimes has been committed.[94] Thirdly, it must not be possible to obtain any evidence in any other way. Lastly, the decision to do so shall be taken by the judge or, in urgent matters, by the prosecutor.[95] In the latter case, the prosecutor must submit the decision to intercept (tele)communications for the judge's approval and the judge must make his/her decision within 24 hours. The judgment can be issued for a maximum of three months and can be extended once for a further three months.[96]

86 Art. 148 CCP expressly states that the evidence 'will not be a basis for conviction', meaning that it is inadmissible.

87 See Kunter, Yenisey & Nuhoğlu 2008, p. 1067.

88 See Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 368-370.

89 ECtHR 27 November 2008, *Salduz* v. *Turkey,* No. 36391\02.

90 Art. 135 CCP. Before the new Code, interceptions were regulated under a different law relating to the fight against organized crime and could be undertaken for those crimes.

91 Art. 116 CCP and the subsequent art.

92 These are defined in a regulation, but some issues still remain unclear, such as whether the provision includes the reading of SMS and emails; İnceoğlu Aytekin A, Türk Hukukunda Adli Amaçlı İletişimin Denetlenmesi, in Prof. Dr. Uğur Alacakaptan'a Armağan, Cilt 1, p. 110.

93 These crimes are serious and necessitate such intervention due to their nature.

94 Art. 135/6 CCP.

95 Art. 119 CCP.

96 If the crime involves organized groups, the judge can extend the period as many times as is necessary for periods not to exceed one month.

The fact that, in urgent situations, the prosecutor can also order precautionary measures, makes the prosecutor's role in the criminal justice process somewhat awkward. It has been said that this has made the prosecutor 'judge like'.[97] Considering the close relationship between prosecutors and judges in Turkey (to be discussed in section 3), the danger is that is that the judge may be seen as an extension of the prosecutor. In that sense, it is disappointing that the reform strategy developed by the Ministry of Justice continues to group judges and prosecutors together and does not envision any separation.[98]

The Criminal Code refers to three different types of suspicion. Yet, the Court of Cassation has not rendered a decision discussing the differences among these.[99] *Reasonable* suspicion is required for conducting a search and seizure;[100] *sufficient* evidence for filing an indictment;[101] and *strong* suspicion for most precautionary measures, such as the intervention of communications, arrest, seizure of real property rights and appointment of secret agents.[102]

According to one prosecutor, 'in practice one does not see any of the criteria [applied by judges or prosecutors]'.[103] Prosecutors explained that they want the police to be specific and undertake additional investigation, before coming to them with requests for precautionary measures: 'This is abstract! I cannot tell who is reporting the crime. I could be living in that house'.[104] Similarly: 'I tell them do not come to me with just a record (*tutanak*). Test the suspicion'.[105]

Some prosecutors do not turn down the police, particularly in popular investigations. For example, intercepted phone conversations irrelevant for the proof of the alleged crimes have been leaked to the media and used to create an image of guilt. This not only violates the personal rights of the suspect and the presumption of innocence, but also constitutes pressure on the judge. It has also been pointed out that interception was not the issue in such cases, but keeping the personal data and preventing leakage was a real problem.[106]

Indeed, allegations concerning irregularities about the application of precautionary measures and their proportionality have been widely discussed by the public, particularly in the case of *Ergenekon*.[107] The case involved over a hundred suspects charged with 'membership of an armed organization', 'attempting to

97 Interview with attorney 1.

98 The Judicial Reform Strategy, which talks about 'judges and prosecutors', see: <http://www.sgb.adalet.gov.tr/yrs.html>.

99 In Turkey, not all decisions of the Court of Cassation are published. It is up to the Court itself to publish important decisions in its journal. Therefore, there may be decisions that have not been published, but which discuss the different types of suspicion.

100 Art. 116 CCP.

101 Art. 170 CCP.

102 Arts. 100, 128, 135, 139 CCP.

103 Interview with prosecutor 2.

104 Interview with prosecutor 1.

105 Interview with prosecutor 2.

106 Interview with prosecutor 2.

107 'Ergenekon Case, A chance for Turkey to face its recent past' EU Commissioner <http://www.aa.com.tr/en/ergenekon-case-a-chance-for-turkey-to-face-its-recent-past-eu-commissioner.html>.

eliminate the government by force and violence, or to prevent it from doing its job either partially or completely' and 'provoking an armed rebellion against the government'. The indictments accuse the suspects of creating internal conflict, chaos and terror, in an attempt to set the grounds for a military intervention. Suspects include famous journalists, university professors, intellectuals, party officials, activists, presidents of universities, academics and generals in the military. The investigation began on 3 October 2008 and involved search warrants issued for the police involving several houses, NGOs, and offices.[108]

All of this is worrying when one considers that the mechanisms for excluding evidence obtained illegally or unfairly are not strong. The very court that hears the case on the merits is expected to decide whether the evidence was obtained illegally. In fact, the law provides that the judgment should discuss evidence, including illegally obtained evidence present in the file, and explain why it was not taken into consideration.[109] These provisions presuppose that any unlawful evidence will be in the case file from the beginning of the investigation until the conclusion of the trial,[110] but fail to appreciate that, once in the file, evidence, no matter whether it has been illegally obtained, would be difficult to ignore by the court.

Indeed, attorneys have expressed concern that the judge is a human being who can be tempted to take the illegally obtained evidence into consideration.[111] Therefore, illegally obtained evidence should, ideally, be taken out of the court file and deposited elsewhere.[112] Further, the current IT system used by judges allows

108 The house of Prof. Türkan Saylan, a doctor specialising in leprosy and co-founder and long-time president of the Association for the Support of Contemporary Living which is known for her support of girls' education, was raided by the police for 7 hours. At the end of the investigation, documents and hard-discs of computers were seized by the police. As Saylan said later, the documents and computers included the scholarship information of the girls who were supported by the Association and the database of the recipients was destroyed by the police. Thus, 9,074 students could not get their scholarship stipends due to the lack of the necessary documents. This was done while she was struggling with highly advanced breast cancer and undergoing chemotherapy treatment over the last five years. The actions of the police were considered disproportionate, as she could not abscond due to her health problems. Prof. Dr. Saylan died on 18 May 2009. Another example is the journalist, columnist and editor of the newspaper Cumhuriyet (*the Republic*), Ilhan Selcuk, who was also apprehended in the Ergenekon case. He was questioned for 11.5 hours and, approximately 40 hours later, was released with the *prohibition of leaving the country*. His detention was also subject to protests, as he was 84 years old and his detention was harmful to his health. As subsequently decided, 'prohibition of leaving the country' would have been a sufficient precautionary measure to protect his health; see <http://todayszaman.com/tz-web/detaylar.do?load=detay&link=184216>.

109 Art. 230/1/b CCP. Interestingly, when writing to the prosecutor, the police must mention which evidence that it obtained was unlawful; art. 6/6 of the Regulation on the Judicial Police.

110 Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 373. These authors defend this choice of the legislature, although the majority of the doctrine is criticized; Ünver 1998, p. 185-187; Şen 1998, p. 209-212; Yıldız 2002, p. 203-205; Erman 1998, p. 79.

111 Interview with attorney 1. This point was made by attorneys 3 and 4 as well.

112 Interview with attorney 2.

them to see all information about suspects, including all other pending trials against him/her,[113] creating possible bias against the suspect.

There are three kinds of criminal courts in Turkey all of which are courts of first instance. The Courts of Peace hear offences with a maximum of two years imprisonment as the prescribed sentence and related monetary fines. These courts are the only criminal courts that do not work with prosecutors. Cases are initiated on the basis of citizen complaints. In these courts, a single judge conducts the hearings and is responsible for all judicial decisions.

Aggravated Felony Courts[114] have jurisdiction over crimes with prison sentences of life or over 10 years. In these courts, hearings are conducted, and decisions are made, by three-judge panels, with one presiding judge.

Finally, General Criminal Courts have jurisdiction over all other types of cases that are otherwise not within the jurisdiction of either the Court of Peace or the Aggravated Felony Court. Similar to Courts of Peace, a single judge presides in these courts.[115]

With regard to appellate courts, the Court of Cassation in Ankara is the highest and only appellate court.[116] The new Criminal Code introduced intermediate appellate courts, but these are yet to be established.[117] In Turkey, there is no plea bargaining system (guilty plea procedure), nor are there expedited proceedings.

1.4. Levels of crime and the prison population

In recent years, the media has 'discovered' crime as an interesting and popular issue. It can therefore be said that, due to increased media coverage, crime has become more visible. This has led to arguments that crime has 'exploded' in

113 Informal discussion of the authors with a judge in the Criminal Court of General Jurisdiction in the course of conducting other research.

114 Some authors use 'Court of Assize';, see Turkish Criminal Procedure Code (Ceza Muhakemesi Kanunu) Yenisey F. (co-ed), Istanbul 2009.

115 With regard to geographical jurisdiction, Courts of Peace and General Criminal Courts have jurisdiction in cases that originate within district boundaries, while Aggravated Felony Courts are competent in cases that originate within the province boundaries. Accordingly, each district has at least one Court of Peace and General Criminal Court, and each province has at least one Aggravated Felony Court. Existing courts may have multiple chambers, so that they can deal with the workload effectively.

116 Ten of its 30 chambers are responsible for appellate review of criminal cases, and the workload between chambers is determined according to subject matter. Thus, for example, the First Chamber is responsible for reviewing cases of murder and related offences, and the Sixth Chamber for some white collar crimes. Each chamber has five judges, one of them being the presiding judge. The decision of the Court in a criminal case is final and binding (since there is no second level appellate court) and sets a precedent for other cases by example only. However, *en banc* decisions of the Court of Cassation are binding.

117 Decisions rendered at first instance by courts can be reversed or approved, but the court of first instance can insist on its ruling, in which case the matter is reviewed by the General Assembly of the Court of Cassation, which will be then issue a decision that is final.

Turkey.[118] Possibly feeling under pressure, the police claim that, in 2008, crime levels were down, particularly concerning crimes against property, such as bag snatching, which showed the highest reduction with 41 %.[119] There is no specific data that could be used to defend these claims. Police statistics only reflect crimes reported to the police, and the accuracy of that data is questionable. There are also no systematic victimization surveys held in Turkey that would show clear trends. However, considering the worldwide reduction of crime rates over the past decade, without more sound data, it would be difficult to argue that the situation in Turkey is different.[120]

Turkey has not participated in the International Crime Victims Surveys as a whole, but in 2005, the study was done on a smaller scale for Istanbul households.[121] The study found that, when compared with other major European cities, Istanbul had lower victimization rates when it comes to 'contact offences' (such as robbery, theft) than most European capitals, while the rates for 'non-contact offences' (such as car theft, burglary) were higher. However, the fear of crime was found to be among the highest in Europe.

It can be argued that the 'discovery' of crime by the media has contributed to this high fear. In fact, the media has often portrayed street children who sniff paint thinner as violent and cold-blooded thugs. Also, bag snatching and other robberies prevalent in big towns have been demonized in the media.[122] While these figures cannot be used to describe crime in the whole country, it must be remembered that Istanbul is the largest city in Turkey.

Foreigners in Turkey are viewed as a security threat but, rather than imputing criminality on them, there is a tendency to deport them. Some foreigners awaiting deportation are held in prison-like facilities in appalling conditions,[123] but the public does not see them responsible for crime. Foreigners of African descent are a new phenomenon in Turkey and are stereotyped as drug dealers, although they make their living by street vending. Refugee advocacy groups report that the African community in Istanbul is discriminated against and ill-treated and harassed by the

118 <http://www.radikal.com.tr/haber.php?haberno=213770>. The article quotes police statistics and states that, in 2006, crime increased by 61 %. Further, the article states that, in 2006, the police apprehended 186,316 people, while in 2005 the number was 168,076 and in 2004 238,727. The article also states that the fact that the number of apprehended increased by only 11 % while crime increased by 61 % could be read as a sign of passive resistance by the police against the EU harmonization legislation. Similarly, the media has quoted the Ankara Chamber of Commerce research, stating that crime increased dramatically by 35.5 %. <http://www.tumgazeteler.com/?a=977087>, or the President of the Court of Cassation talking about the crime explosion: <http://www.gencturkhaber.com/video/Hasan-Gerceker--Suc-patlamasi-var.html,015930>.

119 Emniyet Genel Müdürlüğü 2008, Faaliyet Raporu, p. 28.

120 Jahic & Akdas, 2007.

121 Jahic & Akdas, 2007.

122 <http://www.milliyet.com.tr/default.aspx?aType=SonDakika&ArticleID=1013111>.

123 <http://www.radikal.com.tr/haber.php?haberno=252036>.

police.[124] The case of *Festus Okey*, a Nigerian refugee suspected of drug dealing, became famous when he died at the Beyoglu Police Station in Istanbul.[125]

Further, when it comes to sex workers from the Commonwealth of Independent States, Russian or Eastern European countries, the public has a bad impression. This is often the case, even if they are victims of trafficking. They are regarded as 'hot passionate, blond bombshells' willing and available for any sexual acts required of them. For most people in Turkish society, women from the Soviet Bloc countries have become equated with the term 'prostitute' regardless of whether they are sex workers or not, and have been given a special name 'Natasha'.[126] Because of these prejudices, regardless of their visas or status, foreign woman with blonde hair become subject to harassment by locals and the police. A public survey on xenophobia and racism[127] found that 18 % of Turkish people would not like foreigners as their neighbour,[128] while over 50 % do not want non-Muslims to have jobs in public places.

One of the major issues has been the overcrowding of prisons. The prison population has doubled since 2000.[129] Ethnic data is not gathered in Turkey, so any number as to the ethnic profiles of the prison population would only be an estimate. In the past, overcrowding has been addressed by frequent amnesties, but the building of new prisons (with EU funds) has dispensed with that option. It has also been argued that frequent amnesties, or parole laws, were undermining efforts to fight crime. According to the Ministry of Justice, as of 31 October 2009, the total number of persons in prison was 116,690 and rising, with a capacity of only 85,000

124 United States Committee for Refugees and Immigrants, *World Refugee Survey 2008 – Turkey*, 19 June 2008, available at <http://www.unhcr.org/refworld/docid/485f50d776.html> [accessed 5 November 2009]. According to the report of Refugee Advocacy and Support Program by the Helsinki Citizens Assembly, police officers demand money from asylum seekers of African backgrounds when checking their ID and during home raids. If the asylum seekers refuse to give money, the police threaten to accuse them of possessing drugs.

125 Police Cover Up in Okey's Death <http://bianet.org/english/english/101739-police-cover-up-in-okeys-death>. According to the information of the Helsinki Citizens Assembly, on the 20 August 2007, Festus Okey was stopped by police officers in Beyoglu. At the time Mr. Okey had another friend with him. Both of them were searched by the police and asked to show their IDs. The friend of Mr. Okey stated that the police officer searching Festus Okey started to hit him in the street. Both of them were taken to the police station, on the grounds that they did not have their identity cards on them and the friend said that he lost sight of Festus while being taken to the station. While he was giving his statement at the ground floor of the Beyoglu Police Department, he heard a gun shot.

126 Gülçür L, İlkkaracan P. 'The Natasha Experience': Migrant Sex Workers from the Former Soviet Union and Eastern Europe in Turkey: Women's Studies International Forum vol. 25 (411-21) Copyright Elsevier 2002 <http://www.scribd.com/doc/7343044/NATASHA-Experience>.

127 The Frekans Research Field and Data Processing Co. conducted the survey, as part of a project to promote the Turkish Jewish community and culture, with the sponsorship of the European Commission and the Beyoğlu Rabbi's Office Foundation. A total of 1,108 people around the country were questioned between 18 May and 18 June 2009.

128 <http://www.kanalahaber.com/icimizdeki-irkcilik-urkutuyor...-haberi-32360.htm>.

129 <http://www.cte.adalet.gov.tr/#>.

beds. (During the course of the writing of this report alone, the number went up by 3,197. On 31 August 2009, the number was 113,493,[130] while on 29 March 2009, it was 109,162).[131]

This number includes those in pre-trial detention, detainees that are currently being tried, detainees pending the outcome of their appeal and convicts. Half the figure consists of detainees who are held together with convicts, as there are few facilities separately designed for detainees. Further, conviction rates in Turkey are low and only one of every two persons are found guilty.[132]

Worse, attorney interviews indicate worrying trends: the decision to continue detention is automatic and made on the file, without an appearance in court, despite the principle of immediacy;[133] to continue with detention until the defendant provides a statement, for fear that, once released, he/she may not be found again;[134] and detention decisions without proper reasoning.[135]

1.5. Legal aid for persons suspected or accused of a crime

As indicated earlier, for a country of 70 million people, expenditure for legal aid is very low by international standards, amounting to less than 1 Euro per person.[136] Criminal legal aid is available without a means test for anyone who requests it, from the moment of detention until appeal. When the criminal defendant is disabled (to the extent that this disability effects his/her capacity to give a defence), or a minor, he/she must have counsel appointed as a matter of law (mandatory criminal legal aid).[137] For crimes that carry a sentence of a minimum of five years,[138] counsel is also mandatory.[139] Mandatory counsel is required when the suspect is before the investigative judge for detention. In other words, the system operates 'on request' unless mandated by law.

Research in the Istanbul criminal courts has found that less than three per cent of all criminal defendants had access to a government paid lawyer. The same

130 <http://www.cte.adalet.gov.tr/>.

131 <http://www.cte.adalet.gov.tr/kaynaklar/istatistikler/yas_cins_ogrenim/genel.htm>.

132 The latest figures are from 2007, which shows that of the total 2,189,082 cases heard before the courts, only 48.7 % ended with conviction, 20 % with acquittal and the rest with other decisions: see <http://www.adli-sicil.gov.tr/istatistik_2007/ceza%20mahkemeleri/ceza2-2007.pdf>.

133 Interviews with attorneys 3 and 4.

134 Interview with attorney 1.

135 Interview with attorney 3.

136 Figures of 2006 of the European Commission for the Efficiency of Justice (CEPEJ) were about the same; see <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2006/Turkey.PDF>.

137 One police officer explained that, if the suspect is illiterate, they also ask the Bar for an attorney; interview with police officer 2.

138 Representation by a lawyer is not mandatory, even for some rather serious offences such as manslaughter, sexual assault, or other serious assault cases, because the minimum prison sentence for these crimes is two years and not five.

139 For a discussion of the changes in the law concerning mandatory representation, see Elveris, Jahic & Kalem 2007, p. 161, 243-252.

research found that just over half of defendants had five years of schooling or less.[140] Similarly, research conducted in the Umraniye and Bayrampasa prisons among detainees and convicts found that 76.2 % of them had eight years of schooling or less.[141]

Given the widespread poverty in Turkey, with average monthly income per household being approximately 600 Euro,[142] legal aid carries great importance, particularly when one considers that criminal defendants have such a profile. These are groups who often cannot afford to hire a private attorney, and the existence and easy accessibility of legal aid therefore becomes crucial for their access to justice. In fact, research shows that only 18.5 % of the urban population in Turkey has ever made use of the services of an attorney, with the second most common reason being that it was expensive.[143]

The government has delegated provision of the criminal legal aid service to local bar associations. Yet, there is no department at the Ministry of Justice that oversees the provision of these services. Many local bar associations have established Criminal Procedure Practice Units/Centers, which administer the service with funds provided by the government. Accordingly, there is no institution that is responsible for the delivery of legal aid as a matter of policy and monitoring. There are also no quality assurance mechanisms or monitoring of the delivery of the services.[144] The responsibility of the lawyer in providing legal aid services is dealt with via the internal disciplinary mechanisms of the bar associations.

It was asserted that, when there are complaints filed against an attorney by judges for failing to appear in court without reason, or the attorney submits too many excuses for non-appearance in court, the Bar appoints a Board member to determine whether the situation requires an investigation. The matter is usually not taken further than this although, in the past, there have been attorneys who have been punished.[145] One can therefore conclude that the proper workings of the

140 Elveris, Jahic & Kalem 2007, p. 182.

141 İstanbul'da Şiddet ve Şiddetin Sosyolojik Arka Planı Araştırma Raporu, Istanbul 2008, p. 125.

142 Derived from 2007 statistics reported in Turkish Statistical Institute. (2008); *Turkey in Statistics 2008*. Ankara: Turkish Statistical Institute, p. 38. See <http://www.tuik.gov.tr/IcerikGetir.do?istab_id=5>. Approximately one fifth of the population lives below the poverty line; see <http://www.radikal.com.tr/haber.php?haberno=242747>. In 2008, one of every seven families was receiving economic assistance, either from the government or family; see <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetay&ArticleID=932340&CategoryID=80>.

143 Kalem, Jahic & Elveris 2008, p. 19.

144 Another study conducted in an urban poor part of Istanbul to assess whether people could understand the language used to remind them of their rights found that 65 % of people could not do so. Results of this research were presented at the Annual Conference of the Law and Society Association in July 2006, in Baltimore, USA. The presentation was by Galma Jahic and Idil Elveris, and was titled 'Pilot study of Legal Problems and Legal Needs of the Urban Poor in Istanbul.'

145 Interview with attorney 4. The same attorney said that it was difficult to monitor attorney performance only on the basis of the file, but if there was an intention to do so, a system could be easily set up. However, in his opinion, the current Bar was not willing to undertake this.

internal disciplinary mechanism of the Bar depend to a large degree on the sensitivity of the Bar organizations' own administration.

The current legal aid system operates under an appointment system. Any suspect or defendant who wishes to benefit qualifies, regardless of their financial status or the seriousness of crime in question.[146] When a criminal defendant requests a lawyer, this is relayed to the Bar by the police, prosecutor, judge or the court. In any case, if they comply with the request, the police ask the Bar to send a lawyer. However, the Istanbul Bar has been operating a boycott on such services for months,[147] due to the delayed payment of legal fees to CCP lawyers. Therefore, in Istanbul, even in cases where the presence of an attorney is mandatory, no counsel is being appointed. The suspect or his/her relatives can no longer directly apply to the Bar to request a legal aid lawyer.

Legal aid is provided by attorneys who sign up to do so with the Bar. There are not many organizational requirements for attorneys to work for the CCP service. Some bars request attorneys to attend courses concerning criminal legal aid delivery, but this is not standard practice. There are no restrictions stating which lawyers qualify to provide the service. Any lawyer with a license to practice can do so. The regulation on legal aid states that, as long as there is no conflict of interest among co-defendants, the same lawyer can represent more than one criminal defendant. A suspect or defendant has the right to benefit from an attorney at all stages of the investigation and prosecution, which includes any appeal.[148]

The suspect/defendant must be reminded that he/she has the right to legal assistance, may request collection of exculpatory evidence and is to be given the opportunity to invalidate the existing grounds of suspicion against him/her and put forward issues in his/her favour.[149] This provision, along with all others, refers directly to the right of the suspect/defendant to defend him/herself.

There is no public defender service and lawyers are paid on a case-by-case basis in respect of action taken by them, according to a criminal legal aid fee tariff. The tariff specifies tasks and the corresponding fees, depending on the court hearing in the case, or the stage the action is taken (investigative or prosecutorial). In other words, there is a flat fee for each type of work. Lawyers often complain that the tariff is lower than the minimum fee tariff of the Bar while travel allowances are minimal.

For instance, for work that is done during the investigative phase (without further specification as to what this may be), an attorney is entitled to 69 Euro; for cases tried in Courts of Peace, 107 Euro; for cases in Courts of General Jurisdiction

146 Whether the defendant has no attorney because he/she is indigent, or because he/she does not wish to retain one for any other reason, is irrelevant.

147 Very recently, some disctricts in the city have lifted the boycott.

148 Art. 149/1 CCP.

149 Art. 147 CCP. There is a similar provision under art. 23 of the Regulation on arrest, custody and provision of statement, number 25832.

118 Euro; for cases in Courts of Aggravated Felonies 215 Euro.[150] The travel allowance is 0.70 Euro.[151]

Further, the fees typically are paid late, are subject to tax and must be approved by the prosecutor.[152] The latter issue is said to undermine the independence of the legal profession.[153]

Interviews conducted among judges, prosecutors and attorneys found that members of all three professional groups thought that the CCP service was not operating efficiently. However, the reasons they saw and solutions they offered, differed. Judges gave waiting time as a concern and attributed this to the Bars and attorneys themselves.[154] Similarly, prosecutors also gave waiting time for the arrival of an attorney as a problem, but they also complained about attorneys not taking their job seriously, by engaging 'in show' rather than proper defence, or repeating useless statements instead of developing a proper defence, and by not dedicating themselves to the service they are providing.

They also expressed dissatisfaction with the Bar concerning the inefficiency of the appointment system, lack of control of the quality of the provided service and the change of lawyers during the legal process.[155] These statements should be read with caution, as the time that the interviews were conducted coincides with the wide application of mandatory criminal legal aid (between June 2005 and December 2006). At that time, the law required that, in almost every case in General Jurisdiction and Aggravated Felony Courts, a counsel be appointed for the criminal defendant. As the system could not cope with these demands, there were long waiting times for courts and consequent delays. This was one of the reasons why the law was subsequently changed so as to apply to a much more narrowly defined list of circumstances.

On the other hand, the majority of lawyers stated that there were problems such as the lack of experience of CCP lawyers, absence or poor communication/contact with defendants, lawyers mainly trying to show off in court rather than conduct competent work, poor pay and tardy financial compensation for expenses, delays due to the assignment system, lack of quality monitoring, large workloads and a general lack of motivation.[156] As can be seen, this

150 These amounts are in Turkish lira as follows: 146 Turkish liras; 226 Turkish liras; 248 Turkish liras; 452 Turkish liras.

151 This amount is the equivalent of 1.5 Turkish liras.

152 The attorneys must show a proof of the work done, by either taking the hearing record (if appointed after the filing of the indictment), or by police interview documents (if appointed in the investigative stage), to the prosecutor's office to have its authenticity approved. To have this process expedited, sometimes the Bar is said to assign people to the prosecutor's office on a temporary basis.

153 Herkese Adalet ve Özgürlük İçin CMK Platformu, 4 July 2009.

154 Elveris, Jahic & Kalem 2007, p. 229.

155 Elveris, Jahic & Kalem 2007, p. 230.

156 Elveris, Jahic & Kalem 2007, p. 231. When asked about what should be done to improve the situation, almost half of judges saw an on-duty CCP lawyer at the court as a possible solution, particularly in relation to the problem of delays. Prosecutors, on the other hand, believed that the most important thing would be to increase the motivation of the CCP lawyers, by increased payments and improved training. The majority of lawyers have stated →

research somehow showed that the criminal justice actors were aware of the lack of oversight over the system exercised by the bar, or other relevant authority, leading to quality related problems in legal aid delivery.

Indeed, the study found a direct correlation between being represented by a criminal legal aid attorney and being convicted.[157] Further, it demonstrated that training, motivation and fees are all interrelated matters. However, the government has thus far not done anything to address these concerns.

2. Legal rights and their implementation

2.1. The right to information

2.1.1. Apprehension:

Individuals apprehended or detained[158] are to be promptly notified, *in writing*, or when that is not possible, orally, of the grounds of their apprehension and the charges against them.[159] This right is triggered at the time of apprehension, or as soon as practicable thereafter. In practice, there is a difference between an apprehension made spontaneously and detention orders.[160] The former is more of an after-thought, as the police try to first control the situation and, for example, remove any weapons. They must then indicate the nature of the suspicion.

In terms of detention orders, the police must explain to the suspect that he/she is sought for instance for a murder charge, or that an apprehension order is pending against him/her. For example, if the crime involves drugs, the police should state whether it is for import, export or just use.[161]

that, to increase the motivation of the CCP lawyers would improve things significantly, and efforts should be made to make the services more attractive and interesting for experienced lawyers. Many lawyers have also stressed the importance of training, and that meetings, which would allow them to share their practices and support each others' work, would also be of great benefit. More awareness raising activities, and the promotion of the service among the general population, were also mentioned as necessary for overall improvement.

157 Elveris, Jahic & Kalem 2007, p. 215.

158 It should be noted that the arrest takes place on the initiative of the police, while detention is by order of the prosecutor.

159 Art. 19(4) of the Constitution; arts. 90(4), 98 (4), 141(1)(g), 147(1)(b)(f), 170(3)(h), 176 (1), 191(3)(b) CCP; arts. 6(4) Regulation on Arrest, Detention and Provision of Statement (police interview) of the Ministry of Justice; arts. 6(7) and 23 of the Regulation on Arrest, Detention and Provision of Statement (police interview) of the Ministry of Justice. For the regulation see: Official Gazette date 6 January 2005, No. 25832. Similarly, see Circular no: 3 issued by Ministry of Justice, on the application of the law on arrest, provision of statements and custody, Official Gazette date 1 January 2006. The requirement for 'charges' to be notified to the apprehended person includes 'information about the grounds for apprehension', according to art. 13 of the Law on Duties and Authority of the Police, and art. 6 (4) of the Regulation on Apprehension, Detention and Provision of Statement.

160 Interview with police officer 1.

161 Interview with attorney 3.

In practice, the police are said to be in the habit of taking a suspect without any explanation, or by merely saying 'the prosecutor wants you'.[162] Sometimes, a notice arrives in the mail saying 'please contact police station x', without stating whether as a witness or suspect.[163] It is said that the amount of information given by the police varies according to the level of education, financial situation and social status of the suspect. The more one knows about their rights, or the lesser seriousness of a crime one is accused of, the more open the police are said to become.[164]

However, if someone is charged with organized crime, narcotics, murder or money laundering or is subject to hot pursuit and his/her house has been surrounded very early in the morning, one cannot obtain the same information.[165] In other words, in these type of situations one cannot know the extent to which detained persons are informed of their rights. One attorney said that the information that comes from the prosecutor (to the police or defendant) is sometimes not sufficiently clear.[166]

The information can be given orally, but must eventually be recorded. At this stage, the suspect must be informed only of the character and source of the accusation brought against him/her. This includes a description of the alleged offence and the circumstances surrounding it. The police shall also inform the suspect promptly prior to the first interrogation about his/her legal rights, after taking measures to prevent him/her from escaping, and harming him/herself and others.[167]

An Apprehension and Detention Record, Suspect and Defendant Form[168] must be filled out, and a signed copy provided to the suspect. This form includes the following information: personal data of the defendant, the place, date and time of apprehension, apprehending officer and crime leading to apprehension, prosecutor notified of the apprehension, or prosecutor ordering the detention. The form states that the defendant must provide information about his/her identity in a truthful way and notes that giving false or no personal information constitutes a crime.[169] The form then lists the rights of the defendant as follows:

- Right to silence.
- Right to inform a person of the suspect's own choosing that he or she has been apprehended

162 Interview with attorney 1.
163 Interview with attorney 3.
164 Interview with attorney 1.
165 Interview with attorney 1. 'They search your house the whole day and you learn the charge only in the late afternoon. Once attorneys are involved, you are more likely to learn your rights. The attitudes and manners can change with our arrival'.
166 Interview with attorney 3.
167 Art. 90(4)CCP; art. 6 of the Regulation on Arrest. According to art. 147 CCP, this information will be repeated at the beginning of the first interrogation.
168 A copy of this form is attached to the Regulation on Arrest, detention and provision of statement, Official Gazette No. 25832.
169 See 2.3.4 on the right to silence.

- Right to put forward issues in his/her own defence in order to rebut suspicions about him/her.
- Right to an attorney.
- Right to ask for release from the judge of peace.

The defendant must sign this form, saying that he/she has been read these rights and understood them. It is possible that, in some cases, suspects/defendants end up signing the form without really reading it, since there are no guarantees that the police actually inform the suspects of their rights verbally.

There used to be two separate documents, one recording the apprehension and/or detention and a separate defendant rights form. This new version combines the two forms, although they serve separate purposes. This could be seen as a weakness, since the personal data of the suspect and the crime may make it appear as an internal police document. In a sense, the form could be seen as a 'letter of rights'. It should be noted that the form is written in surprisingly plain Turkish.[170] In practice, the police are said to formulate the question as 'do you know your legal rights', without explaining them one by one.[171]

There are some further formalities that must to be completed by the police. For instance, the police keep a book recording the reason of apprehension, hour and the name of the person who was informed that the suspect was been apprehended,[172] even if the suspect does not want anyone to know about it. In cases where the person is apprehended by force, his/her detention is ordered by the prosecutor, and he/she is sent for medical examination to a state hospital, or to the Institute of Forensic Medicine, by the order of the prosecutor.[173] The medical examination will be repeated if the suspect is released, transferred or brought before other judicial authorities, or if the duration of detention is prolonged.[174]

The suspect can be questioned only after this formality. While the medical examination was introduced to prevent inhuman treatment and torture, one attorney mentioned that some doctors were insensitive about the issue and the examination was not conducted thoroughly but simply by asking the suspect whether he/she had any complaints. In addition, the suspect was taken to the doctor by the police officer who apprehended him/her, rather than and not by a separate officer. Worse, the officer may be present when the suspect is examined by the doctor, making it more difficult – if at all possible – to talk about any possible inhuman treatment.[175]

When a suspect is taken into custody, the police must inform the prosecutor and await his/her instructions.[176] This is mostly true for serious crimes, such as

170 Unfortunately the text in the CCP remains difficult to understand.
171 Interview with attorney 2.
172 Art. 13(G) of the Act on the Responsibility and Jurisdiction of the Police.
173 Art. 9/1 of the Regulation on Arrest Detention and Provision of Statement.
174 Art. 9/2 of the Regulation on Arrest Detention and Provision of Statement. If the person is wounded he/she is sent to the Institute of Forensic Medicine; interview with police officer 1.
175 Interview with attorney 4.
176 Art. 90/5 CCP.

murder causing bodily harm, or crimes that create public reaction (for example, sexual abuse of children of murder). One police officer said that, for lesser crimes, prosecutors do not always want to be contacted.[177] This was confirmed by a prosecutor, who said that, for cases involving unidentified suspects (whose name and address has not been determined), there was no point in contacting them.[178] When contacted, the prosecutor can order one of the three things: he may want to interview the suspect; he/she may tell the police to interview the suspect and then have him/her released; or he/she may instruct the police to take the suspect into detention for him/she to later question the suspect.[179]

2.1.2. Police interview

There are two possibilities for a police interview to take place. First, after the apprehension, if the release of the suspect is not ordered by the prosecutor. Secondly, the person is detained by the order of the prosecutor. In both cases, the suspect is in detention and the charges against him/her are explained to him/her before questioning. This information must be supplied both verbally and in writing. Each record must be read and signed by the suspect. The suspect has the right to have an attorney present while being interviewed by the police. Research involving cases filed in 2000 and 2001 indicated that only 8.7 % of defendants had an attorney at this stage. It is unknown if and to what extent the new CCP has affected representation levels at the police interview, but the same research quotes lawyers who claim that police officers do not inform suspects of the right to a lawyer, and sometimes discourage suspects from requesting lawyers. While the researchers indicated that they did not have information on how widespread these negative practices were, they should still raise concerns.[180] This point was repeated in attorney interviews (see 2.2.2).

Lawyers have further reported that they sometimes face difficulties in having a confidential conversation with their clients[181] in police stations, and that the police are not always accommodating in that sense. Another attorney explained that keeping attorneys waiting, or not letting them inside the police station, was a police tactic.[182] In fact, one attorney described an instance two years ago, where the police has threatened to record even the gaze of the suspect to his attorney, but more recently at the same station, he was given a list of questions by the police that they were going to ask to the suspect and was even allowed to make a copy thereof.[183] This can be read as a sign of changing attitudes.

177 Interview with police officer 1.
178 Interview with police officer 2. Prosecutors also let the police know in advance what the police need to do, depending on the crime investigated.
179 Interview with police officer 1.
180 Elveris, Jahic & Kalem 2007, p. 195.
181 Interview with attorney 2. This attorney has mentioned that, due to security concerns, the gendarmerie was in the room.
182 Interview with attorney 4.
183 Interview with attorney 2.

As noted above, the police may interrogate the suspect[184] under certain circumstances (for example, the prosecutor does not wish to do so him/herself, or the suspect is not a minor). The statement given before the police can be used at trial as evidence, as long as it is taken in the presence of an attorney, or is confirmed by the suspect before a judge or the court (see 1.3). If there is an inconsistency between the statement at the trial and previous statements of the defendant, the police interrogation may be read at the trial, if (and only if) his attorney was present at the police interrogation, so that the criminal defendant will have opportunity to explain this inconsistency.[185]

While giving a statement, or during interrogation, a defendant/suspect shall be reminded not only of the charges against him/her, but also that he/she may request the collection of exculpatory evidence. He/she and shall be given the opportunity to invalidate the existing grounds of suspicion and to put forward issues in his/her favour.[186] If detained, the suspect must be furnished with the legal and factual grounds and reasons, and the contents of the decision shall be explained orally. Additionally, a written copy of the decision shall be given to him/her.[187]

This right can be seriously limited when the prosecutor issues a decision requiring secrecy, an issue which will be discussed in 2.4.1. Nevertheless, when the suspect wants to offer evidence, such as site visits that could give rise to further evidence (for example, the place where he/she obtained the drugs), this is done by notifying the prosecutor[188] and obtaining an order for search and seizure.

The regulation on arrest states that these duties shall be performed by trained police who are experienced, patient, calm, and smart, and who understand the psychology of criminals and have passed a psycho-technical test.[189] One police officer interviewed said that he was conducting 10-15 interviews per day and explained that it took him six months to learn how to conduct an interview. He confirmed that one must control himself and protect himself against provocations, since the suspect may say anything he/she wants.[190] It is important to note that the ECtHR has declared Turkey to be in violation of the ECHR in a considerable number of cases involving police behaviour. Although it has been alleged that the police no longer resort to violence, human rights group claim that, in the last three years, 31 people have died in police custody.[191]

Apart from the obligation to remind the suspect/defendant of his/her rights at certain stages, and getting him/her to sign the related records, there are no

184 Art. 161/2 CCP.

185 Art. 213 CCP. In addition, the police may not repeat the interrogation of the suspect. If any need arises to do so, it must be done by the prosecutor; art. 148/5 CCP.

186 Art. 147 (1)(f) CCP; also see a similar provision in art. 23(1)(g) of the Regulation on Arrest Detention and Provision of Statement.

187 Art. 101 (2) CCP.

188 Interview with police officer 2.

189 Arts. 30 and 31 of the Regulation on Arrest Detention and Provision of Statement.

190 Interview with police officer 2.

191 English version of the article is not available. For Turkish; see M.Utku Şentürk, 'Ne bu şiddet bu celal?', 25/11/2009, quoting Human Rights Watch. See <http://www.radikal.com.tr/Radikal.aspx?aType=RadikalDetay&ArticleID=966116&Date=26.11.2009&CategoryID=77>.

further obligations to verify whether he/she has properly understood the information on his/her rights. Research has shown that, while judges and prosecutors believe that the suspects/defendants understand their rights, the majority of attorneys believe that they do not. Further, attorneys point out to serious deficiencies in the way suspects are reminded of their rights. Some attorneys have reported that, at the investigation phase, police officers do not inform the suspects of their rights, and sometimes even discourage suspects from requesting an attorney.[192]

2.1.3. Charge

A person who is not released within 24 hours, or who is detained by the order of the prosecutor shall be brought before the prosecutor for interrogation. During this interrogation, the prosecutor shall also inform the defendant of the charges against him/her. At this time, the prosecutor questions the suspect, in order to understand whether there is sufficient evidence to issue an indictment, or whether there is strong evidence justifying pre-trial arrest.

As can be seen, the right to information must be complied with at almost every stage of the investigation (on apprehension, when giving a statement, during interrogation) and later, at the trial stage, when the indictment is notified to the suspect before trial and subsequently read before him/her during trial. Thus, any amendments to the charge(s) against him/her will also be communicated to the suspect as the investigation develops.

2.1.4. Pre-trial stage and trial

The indictment must contain evidence of the offence and explain the events that comprise the charges, as well as providing the relationship between the charge and the evidence.[193] The indictment and notification shall be provided to the suspect at least one week prior to the first hearing day (see 1.3).[194] However, in practice, prosecutors may not send copies of the indictment, as they seem to think that the attorney can go to the court and obtain a copy.[195] While this may be true for persons who have an attorney, people without counsel would not even think to do this. The attorney can be present in all sessions of the hearing, even if the accused is not present at trial.[196] The suspect must be informed beforehand of any changes in the nature of the crime charged.[197]

Individuals who had not been given written documentation of the grounds of apprehension, or of pre-trial arrest and the charges against him/her or who have not been provided with an oral explanation of the grounds, may claim material and

192 Elveris, Jahic & Kalem 2007, p. 195, 229.
193 Art. 170 CCP.
194 Art. 176 (4) CCP.
195 Interview with attorney 1.
196 Provided that he/she is interrogated.
197 Art. 226 CCP.

emotional losses from the State.[198] It was claimed, however that the jurisprudence of the Court of Cassation made it very difficult to actually do this, requiring the claimant to be absolutely innocent.[199] While the number of applications is not high, compensation amounts have been growing.[200] At the same time, it was pointed out that the court hearing these cases is a criminal court, not well versed in compensation cases.[201] Further, it was pointed out that, without exhausting this domestic remedy, people cannot apply to the ECHR.[202] Yet., the process was very long (and had complications such as officers no longer serving in the same post, or witnesses dying).

The failure of public authorities to carry out their duties also gives rise to criminal liability,[203] but it has been said that most cases get dropped. When asked about the frequency of attorneys using these measures, two attorneys replied that once clients considered themselves 'saved', they did not want to resort to administrative, disciplinary or criminal measures.[204] Nevertheless, these cases have become more frequent as judges and attorneys have become more conscientious about the issue.[205] It has also been indicated that disciplinary and administrative investigations against the police or other authorities have been more effective in preventing repetition of unlawful practices, than have filing compensation claims. In addition, the Parliament's Commission on Human Rights has explained that the highest number of complaints it received from citizens concerned the judiciary, but due to principles of separation of powers and judicial independence, it could not act on these, thus barring a possible avenue for addressing citizens' complaints.[206]

2.2. *The right to defend oneself*

2.2.1. The right of a person to defend him/herself

Both the ECHR and the Turkish Constitution[207] expressly state that everyone (either a suspect or defendant) has the right to defend him/herself in person or through legal assistance. While some articles of the CCP expressly refer to this right, it exists

198 Art. 141(1)(g) CCP.

199 Interview with attorney 3. The Court of Cassation held that 'it is not to be determined whether the arrest was proper but whether the plaintiff (the suspect in the original trial) could be held liable in any way for the measures taken against him, such as confessing to the crime or attempting to escape, led to the arrest', Yargıtay Ceza Genel Kurulu, 1986/5-5 E. 1986/79 K. 3.11.1986.

200 Interview with attorney 1.

201 Interview with attorney 3.

202 Article 35 §1 ECHR 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

203 Art. 257 CCP.

204 Interview with attorney 1 and attorney 2.

205 Interview with attorney 1.

206 <http://www.tbmm.gov.tr/komisyon/insanhak/insanhaklari.htm>.

207 Art. 6 of the ECHR and art. 36 of the Constitution.

without a doubt throughout the whole criminal process (starting from the very beginning of the investigation phase). In fact, most of the procedural rules and 'subsidiary' rights in the CCP are for the effective use of this right (these have been already explained under section 1.5).

While a person can always say that he/she does not want an attorney, this is not an irrevocable waiver. In other words, even if the suspect states that he/she does not want an attorney at the investigation stage, he/she can change his/her mind at a later stage. In general, the suspect/defendant, after being reminded of his/her right to an attorney, either chooses an attorney, or one is appointed at his/her request.

2.2.2. The right to legal advice at the investigation stage

The right of the attorney to consult with the suspect (or defendant), to be present during the provision of the statement or interrogation, and to provide legal assistance, shall not be prevented/restricted at any stage of the investigation and prosecution process.[208] If the suspect requests an attorney, then the attorney must be contacted before proceeding with the statement or interrogation. In other words, if the suspect/defendant has requested legal assistance, he/she cannot be questioned further.[209]

Whether the police actually suspend the interview if the suspect asks for counsel is a different matter. When specifically asked about this, most attorneys have answered 'the police should'. One attorney explained that the prosecutor should be notified about this.[210] Another said that some stop, while others say 'you should have said this before, I have now started'. This attorney explained that it very much depended on the attitude in the city or the director of the police in the district.[211] One attorney stated that it also depended on the socio-economic status of the suspect. If he/she is unemployed and does not appear to have a family, then the police are inclined to act according to a social hierarchy.[212] Another one said that everything was possible,[213] while one prosecutor simply said 'I stop'.[214]

It is of course difficult to assess what happens in reality, but attorneys also mentioned a worrying practice called 'oral interview'.[215] Although the police must remind the suspect of his/her rights, take him/her for a medical check and ensure that he/she has an attorney, this is not always done. Instead, the police meet and

208 Art. 149(3) CCP.

209 Even at the investigation stage in terrorist cases, where access to an attorney may be delayed by the judge for up to 24 hours pursuant to art. 10 of Law, No. 3713, provision of statement/interrogation is delayed until the arrival of the attorney.

210 Interview with attorney 1.

211 Interview with attorney 3.

212 Interview with attorney 4.

213 Interview with attorney 1.

214 Interview with prosecutor 2. Research evidence shows that access to criminal legal aid is the highest at the prosecution stage, where 23.7 % of people had a lawyer, Elveris, Kalem & Jahic 2007, p. 188.

215 Interview with attorney 1.

introduce themselves to the suspect; make the suspect trust them, scare him/her or, depending on the crime, try to patronize the suspect. Policemen abound in the station: one apprehends the suspect, one searches him/her; one prepares him/her for the interview; one scares him/her and one speaks to him/her to obtain information before the attorney arrives. Upon arrival, attorneys feel that the suspect has been 'broken down', the scene has been already set up and the 'informal' interview has taken its course.

When confronted by attorneys about this practice, the police retort that 'it is not a crime to chat someone up'.[216] One attorney described incidents where the attorney arrived, only to find that the interview had already taken place and the suspect had signed the form. The only missing signature was the attorney's. When the attorney refused to sign, or only signed with reservation, the police requested another attorney from the Bar, saying that the previous attorney did not arrive.

On another occasion, the police pressure the suspect to sign a record issued against the advice of the attorney. The attorney explained this by the fact that the police want attorneys that suit them.[217] Other police tactics undermining the right to an attorney and the right to silence are discussed in length under 2.3.4.

Indeed, research measuring access to criminal legal aid lawyers at different stages of the criminal justice process found that representation levels in police stations was only 7.3 %.[218] In order to measure this, records of statements given to the police were examined. These records had boxes indicating whether the defendant wanted to provide a statement. In some cases, the 'no' box was checked, however, there still was a statement. One possible answer to this seems to be confirmed by the above explanation. Even if the suspect tries to remain silent or requests an attorney, the police may try to talk them slowly into providing a statement. At the same time, one police officer explained that suspects do not want an attorney, because they also know that they will only receive a fine (for possession of drugs).[219]

It has been suggested that this police practice may have developed due to the text of the reminder of the right to silence.[220] It does not mention what happens when someone chooses to speak after he/she has been warned. In other words, it does not specify, like the 'Miranda' warning, that 'everything you say can and will be used against you'. The police seem to use the information obtained through informal means when corresponding with the prosecutor. Judges are said to be aware of this police practice, but do not confront the police for resorting to these illegal methods. Instead, some question the defendant about statements obtained. One attorney[221] stated that sometimes a judge takes into account unlawfully obtained evidence, knowing it is unlawful, only because the judge is curious why

216 Interview with attorney 1.
217 Interview with attorney 4.
218 Elveris, Jahic & Kalem 2007, p. 187.
219 Interview with police officer 2.
220 Interview with attorney 1. Unfortunately for defendants, this statement is not true, since possession of drugs, even for personal use carries a 1-3 year sentence.
221 Interview with attorney 1.

the defendant committed the crime. Under such circumstances, the attorney interviewed reminds the judge of the fact that curiosity may not be the reason to hear unlawful evidence.

Concerning investigation of terrorism cases, access to an attorney may be delayed by the judge for up to 24 hours. However, the suspect cannot be interrogated during this time.[222] Further, if there is evidence showing that the attorney is aiding communication among members of a terrorist organisation, the judge may decide that correspondence can be provided only under the supervision of an official, and documents handed over or exchanged may be reviewed by the judge. The judge then decides whether the whole or part of the documents is to be returned, thus compromising attorney-client privilege.

Juveniles[223] above the age of fifteen who have been charged with a terrorism offence, shall be tried not in juvenile courts, but like adults in felony courts. This is in direct violation of the UN Convention on the Protection of the Rights of the Child.[224] For people charged with terrorism, alternatives to imprisonment, postponement of the sentence, as well as parole are inapplicable.[225] In other words, when it comes to terrorism cases, there appears to be a separate procedure for investigation and trial, which is different from other criminal cases.

2.2.3. The right to legal representation at the trial stage

If the suspect is detained, he/she can have up to three attorneys. Nevertheless, the design of the court room does not allow the defendant to sit together with his/her attorney. One attorney said: 'You communicate from a distance. This is desperation!'.[226] Further, research conducted before the Istanbul Courts has shown that, in 90.4 % of cases, the criminal defendant had no attorney.[227] The research also found that representation by counsel was different according to the type of court – 4.5 % for Courts of Peace, 10.3 % for Courts of General Jurisdiction and 42.1 percent for superior courts.[228] The latter number is still less than half, in a court that hears

222 Art. 10 of the Act on Fighting Terror No. 3713, published in the Official Gazette on 12 April 1991.

223 Juvenile justice and courts appear to be a problem in itself. Juveniles below the age of 15 should be delievered to juvenile police as soon as they are apprehended, but this seems to be the case only in Istanbul. One attorney said that, outside Istanbul, juvenile police operate as a transfer station taking the child to the court. All other actions are taken by the terror police.

224 Art. 40.3 of the Convention on the Protection of the Rights of the Child: 'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law'. Pursuant to art. 9 of the Act on Fighting Terror, children of 15 and above are prosecuted by Specialized Aggravated Felony Courts. This thus constitutes a breach of the Convention.

225 Art. 13 of the Act on Fighting Terror.

226 Interview with attorney 3.

227 Of those who were represented by an attorney, 7.2 % were represented by private attorneys while 1.9 % were represented by CCP lawyers.

228 Elveris, Jahic & Kalem 2007, p. 190-191.

the gravest crimes and where defendants are usually detained and sentenced to long prison terms.

In fact, the same research showed that 74.2 % of offenders who receive a prison sentence do so without ever being represented by a lawyer.[229] At the same time, attorneys appointed under the criminal legal aid system may not be dismissed by the suspect/defendant.[230] This can be seen as a problem, as it is common practice that most of the legal aid attorneys do not visit their clients in jail.

However, in cases where the appointed attorney does not appear at the hearing, or fails to fulfil his/her duties, then *the judge or the court* must take the necessary steps to immediately appoint another attorney.[231] In such cases, the suspect/defendant may draw the attention of the judge/court to this issue and ask for a replacement. At the same time, the suspect/defendant may always choose an attorney of their own from outside the legal aid scheme, therefore ending the duties of the appointed attorney.

2.2.4. Independence and competence of defence lawyers

There is no separate criminal defence bar in Turkey, although some lawyers never take any criminal defence work, some take only criminal work, and some do both. It is understood that young lawyers who try to develop a clientele and expertise often undertake criminal legal aid work. Legal aid work is not, however, highly regarded. As soon as the attorney believes that he/she has developed expertise, they move away from the system. One often hears that the criminal legal aid service is of low quality. Indeed, the research conducted before the Istanbul courts found a correlation between being represented by a criminal legal aid attorney and being convicted.[232] While we do not know how many attorneys in Turkey take legal aid cases, the number in Istanbul is 3,167 out of 23,884 attorneys registered with the Bar.[233]

There is no bar exam or any similar qualifying scheme necessary to either practice law before getting a licence, or to maintain it. The fact that the legal aid service is being delivered by a professional organisation that has been established to further the interests of a profession, rather than to protect clients, is a matter of concern. This is suggested by the fact that the Bar brings up the issues concerning criminal legal aid solely in terms of late or no payment of the attorneys' fees.

229 Elveris, Jahic & Kalem 2007, p. 216.

230 Art. 7(2) of the Regulation, Official Gazette of 3 February 2007, No. 26450.

231 Art. 151/1 CCP. It is said that the Court of Cassation insists on the proper application of this rule. The court must adjourn the hearing in order to provide the defendant with a lawyer, giving the lawyer sufficient time to examine the case and to prepare a defence (see Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009, p. 239; Ünver & Hakeri 2009, p. 208). According to case law, it will be unlawful for the court to give a sentence in a hearing where the (mandatory) attorney is absent (10.CD. 26. 12.2005 t., E. 2005/24359, K. 2005/19605, Ünver & Hakeri 2009, p. 208).

232 Elveris, Jahic & Kalem 2007, p. 215.

233 See <http://www.istanbulbarosu.org.tr/Document.asp?Konu=301&DocumentIndex=cmuk/tanitim.htm>.

Whether the service is of good quality and whether the suspects' rights to defence are observed is never discussed. The current boycott by the Istanbul Bar only goes to emphasize this point.

Research has shown that the CCP Units do not function properly. A majority of judges and prosecutors interviewed believe that the Units have some problems related directly to their management.[234] For them, delays in appointment and the arrival of attorneys seem to be the most important problems. Judges have stated that the Bar fulfils its main tasks, but it is not able to accomplish them on time. Hence, the court often has to wait for the attorney to arrive.

Legal aid lawyers, on the other hand, believe that the Unit also does not function well, but for the following reasons: lack of experience of the CCP Unit attorneys, absence or poor communication/contact with the suspects/defendants, poor pay and tardy financial compensation for their expenses, delays due to the assignment system, lack of quality monitoring, large workload and a lack of motivation.[235] This issue will be dealt further under section 3.

The Bar has been reluctant to establish requirements for lawyers to attend courses to participate in legal aid, undermining the quality of the service. If attorneys fail to provide quality service, the matter can be referred to disciplinary proceedings, but a glance at the 2008 Report of the European Commission for the Efficiency of Justice (CEPEJ) shows that Turkey has a very low number of disciplinary proceedings per 1000 lawyers.[236] Once an attorney is assigned to a case by the CCP unit, he/she is subject to professional rules just like a private matter. In other words, he/she must exercise the same duty of care. An attorney may refuse the assignment/abstain from performing the duty on reasonable grounds.[237]

2.3. Procedural Rights

2.3.1. The right to release from custody pending trial

This right is not expressly stated in Turkish law. While this could be seen as a weakness in terms of defendants' rights, the right can nevertheless be inferred from the direct application of the ECHR in terms of human rights matters, or the Constitution provisions concerning the right to personal freedom and security.

As indicated in 1.4, prison overcrowding is a significant problem. Particularly in large towns, prisoners take shifts to sleep in beds, while prisons in the Black Sea

234 Both groups have also expressed concern with regard to the quality of the service provided by the attorneys, including their lack of interest and inexperience and the superficial way in which they handle cases.

235 Elveris, Jahic & Kalem 2007, p. 231.

236 European Judicial Systems, Edition 2008: Efficiency and Quality of Justice, CEPEJ, p. 218.

237 Art. 6 of the Regulation on Arrest Detention and Provision of Statement and the CCP Unit Directive of the Istanbul Bar. Date of entry into force 17 April 2008; for the text, see <http://www.istanbulbarosu.org.tr/Document.asp?Konu=302&DocumentIndex=cmuk/icyonetmelik.htm>. Art. 6 of the Regulation on Arrest Detention and Provision of Statement and the CCP Unit Directive of the Istanbul Bar.

region operate at half their capacity. In the last five years, there has been extensive reform in the prison system, with considerable improvements in some prisons. Further, new prisons have been built, increasing capacity of the system; however, the figure is still 30,000 short. The government should also question whether spending 476 Euro[238] per month for each person in jail is a good investment, given the literacy and poverty rates in the country, as well as the low funding of legal aid.

Indeed, the total prison population and incarceration rates have been increasing, and have more than doubled since 2000.[239] At that time, over 50 % of all the prison population consisted of detainees,[240] who may not be found guilty at the end of their trials. In 2007, of the 1,920,862 total cases, only 1,065,953 ended with a guilty verdict,[241] of which 767,868 resulted in custodial sentences. This amounts to 72.1 % of all convictions. It should be noted that custodial sentences include prison sentences converted to fines, security measures (for example, to be prohibited from going to particular places or from practicing a particular occupation) and suspended sentences.[242] Given all of this, the high detention rates are worrisome.

One of the reasons for overcrowding is that the sentences prescribed for crimes are still lengthy when compared with other European countries.[243] Further, the time served to qualify for parole has been lengthened. Under the new law on Corrections, a person must spend two thirds of his/her sentence behind bars before being eligible to be released on parole. Up until 2005, this period was half of the sentence. In addition, courts rarely resort to issuing bail, limiting its use.[244] The high detention may also be read as a sign of a serious problem with the legal aid system, despite the current rule of mandatory representation in detention hearing.

Data concerning the average length of time spent in custody awaiting trial (or pending trial) is not published. However, considering the average length of prosecution in Turkey (246 days in all criminal courts),[245] and the rather high percentage of detentions, it is fair to assume that suspects/defendants may be kept in custody for a long time. Where the crime is not within the jurisdiction of the Aggravated Felony Court, the maximum period of detention is one year.[246] If deemed necessary, this may be extended for a further six months. Where the crime is under the jurisdiction of the Aggravated Felony Courts, the maximum detention period is two years and any extension granted shall not exceed three years.[247]

238 This amount equals to 1,000 Turkish liras.

239 <http://www.cte.adalet.gov.tr/>. See also the table in footnote 1. The trend is clearly visible.

240 Source: <http://www.cte.adalet.gov.tr/#>.

241 Statistics 2007 announced by the General Directorate of Criminal Records and Statistics, see <http://www.adli-sicil.gov.tr/istatistik_2007/ceza%20mahkemeleri/ceza11-2007.pdf>.

242 See <http://www.adli-sicil.gov.tr/istatistik_2007/ceza%20mahkemeleri/ceza11-2007.pdf>.

243 Centel, Zafer & Cakmut 2008, p. 545.

244 See art. 109 and 113 of CPC.

245 Statistics 2007 announced by the General Directorate of Criminal Records and Statistics, see <http://www.adli-sicil.gov.tr/istatistik_2007/ceza%20mahkemeleri/ceza1-2007.pdf>.

246 CCP art. 102.

247 Pursuant to art. 12 of Law numbered 5320, the periods stated under art. 102 of the CCP will enter into force on 31 January 2010. Until then, the periods stated under art. 110 of the former →

It should also be said that there are alternatives to detention, such as judicial control,[248] but attorneys explain that this is not used by judges very much.[249] This alternative can be used when the reasons for detention are present (strong doubt that a suspect committed a crime, is likely to abscond or destroy evidence). Further, the maximum sentence of the crime should be three years or less.[250]

An attorney described a worrying practice concerning detained defendants.[251] Sometimes, detainees make it to court but their attorney does not appear. In this case, the judge simply decides that the suspect cannot be questioned and detention should continue.[252] Other times, the attorney appears in court, but the detainee does not, due, for example, to a breakdown of the prison car. In this case, particularly when the detainee is yet to be interrogated, the judge would not release him/her, despite indications pointing out that detention may have been inappropriate.[253]

Further, in the investigation stage, the failure of the courts to remain open after 5 pm means that some suspects spend the night at the police station, particularly if they have been apprehended by the police after 3 pm,[254] because the completion of paper work takes approximately 2 hours. Those suspects apprehended 'after hours' are taken into custody, to be taken to the prosecutor the next day. This indicates the need for a night court.[255]

2.3.2. The right of a defendant to be tried in his/her presence

In general, a trial cannot be held regarding a defendant who fails to appear.[256] However, there are many exceptions to this rule. For example, if the collected evidence is sufficient to render a judgment other than a conviction, the trial may be concluded in the absence of the defendant, even if he/she has not been interrogated concerning the merits of the case. If the defendant escapes, or does not appear at the hearing, following an interrogation about the case, and his/her presence is

CCP apply. It is nevertheless unclear what the maximum years of detention may be under the new CCP as well as the former CCP.

248 Arts. 109 and 110 of the CCP on judicial control.

249 Interviews with attorneys 1 and 4.

250 Judicial control can include the following measures: prohibition from leaving the country; to be present at a certain time and place as determined by the judge; to attend courses and invitations determined by the judge; to refrain from driving certain vehicles; to undergo drugs or alcohol treatment; to provide security for payment of compensation to be later determined for the victim, or other costs, or child support; to refrain from carrying a weapon. If the person under judicial control acts contrary to the judicial control order, he/she can be immediately detained, irrespective of the sentence he/she faces.

251 Interview with attorney 1.

252 As the attorney put it 'Your attorney is not here. We cannot interrogate you. Detention is to continue. Back to prison, off you go!'.

253 The attorney has explained that judges think that, while the suspect is under their control, they should complete all formalities before the suspect disappears; interview with attorney 1.

254 Interview with police officer 2.

255 Interview with attorney 1.

256 Art. 193(1) CCP.

considered no longer necessary by the court, then the hearing may be conducted in his/her absence.

Further, if the alleged crime prescribes a judicial fine or confiscation of assets as the sole punishment, then the hearing can be conducted, even if the defendant fails to appear.[257] In addition, if the court deems the presence of the defendant unnecessary after considering his/her right of defence, it shall continue to conduct the hearing and conclude the case in the absence of the defendant. However, if the defendant has no attorney, the court shall ask the Bar to appoint an attorney for him/her. If the defendant is allowed back into the courtroom, the proceedings conducted in his/her absence shall be explained to him/her. No doubt these provisions have been drafted to expedite proceedings, but their broad application may have serious consequences for defendants.

With respect to organized crime cases,[258] where the number of the defendants are large and, in some hearings actions will be taken that do not concern all of them, the court may decide to conduct sessions in their absence.[259] If the hearing had been conducted in the absence of the defendant, the defendant, if supported by justifiable reasons, may claim the reinstatement of the decisions and interactions of the court within one week after he/she has been notified.[260] However, if the defendant was not present because he/she was excused upon his/her own request, or if he/she had been represented by an attorney, he/she does not have this right.

2.3.3. The right to be presumed innocent

The Constitution states that, until proven guilty, a person shall be deemed innocent. The attorney interviews we have conducted concerning this right have exposed some myths about this presumption: one attorney said that, although he does not think it is completely violated, it is the defendant who must attempt to prove that he/she did not commit the crime.[261] Another attorney stated that general community did not believe in the concept,[262] and only when people themselves experience an injustice, do they understand its importance.[263] One prosecutor pointed out that, in a society where there is a saying 'where there is smoke, there

257 Art. 195 CCP.

258 For example, producing and trading narcotic or stimulative substances committed within the activities of a criminal organization, crimes committed by using coercion and threats within an organization formed in order to obtain unjust economic gain, crimes as defined by the second book, section 4, chapters 4-5-6-7 8 of the Criminal Code (except for arts. 305, 318, 319, 323, 324, 325 and 332).

259 However, if during the sessions conducted in their absence, a circumstance is revealed that affects them, these shall be notified to them in the following session; art. 252(1)(b) CCP.

260 Art. 198 CCP.

261 Interview with attorney 2. He noted that, in his opinion, judges tried to be fair, not always trying to convict. Another attorney expressed the opposite view; judges were very accustomed to crime and criminals and prone to punishment; interview with attorney 1.

262 'We have not internalized the concept. If the police have brought him in, he must have done something. If Forensics says so, it should be provocation. If the attorney says he is innocent, he must be guilty', Attorney interview 1.

263 Interview with attorney 1.

must be fire', there can be no talk of the presumption of innocence.[264] He pointed out that the system was trying the defendant and not the evidence.

While governmental figures and courts refer to suspects and use careful language in public, attorneys indicated that the way the media portrays suspects undermines the right to be presumed innocent. Even if the person is acquitted, in the eyes of the public, he/she often remains guilty.[265] One attorney said that investigations are made which involve use of the media, and people are shown on television with handcuffs. In fact, as the hearings get closer, news about the matter increases, creating possible bias in judges as well.[266] One prosecutor said that telephone conversations are leaked to newspapers, leading the suspect to become 'suspicious' in the eyes of the public, and thus creating pressure on judges.[267]

One attorney has stated that the legal requirement of the deletion of criminal records after the legally prescribed period is often overlooked. When the person needs to provide a criminal record (for example, to apply for a job), prior convictions come up, which cause further prejudice.[268]

These statements indicate concerns about the actual application of the presumption of innocence, particularly when one bears in mind the high number of detainees and the high acquittal rates, as described in 1.4. Indeed, detained people, even if they are subsequently released, carry a social stigma that is already attached to them. One attorney mentioned the famous case of an alleged sex offender, who turned out not to be the offender. He later had difficulty buying bread or going to the mosque.[269] In fact, the crime of 'attempting to influence fair prosecution' was created,[270] in order to prevent this, but the effect of this provision is unclear.

2.3.4. The right to silence

The right to silence is also implicitly recognized in the Constitution. No one can be forced to provide a statement or evidence that would incriminate him/herself or his/her relatives (specified in the law). Further, both the Constitution and the CCP expressly state that the suspect has a right to silence.[271] However, as discussed in section 2.2.2, it is no secret that people have been forced by the police to confess.[272] Perhaps this is why the law now provides that, if the statement was taken without a

264 Interview with prosecutor 2.
265 Interview with attorney 4.
266 Interview with attorney 3.
267 Interview with prosecutor 2.
268 Interview with attorney 4.
269 Interview with attorney 3.
270 Art. 288 CCP.
271 Art. 38 Constitution, art. 147 CCP.
272 As recently, in 2009, the Commission on Human Rights, operating under the Turkish Parliament, has detected partial human rights abuses in the form of degrading treatment amounting to torture; see the Report of the Commission dated 9 June 2009, <http://www.tbmm.gov.tr/komisyon/insanhaklari/belge/Beyoglu_Ilce_Emniyet_Müdürlüğü_inceleme_Raporu.pdf>.

lawyer being present, then that confession or statement cannot be used to convict someone, if it is subsequently retracted in court before a judge.

Interviews with criminal justice professionals have shown conflicting points of view as to the extent of the use of the right. One police officer said that suspects use their right to silence because they think that the police are being unfair to them, and [in protest], want to only talk to the prosecutor.[273] One prosecutor explained that the police sometimes record that the suspect wants to use the right to silence, because they cannot be bothered taking a statement, issuing the form and writing down the interview. In that case, it is easier for them to say that the suspect will not talk to them and refer the matter to the prosecutor.[274] This prosecutor suggested that this is why, on paper, it looked like there were many people who used the right to silence. However, this did not reflect the truth. He also said that Turkish people were inclined to talk by swearing to god that they did not commit the crime.[275]

The same point was also made by an attorney. He said that, unlike in the United States, it was very common for suspects to talk, whether or not in the presence of an attorney. In hearings, suspects also usually wanted to talk, and would not accept advice that they be silent.[276] Nevertheless, he said that it was not correct that the right is not exercised at all, although depending on the place of the investigation, there might be some resistance.

Most of the attorneys, however, pointed out that the police try to talk the suspects out of using the right, by resorting to various tactics. This could be done through 'sticks' – either by threatening to include the family of the suspect in the investigation,[277] or to blame the suspect for other unresolved matters. Sometimes 'carrots' were offered too, such as saying that the suspect would be released if he talked, or that the provision of a statement would constitute a mitigating circumstance.[278] This latter point apparently creates problems in building trust between the client and the attorney, particularly when the client obtains conflicting information from the police and the attorney. However, case law points out that, the fact that a suspect makes use of the right to silence, cannot be used as a ground either for rejection or as a mitigating circumstance at sentencing before the court.[279]

At law, a person cannot be convicted solely based on his confession. The Court of Cassation has held that, for a confession to be accepted as grounds for conviction, other corroborative evidence is required.[280] When asked why the police preferred

273 Interview with police officer 2.
274 Interview with prosecutor 2.
275 Interview with prosecutor 2.
276 Interview with attorney 3.
277 Interview with attorney 4.
278 Interview with attorney 3.
279 4.CD., 1.5.1997, 1070/2947, see: <http://yargitay.gov.tr/Mevzuat/emsal/971070_4c.txt>.
280 According to the Court of Cassation, the confession must be made before a judge, in an overt and definitive way, must be reasonable and possible and not be withdrawn. In addition, there must be corroborative evidence present in the case (CGK, 7.3.1983, 3/104, see: Savaş & Mollamahmutoğlu 1995, p. 767). Further, the confession must be based on the persons' free will. No confession will be accepted for conviction if scientific evidence is inconsistent with it, →

that suspects talk, it was explained that, when corroborated with other evidence, such as phone tapping,[281] or witness statements,[282] the confession can lead to a conviction. Further, it has been indicated that the police sees itself as a party in the matter, and feels that it must justify the apprehension of a suspect.

Reducing the number of unresolved matters also contributed to the pressure to obtain a confession.[283] This was also confirmed by one police officer,[284] although he said there was no such thing as pressure. On the other hand, one prosecutor noted that they received too many unresolved cases from the police.[285] This could be the reason why the police are reluctant for defendants to use this right.

Meanwhile, it should be noted that suspects must answer questions concerning their identity in a truthful fashion, which can perhaps be considered to undermine the right to silence, since revealing an identity might trigger the finding of previous criminal records. Indeed, the police use the ID cards of persons it apprehends to ascertain their identity. If they do not carry one, this is obtained from the internet (census records) and if not, a finger print is used.[286] Without ascertaining the identity, no statement is taken. Further, the law provides that information concerning the economic and social status of the suspect shall be obtained.[287] According to one attorney, whether this information can be considered information relevant to the substance of the crime, or solely as a matter of identity, is of debate, but the police view it more like the latter and do not accept that a suspect would remain silent about this information. However, this may lead to further questions about the crime, further undermining the right to silence.[288]

2.3.5. The right to a reasoned judgment

The right to a reasoned judgment is enshrined in the Constitution, as well as the CCP, and covers all judgments, including minority opinions.[289] Further, the judgment must state not only the reasons, but also any legal remedies against the judgment, as well as the time period within which any documents must to be filed and where.[290] It has been suggested that judges have a tendency to 'cut and paste' the allegations of the prosecutor and defence arguments put forward, and write the judgment accordingly.[291] Others sometimes repeat the grounds mentioned in the

and no other corroborative evidence is found (CGK, 2.12.1991, 1-301/334, YKD July 1992, vol. 18, p. 1108).

281 Interview with attorney 2. It has been suggested that more recently, investigations increasingly begin with intercepted phone conversations.

282 Interview with attorney 1.

283 Interview with attorney 3.

284 Interview with police officer 2.

285 Interview with prosecutor 2.

286 Interview with police officer 2.

287 Art. 147 CCP.

288 Interview with attorney 3.

289 Art. 34 and 230 CCP.

290 Art. 40/2 Constitution, art. 232/6 CCP.

291 Interview with attorney 3.

Code,[292] and then add 'for the above explained reasons' as a standard sentence. Similarly, the Court of Cassation had a tendency to write 'approved, for the judgment is in line with substance and procedure'.[293] However, it has found that a judgment based on insufficient reason, such as cases where the reasons only include expressions like 'based on the discretion of the court', were contrary to the law.[294]

When it comes to decisions concerning detention, judges are said to use vague language deliberately in an attempt to refrain from appearing to provide their opinion on the merits, particularly if it is them who will subsequently hear the case. They therefore use standard formulations, such as 'according to evidence in the file'.[295] One attorney said that, while this was a fair concern, perhaps the system should be changed so that decisions of this kind would be made by a 'judge of liberties'.[296] Another attorney has said that judges repeat the conditions as stated in the law, such as the way the crime was committed, or the situation of the victim, without providing an explanation as to exactly what these actually were.[297] This violates the jurisprudence of the ECtHR, which states that a justification that simply recites the legal provisions as a ground does not constitute a 'reason'.

Yet another attorney said that judges were getting better in writing opinions, but they were still far below the standard of the ECtHR.[298] In fact, one attorney went as far as to say that in Turkey decisions concerning detention, as well as release from detention, contained the same wording.[299]

While the high workload of the first instance and appellate courts might be a contributing factor in the writing of opinions in this manner, one must also remember that, in Turkey, decisions of the courts of first instance are not available online. The Court of Cassation has a journal, but this contains decisions selected by the court itself. It may be that, once all court judgments will be available online, as is to the current proposal, this might force judges to write better opinions and justifications.

2.3.6. The right to appeal

Either party can appeal the judgment, whether it is a conviction or an acquittal. If only the prosecution files an application for appeal, then the principle of *reformatio in peius* is triggered. The defendant should thus not be placed in a worse position as a result of the appeal of the prosecution. A judgment can be appealed only if it is against the law. If the law that should be applied is not applied or is misapplied,

292 Interview with attorney 2.
293 Interview with attorney 3.
294 4.CD., 18.5.1994, 1437/4605, Centel & Zafer 2005, p. 674.
295 Informal discussion of the author with a judge in the Criminal Court of General Jurisdiction.
296 Interview with attorney 3. This judge of liberties would be a seperate cour that only hears matters concerning detention. It does not exist under Turkish law but the attorney points out that it is needed.
297 Interview with attorney 2.
298 Interview with attorney 1.
299 Interview with attorney 3.

this constitutes a violation of the law.[300] The right to appeal must be exercised within seven days either from the verbal announcement of the decision to the criminal defendant, or to his/her lawyer. If neither was present at the final hearing, then the period of appeal starts with the service of the judgment. Usually, decisions are first announced orally and the reasoned judgment is written later (sometimes months later). During this time, lawyers file a pleading to reserve the right to appeal. When the reasoned judgment is served, then a detailed appeal submission is made explaining the law and the reasons for appeal.

It is questionable that all persons involved in the proceedings know about this right. In their case, appeals without proper grounds may not have much merit. While the law provides safeguards, such as automatic appeal (*ex officio*) for decisions that carry a sentence of 15 years or higher, or re-directing to the proper venue where the appellant files the appeal at the wrong place, overall the right to appeal is not easy for those proceeding *pro se* to exercise effectively. Indeed, research shows that people who had private counsel were more likely to appeal a judgment than those who proceed with a criminal legal aid lawyer, or someone acting *pro se*. The ratios were 41.3 %, 51 % and 14 % respectively.[301] This may mean that defendants (particularly first time offenders) who do not have a lawyer are not aware of the fact that they have a right to appeal, or perhaps do not know how to do it. On the other hand, these results also indicate that, even among those who do have a lawyer, the right to appeal is not always exercised.

Appeals are made to the Court of Cassation in Ankara. As a rule, an appellate review is conducted over the file. Only in certain situations, such as a judgment sentencing the defendant a to minimum of ten years, or upon request of the defendant, or *ex officio*, will there be a hearing.[302] The Court of Cassation is the only venue of appeals, and its workload has grown enormously over recent years. In 2007, there were in total 323,738 pending appellate cases of which 182,733 were filed in that year alone.[303] In other words, 141,005 of pending cases were filed before 2007 and still awaited appellate review. Of the 323,378 cases, only 129,420 were reviewed in 2007, leaving almost one third of the total number for the following year.

This pattern of incoming applications exceeding outgoing decisions has remained unchanged over the years and further contributes to delays. Even back in 1997, there were a total of 136,129 cases pending appeal, of which 7,770 were applications from previous years.[304] The numbers grow exponentially year by year and it was recently decided that intermediary courts of appeal should be established, but this law is still to be operational. Yet, one prosecutor said that this would not be a solution,[305] while one attorney questioned the wisdom of only using

300 Art. 288 CCP.
301 Elveris, Jahic & Kalem 2007, p. 218.
302 Art. 299 CCP.
303 See <http://www.adli-sicil.gov.tr/istatistik_2007/yarg%C4%B1tay/yarg%C4%B13-2007.pdf>.
304 See <http://www.adli-sicil.gov.tr/istatistik_2007/yarg%C4%B1tay/yarg%C4%B13-2007.pdf>.
305 Interview with prosecutor 2.

it to address the heavy case load.[306] It has been also said that there are not enough judges in Turkey to staff these courts, while the government continues to require that judges retire at 65.

The imbalance between the number of incoming and outgoing cases extends to the waiting times for appellate review. In 2007, 391 days (over a year) were needed for a file to be reviewed by the Court of Cassation. In 1997, the same figure was 28 days while, as late as 2001, the figure was 77 days, jumping to 139 days in 2002.[307] If one remembers that the first instance process is also long, these delays in appeal also effect the prison population, since one fifth of them consists of people who are awaiting the outcome of their appeal.

Attorneys have said that the heavy workload of the Court of Cassation causes files to not be properly reviewed,[308] or even read at all.[309] In 2007, the reversal rate in criminal cases was 31.9 %, while the affirmation rate was 39.5 %.[310] The remaining decisions involved partial reversal, denial of appeal and the application of the time bar. It should be noted that the ratio of time barred cases has also been increasing, reaching 7.1 % in 2007, suggesting that the time bar is slowly becoming a mechanism to cope with the serious case load in the appellate process. In addition, when a ground for appeal is rejected by the Court of Cassation, the wording used for the purpose is merely 'rejection of the appeal', with no further justification as to the reasons.[311]

On the other hand, two attorneys interviewed expressed concerns about a practice that has developed, following the case law of the Court of Cassation, regarding suspension of the judgment.[312] Suspension of the judgment[313] is a new mechanism where the court refrains from issuing/declaring a final judgment. In one sense, it is an alternative to the execution of a prison sentence of two years or less. In other words, instead of issuing a judgment and not executing the prison sentence, the court does not issue a judgment, but refers the defendant to a period of probation. If the defendant commits another intentional offence within five years following the suspension of the judgment, or if he/she does not comply with the requirements of the probation, the suspension will be withdrawn and the judgment will be announced. Otherwise, the case will be dropped.

The decision to suspend the judgment is not subject to appeal, as there is no judgment to appeal against. The only remedy is to file an objection to a higher court than the one rendering the judgment.[314] The Court of Cassation has held that the decision on suspension cannot be reviewed on the merits, but solely on whether or

306 Interview with attorney 1.

307 See <http://www.adli-sicil.gov.tr/istatistik_2007/yarg%C4%B1tay/yarg%C4%B18-2007.pdf>.

308 One attorney asserted that the length of attention per file could be 2 minutes, while another said this was 6 minutes; interviews with attorney 3 and 4.

309 Interviews with attorney 2 and 3.

310 <http://www.adli-sicil.gov.tr/istatistik_2007/yarg%C4%B1tay/yarg%C4%B15-2007.pdf>.

311 Interview with attorney 2.

312 Interviews with attorney 1 and 4.

313 Art. 231/5 CCP.

314 Art. 231/12 CCP.

not the conditions to declare it in fact exist.[315] Suspension of the judgment deprives the defendant from the right to be acquitted. Further, it puts the person on probation for up to five years. While the person is subject to probation, the judicial record shows a suspended judgment. While most commentators are critical of this, the judges of the Court of Cassation defend their point of view.[316]

2.4. Rights relating to effective defence

2.4.1. The right to investigate the case

In the investigation stage, procedural actions are carried out secretly, unless specified otherwise by the law, without prejudice to the right of defence.[317] However, a decision requiring secrecy can be issued by the prosecutor after taking into consideration two things. First, it should be determined whether a lack of secrecy endangers the goal of the investigation, and secondly, whether this would ensure a fair trial.

As the law uses such broad terms, it can be said that the right to investigate the case may be limited at will. Indeed, one attorney described an incident in which a secrecy decision was rendered, due to the high number of attorneys who went to court to review the file, thus giving the prosecutor no opportunity to work on it.[318] He explained that the first consideration (lack of secrecy endangering the goal of investigation) usually prevails over the latter.[319]

It has been suggested that secrecy decisions are often rendered in organized crime cases.[320] This is done by automatically grouping accomplices into a 'gang', and extending detention times (which can be more than 24 hours). When there is secrecy, not only reviewing but also the taking copies of the documents in the investigation file, without paying court dues, can be problematic. While the suspect has the right to have his attorney present, irrespective of whether it is a search, seizure or provision of a statement, it can sometimes lead to situations such as described by one attorney: 'We did not know what the accusation was. We got into a room. The client looks at me and I am looking at the client'.[321]

The law allows the suspect to request the collection of evidence and be given the opportunity to challenge the existing grounds of suspicion against him/her, and to put forward issues in his/her favour.[322] However, this right appears to be seriously undermined, even when there is no secrecy. A request for the court to

315 CGK 25.9.2007, 183-190.; 8. CD., 25.10.2007, E. 2007/8653, K. 2007/7249, 8. CD., 13.7.2006, E. 2006/5860, K. 2006/6504. Also see Interview with attorney 3. CGK 25.9.2007, 183-190.

316 For a paper of a judge of the Court of Cassation criticizing the view of commentators, see Erel 2009, p. 34-36.

317 Art. 157 CCP.

318 Interview with attorney 3.

319 Interview with attorney 3.

320 Interview with attorney 3.

321 Interview with attorney 2.

322 Art. 147 CCP.

write to various authorities asking for responses, or to explore a premise, or simply have a witness heard, are often met with resistance.[323] Witnesses may be brought together with the suspect and with each other at this stage, only if irreparable harm shall result from not doing so, or for identification purposes.[324]

One would think that the latter option should be easier, as it does not really require the judge or prosecutor to engage in any extra effort. However, judges apparently believe that the investigation should be done on the file and that they therefore should not engage in the collection of evidence at this stage, but rather, at the trial stage. This limits the right, despite the fact that it is a mandatory provision. In other words, the judge has no discretion.[325]

The situation is even more problematic when the investigation involves secret witnesses, as there is no opportunity for the defence either to see what he/she has said or to question him/her. In fact, one may not even know whether the secret witness exists. The practice of anonymous witnesses is said to undermine the equality of arms principle.

2.4.2. The right to adequate time and facilities for the preparation of the defence

Article 6 §3.b of the ECHR provides that everyone charged with a criminal offence has the right to have adequate time and facilities for the preparation of his/her defence. In terms of a specific amount of time, the law states that there must be at least one week between the service of the indictment and the hearing day.[326] Further, if this period is not adhered to, the defendant shall be reminded of his/her right to request a postponement of the hearing.[327] However, as noted in section 2.1.2, it does not seem customary to send a copy of the indictment to the defendant. Further, the law provides that, if the nature of the crime changes, the defendant cannot be convicted of another provision, unless he/she had been informed prior to this change and had been given the opportunity to provide a defence.[328] Where an additional defence is necessary, the defendant shall be given time upon his/her request.

In practice, when it becomes apparent during the trial that the defendant should have been charged with a provision requiring a higher sentence, the defendant is asked whether he/she will submit additional defence.[329] This means that the judge is seriously considering resorting to the higher sentence but he/she does not explain this to the defendant in a clear way. If the defendant has no counsel, he/she will not understand what this amounts to and he/she can easily end up with a higher sentence without having the opportunity to prepare a proper defence. By doing this, the judge makes sure that the record reflects the opportunity

323 Interview with attorney 3.
324 Art. 52(2) CCP.
325 Interview with attorney 3.
326 Art. 176 (4) CCP.
327 Art. 190 CCP.
328 Art. 226 CCP.
329 Interview with attorney 2.

of the defendant to provide an additional defence. This guarantees that the verdict cannot be reversed on that ground. While this may look correct on paper, in substance this is anything but correct.

A lack of time was highlighted as a problem in the investigation phase. For instance, a prosecutor may be working on the file for over six months, leading to dozens of files of evidence. However, when it comes to the available time for the attorney before the statement of the suspect is taken, this might only be half an hour, leaving no time for any defence.[330] During the trial, if the attorney changes, the court may adjourn the hearing to a later date. If the new attorney maintains that he/she has not been given sufficient time to prepare a defence, then the hearing must be adjourned.

2.4.3. The right to equality of arms in examining witnesses

Article 6§3.d of the ECHR states that everyone charged with a criminal offence has the right to examine, or have witnesses against him examined. The CCP does not regulate the rights of the suspect or his/her attorney to take statements from prospective witnesses. The statement of a witness may be taken only by the prosecutor, judge or court. However, it is not clear whether the decision to take the statement of the witness can be made by their own initiative, or upon request of the suspect/defendant and his/her attorney. At the prosecution stage, however, the attorney may ask direct questions to the defendant, the intervening party, the witnesses, experts, and other summoned individuals.[331] The defendant may also direct questions with the help of/via the judge.

In practice, however, lawyers complain that judges do not let them ask questions directly. In the words of one attorney, nine out of 10 judges would not allow it.[332] He continued:

> 'When you ask why, the judge replies that he applies the law that way. When you insist that this is what the law says, the judge responds that this is the way he applies the law. I will ask [the questions]. My practice, the practice of this court is like this. But if there is anything called the law, it should not be this way. (…) But he did not internalize it [the law]. So he resists'.

Another attorney says:[333]

> 'The courtroom is not designed for that! How can I question someone whose face I do not see? When I tell the witness to turn to me, then I am told not to engage in a show. But I have to communicate with the witness! Do not do this, do not do that! They see us like slaves or people they rule over from the bench. There is no infrastructure, no recording, no stenography! In a system where it is the judge who dictates the hearing record, you have no right to ask questions. I always waive this right and imply with

330 Interview with attorney 3.
331 Art. 201 CCP.
332 Interview with attorney 3.
333 Interview with attorney 1.

my petitions to the judge the kind of questions I want asked [to the defendant] and he asks. This is my solution'.

Where the defendant requests the witness or expert to appear before the court, or requests evidence to be collected, he/she must submit a written application to that effect to the judge or the court, indicating the events they are related to, at least five days prior to the day of the hearing.[334] In cases where the application is denied, the defendant may bring these individuals along to the hearing, in which case, they must be heard.[335] However, one attorney indicated that he knows of cases where this request has been denied.[336] The presentation of evidence must be denied if it is unlawfully obtained, if the evidence is irrelevant and if the request is made only to delay the proceedings. One attorney said that, if he has made 50 requests for the collection of evidence, only two have been granted so far.[337]

When special or technical knowledge is required for the solution of a case, the judge may decide to obtain the opinion of an expert on its own initiative, upon request of the prosecutor, or of a party.[338] The expert is entitled to ask questions to the suspect/defendant, in order to collect information to write a report. After this, the parties are given time to either asking for a new expert opinion, or to submit comments concerning the expert report. In practice, however, expert opinions particularly if they concern forensic matters or psychological fitness reports, are sent to the government established Forensic Medicine Institute. This institution has been controversial for years, and recently has been embroiled in scandalous decisions,[339] to the point that the President has tasked the State Auditing Authority to conduct a review of every aspect of its actions over the past three years.[340]

2.4.4. The right to free interpretation of documents and to translation

Article 6 §3.e of the ECHR states that everyone charged with a criminal offence has the right to have the free assistance of an interpreter, if he cannot understand or speak the language used in court. In conformity with the ECHR, the law prescribes that, if the defendant does not speak enough Turkish to express himself, the essential parts of the accusation and defence shall be translated by an interpreter appointed by the court.[341] This also applies in the investigation phase for the

334 Art. 177 CCP.

335 This rule has been criticised, since its absolute implementation may give rise to manipulation/abuse, such as the delay of the proceedings.

336 Interview with attorney 4.

337 Interview with attorney 3.

338 Art. 63 CCP.

339 These include the contamination of sperm from an autopsy of a young woman's body; the release of a Mafia convict on the grounds of sickness, while refusing to do the same for terror convicts who were on the verge of death due to cancer; mixing up blood samples and writing the report with the wrong sample; rendering a medical report claiming that a 14 year old girl who was sexually harassed was not emotionally stressed due to the incident.

340 <http://www.hurriyet.com.tr/gundem/12109809.asp>.

341 Art. 202 CCP.

suspect, victim and witnesses. The interpreter, at this stage, is appointed by the judge or prosecutor. The fact that a suspect has this right in the investigation stage can be inferred from the record of custody, which requires officers to indicate whether an interpreter has been provided.[342] In addition, during consultation with an attorney, the detainee has the right to benefit from the assistance of an interpreter.[343]

At least in Istanbul, there is a roster of translators, but their proficiency has not been determined. Nor are they salaried staff.[344] It is usually up to the parties to find an interpreter and bring him/her along. Their fees are minimal. This can be problematic when the job concerns the whole day, or involves going to the prison.[345] Attorneys have said that court staff get involved in translation when it comes to Kurdish, while for Western languages, greater efforts are made.[346] One prosecutor explained that use was also made of police resources, although, the police seem no more resourceful than the courts. To arrange for translation, they seem to contact consulates, resort to tourists and, worse, to asylum seekers, who are held in detention (to be deported) by the Foreigners Police.[347]

Defence attorneys said that they did not want to use those translators found by the police, since they feel that the relationship between the police and the translators is ongoing.[348]

3. The professional culture of defence lawyers

'The profession was born in Turkey as a bourgeois profession without precedent'.[349] This quote captures perfectly the fact that, unlike in the Western world, there was no such thing as an attorney in Ottoman courts until the 19th century. Disputes were heard in Shariah courts sitting only with a judge (*kadı*) and the parties. There was neither any appeal nor defence.[350] While there were persons who specialized in drafting petitions to authorities (*arzuhalci*) on behalf of the people, they did not appear in court. They can be considered as the core of the profession.[351] Since there were no local attorneys, the first bar organization in Turkey was established in Istanbul in 1870 by foreign nationals.[352]

The Westernisation/Modernisation movements in the 19th century and the growing trade relations with the West, led to the establishment of Western style courts in Turkey. With the establishment of modern Turkey in 1923, Sharia law and

342 Art. 12 of Regulation, No. 25832.
343 Art. 41 of the Regulation on the visit of detainees, *Official Gazette* No. 25848, 17 June 2005.
344 Interview with attorney 2.
345 Interview with attorney 3.
346 Interview with attorney 1.
347 Interview with police officer 2.
348 Interview with attorney 4.
349 Inanici 2000, p. 135.
350 Inanici 2000, p. 135.
351 Yilmaz 1995, p. 196.
352 Battal & Erdem 1985, p. 678. The first Ottoman Bar had to wait for eight more years to become established in Istanbul.

courts were abolished. In the first years of the Republic, criminal law, civil law, commercial law, procedural laws were all translated and taken from Western countries *in toto*. In that sense, the Turkish revolution-modernization project is very much based on the idea of law as a tool of social change. Indeed, in 1924, the Parliament passed the Law on Attorneys, making it a profession in Turkey for the first time.[353] In 1939, the number of attorneys was only 1,631.[354] Today, the profession numbers 63,487.[355]

At the same time, the reception of new laws did not mean that attorneys who were educated in the Sharia law tradition were happy to apply them. This led to confrontations between the government in Ankara and the Istanbul Bar.[356] It was clear to the government that a new breed of lawyers, who would take a strong stance in defending the values of the Republic, was necessary. In 1933, the University of Istanbul was 'reformed' through the retirement of old law school teachers.[357] Further, a new law school was established in Ankara to rival Istanbul, in order to inculcate the ideas of the Republic into the legal profession. There are speeches of the then Minister of Justice, who puts the responsibility for safeguarding the revolution on the shoulders of the prosecutors and judges.[358] However, attorneys remained suspicious.[359] While this led to very strict controls of the profession, such as the purging of bar members, it also led to a close relationship between the state and the profession, since the Bar owed its powers to state regulation. The profession obtained its independence in 1969. However, arguments about the control and monitoring exercised by the Ministry over the Bar continue even today.

Given this historical background, attorneys feel that judges and prosecutors do not see them as equals.[360] In fact, in terms of courtroom architecture, the prosecutor and judge sit next to each other at the bench, while the defence lawyer sits lower and away from his/her client, preventing consultation during hearings. Similarly, when the court takes a break for discussion of whether to release a detained criminal defendant, the prosecutor does not retire like everybody else, but remains in the courtroom along with the judges.[361] Prosecutors' close social relationship with

353 Yilmaz 1995, p. 197. In 1938, a new law was adopted. Finally, the current law was enacted in 1969.

354 Ozkent 1948, p. 647.

355 <http://www.barobirlik.org.tr/tbb/avukat_sayilari/2008.aspx>. About a third of the profession is female.

356 Attorneys of the Istanbul Bar resisted the new government, by electing eight times as its president Fikri Lutfi, a man known for his preference for the sultan, Ozman 2000, p. 169.

357 Ozman 2000, p. 171.

358 Akzambak 2005, p. 171-172.

359 Ozman 2000, p. 173. Commissions were established, which purged 374 out of 805 attorneys of the Istanbul Bar. Inanici reports that the number was 473 out of 960, Inanici 2000, p. 138.

360 69.4 % of lawyers agree with the statement that the prosecutor is treated as being superior than lawyers; Cirhinlioglu 1997, p. 81.

361 This issue has been pointed out in the EU Commission's reports; see Björnberg & Cranston 2005, p. 20-22. To what extent, and whether this practice has changed, should be separately investigated.

judges starts when they are candidate judges and prosecutors during their internship, and continues throughout their career.

Although their functions are separate, prosecutors and judges are regulated by the same law; they reside in the same buildings (provided by the government); they commute to work together (in shuttles provided by the government); they holiday in the same place; they marry each other and work in the same building next to each other. Not surprisingly, this leads attorneys to feel sidelined.

In fact, the attorneys who we interviewed complained about not being given an opportunity to talk in court, or being given time, but asked to 'do it in two minutes'.[362] Sometimes, the words are put into their mouths, implying an attitude of 'I know what you will be saying'.[363] At the same time, an attorney has said that judges are under time pressure due to their heavy work load,[364] as well as the burden of dictating the hearing record.[365] Lawyers themselves were also not doing their part.[366] One attorney indicated that attorneys should not just wait for the indictment to be prepared by the prosecutor, but should work with the prosecutor during the investigation so as to understand the point of view of the prosecutor, as well as to ensure that the prosecutor views facts from the view point of the defence.[367]

One attorney said that some attorneys were providing a defence only at the last hearing.[368] This suggests a tendency of attorneys to have a collaborative or passive role vis-à-vis the prosecutor. One attorney specifically referred to judges as acting like a *kadi* setting his/her own rules in disregard of the law, or seeing him/herself as a *kadi*.[369]

On the other hand, research conducted in the Istanbul criminal courts found that a majority of judges made positive comments about the role of the defence lawyer in the criminal justice process, by allowing easier communication between the judge and the defendant, and helping the process to function properly.[370] For judges, they were seen as a mediator or a 'double check', to make sure that he/she does not miss anything. Some judges mentioned that lawyers were an important guarantee that the legal rights of the defendant will not be violated.

Prosecutors, on the other hand, were more suspicious, and only half of them made positive comments.[371] In their opinion, the impact of the lawyer depended on the lawyer him/herself and his/her qualities.

362 Interview with attorney 3.
363 Interview with attorney 3.
364 Interview with attorney 2.
365 It should also be noted that, in Turkey, there is no recording of the hearings. In order to find out what happens in the hearings, one must read the hearing records. However, these records do not always reflect what transpires in court in reality, as they are dictated by the judge to a court reporter. The judge, of course, filters whatever transpires in the hearing.
366 Interviews with attorney 1 and 2.
367 Interview with attorney 1.
368 Interview with attorney 4.
369 Interview with attorney 1.
370 Elveris, Jahic & Kalem 2007, p. 234.
371 Elveris, Jahic & Kalem 2007, p. 235.

In the same research, lawyers also saw their contribution in positive terms, again pointing out similar views as judges. Interestingly, there is no separate criminal defence Bar in Turkey, but in the professional discourse, one often sees references to the profession of 'defence'.[372] This groups all attorneys into the category of 'defence', as if attorneys do nothing else apart from criminal work. In fact, some lawyers never undertake any such activities.

The finding that only one in five persons makes use of the services of an attorney was mentioned in 1.5. The first common reason for not using attorneys was that respondents thought they could represent themselves.[373] This suggests that many people may not understand the function and benefits of having an attorney. It was also explained (in 2.3.4) that many suspects do not use the right to silence. When asked why this would be the case, one attorney[374] explained: 'The culture of going to a lawyer is not established. The fact that it is new, plays a role in this. People think it will not make them credible. Since he hired an attorney he must have some things that he cannot answer for. Maybe it is better if I do my own defence'.

The accessibility study concerning criminal courts asked judges for their assessment as to why defendants did not request criminal legal aid lawyers. Most of them replied that this was because they did not believe they needed a lawyer.[375] In marked contrast to judges (and prosecutors), the majority of lawyers stated that *ignorance* and *lack of rights consciousness* among defendants were the main reasons for defendants not requesting an attorney. Some lawyers also responded in terms of the 'failure of law enforcement agencies to remind the defendants of their rights' and/or the 'absence of campaigns, activities, materials promoting this service'.

While it is clear that the culture of retaining an attorney is not well developed in Turkey, many factors may be contributing to this. Attorney interviews imply a resistant culture among judges towards attorneys rendering an active defence. One attorney said that even some colleagues state that they do not take criminal cases, because there is not much for an attorney to do in a criminal case.[376] The existing culture of the defence bar, and the regulations prohibiting the promotion of legal services, may be also contributing to this.

Interviewed attorneys described defence lawyers as passive and not brave.[377] One attorney said that attorneys were not doing their homework well.[378] Another said that attorneys considered defence work as something to be done only in court,

372 Inanici 2000, p. 141.
373 Elveris, Jahic & Kalem 2008, p. 21.
374 Interview with attorney 3.
375 Elveris, Jahic & Kalem 2007, p. 225. Judges explained that defendants trust the judge or the court to defend them, are ignorant/indifferent, do not want to deal with the service, distrust lawyers, do not believe that the lawyer can make a difference in their cases, or believe in their own capacity to defend themselves.
376 Interview with attorney 2. In his view: 'It is in fact quite the opposite. If an attorney is going to help anyone, this is in criminal cases'.
377 Interview with attorney 1.
378 Interview with attorney 2.

and in an oral and written fashion.[379] Another lawyer said that, in general, attorneys have been passive.[380]

Indeed, research at the Istanbul criminal courts found a correlation between conviction rates and the type of representation. In both the General and Aggravated Felony courts, defendants who were not represented by a lawyer at all had the lowest conviction rates. Defendants represented by CCP lawyers in Aggravated Felony courts had the highest conviction rates, and in General courts, rates were similar to those represented by private lawyers.[381] While the results do not explain the reasons, it is nevertheless disappointing since, without seeing the benefits, people may be inclined never to retain a lawyer.

Worse, attorneys underline the independence of the profession much more than the public service side of it. This is also obvious in the discourse surrounding legal aid, where the issue is discussed from the point of unpaid legal fees rather than the quality of the service provided.

At the same time, the criminal legal aid study contained some data about the way attorneys perceive themselves when they provide defence: 'Defence does not mean changing the truth; it means submitting evidence that also raises things that are beneficial for the criminal defendant. This does not mean changing the direction of the judiciary. There is a misconception that the lawyers present guilty people as innocent during the legal process. But no! We are not judges, we are lawyers. We undertake the defence of a particular side and make sure that the evidence to their advantage is presented'.[382] One prosecutor said that due to the inquisitorial system, the prosecution does not only collects evidence to convict the defendant, but also exculpatory evidence that may lead to his/her release. It therefore seems that the prosecutor acts like a defence counsel. Although the police do not directly work under the prosecutor, the police expect the prosecutor to be chief of the police. This all may lead to confusion and contradictory functions for actors. In order for everybody to do their job, the system had to decide which model to adopt.[383]

Not only do they seem to have ethical dilemmas about their role, but attorneys also feel conflicted when doing their job. It has been indicated that legal representation during the police stage is complex, involving trying to understand the facts and the legal basis of the case, preventing the illegalities of the police and

379 Interview with attorney 3.

380 Interview with attorney 4.

381 Elveris, Jahic & Kalem 2007, p. 215.

382 Elveris, Jahic & Kalem 2007, p. 236. To further illustrate the confusion surrounding this matter, an incident in the training for criminal legal aid lawyers undertaken by Idil Elveris can be described. In the training, role plays were assigned to participating lawyers. One person was asked to play the role of a defendant who was detained for stealing a car. The lawyer was visiting him in jail to discuss his release. The defendant was in a dire financial situation and desperate to get out of jail to take care of his family. He described the events leading to his arrest at length, but his attorney interrupted him to say: 'Do as I tell you. It didn't happen at night. The dawn was breaking when all this happened. You will get a lesser sentence when you say so'.

383 Interview with prosecutor 2.

reaching the truth by fair and just ways.[384] Attorneys also feel torn between fighting illegalities and not harming their clients. While a lawyer has to act in the interest of his/her client, 74.8 % of lawyers do not think that their colleagues act according to ethical standards.[385]

In view of all this, it is difficult to make conclusions. One thing that appears clear is that criminal justice actors, as well as society, have question marks about the role of a defence lawyer. While attitudes may be changing, particularly in places where there is a lower case load and younger judges,[386] this is not happening very quickly.

4. Political commitment to effective defence

While this report indicates that, without a doubt, there have been many developments concerning defence rights in the last five years, it is difficult to interpret this as a political commitment to effective defence. While they were relatively small in number and in no way representative of the whole country, let alone of Istanbul, our interviews still show the different attitudes and values among the criminal justice actors, making the job of an attorney very difficult. The police, judges and prosecutors should be trained to make the use of the defendants' rights more effective.

An unacceptable number of people are still not represented in court. Even if they are represented, the service is of low quality and the government does not even seem to care, as is evidenced by its indifference to the boycott by the Istanbul Bar. When mandatory legal counselling rules proved to be expensive, the government preferred to limit the right, rather than considering a new model. The difference in resources allocated for the police (3 billion Euro) and legal aid (5 million Euro) make the government's priorities very clear. The media's 'discovery' of crime is contributing to public fears about crime, and encourage tougher sentencing polices, which then directly affects the prison population.

All of this makes it very difficult to conclude that the government cares about effective defence. Although laws change, and many reforms have been made in the past five years, the critical problems of the criminal justice system remain, and attitudes concerning limiting of the right to defence prevail. It is, of course, difficult to know the precise extent of these attitudes, and further research is required. However, it cannot be said that the government demonstrates sufficient political will and commitment to provide effective defence.

5. Conclusions

The key problems identified in this report may be summarised as follows:

384 Interview with attorney 1.
385 Cirhinlioglu 1997, p. 94.
386 Interview with attorney 2.

- a slow criminal justice process from first instance[387] to appeal (one fifth of the prison population consists of people awaiting the outcome of their appeal), which therefore undermines the process of justice.
- prison overcrowding, due to longer times served under new criminal laws and the disproportionate application of detention, as well as inadequate provision for pre-trial release/bail;
- lack of lawyer involvement throughout the criminal justice system, which appears to result from a number of factors, including the failure to inform suspects and defendants in an effective way of their right to a lawyer, and a general lack of public knowledge concerning people's rights;
- lack of institutional framework for *effective* management, monitoring and policymaking for legal aid, as well as inadequate legal aid provisions and mechanisms for ensuring the availability of lawyers;
- low rates of pay for legal aid lawyers;
- a culture of passivity amongst defence lawyers particularly at the investigation stage, as well as a general negative attitude towards legal aid cases;
- a professional culture amongst judges and prosecutors that diminishes the potential impact of defence lawyers;
- lack of implementation of ECtHR judgments against Turkey, which have set higher standards in defence rights.

387 The CEPEJ report of 2008 indicates 311 days for robbery cases, while 333 days for intentional homicide. CEPEJ, Scheme for Evaluating Judicial Systems 2007, Country: Turkey, p. 28.

6. BIBLIOGRAPHY

Books

Akzambak 2005
Akzambak, M., *Atatürk'ün Devrimci Adalet Bakanı Mahmut Esat Bozkurt*, Itanbul: Zafer, 2005.

Ansay 1996
Ansay, T., *Introduction to Turkish Law*, The Hague-London-Boston: Kluwer, 1996.

Björnberg & Cranston 2005
Björnberg, K. & Cranston, R., *The Functioning of the Judicial System in the Republic of Turkey*, Report of an Advisory Visit, 2005.

Centel & Zafer 2005
Centel, N. & Zafer, H., *Ceza Muhakemesi Hukuku*, Istanbul:Beta, 2005.

Centel, Zafer & Cakmut 2008
Centel, N., Zafer, H. & Cakmut, O., *Türk Ceza Hukukuna Giriş*, Istanbul: Beta, 2008.

Cirhinlioglu 1997
Cirhinlioglu, Z., *Türkiye'de Hukuk Mesleği*, Ankara: Şafak, 1997.

Elveris & Jahic 2006
Elveris, I. & Jahic, G., *Pilot study of Legal Problems and Legal Needs of the Urban Poor in Istanbul*, 2006.

Elveris, Jahic & Kalem 2007
Elveris, I., Jahic, G. & Kalem, S., *Alone in the Courtroom: Accessibility and Impact of Criminal Legal Aid*, Istanbul: Istanbul Bilgi University Publications, 2007.

Jahic 2008
Jahic, G., *European Sourcebook of Crime and Criminal Justice Statistics 2008, Questionnaire covering the years of 2003-2007*, 2008.

Kalem, Jahic & Elveris 2008
Kalem, S., Jahic, G. & Elveris, I., *Justice Barometer: Public Opinion On Courts in Turkey*, Istanbul: Istanbul Bilgi University Publications, 2008.

Keyman & Onis 2007
Keyman, F. & Onis, Z., *Turkish politics in a changing world, Global Dynamics and Domestic Formations*, Istanbul: Istanbul Bilgi University Press, 2007.

Kunter, Yenisey & Nuhoğlu 2008
Kunter, N., Yenisey, F. & Nuhoğlu, A., *Muhakeme Hukuku Dalı Olarak Ceza Muhakemesi Hukuku*, Istanbul:Beta, 2008.

Öztürk, Tezcan, Erdem, Sırma, Saygılar & Alan 2009
Öztürk, B., Tezcan, D., Erdem, M.R., Sırma, Ö., Saygılar, Y.F. & Alan, E., *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku,* Ankara:Seçkin, 2009.

Savaş & Mollamahmutoğlu 1995
Savaş, V. & Mollamahmutoğlu, S., *Ceza Muhakemeleri Usulü Kanununun Yorumu*, Vol. 1, Ankara: Seçkin, 1995.

Sen 1998
Şen, E., *Türk Ceza Yargılamasında Hukuka Aykırı Deliller Sorunu*, Istanbul: Beta, 1998.

Ünver & Hakeri 2009
Ünver, Y. & Hakeri, H., *Ceza Muhakemesi Hukuku, Cilt 1*, Ankara: Seçkin, 2009.

Yenisey 2009a
Yenisey, F., *Turkish Criminal Procedure Code - Ceza Muhakemesi Kanunu*, Istanbul: Beta, 2009.

Yildiz 2002
Yıldız, A., *Ceza Muhakemesinde İspat ve Delillerin Değerlendirilmesi*, diss. Istanbul, 2002.

Articles in Journals

Battal & Erdem 1985
Battal, S. & Erdem, N., 'Avukatlık Mesleğinin Türkiye'deki Tarihçesi', *Ankara Barosu Dergisi*, 5-6 1985, p. 675-685.

Inanici 2000
Inanici, H., 'Turkiye'de Avukatlık Ideolojisi', *Toplum ve Bilim,* 87 Winter 2000-2001, p.135-163.

Ozkent 1948
Ozkent, H., 'Dünün ve Bugünün Türk Avukatlığına ve Barolarına Kısa Bir Bakış', *İstanbul Barosu Dergisi*, 22, 10, 1948, p. 643-651.

Ozman 2000
Ozman, A., 'Siyaset, hukuk, ideoloji ekseninde hukukçu kimliğinin yeniden tanımlanması: Erken Cumhuriyet dönemi üzerine bir inceleme', *Toplum ve Bilim*, 87 Winter 2000-2001, p. 164-177.

Yilmaz 1995
Yilmaz, E., Bir meslek olarak dünden yarına avukatlık, AHFD, s. 1-4, 1995.

Chapters in Compilations

Elveris 2009
Elveris, I., 'Adalet Hizmeti? Istanbul Adliyelerinde Gozlemler', in: S. Kalem (ed.), *Adalet Gözet: Yargı Sistemi Üzerine Bir İnceleme*, 2009, p. 71-104.

Erel 2009
Erel, K., 'Yargıtay Kararları Işığında Hükmün Açıklanmasının Geri Bırakılması, Türk Ceza Hukuku Derneği Yayını', in: *Ceza Muhakemesi Kanununun* 3 Yılı, TCHD yay., Istanbul, 2009, p. 329-348.

Erman 1998
Erman, S., 'Sentez Raporu', İstanbul Üniversitesi Hukuk Fakültesi Eğitim Öğretim ve Yardımlaşma Vakfı Yayını, in: *Prof. Dr. Nurullah Kunter'e Armağan*, Istanbul: Beta, 1998, p. 75-83.

Gülçür & İlkkaracan 2002
Gülçür**,** L.**,** İlkkaracan**,** P.**,** 'The Natasha Experience': Migrant Sex Workers from the Former Soviet Union and Eastern Europe in Turkey: Women's Studies International Forum**,** vol. 25 (411-21)**,** Copyright Elsevier 2002**,** <http://www.scribd.com/doc/7343044/NATASHA-Experience**>.**

Inceoğlu & Aytekin 2008
İnceoğlu Aytekin A, Türk Hukukunda Adli Amaçlı İletişimin Denetlenmesi, in *Prof. Dr. Uğur Alacakaptan'a Armağan*, Vol. 1, Istanbul, 2008, p. 103-126.

Inceoglu, Aytekin & Karan 2008
Inceoglu Aytekin, A. & Karan, U., 'Türkiye'de Ceza Davalarında Uzlaşma Uygulamaları: hukuki çerçevenin değerlendirilmesi', in, Jahic, G. and Yesiladalı, B. (eds), *Onarıcı Adalet: Mağdur-Fail Arabuluculuğu ve Uzlaşma Uygulamaları: Türkiye ve Avrupa Bakışı*, Istanbul Bilgi Universitesi Yayınları, 2008, p. 45-81.

Kalem 2008
Kalem, S., 'Ceza Davalarında Uzlaşma: Uygulayıcı Görüşü', in: Jahic, G. and Yesiladalı, B. (eds), *Onarıcı Adalet: Mağdur-Fail Arabuluculuğu ve Uzlaşma Uygulamaları: Türkiye ve Avrupa Bakışı*, Istanbul: Istanbul Bilgi Universitesi Yayınları, 2008, p. 88-107.

Mahmutoğlu 2009
Mahmutoğlu, F., 'Kamu Davasının Açılmasının Ertelenmesi ve Hükmün Açıklanmasının Geri Bırakılması', Türk Ceza Hukuku Derneği Yayını *in: Ceza Muhakemesi Kanununun 3 Yılı,.*, Istanbul, 2009, p. 349-368.

Nuhoğlu 2009
Nuhoğlu, A., 'Koruma Tedbiri Olarak Tutuklama', Türk Ceza Hukuku Derneği Yayını, in: *Ceza Muhakemesi Kanununun* 3 Yılı, Türk Ceza Hukuku Derneği Yayını, Istanbul 2009, p. 175-191.

Ünver 1998
Ünver, Y., 'Ceza Hukukunda Objektif Sorumluluk', İÜHF Ceza ve Ceza Usul Hukuku Anabilim Dalı, in: *Ceza Hukuku Günleri – 70. Yılında Türk Ceza Kanunu Genel Hükümler,* Istanbul: Beta, 1998, p. 109-195.

Yenisey 2009 (b)
Yenisey, F., 'Kamu Davasının Açılması ve İddianamenin İadesi', Türk Ceza Hukuku Derneği Yayını *in: Ceza Muhakemesi Kanununun 3 Yılı*, , Istanbul, 2009, p. 232-251.

Other Sources

Almanac Turkey 2006-2008: Security Sector and Democratic Oversight released by Turkish Economic and Social Studies Foundation (TESEV), see <http://www.tesev.org.tr/UD_OBJS/PDF/DEMP/almanak2008_02_07_09.WEB%20icin. pdf>.

Arslan F., *Türkiye'de ve Avrupa'da Kolluk Adalet İlişkisi* <http://www.caginpolisi.com.tr/48/10-11-12-13-14-15.htm>.

Commission for the Efficiency of Justice (CEPEJ), Scheme for Evaluating Judicial Systems 2007, Country: Turkey, European Judicial Systems, Edition 2008: Efficiency and Quality of Justice, CEPEJ.

Emniyet Genel Müdürlüğü 2007 Faaliyet Raporu, (Activity report for 2007, General Directorate of Security), see: <http://www.egm.gov.tr/Duyurular2008/2007_EGM_Faaliyet_Raporu.zip>.

Emniyet Genel Müdürlüğü 2008 Faaliyet Raporu, (Activity report for 2008, General Directorate of Security), see: <http://www.egm.gov.tr/Duyurular2009/Faaliyet_Raporu.pdf>.

İstanbul Ticaret Odası, İstanbul'da Şiddet ve Şiddetin Sosyolojik Arka Planı Araştırma Raporu, Yayın No: 2008-11, Istanbul 2008

Jahic & Akdas 2007
Jahic, G. & Akdaş, A., *Uluslararası suç mağdurları araştırması: İstanbul hane halkında suç mağduriyeti,* Ankara: TÜBİTAK project no: 104K100. Final report available through ULAKBİM, at <http://www.ulakbim.gov.tr/>.

<http://www.cte.adalet.gov.tr/>.

<http://www.tuik.gov.tr/PreHaberBultenleri.do?id=3894>.

Ministry of Justice, Judicial Reform Strategy, Ankara 2009, see: <http://www.sgb.adalet.gov.tr/yrs.html>.

Annex

TITLE	EXPERIENCE	PLACE AND DATE OF INTERVIEW
A1 Attorney (Female)	20 years experience	Istanbul, 25/8/2009
A2 Attorney (Male)	8 years experience	Istanbul, 26/8/2009
A3 Attorney (Male)	4 years experience	Istanbul, 28/8/2009
A4 Attorney (Male)	4 years experience	Istanbul, 28/8/2009
Pr1 Prosecutor (Male)	16 years experience	Istanbul, 2/9/2009
Pr2 Prosecutor (Male)	15 years experience	Istanbul, 7/9/2009
Po1 Police officer (Male)	12 years experience	Istanbul, 23/8/2009 (Over Skype)
Po2 Police officer (Male)	2 years experience	Istanbul, 5/9/2009

The Legal Ethics of Assisting Pro Se Litigants

Monday, July 14, 2014 **1:15 p.m. – 2:00 p.m.** **James River Salon C**

Speaker: Laurie D. Zelon, Associate Justice
Second District, Division Seven of the California Courts of Appeal

Laurie D. Zelon, Associate Justice

Justice Zelon has served as an associate justice of the California Court of Appeal since 2003.

She was born in Durham, North Carolina. She received her B.A. degree in 1974 from Cornell University and her J.D. degree in 1977 from Harvard Law School. During the twenty-three years that preceded her appointment to the Los Angeles Superior Court in 2000, Justice Zelon had an active litigation practice, involving scientific and technical issues, fiduciary obligations, and other complex commercial disputes. Justice Zelon is a past President of the Los Angeles County Bar Association. She is a past member of its Board of Trustees, and past Chair of its Federal Courts Committee, its Judiciary Committee, its Access to Justice Committee, and its subsection on Real Estate Litigation. She has been active since her admission to practice in the American Bar Association and has served as Chair of the Standing Committee on Lawyers' Public Service Responsibility, as a member of the Consortium on Law and the Public, and as Chair of its national Law Firm Pro Bono Project. From 1994 to 1997, she was Chair of the Standing Committee on Legal Aid and Indigent Defendants.

In California, Justice Zelon has been a long-time member and served as Chair of the California Commission on Access to Justice. She is an active member of several statewide judicial committees addressing administration of justice issues. She has written articles and spoken at educational programs for judges and lawyers concerning pro bono, public service, legal ethics and legal education.
She was the 1993 Recipient of the William Reece Smith, Jr. Special Services to Pro Bono Award, the 1999 Recipient of the Charles Dorsey Award from the National Legal Aid & Defenders Association, and the 2000 recipient of the Loren Miller Legal Services Award from the State Bar of California. She was the first recipient, in February 2000, of the Laurie D. Zelon Pro Bono Award, given by the Pro Bono Institute of Washington, D.C.

Justice Zelon is married, and the mother of two sons. In her spare time, she enjoys outdoor activities, reading, and music.

Access to Justice for the Self Represented Litigant

Module A
Judges, Ethics and Self-Represented Litigants – The Law Today

Center on Court Access to Justice for All

1

Acknowledgements

These modules reflect updates and additions to the Self-Represented Litigation Network Judicial Curricula on Access to justice, developed by the National Center for State Courts, the American Judicature Society and the National Judicial College, with funding from the State Justice Institute.

2

The Courtroom Goal: Ensuring Access to Justice in a Neutral Court

3

How Many People Represent Themselves

- New Hampshire (2005): Domestic relations:70%; domestic violence: 97%
- California (2004): family law: 80%;unlawful detainer (defendants): 90%

4

On Appeal

- Montana Supreme Court (2005): 31% of civil and criminal appeals
- New Mexico Court of Appeals (2005): 12%

5

Issues When Working with SRLs

- Lack of knowledge of law and procedure
- Lack of confidence in presenting facts and law
- Incomplete presentation of facts and complex foundational requirements

6

Benefits of Working with SRLs

- SRLs appreciate "telling my story"
- Easier getting to resolution when speaking directly to the party without the filter of an attorney
- Making system fairer for SRL makes it fairer for all

Issues At The Clerk's Office

- Confusing and crowded
- Training *not* to answer questions
- No help, no explanation, no referral
- What did the court order; what's next

Legal Information v. Legal Advice

- You can explain and answer questions about how the court works and give general information about court rules, procedures and practices.

9

What you Can't Do:

- **Tell a litigant whether a case should be brought**
- **Give an opinion about an outcome**

10

What You Can Do

- Provide information from a litigant's case file
- Provide court forms and instructions and scheduling data
- Refer to self-help; other in-court services; or appropriate external services

11

Judicial Challenge

- How to make sure that facts and law are before the decision-maker without being or being perceived as non-neutral?

12

Neutral "Engagement" Permits Making Decision on the Merits

Key goal: deciding cases on the merits:

- Avoiding missing evidence, lack of foundation, etc.
- Reducing the risk of unjust result

Engagement is neutral and perceived as neutral if the judge is even-handed and explains what he or she is doing

13

2012 Resolution of Conference of Chief Justices and COSCA Recommending New Rule 2.2 (B)

A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard;

14

Resolution Also Advocates State-Specific Comments

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators suggest states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants.

15

Examples of State Comments Endorsing Particular Actions

- ***Construing pleadings to facilitate consideration of the issues raised*** **(CO)**
- ***Providing brief information about the proceeding and evidentiary and foundational requirements*** **(LA, OH, DC, CO, IA)**
- ***Attempting to make legal concepts understandable*** **(CO)**
- ***Asking neutral questions to elicit or clarify information*** **(LA, DC)**

16

Additional Endorsed Actions

- *Modifying the traditional order of taking evidence* (OH, DC, CO, IA)
- *Refraining from using legal jargon* (LA, OH, DC, IA)
- *Explaining the basis for a ruling* (LA. OH, DC, CO, IA)
- *Making referrals to any resources available to assist the litigant in the preparation of the case* (LA, OH, DC, CO, IA)

17

US Supreme Court Generally Endorsed This Approach in *Turner v. Rogers* (2011)

- Civil contempt incarceration order reversed for judge's failure to follow procedures which would have provided sufficient fairness and accuracy.
- Specific example was failure to question defendant about ***current*** ability to make payments

18

Many States Have Already Adopted 2007 ABA Model Code Commentary Which Also Underlines Judicial Discretion

[4] *It is not a violation of this Rule [2.2], however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard*.

19

THE CASE LAW ENVIRONMENT

- Case law affirms that SRLs should be held to the same law and rules as attorneys
- This principle does not prevent the judge from using discretion to ensure that both sides are fully heard within those laws and procedures

20

The Impact on Public Trust and Confidence

- Direct correlation between perceptions of fairness and public confidence in the courts
- Building confidence & positive perceptions in court supports judicial independence
- Positive impact on legislature, budgets, etc.

21

Concluding Thoughts: Implications Beyond the Self-Represented

- SRL techniques and flexibility often equally helpful in other cases
- Efficiency improvements benefit all
- Attitude is transformative and liberating: makes judging more fun, rewarding, and interesting

22

Pro Se Assistance Panel

Monday, July 14, 2014 **2:00 p.m. – 3:15 p.m.** **James River Salon C**

Speakers: Lisa Jaskol, Directing Attorney
Public Counsel's Appellate Law Program
Glenn Rawdon, Program Counsel for Technology
Legal Service Corporation
Michael S. Truesdale, Attorney
Law Office of Michael S. Truesdale, PLLC

Lisa Jaskol, Directing Attorney

After graduating from Yale Law School in 1988, Lisa clerked for the Hon. Harry Pregerson of the United States Court of Appeals for the Ninth Circuit. She then worked as a litigation associate at Irell & Manella LLP from 1989 to 1991. In 1991, Lisa joined the appellate law firm Horvitz & Levy LLP, where she became a partner.

On a leave of absence from Horvitz & Levy from 2001 to 2004, Lisa served as Directing Attorney of Public Counsel's Homelessness Prevention Law Project. Lisa rejoined Public Counsel in 2007 as the founding Director of its Appellate Law Program, overseeing and staffing a new appellate self-help clinic -- the first in the nation -- located at the California Court of Appeal in downtown Los Angeles, and working with pro bono counsel to provide representation on appeal to selected litigants. Based in part on Lisa's work, in 2009 the Judicial Council of California awarded a prestigious Kleps Award for innovation in the courts to the Court of Appeal's Second Appellate District for the appellate self-help clinic.

In 2010, the Los Angeles County Bar Association presented the Pamela E. Dunn Appellate Justice Award to Lisa. Lisa is a member of the California Academy of Appellate Lawyers and she is a State Bar certified appellate specialist. In 2012, the Chief Justice of California appointed Lisa to the Judicial Council's Appellate Advisory Committee. Lisa is the immediate past Chair of the Appellate Courts Section of the Los Angeles County Bar Association and the Co-Chair of the Amicus Briefs Committee of Women Lawyers Association of Los Angeles.

Glenn Rawdon, Program Counsel for Technology

Glenn Rawdon is Program Counsel for Technology with the Legal Services Corporation. He is responsible for helping legal services programs with their technology efforts and with the administration of the Technology Initiative Grants (TIG) program. Since the program started in 2000, TIG has made over 525 grants totaling over $40 million, many of them in partnerships with SJI and the courts.

Glenn is a member of the Executive Committee of the Self-Represented Litigants Network and a frequent speaker on self-help strategies. Before coming to LSC in 1999, he was a managing attorney at Legal Services of Eastern Oklahoma for five years and before that, he was in private practice. He has served as co-chair of the Law Office Management section of the Oklahoma Bar Association and was a member of the Legal Technical Advisory Counsel of the ABA.

Michael S. Truesdale, Attorney

Mike is a solo practitioner focusing primarily on appeals and on error preservation in complex civil litigation. He is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. After leading the appellate practice of a litigation boutique with which he had practiced

for ten years, Mike started his solo practice in 2010 to assist other attorneys and clients navigate the time-consuming and technical aspects of the appellate process.

Throughout his career Mike has worked on numerous cases before the Supreme Court of Texas and has handled appeals before eleven of the fourteen Texas intermediate courts of appeals. On a national level, Mike has led state court appeals in other jurisdictions, including California and Michigan, and federal appeals in the Fifth and Seventh Circuits, and has appeared as counsel in cases before the United States Supreme Court.

Mike graduated *cum laude* and in Honors Studies from Texas Tech University, where he later earned his Masters Degree and served on the faculty as the debate coach. Mike graduated from Texas Tech University School of Law in 1994, *magna cum laude*, where he participated in numerous appellate moot court teams and served as Managing Editor of the Texas Tech Law Review.

Mike is admitted to practice in Texas state courts and before all U.S. District Courts in Texas, the U.S. Courts of Appeals for the Fifth, Seventh, Ninth and Eleventh Circuits, and the U.S. Supreme Court. He is currently the secretary of the State Bar of Texas Civil Appellate Section. As a supporter of pro bono services, Mike also serves as the Liaison to the Supreme Court Pro Bono Pilot Program, and has worked with appellate courts across the state to expand access to legal services for pro se litigants.

Mike is a member of the College of the State Bar of Texas, and is AV Preeminent Rated by Martindale Hubble. He has been named a Texas Super Lawyer in appellate practice in 2009 - 2013 and a Texas Rising Star Super Lawyer in 2004-2007 in the Thompson Reuter's *Law and Politics* publications.

Mike served as a director for Reading is Fundamental, Austin, as a scout leader and soccer coach, has mentored a student over a seven-year period through Austin Partners in Education, and currently volunteers with area high school debaters. Mike is a cyclist who commutes to work by bicycle when he can, and enthusiastically (but not speedily) enjoys long-distance rides like the annual Hotter’n Hell 100 or RAGBRAI.

Instructions and Templates for Preparing a Petition for Review in the Supreme Court of Texas:

Prepared by the State Bar of Texas
Appellate Section Pro Bono Committee
2012

Petition for Review Template and Instructions

I. Introduction

This document is designed to help you prepare a petition for review to be filed in the Supreme Court of Texas. It shows what must be included in your petition and gives examples of what a completed petition looks like. The Supreme Court of Texas considers only *civil* cases, including cases involving juveniles. This guide does not explain how to file a petition in a criminal case. If you are complaining about a *criminal* conviction, you must file a petition for discretionary review to seek review in the Court of Criminal Appeals of Texas. The easiest way to know if your case is regarded as civil or criminal is to look at the cover page of the opinion in the court of appeals. If it has the letters "CR" after the docket number, then it is a criminal case. If it has the letters "CV" after the docket number, then it is a civil case.

You can use this document to guide you in completing a form for a petition for review. If you prepare your petition on a computer, you can simply insert information about your case into the form found at the following website: [to be added]. Or, if you are preparing a hand-written or typed petition for review, you can complete the form found at the following website: [to be added].

Although this instructional guide will help prepare a document that follows the proper format for a petition for review, you are strongly advised to retain competent legal counsel if you are able to do so. If you cannot afford a lawyer, you are urged to contact the many pro bono programs in Texas that may be able to assist you.

II. The petition for review process

A. What is a petition for review?

As a general rule, the Supreme Court of Texas reviews judgments entered by the state's courts of appeals. If a party to an appeal does not like the judgment of a court of appeals, or believes the court of appeals made a mistake, the party may ask the Supreme Court to review the court of appeals' ruling. The party who seeks review in the Supreme Court does so by filing a document called a "petition for review," and is called the "petitioner." The other party to the case is called the "respondent."

B. Why file a petition for review?

Texas has fourteen courts of appeals that decide thousands of civil appeals each year. The Supreme Court cannot reconsider every decision issued by those courts. Instead, it evaluates all petitions that are filed and then grants review of those cases raising issues the court considers to be important to Texas law. Sometimes an issue is important because judges on the courts of appeal disagree with how the law should be applied. Other times an issue is important because one court of appeals applies the law differently from another. Sometimes a case requires the court to interpret a statute, a rule, or a provision of the Texas Constitution. Whatever the case

may be, your petition should state what issues you think the Supreme Court needs to decide and why those issues are important.

C. Steps in the review process

Review of a case at the Supreme Court involves several steps. A case is started when a petitioner files a petition for review. The court may deny review after considering the issues raised in a petition, as happens in most cases. If, on reviewing the petition, the court thinks the issue raised may be important enough to receive full review, the court will ask the parties to provide more information on the case in "briefs on the merits." This second round of briefing involves longer briefs (up to fifty pages) that go into more detail about the facts, about what happened in the courts below, and about why an error occurred and why the court should grant review to correct any error. The court may deny review after receiving these brief, or it may grant review, decide the case and issue its own opinion. If the court grants review, it may request oral argument or it may decide the case based upon the briefs it receives.

If the court requests brief on the merits in a case involving a pro se party, the court will notify the parties about its "Pro Bono Pilot Program." That program helps match qualified pro se parties with volunteer lawyers who prepare briefs on the merits and to argue the case if the court grants review. Please note that the program only applies after the court requests briefing on the merits. If the court requests briefing on the merits, you will be informed at that time and will be given information on how to apply to participate. Please note that not every pro se party qualifies for the program, and there is no guarantee that a volunteer lawyer will be found in every qualified case.

D. When must a petition for review be filed?

You must file your petition for review no later than forty-five days after the court of appeals issues its judgment. If any party filed a timely motion for rehearing or motion for reconsideration en banc in the court of appeals, you must file your petition for review no later than forty-five days after the court of appeals rules on the motion. You may ask the court for additional time to file your petition by filing a motion for extension of time, and that motion must be filed no later than fifteen days after the deadline to file your petition.

Use the following table to calculate your deadlines. If the day your petition is due falls on a weekend or on a holiday, your petition will be due the next business day on which the court is open.

Date of Appellate Court Judgment (or order on any motion for rehearing/en banc):	+ 45 days (including weekends and holidays)[1] (deadline to file petition)	+ 15 days (last day to file motion to extend deadline for filing petition)
_____	_____	_____

[1] If the deadline for filing a petition falls on a weekend, holiday, or day the Clerk's office is otherwise closed, the deadline will be extended to the next day the Clerk's office is open.

III. What must be contained in a petition for review?

The Texas Rules of Appellate Procedure tell you what must be included in your petition for review, and this guideline describes those components in detail. Those rules are designed so that your petition will give the Court enough information to decide if the case presents an issue that should be reviewed.

Your petition for review must contain the following parts and sections:

- Cover page
- Identity of Parties and Counsel
- Table of Contents
- Index of Authorities
- Statement of the Case
- Statement of Jurisdiction
- Issues Presented
- Statement of Facts*
- Summary of Argument*
- Argument*
- Prayer for Relief*
- Signature
- Certificate of Service
- Appendix

Your petition should not exceed fifteen pages. You must count the sections marked with an asterisk above as part of the allowed fifteen pages. The other sections do not count towards the page limit. The following describes what must be included in each section of the petition, and provides examples for how to complete each.

A Note About Confidential Information

When preparing your brief, there are certain categories of information that should not be referenced. These categories include: social security numbers, birth dates, driver's license numbers, passport numbers, tax identification numbers or similar government-issued personal identification numbers, bank account numbers, credit card numbers, or other financial account numbers. Please do not include these categories of information in your petition.

Also, your petition should not use the names of anyone who was a minor when the suit was filed. Instead of using a name, you may refer to a minor by initials (for example, instead of "John Smith," use "J.S.").

A. Cover Page

The cover page must contain the following information.

- Case Number (if one has been assigned, if not, leave space blank)

- Your name as the Petitioner
- Name of the Respondent (your opponent in the case)
- The name of the court of appeals that decided your case, and the number of your case in that court
- The name of the trial court that decided your case (court name; i.e., district or county, and number), the number of the case in that court, and the name of the trial judge
- The title of the document you are filing (petition for review)
- Your name, address, telephone number, and fax number

The following is an example of how this information is displayed on the cover of a petition. In your petition, you should complete the shaded areas with information about your case:

No. 12-9999

In the
Supreme Court of Texas

John Litigant,
Petitioner,

v.

Jane Defendant,
Respondent.

From the Third District Court of Appeals, Cause No. 03-11-09999-CV,
and the 577th District Court for Travis County,
Cause No. D-10-11111, Honorable James Judiciary

Petition for Review

John Litigant
101 Main Street
Anytown, TX 77777
Telephone: 512-555-5555
Facsimile: 512-555-5556
johnlitigant@pro-se.com
Pro se

B. Identity of Parties and Counsel

Your petition must include a page titled "Identity of Parties and Counsel." This page lists all parties to the trial court's final judgment, as well as the names, addresses, telephone and fax numbers for all attorneys in the trial and appellate courts. If there were other parties, such as guardian ad litems or intervenors, you must also list their names, and provide the names, addresses, telephone and fax numbers for their counsel. You may use the following form as an

example, filling in the shaded areas with information about your case. Only the information that applies to your case must be included.

This example uses a roman numeral (the "*i" at the bottom center of the page)* as a page number because this page does not count against the fifteen-page limit for the petition. Examples of other sections of the petition that do not count against the page limit also use roman numerals (such as "ii, iii, iv, and v").

IDENTITY OF PARTIES AND COUNSEL

The following constitutes a list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

Petitioner	John Litigant
Petitioner's trial counsel (if applicable)	(pro se)
Petitioner's appellate counsel (if applicable)	(pro se)
Respondent	Jane Defendant
Respondent's trial counsel (if applicable)	Larry Lawyer 888 Law Firm Drive Anytown, TX 77777 (999)-999-9999 (999)-999-0000 (fax)
Respondent's appellate counsel (if applicable)	Amy Appeals 777 Judicial Drive Anytown, TX 77777 (777)-777-7777 (777)-777-0000 (fax)
Other parties (if applicable)	Not applicable
Counsel for other parties	Not applicable

C. Table of Contents

Your petition must contain a table of contents. The table should state the subject matter of each issue or point that you raise in your petition. The following provides an example of a table of contents that lists all required sections of a petition (the shaded text refers to the subject matter of the issue raised in an example brief):

TABLE OF CONTENTS

ii

D. Index of Authorities

Your petition must include an index of the authorities you mention in your petition. Those should be arranged alphabetically. Examples are highlighted below.

INDEX OF AUTHORITIES

Cases **Page**

Statutes and other authorities

E. Statement of the Case

Your petition must contain a statement of the case that provides the following categories of information:

1. A brief description of the type of case (for example, "This is a negligence case arising out of a car accident," or "This is a divorce case")

2. Trial court information:

    a. The name of the judge who signed the order or judgment appealed from

    b. Information about the trial court (its court number, name)

    c. The county in which the court is located

    d. The trial court's ruling (for example "The trial court rendered a judgment in favor of Defendant")

3. Court of appeals information:

    a. The parties in the court of appeals

    b. The district of the court of appeals (for example, "The Third District Court of Appeals, Austin,")

    c. The names of the justices who decided the appeal

    d. The author of the court's opinion

    e. The name of any justice who wrote any separate opinion (dissent or concurring opinion)

    f. The citation for the court of appeals' opinion (if any) (for example "999 S.W.3d 111")[2]

    g. How the court of appeals decided the case (for example, "The court of appeals affirmed the judgment of the trial court"), and

[2] Opinions of the Supreme Court and courts of appeals may be published in "Southwest Reporter." Published cases are cited by referring to the volume and page number of the Southwest Reporter where the opinion is found. This example would be found at volume 999 and at page 111 of the third series of the Southwest Reporter.

h. If a party filed a motion for rehearing or en banc consideration, how the court of appeals ruled on such a motion

The following shows how these elements may displayed in the petition:

STATEMENT OF THE CASE

Nature of the case:	This is a suit for negligence arising from a car accident.
Trial Court:	The Honorable James Judiciary, 577th Judicial District Court, Travis County, entered a final judgment in favor of defendant.
Court of Appeals:	Third Court of Appeals, Austin
Parties in the Court of Appeals:	Appellant[s]: John Litigant Appellee[s]: Jane Defendant
Disposition:	Justice Doe authored the court's opinion, joined by Justice Roe and Moe. The court of appeals affirmed the judgment below. No motions for rehearing were filed.
Status of opinion:	The court's opinion is published. *Litigant v. Defendant,* 999 S.W.3d 111, 116 (Tex. App. – Austin 2011, pet. filed).

Page iv

F. Statement of Jurisdiction

Texas law gives the Supreme Court limited power to decide cases. For example, the court does not have the power to decide criminal cases, and generally cannot decide appeals before a trial court enters a final judgment. The court does have the power (or the "jurisdiction") to decide the types of cases described in section 22.001(a) of the Texas Government Code.

Your petition must include a "statement of jurisdiction," telling the court what section of the Texas Government Code section 22.001(a) allows it to hear the case. You should

identify the section of that statute that gives the court jurisdiction to consider your petition. The following provides an example of the most often-used statute mentioned in the "Statement of Jurisdiction" section:

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to section 22.001(a)(6) of the Texas Government Code.

Page v

G. Issues Presented

The Supreme Court reviews cases that it considers to be important. The Court needs some basic information to make that call. Your petition must therefore state all issues you want the court to review. The following provides an example of the "Issues Presented" section of a petition:

ISSUE PRESENTED

Issue 1: Negligence ruling

The court of appeals erred in affirming the trial court's judgment because the evidence at trial was enough to allow a jury to decide if Jane Defendant was negligent in connection with the car accident at issue.

Issue 2: Exclusion of testimony

The court of appeals erred in affirming the trial court's judgment because the trial court improperly excluded testimony showing that Jane Defendant was negligent.

Page v

H. Statement of Facts

Your petition must give the court a brief background of the important facts of your case and about what happened in the trial court and court of appeals. You provide this information in the "statement of facts" section of your petition.

In most cases, the opinion of the court of appeals also includes a summary of the facts. If

it does, your petition must state that the facts set forth in the court's opinion are correct, or point out anything in its statement of facts that you think is incorrect. You may also state additional facts you think will help the court understand the issues presented.

Your statement of facts must refer to the record on appeal. The record on appeal may include the trial court clerk's record and the court reporter's record. The clerk's record is prepared by the trial court clerk and includes documents filed with the trial court. If a court reporter wrote down statements or testimony made at the trial court, then you can ask the court reporter to prepare a record. If you discuss testimony that was given at trial, you should refer to the page in the reporter's record where the testimony is found, or if you refer to a document filed with the trial court clerk, you should refer to the page in the clerk's record where the document is found.

The statement of facts is the first section of the petition that counts against the fifteen-page limit. Thus, it is good practice to begin the statement of facts on a separate page, and to start numbering pages from that point on at 1. (The examples that follow include example page numbers).

The following is a brief example of how a "Statement of Facts" section may be presented:

STATEMENT OF FACTS

The court of appeals correctly stated the nature of this case, which is a suit for damages following a car accident between Petitioner John Litigant and Respondent Jane Defendant. However, more facts are necessary to understand the issues presented.

On December 4, 2009, Litigant was driving on FM 8888 near the city of Anytown, Texas. CR 3, 4. As he drove through a bend in the road, he was hit head-on by a car driven by Defendant. CR 7. Mr. Litigant suffered significant injuries in the accident, and his car was totaled. CR 9; 3RR 4-9 (describing injuries). Mr. Litigant later sued Ms. Defendant for damages, claiming that her

failure to pay attention while driving caused the accident.

Page 1

At trial, Litigant attempted to offer evidence establishing that Ms. Litigant was sending a text message while driving at the time of the accident. 4 RR 27-28. But the trial court sustained objections to the testimony and refused to let the jury hear the testimony. 4 RR 28. Without hearing that testimony, the jury decided that Defendant was not negligent in connection with the accident. CR 211. Litigant preserved his objection to the judge's ruling that the jury would not hear the testimony about the text messages Defendant sent at the time of the accident by making a timely bill of review. 5 RR 1-7.

On appeal, the Third Court of Appeals affirmed the decision of the trial court judge in a published opinion authored by Justice Moe. The court of appeals concluded that evidence showing Defendant was sending a text at the time of the accident was inadmissible, and that the trial court did not commit error in excluding that testimony. *Litigant v. Amicus*, 999 S.W.3d 111, 116 (Tex. App. – Austin 2011, pet. filed).

* * *

Page 2

I. Summary of the Argument

Your petition must provide a brief summary of the arguments made in the brief. The summary should do more than merely repeat the issues or points raised in the petition.

Your summary should seldom be more than two pages long.

The following is a brief example of how a "Summary of Argument" section may be set forth:

SUMMARY OF ARGUMENT

The court of appeals committed error when it affirmed the trial court's judgment in favor of Defendant. Evidence that Ms. Defendant was sending a text message at the time of the accident should have been admitted at trial. The evidence was relevant to the issue of whether Ms. Defendant failed to pay attention at the time of the accident and whether that negligence contributed to the accident. This Court should grant review, and should hold that a jury should be able to decide whether sending a text message while driving on a curved road constitutes negligence.

Moreover, the court of appeals erred in finding that Litigant failed to properly object to the exclusion of the evidence. Mr. Litigant properly offered the evidence, and after Defendant's objection was sustained, took the proper steps to inform the court of the substance of the evidence that would have been offered if the objection had been overruled. This Court should grant review to clarify the steps needed to preserve a complaint that the trial court improperly excluded evidence offered at trial.

* * *

Page 3

J. Argument

Your petition must include arguments in support of the issues you raise. You should cite legal authorities and the record where appropriate. You do not need to address every issue you identified in your "Issues Presented" section – if the Supreme Court requests briefing on the merits, you may address other issues at that time.

Your argument should focus on why the Supreme Court should decide to hear your case. Texas Rule of Appellate Procedure 56.1(a) lists factors the court considers in deciding whether to grant review. These include the following:

> "(1) whether the justices of the court of appeals disagree on an important point of law;
>
> (2) whether there is a conflict between the courts of appeals on an important point of law;
>
> (3) whether a case involves the construction or validity of a statute;
>
> (4) whether a case involves constitutional issues;
>
> (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
>
> (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court."

You may find it helpful to refer to one or more of those factors in explaining why the court should grant review of your case.

The following provides brief excerpts from a hypothetical "Argument" section of a petition:

ARGUMENT

I. This Court should grant review to correct the trial court's erroneous exclusion of relevant evidence.

A. The use of a cell phone to send text messages while driving is relevant to an allegation of negligence.

The term "negligence" means "the failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the

same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances. *See, e.g., Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984); *see also* Texas Pattern Jury Charge 2.1 (Negligence and Ordinary Care). Litigant attempted to offer evidence of Defendant's use of her cell phone to send a text message at the time of the accident to show that Defendant did not exercise ordinary care. 4 RR 27-28.

The trial court committed error in refusing to allow testimony that Defendant was sending a text at the time of the accident, and the court of appeals committed error in affirming. *Litigant v. Defendant*, 999 S.W.3d 111, 114 (Tex. App.— Austin 2011, pet. filed). Those courts were persuaded by the fact that many people send text messages while driving, and thus concluded that Defendant's conduct did not violate any standard of ordinary care. This Court should grant review to decide whether an act may still be negligent even if "everyone else does it."

2. Litigant properly preserved his argument concerning the excluded testimony.

At trial, Litigant sought to offer the testimony of Paul Passenger who was in the car with Ms. Defendant at the time of the accident. Specifically, Litigant intended to call Mr. Passenger to testify that, at the time of the accident Ms. Defendant was trying to send a text message and was distracted from the task of driving. 4 RR 27-28. Defendant objected to the offered testimony on relevance grounds, and the trial court sustained the objection. 4 RR 29.

Prior to the submission of the case to the jury, Litigant made an offer of proof. 5 RR 1-7. In that offer, Litigant informed the court what he had intended to ask Passenger and what answer he expected to receive from Passenger. However, on appeal the court concluded that Litigant had failed to clearly demonstrate precisely what Passenger would have said if he had been allowed to testify, and that Litigant thus failed to preserve any complaint about the exclusion of his testimony. That ruling below cannot be reconciled with the terms of the rules setting forth the steps to preserve error when evidence is improperly excluded. This Court should grant review to confirm what a party must do to be able to complain on appeal when a trial court refuses to allow testimony on a relevant issue.

* * *

Page 4

K. Prayer for Relief/Signature

Your petition must include a short conclusion (a "prayer for relief") that tells the court what relief you request (for example, a reversal of the judgment of the court of appeals). You must sign the petition. An example of a prayer and signature block follows:

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court reverse the judgment of the court of appeals, and remand this case to the trial court for additional proceedings.

Respectfully submitted,

_____

John Litigant, pro se

Page 12

L. Certificate of Service

When you file a petition, you must send a copy to your opponent, and you must promise in your petition that you have done so by signing a "certificate of service." In addition to being signed, your certificate must state the name and address of each party to whom you delivered a copy of your petition. If you serve an attorney, you must state the name of the party the attorney represents. Your certificate must also state how you served each party (for example, by first class mail) and the date on which you served them. Your certificate of service does not count against the fifteen-page limit. The following is an example of a certificate of service:

CERTIFICATE OF SERVICE

I certify that a copy of this Petition for Review was served on Respondent Jane Defendant, through counsel of record, Amy Appeals, 777 Judicial Drive, Anytown, TX 77777, by US. Mail on [date mailed].

_____

John Litigant, pro se

M. APPENDIX

You must attach to your petition an appendix containing copies of certain documents from the case on appeal. Your appendix should include the following items:

(1) a copy of the trial court judgment or ruling that was appealed to the court of appeals;

(2) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;

(3) the opinion and judgment of the court of appeals (they are separate documents); and

(4) an exact copy of any rule, regulation, ordinance, statute, constitutional provision on which you rely to win your case, and an exact copy of the important language of any contract or other document that is central to your argument

You may also include other items that you think are important for the court to consider in reviewing your petition (for example, copies of the most relevant authorities, documents on which the suit was based, etc.). The appendix does not count against the page limit for the petition.

You should prepare an index that lists the items you put in your appendix. Typically, documents included in an appendix are identified and separated by tabs. An example of an index to an appendix follows:

APPENDIX

TAB

1 Judgment of trial court, dated 10/10/11

2 Opinion of Court of Appeals, dated 11/11/11

3. Judgment of Court of Appeals, dated 11/11/11

4. Excerpts from the deposition testimony of Paul Passenger introduced at trial (pages 5 RR 1-7)

IV. Other Resources

A. Sample briefs

Attorneys file both paper copies and electronic copies of petitions for review with the Supreme Court. Electronic versions of filed petitions for review are posted on the court's website. Briefs filed during 2012 are found at http://www.supreme.courts.state.tx.us/ebriefs/ebriefs_2012.asp. You may find it helpful to review samples of petitions found on that page.

B. Applicable court rules

The Texas Rules of Appellate Procedure apply to cases pending in the Supreme Court. Those rules are found at http://www.supreme.courts.state.tx.us/rules/traphome.asp .

Current Technology Capacities Used to Support Pro Bono

The promise of using technology to increase the assistance provided by pro bono lawyers to low-income persons with legal problems is to make life easier for everyone. Pro bono coordinators want it to be easier to find pro bono lawyers, pro bono lawyers want more resources to help in areas unfamiliar to them, and clients want to be able to work better with their pro bono lawyers. While emerging technologies offer much promise of this, what we have already that is available and affordable is not being used to anywhere near its full capacity.

Here is a laundry list of what exists today, each component of which is being used somewhere, but nowhere are all in place and most places don't even use a majority:

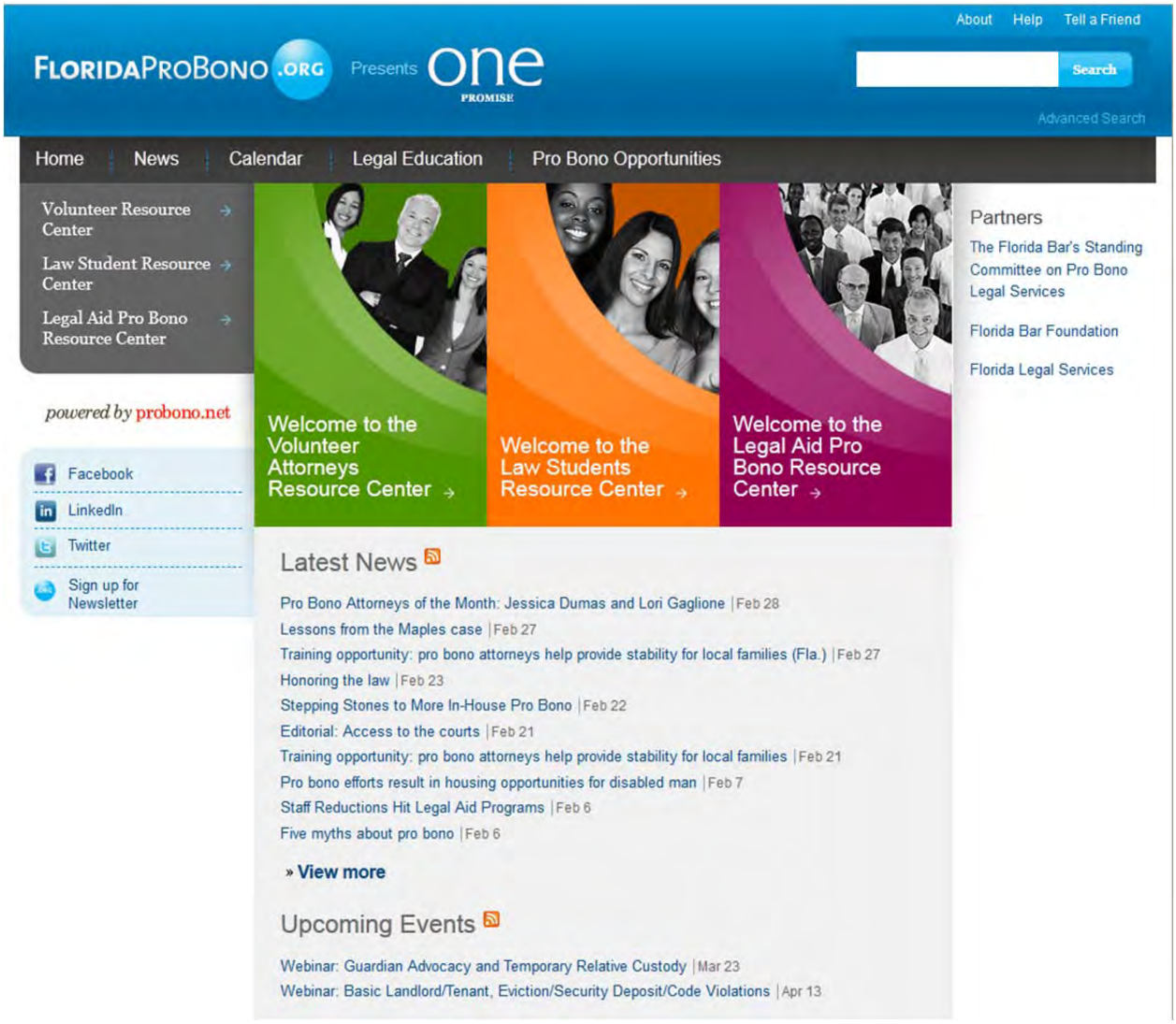
- A pro bono website that:
    1. Allows lawyers to sign up to do cases
    2. Provides case opportunities online
    3. Has a calendar listing live trainings, either in person or via webinars
    4. Has online training materials for pro bono lawyers
    5. Has a library of informational materials, briefs, and pleadings
    6. Has automated documents for pro bono lawyers to use for their cases
    7. Has practice areas for mentoring of lawyers new to case type by experienced lawyers
    8. Helps lawyers find what they need on the sites using Live Chat
    9. Can "push" information out to the pro bono panel
- A case management system (CMS) that:
    1. Works like a customer relationship management (CRM) system, including integration with form letters and email
    2. Allows coordinators to search for lawyers by case type, location, last case taken, availability
    3. Can export case information to the Pro Bono lawyer's CMS so that double data entry is avoided
    4. Tracks referred cases and work accomplished, eligibility screening, oversight, and timely case closure
    5. Tracks Pro Bono fiscal allocation and timekeeping.
- A phone system that allows a Pro Bono lawyer to log into the system to take calls for intake and advice according to language and case type

Websites to Support Pro Bono

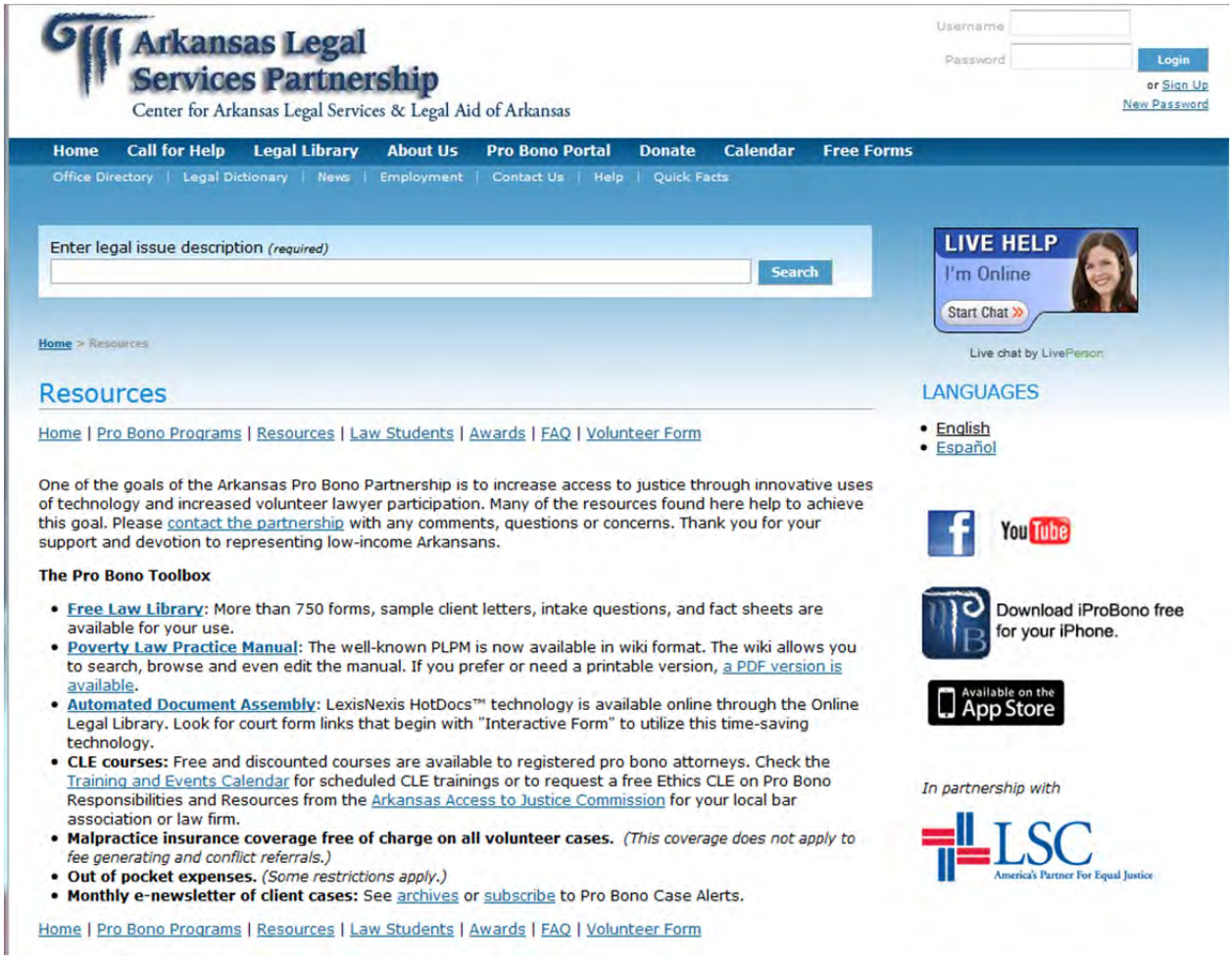
Near the beginning of LSC's Technology Initiative Grant Program (TIG) it developed two website templates that could be used as statewide websites without the need for programs to do their own development. One template was developed by Pro Bono Net and the other was an open source template build with the open sources content management system Zope. (This template has now been replaced by one built on another open source content management system for website development,

Drupal.) A requirement for each template was that it had the capability to support three separate sections, one for clients, one for staff advocates, and one for pro bono attorneys.

Over the years these templates have been much improved, but the same basic structure remains and the vast majority of states and territories use one of these two templates. Here is an example of a site built on the Pro Bono Net template:



As you see on this home page, there are sections for news, calendar events, and legal education materials for the Pro Bono lawyers, and case opportunities available to them. Similar resources are available on a site based on Drupal:

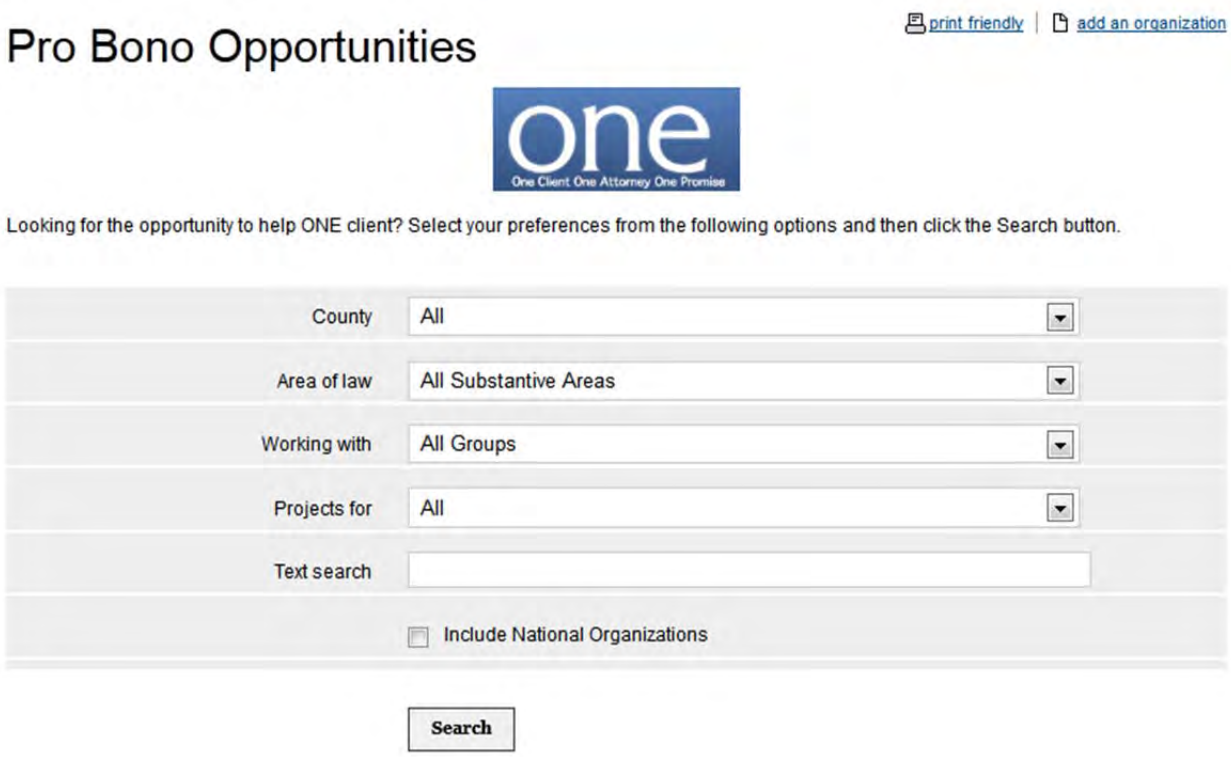


Again there is legal information, training courses with calendar, automated forms, and on a different page, case opportunities.

While the tools are similar and available, few legal services programs take full advantage of them. The depth of the resources varies greatly and few have pro bono sites that are as content rich as they are for clients. In short, technology is not the obstacle, it is the adoption of the technology available and the allocation of resources to support them. Let's take a more in-depth look at these capabilities.

Allows Lawyers to Sign up for Cases

We never have enough pro bono lawyers, so the website should present the potential volunteer attorney with opportunities for a pro bono project near him or in her practice area. Here is how that looks on FloridaProBono.org.



The potential volunteer can search by location, practice area, and/or client group. This page allows persons other than lawyers to volunteer, too. Under "Projects for" are opportunities for law students, interpreters, paralegals and more.

Provides case opportunities online

In addition to signing up lawyers for the volunteer panels, some sites let current volunteers see existing pro bono opportunities. These can be provided on the website or pushed out by email or RSS feeds. Here are some opportunities from the Arkansas Legal Services Partnership site:

County: Conway

Case Type: Will
Pro Bono Organization: RVAP
Case Number: 11E-3079105

Client seeks to have a will drafted for her. Client is 55 years old but she is in bad health. Client owns a mobile home that sits on 5.2 acres. E-mail Janet Dyer at jdyer@arkansaslegalservices.org or call 479-785-5211 for more details.

County: Crawford

Case Type: Adoption
Pro Bono Organization: RVAP
Case Number: 11E-3078815

Client seeks to adopt her 15 month old grandchild. Client is 49 years old and disabled. Client's son is the father of the child and currently in prison. The mother of the child abandoned the child to the care of the client. The client's daughter lives nearby and assists the client in caring for the child. E-mail Janet Dyer at jdyer@arkansaslegalservices.org or call 479-785-5211 for more details.

County: Drew

Case Type: Domestic Abuse
Pro Bono Organization: VOCALS
Case Number: 11E-3077752

Client needs help obtaining a divorce from spouse due to past physical abuse. Parties have been separated since March, 2010. No children, no debts. E-mail dramsey@arkansaslegalservices.org or call Donna Ramsey at 870-536-9006 ext. 103 for more details.

Has a calendar listing live trainings, either in person or via webinars

Many pro bono lawyers do not practice in poverty law areas and may feel uncomfortable taking cases outside their areas of expertise. While we want to increase our pool of volunteer lawyers, we also want to provide more opportunities for those already signed up by training them in other subject matters. Most programs provide live trainings, either in-person or via webinars, but pro bono attorneys need a way to find them. While outreach is the most valuable way, so too is having an up-to-date calendar on the website. Here is a week from the Florida site showing a webinar that also counts for CLE:

Has Recorded Training Materials for Pro Bono Lawyers

In addition to live trainings, programs can provide training 24/7 via their websites by providing recorded trainings. To make them even more attractive to their panel they can get them accredited for CLE. Here are some of the offerings on the Florida site:

print friendly

Legal Education

A wide range of recorded legal education seminars, including many that are eligible for free CLE, are available to help attorneys represent low income Floridians through a pro bono program. Click on a legal area and check out the videos, recorded webinars and audio recordings. Other resources are described also. Many of the seminars and resources are posted on this site and can be used immediately. Others are password-protected and will require you e-mailing or calling a local pro bono coordinator who will be happy to give you the password and help you to get your One pro bono case.

We hope you find all the resources you need to provide pro bono assistance. We welcome your suggestions for other resources we should develop. Thank you for all your help!

If you need any technical assistance with the resources here, contact Jimmy Midyette for help.

Click a title for available topics:

Children

Civil Procedure/Attorneys' Fees

Civil Rights

Community Lawyering

Consumer

Disaster

Education

Seniors

Employment

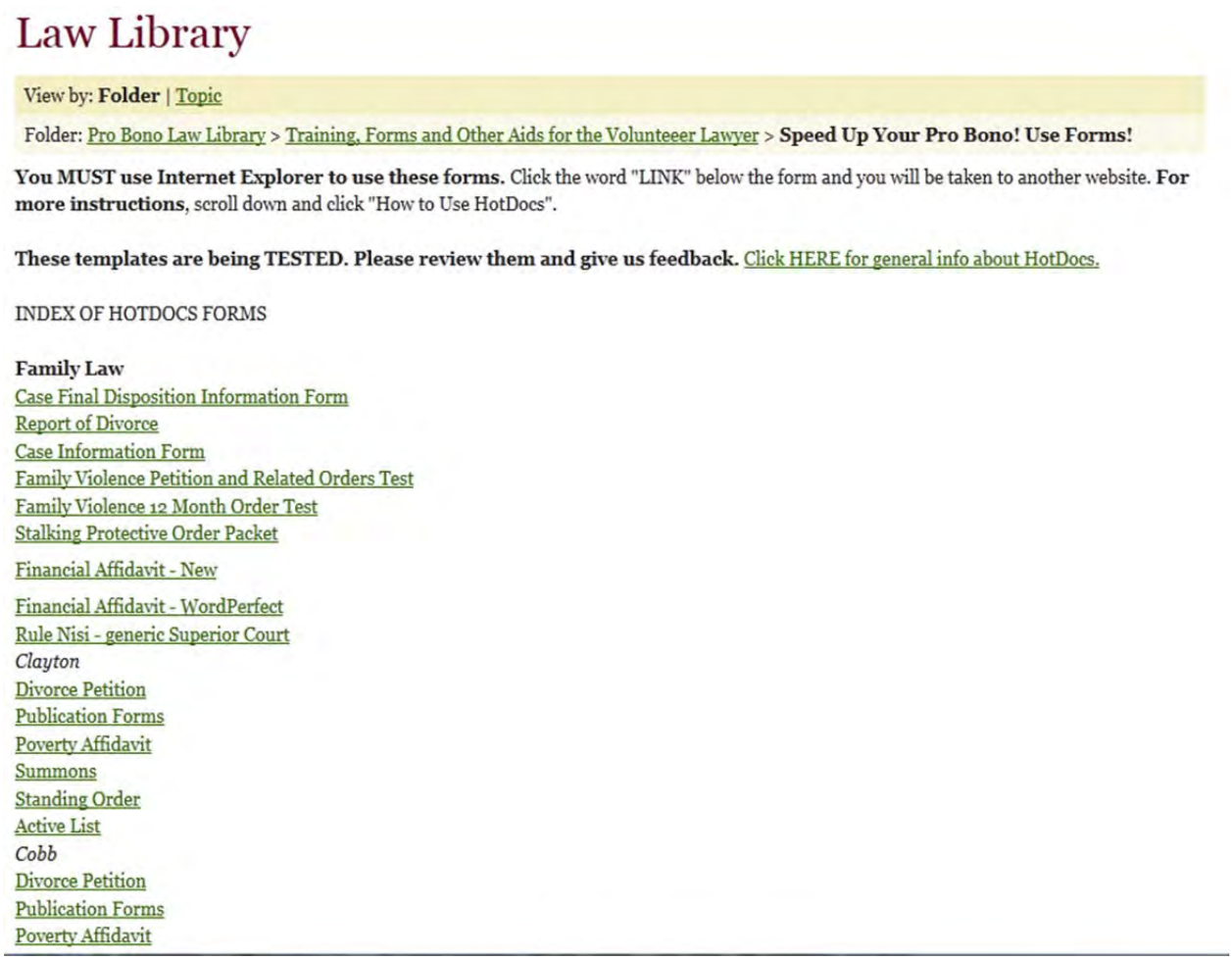
Library of Support Materials

Just as a panel member may lack training in an area, so too might she need information, pleadings and forms. Anything a program to do to make it easier for an attorney to assist a client will help everyone, plus often these areas serve a double duty. The same brief bank or form that is used by a pro bono lawyer can also be used by staff advocates. The legal information pamphlet on a legal problem area that is useful to a volunteer can help new staff learn and veteran staff learns more. On the Illinois site, for example, they have videos, briefs, and forms on many areas:

Has Automated Forms in most Common Practice Areas

The biggest advantage of having an automated form system for all advocates — staff or pro bono — is that the interviews to populate the form with client specific information are created by the program's most experienced attorneys, thereby transferring this experience to the least experienced advocate. If an attorney new to an area of law asks the client the questions prompted by the form, he cannot forget anything that is needed. If specific forms are needed for specific counties, the forms can vary depending

upon the county selected. Most importantly, should the law change, then the online automated form is updated once it is updated for everyone. Here are a few of the forms available for pro bono lawyers in Georgia:



Law Library

View by: **Folder** | Topic

Folder: Pro Bono Law Library > Training, Forms and Other Aids for the Volunteeer Lawyer > **Speed Up Your Pro Bono! Use Forms!**

You MUST use Internet Explorer to use these forms. Click the word "LINK" below the form and you will be taken to another website. **For more instructions**, scroll down and click "How to Use HotDocs".

These templates are being TESTED. Please review them and give us feedback. Click HERE for general info about HotDocs.

INDEX OF HOTDOCS FORMS

Family Law
Case Final Disposition Information Form
Report of Divorce
Case Information Form
Family Violence Petition and Related Orders Test
Family Violence 12 Month Order Test
Stalking Protective Order Packet
Financial Affidavit - New
Financial Affidavit - WordPerfect
Rule Nisi - generic Superior Court
Clayton
Divorce Petition
Publication Forms
Poverty Affidavit
Summons
Standing Order
Active List
Cobb
Divorce Petition
Publication Forms
Poverty Affidavit

Has Practice Areas for Mentoring

To support the panel, it is important to give them a way to ask a question and to get an answer from an experienced attorney. What might take someone hours to figure out on his own can be answered in minutes by someone with experience. Setting up listservs or blogs to support these efforts means that members can ask or answer questions at times of their choosing. Here is the description of one such area on the Georgia site:

Consumer Law Roundtable Working Group

Last activity: 11/14/11 subscribe

This is a private but unmoderated listserv for the consumer law advocates roundtable work group.

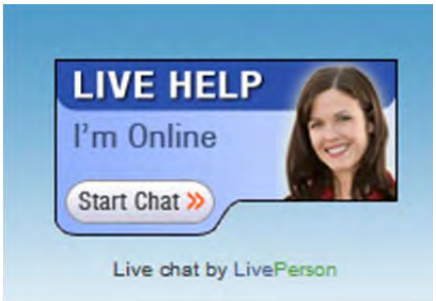
Do not post confidential client information. This is an internet group mail service.

By using this listserv, you agree the host reserves the right to limit or curtail each member's use of this listserv, edit or reject messages and other content, and otherwise manage this listserv to ensure compliance with local, state and federal law.

You are prohibited from posting inflammatory, discriminatory, emabarrassing or hurtful messages and attachments. Do not post material that is copyrighted unless you have permission to do so.

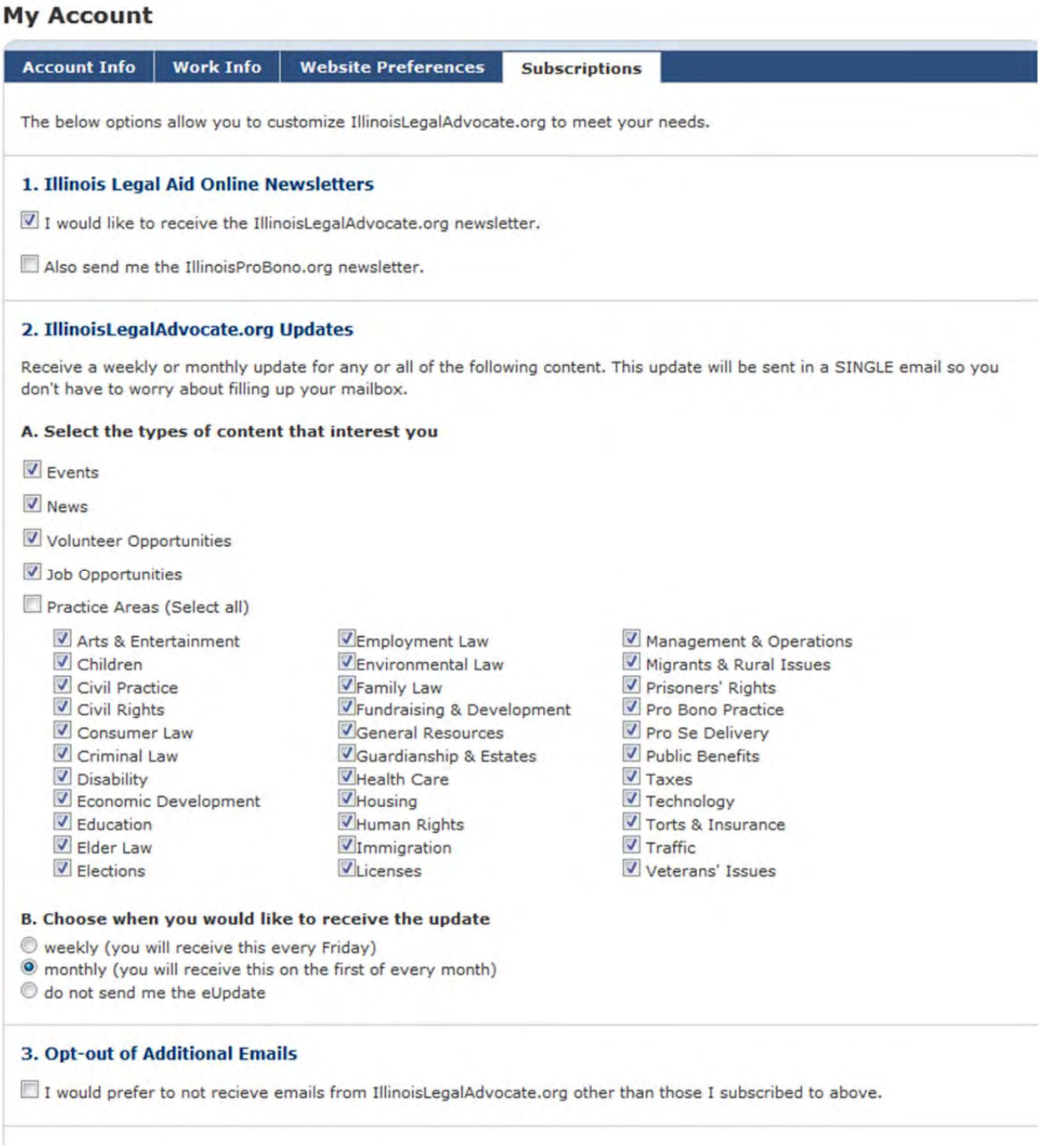
Live Online Help to Support the Pro Bono Lawyers

While a program might have a great pro bono website with all of the resources mentioned, this will be of little assistance if the pro bono lawyers cannot find what they need. Commercial websites have long used online, live assistance to help customers navigate their sites to find the merchandise for which they are looking. Several states' pro bono sites now use this same feature to help volunteer lawyers find the tools they need to assist their clients. In a state with several pro bono coordinators they can take turns being available online and they can still do other work while available. When a panel member needs assistance, a screen will pop up on the pro bono coordinator's computer and he can answer questions or help volunteers get to the right section of the website. Volunteers will know help is available because they will see this on the site:

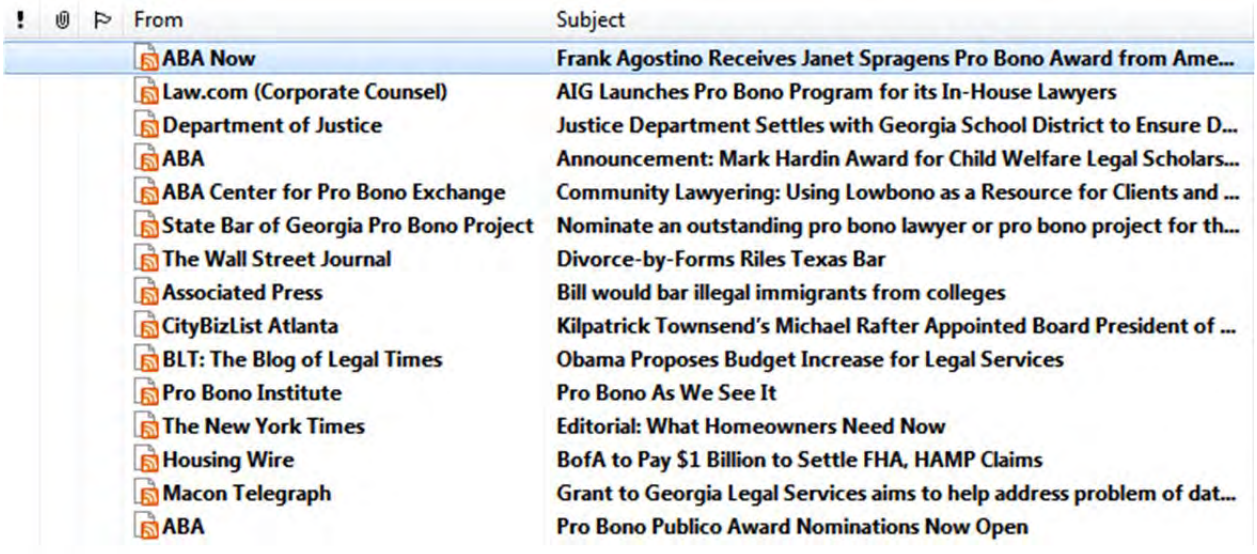


Can Push Information Out to the Panel

A pro bono website is a great place for volunteer lawyers to come to find information and forms, but it is important to make this a two way street. Rather than waiting for them to come looking, technology makes it possible to deliver information to their desktops. One way is by using email listservs and newsletters. This can be done to the whole panel or by practice area. It is a good way to keep panel members up to date about changes to the law or individual case opportunities. You can let panel members decide what they want to receive. Here is how that page looks on IllinoisLegalAdvocates.org:

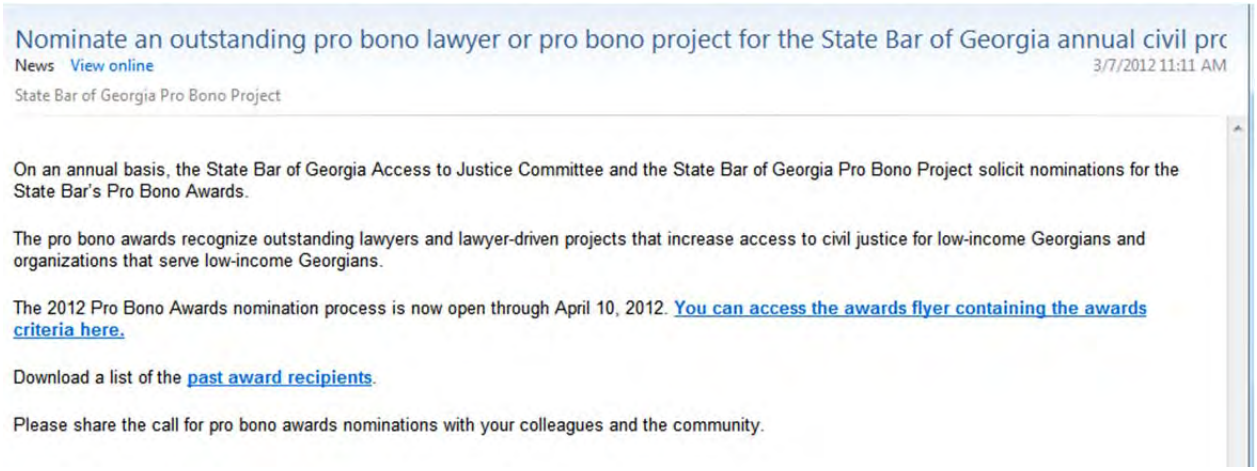


Another way to push out your information is through what is called an RSS feed. Email programs such as Outlook and providers such as Google have RSS readers and information can be pushed out from the website to the RSS subscribers. When you are posting something new on your site a user doesn't have to come to the site to see it, RSS can let them know it is there. Here is a list of RSS feeds from GeorgiaAdvocates.org that pushes out all of the items posted on their News page:



From	Subject
ABA Now	Frank Agostino Receives Janet Spragens Pro Bono Award from Ame...
Law.com (Corporate Counsel)	AIG Launches Pro Bono Program for its In-House Lawyers
Department of Justice	Justice Department Settles with Georgia School District to Ensure D...
ABA	Announcement: Mark Hardin Award for Child Welfare Legal Scholars...
ABA Center for Pro Bono Exchange	Community Lawyering: Using Lowbono as a Resource for Clients and ...
State Bar of Georgia Pro Bono Project	Nominate an outstanding pro bono lawyer or pro bono project for th...
The Wall Street Journal	Divorce-by-Forms Riles Texas Bar
Associated Press	Bill would bar illegal immigrants from colleges
CityBizList Atlanta	Kilpatrick Townsend's Michael Rafter Appointed Board President of ...
BLT: The Blog of Legal Times	Obama Proposes Budget Increase for Legal Services
Pro Bono Institute	Pro Bono As We See It
The New York Times	Editorial: What Homeowners Need Now
Housing Wire	BofA to Pay $1 Billion to Settle FHA, HAMP Claims
Macon Telegraph	Grant to Georgia Legal Services aims to help address problem of dat...
ABA	Pro Bono Publico Award Nominations Now Open

If an advocate sees something of interest to her, she clicks on the feed and sees the story or can click a link and go directly to the website:



Nominate an outstanding pro bono lawyer or pro bono project for the State Bar of Georgia annual civil prc

News View online 3/7/2012 11:11 AM

State Bar of Georgia Pro Bono Project

On an annual basis, the State Bar of Georgia Access to Justice Committee and the State Bar of Georgia Pro Bono Project solicit nominations for the State Bar's Pro Bono Awards.

The pro bono awards recognize outstanding lawyers and lawyer-driven projects that increase access to civil justice for low-income Georgians and organizations that serve low-income Georgians.

The 2012 Pro Bono Awards nomination process is now open through April 10, 2012. You can access the awards flyer containing the awards criteria here.

Download a list of the past award recipients.

Please share the call for pro bono awards nominations with your colleagues and the community.

Why wait for them to come to you!

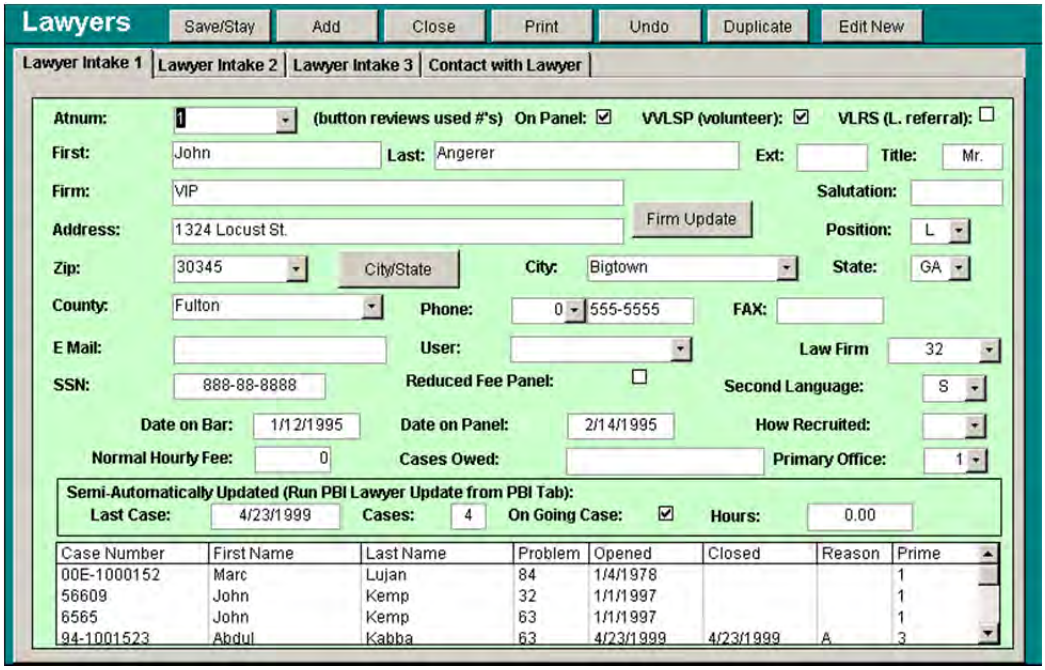
Case Management Systems Optimized to Support Pro Bono

Every LSC program has a case management system. A CMS is essential for reporting to LSC, for recording the time records required, and for advocates to keep track of their cases, but they can be much more.

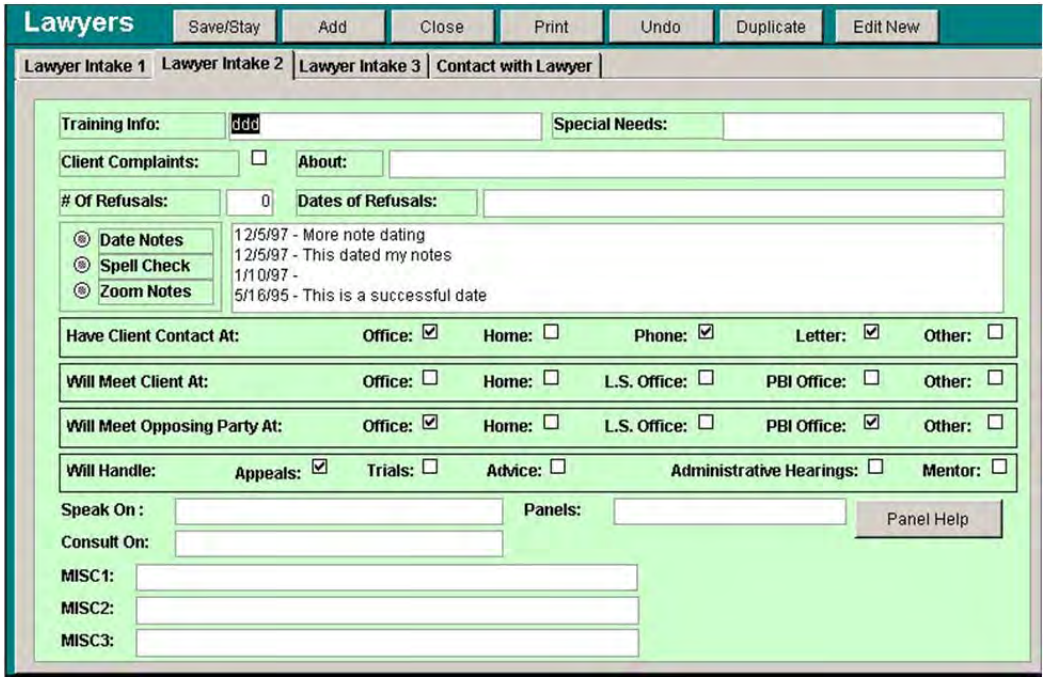
Works for a Customer Relationship Management System for Pro Bono Coordinators

Businesses keep track of their customers using databases they call customer relationship management (CRM) system. Simply stated, this is where they store information about their contacts that may be useful to them, such as past orders, phone calls, relationships with other contacts, important dates, and past employment. This type of functionality is found in some of the CMS available to legal service

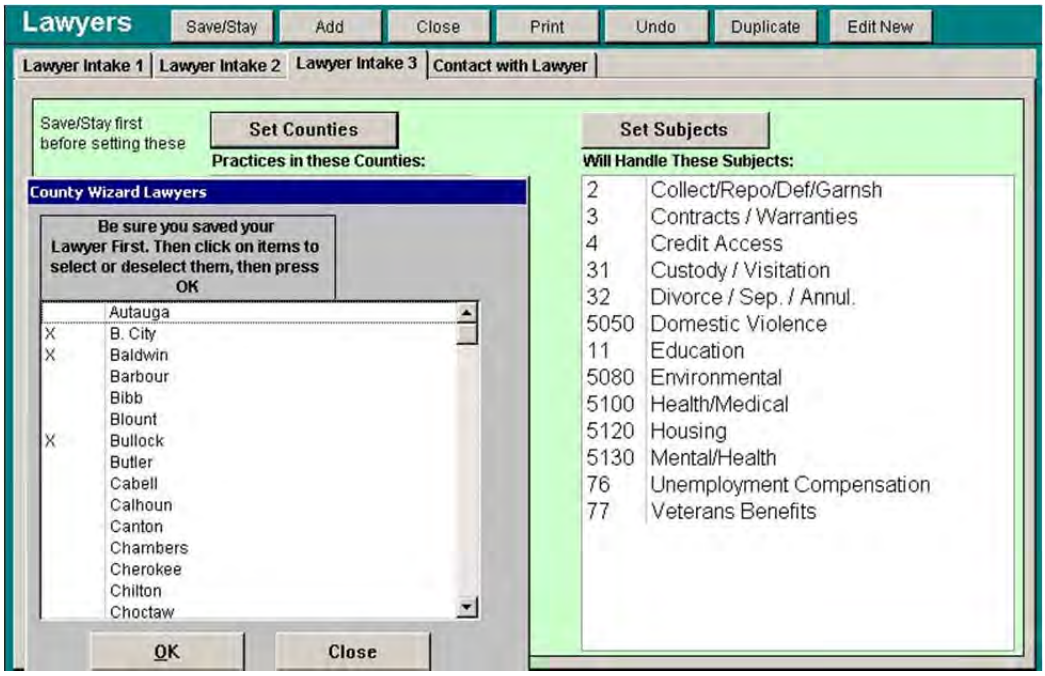
programs today. The next several screen shots give an illustration of the types of information that can be tracked. This screen records the basic contact information as well as a list of cases handled:



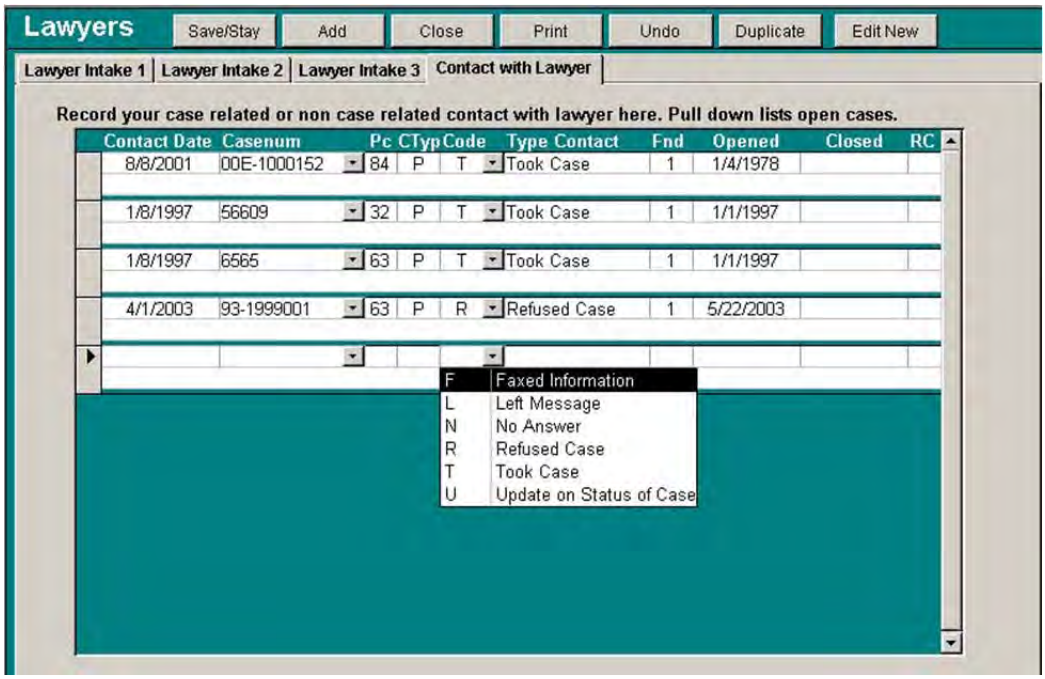
This next screen tracks information on the trainings the attorney has had, information on how many times he has turned down a case, how he is willing to meet with clients, and the courts in which he is willing to take cases:



This screen lists the counties and legal areas in which he will take cases:



And finally, here the pro bono coordinator can record each contact with the attorney:



Once all of this information is available to the pro bono coordinator, she can match a prospective client with an attorney by doing a search using any information that applies, such as for an attorney to do a divorce in Bibb County who has no open cases and speaks Spanish.

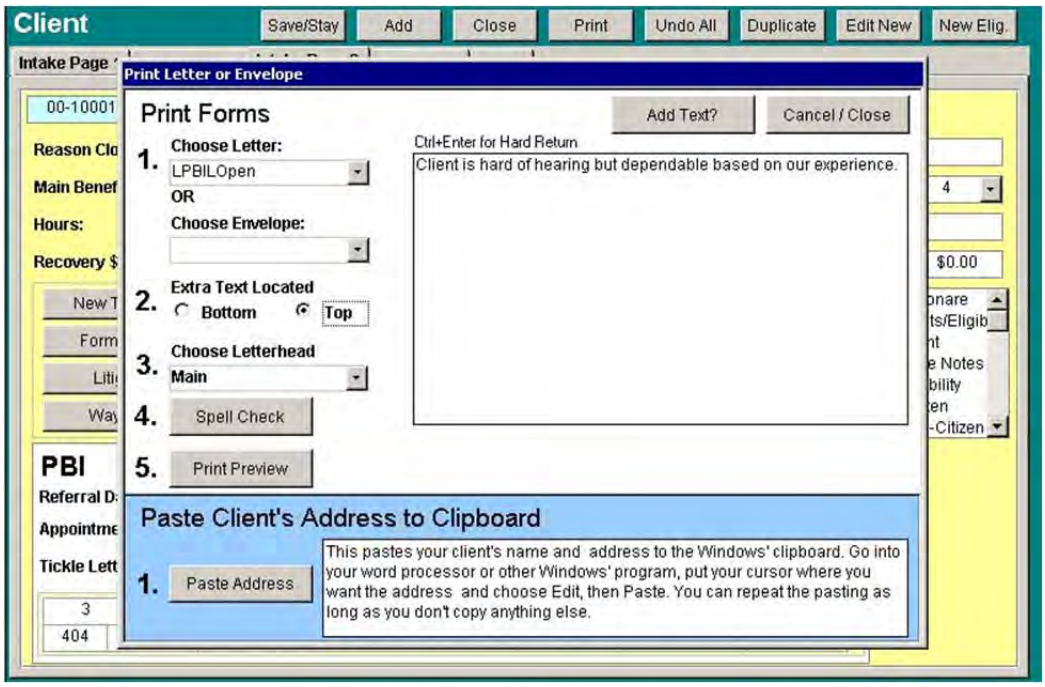
VATNUM	VLNAME	VLNAME		UNTY	VFIRM	VONF	VON(	VLASTC/	V/	VPHONE
1	John	Angerer		ulton	VIP	Yes	Yes	4/23/1999	0	555-555
10	Earl	Baer		ulton	Crow, Lytle, Gilwee,	Yes	Yes	10/25/2001	0	555-555
100	Yoshinori	Himel		ulton	Desmond, Miller, De	Yes	Yes	12/15/2001	0	555-555
101	Paul	Hoff		ulton	Bailey, Lea & Brown	Yes	No		0	555-555
102	John	Holland		ulton		Yes	Yes		404	324-734
103	Theresa	Huff		ulton		Yes	Yes	5/7/2001	404	326-344
104	Dennis	Higgins	Atlanta	Fulton		Yes	Yes	7/23/1996	404	322-070
105	Arnulfo	Hernandez	Atlanta	Fulton		Yes	Yes	9/4/1996	404	322-854
106	Lawrence N.	Hensley	Atlanta	Fulton	Bailey, Lea & Brown	Yes	Yes	5/27/1995	0	555-555
107	Bruce	Hagel	Atlanta	Fulton	Desmond, Miller, De	Yes	Yes	1/23/1995	0	555-555
108	Robert I.	Harris	Atlanta	Fulton	Bullen, McKone, Mc	Yes	No	7/8/1995	0	555-555
109	Clifton M.H.	Higbe	Atlanta	Fulton	Thielen & Thielen	Yes	No	1/30/2001	0	555-555
11	Robert	Banning	Atlanta	Fulton	Department of Healt	Yes	Yes	4/16/2003	0	555-555
110	Michael G.	Harper	Atlanta	Fulton		Yes	Yes	8/27/1995	404	329-927
111	Norman C.	Hilf	Atlanta	Fulton	Nassau/Suffolk Law	Yes	No		0	555-555
113	Jasper E.	Hemple	Atlanta	Fulton		Yes	Yes	2/19/1994	404	327-850
114	Bradley	Holmes	Atlanta	Fulton		Yes	Yes	3/13/1995	404	328-129
115	Gary	Hernandez	Atlanta	Fulton		Yes	Yes	2/3/2001	404	324-478
116	Wayne	Haug	Atlanta	Fulton	Bullen, McKone, Mc	No	No	2/19/1995	0	555-555
117	Dee	Hartozog	Atlanta	Fulton	Weintraub, Genshle	Yes	No		404	328-940
118	Paul	Irish	Atlanta	Fulton		Yes	Yes	10/30/1996	404	322-260
119	Sam	Jackson	Atlanta	Fulton		Yes	No		404	329-534
12	David G.W.	Belden	Atlanta	Fulton		Yes	Yes	8/9/1994	404	323-098
120	Jack	James	Atlanta	Fulton		Yes	Yes	10/14/1996	404	325-920
121	Alice	Jefferson	Atlanta	Fulton		Yes	Yes	6/1/1994	404	326-128
122	Barton	Jenks	Atlanta	Fulton		Yes	No	1/24/1994	404	320-963

Can export case information to the Pro Bono lawyer's CMS so that double data entry is avoided

A useful piece of information to record about each panel member is if his firm's case management system has the ability to import data. If so, then it is important that the legal services program have the ability to export case data from its CMS and transmit it to the pro bono attorney. In addition to the name, address, and other contact information about the client, many programs collect information pertinent to the client's legal problem that would be useful to the pro bono attorney. Being able to send all of this information to the pro bono lawyer saves time and reduces the chance for errors in rekeying the information. This is a particularly helpful feature for legal services programs that regularly refer a large number of cases to a standalone pro bono program.

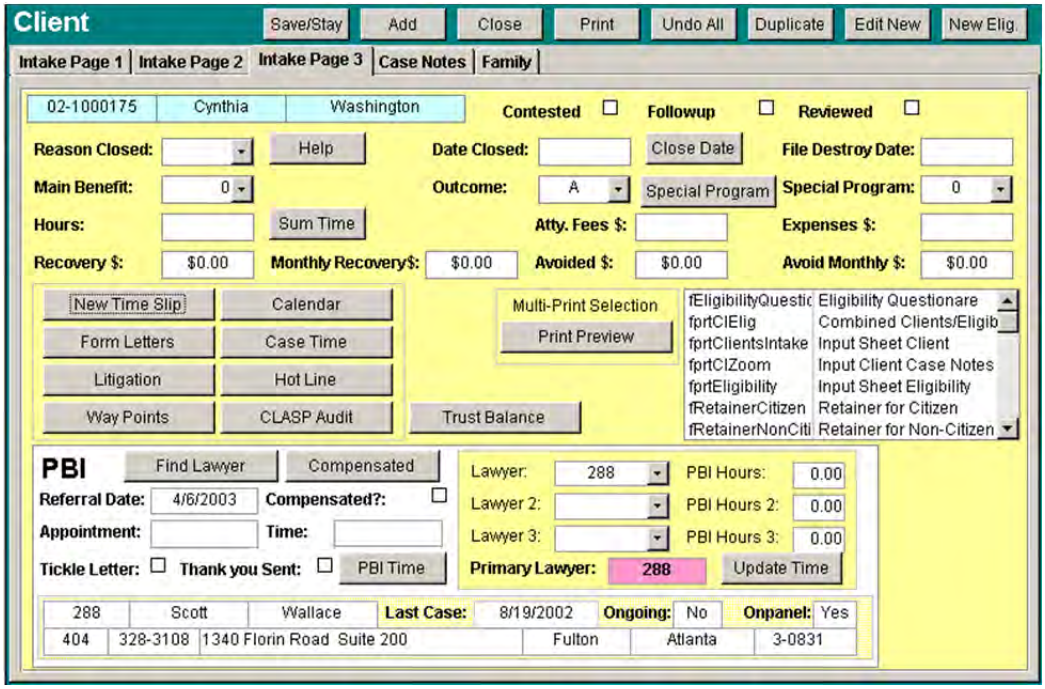
Integrated Email and Form Letter Ability

Once the attorney is selected the correspondence to the attorney and the client should be able to be done directly from the CMS. This screen shows one such system. Notice how you can choose the letter and even the letterhead for the notice to the attorney. It also has letters to send to the client with contact information for the pro bono lawyer inserted automatically. While it is a form letter, client specific information can be inserted as illustrated in the text box in the screen below:



Tracks volunteer/judicare attorney fiscal allocation and timekeeping

The CMS should have the ability to track the progress of the case, record the time from the attorney, and track expenditures, including payments to judicare attorneys. If a fixed amount is allocated to a judicare case, all payments made to the attorney can be recorded so that it is always clear what the financial status of the case is. Also, there should be a built in tickler system for the case so that nothing falls through the cracks. The CMS should be as full featured as possible so that the coordinator can do as much of his work from one place as possible.



Voice over Internet Protocol (VoIP) Phone System with Remote Log In

Not every volunteer attorney wants to go to court, so one way to increase participation is to provide her with other opportunities, such as the ability to give advice and brief services over the phone. While this can be done with a call back system wherein the client is qualified by the legal aid staffer and then told to wait for a call from a pro bono attorney, it is much better for the client if the staffer can simply route the call directly to the attorney. Phone systems now have the ability so that the attorney can log into the system to show her availability, then have calls routed to her just as if she were on the premises. If the volunteer is willing and is trained to do the eligibility screen, callers can be routed to her initially and even on the basis of case type and/or language capability.

This capability might be added by using a hardware SIP Phone[1], a software solution known as a softphone, or by routing to a cell phone. Many cloud-based PBX providers (your phone system lives in the cloud, not at your office) offer these features.

[1] SIP stands for Session Initiating Protocol. SIP phones connect to the Internet to place and receive calls. The device will have a unique IP address and so calls can be routed to it just as if it were connected to the system internally.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

DEVELOPMENTS

A NEW PUBLIC-INTEREST APPELLATE MODEL: PUBLIC COUNSEL'S COURT-BASED SELF-HELP CLINIC AND PRO BONO "TRIAGE" FOR INDIGENT PRO SE CIVIL LITIGANTS ON APPEAL

Meehan Rasch*

INTRODUCTION

Many varieties of new "pro se" or "pro bono" appellate programs have been sprouting up around the country in recent years.[1] Courts, bar associations, and legal services and advocacy

* Associate, Sidley Austin LLP; 2009–10 Sidley Austin Pro Bono Fellow, Public Counsel Appellate Law Program, Los Angeles, California. J.D., UCLA School of Law, 2008; M.A., Indiana University Center on Philanthropy, 2002; A.B., Stanford University, 1999. This article is indebted to the careful program evaluation and detailed materials created by Public Counsel staff, including Appellate Law Program Director Lisa Jaskol, who may be reached at ljaskol@publiccounsel.org for further information about the Program. Thank you to Lisa Jaskol and Christy Mallory for editing and helpful comments on earlier drafts of this piece.

1. For a listing of pro bono civil appellate programs in state and federal courts of appeals compiled in 2005, see Thomas H. Boyd & Stephanie A. Bray, ABA Council App. Laws. Pro Se-Pro Bono Comm., *Report on Pro Bono Appellate Programs* Appendix (2005) (copy on file with Journal of Appellate Practice and Process). However, Boyd and Bray's excellent resource is no longer exhaustive or up to date; many appellate pro bono programs have been initiated or further developed since the publication of the ABA report, including Public Counsel's Appellate Law Program. For a more recent research paper on court support programs and best practices for assisting self-represented civil appellate litigants,

organizations are implementing these projects to grapple with the challenges raised by increasing numbers of pro se (self-represented) and indigent civil litigants in appellate courts.[2] The expansion of pro se litigation strains appellate court resources and staff, but because of the complex, technical nature of the appellate process, the pitfalls for pro se litigants in this area are numerous and substantial.[3] Improper designation of the record, noncompliance with the rules of court, and a failure to provide coherent briefing of the relevant legal and factual issues on appeal are all issues that often impede low-income pro se litigants from obtaining equal access to justice in the appellate process.

Access to justice depends on access to the courts,[4] and pro se civil litigants need adequate information and resources to better navigate state and federal appellate systems and perfect their cases. In many—if not most—cases, they also would

see generally Jacinda Haynes Suhr, Natl. Ctr. St. Cts. Inst. for Ct. Mgt. Ct. Exec. Dev. Program, *Ensuring Meaningful Access to Appellate Review in Non-Criminal Cases Involving Self-Represented Litigants* (May 2009) (available at. http://www.ncsconline.org/D_ICM/programs/cedp/papers/Research _ Papers_2009/Suhr_AccessToAppellateReview.pdf) (copy on file with Journal of Appellate Practice and Process).

2. *See e.g.* Jud. Council Cal., *Statewide Action Plan for Serving Self-Represented Litigants* 2 (Feb. 2004) [hereinafter *Statewide Action Plan*] ("Court operational systems, in accord with traditional adversary jurisprudence, have been designed to manage a flow of cases in which the vast majority of litigants have attorneys to represent them.") (available at http://www.courtinfo.ca.gov/reference/documents/selfreplitsrept.pdf) (copy on file with Journal of Appellate Practice and Process); *see also* Thomas A. Boyd, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. App. Prac. & Process 295, 296–97 (2004) (discussing the increase in pro se litigation in federal, state, and appellate courts and citing sources).

3. *See e.g.* Jud. Council Cal. Admin. Off. of Cts., *Innovations in the California Courts: Shaping the Future of Justice* 16 (2009) [hereinafter *Innovations*] ("For the typical unrepresented civil litigant, the appellate process can be daunting. Filing requirements are exacting. The procedure bears no resemblance to the more familiar trial court routine. The very language can baffle even the sophisticated layperson.") (copy on file with Journal of Appellate Practice and Process).

4. *See* Margaret H. Marshall et al., Conf. C.Js. & Conf. St. Ct. Administrs., *Final Report of the Joint Task Force on Pro Se Litigation* 1 (July 29, 2002) [hereinafter *Joint Task Force Report*] ("[T]he constitutional and historical framework of the American justice system recognizes that a fundamental requirement of access to justice is access to the courts and that this access must be afforded to all litigants—those with representation and those without.") (available at http://www.ncsconline.org/WC/Publications/Res_ProSe_FinalReportProSeTaskForcePub.pdf) (copy on file with Journal of Appellate Practice and Process).

benefit from representation by counsel. For their part, appellate courts struggle to remain neutral and not give legal advice while providing enough guidance to ensure meaningful access for unrepresented litigants.[5] Much of the focus of pro se/pro bono appellate programs has accordingly been on providing print or online resources to which appellate court staff may direct pro se litigants without having to do too much "hand-holding" throughout the process or on methods of screening pro se litigant cases for appointment of pro bono counsel. These are each necessary, but frequently insufficient, measures. Many pro se litigants require technical assistance at each stage of the appellate process, beyond an initial referral to written directions.[6] This need for assistance places a serious burden on court clerks and staff attorneys, who must either spend inordinate amounts of time helping litigants unfamiliar with the court system or deal with noncompliant submissions and faulty briefing as a result of such litigants' lack of guidance.[7] Funding to establish and maintain more formalized assistance structures is not widely available within most courts of appeal. And mechanisms for placement of pro se appellate matters with pro

5. *See e.g.* Mark D. Killian, *Appellate Pro Se Handbook Intended as a Service to the Public as Well as the Bench*, Fla. B. News (Nov. 1, 2007) ("[T]he problem with pro se litigants is that most do not know how to proceed. 'They often are unable to timely file their notice of appeal; they don't know how to perfect their records of appeal, and this places a tremendous burden on the staff attorneys and the court system to give them some guidance without giving them inappropriate legal advice[.]'") (quoting Dorothy Easley, *Florida Pro Se Appellate Handbook* Committee Chair) (available at http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/AB855EE683867E9585257380004F2FA5) (copy on file with Journal of Appellate Practice and Process); *see also Joint Task Force Report*, *supra* n. 4, at 1–2 ("[R]ecent increases in the number of self-represented litigants . . . make significant demands on both court resources and on the ability of judicial officers and court staff to provide an opportunity for a fair hearing while maintaining ethical requirements of judicial neutrality and objectivity."); Boyd, *supra* n. 2, at 298–300 (discussing the challenges posed by pro se appellate litigants).

6. *Cf. Joint Task Force Report*, *supra* n. 4, at 3 (discussing pro se litigation generally) ("Self-represented litigants often expect the filing clerk to provide them with the relevant forms necessary to file a case, which may or may not exist. They also assume that verbal or written instructions will accompany the forms to facilitate the process. Where forms and instructions do not exist, or are difficult for lay people to understand, litigants often turn to court clerks for suggestions on what and how to file.").

7. *Cf. id.* at 3 (discussing pro se litigation generally) ("In some instances, court staff may reject filings by self-represented litigants, once or even several times, due to procedural requirements."); *see also id.* at 4 (discussing the burden of administrative and procedural errors by self-represented litigants after initial pleadings are successfully filed).

bono counsel may depend on proactive litigant request or may be limited in scope to certain kinds of matters.[8] These gaps in the availability of pro bono representation may allow meritorious appeals by pro se litigants to fall through the cracks.

In Los Angeles, a new model seeks to better meet the needs of both indigent pro se appellate litigants and the courts, by providing a staffed self-help clinic on site at a court of appeal. This successful program, now four years old, is a unique collaboration between pro bono public interest law firm Public Counsel,[9] the California Court of Appeal (Second Appellate District),[10] and the Appellate Courts Committee of the Los Angeles County Bar Association.[11] It is the first formal drop-in clinic for pro se appellate litigants housed in any state or federal court, and to our knowledge, no other public interest or legal aid organization in the country currently provides general in-person, self-help technical assistance to indigent pro se individuals

8. *See e.g. Appellate Division Pro Bono Civil Pilot Program*, http://www.judiciary.state.nj.us/appdiv/probono.htm (2001) (New Jersey program providing representation to self-represented low-income litigants in state's intermediate appellate court, limiting placement of pro bono counsel to domestic violence, child custody and visitation, and small claims cases) (copy on file with Journal of Appellate Practice and Process); Boyd, *supra* n. 2, at 305–19 (describing development of an appellate pro bono program at the Minnesota Court of Appeals, limited in scope to appeals from denials of unemployment compensation benefits).

9. Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County, ensuring that other community-based organizations serving these populations have legal support, and mobilizing the pro bono resources of the community's attorneys and law students. Go to http://publiccounsel.org/ for complete organizational and programmatic information, and see http://www.publiccounsel.org/practice_areas/appellate_law for an overview of the Public Counsel Appellate Law Program (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

10. The California Courts of Appeal are divided into six appellate districts. The Second Appellate District, which encompasses the City and County of Los Angeles as well as three other counties, is the state's largest. For general information about the Second District Court of Appeal, see http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/ (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process); *see also* Part I, *infra*. Aside from materials on their websites, none of the other California appellate districts have any dedicated self-help services available to indigent litigants.

11. *See* L.A. Co. B. Assn., *Appellate Courts Committee Page*, http://www.lacba.org/showpage.cfm?pageid=2188 (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

involved in civil appeals. In tandem with managing the self-help clinic, which is staffed three days a week by an experienced appellate attorney,[12] the Public Counsel Appellate Law Program also identifies and evaluates cases for pro bono representation and works with the Appellate Courts Committee to refer appropriate cases to pro bono counsel.

Everyone involved has benefitted from the presence of a knowledgeable, trusted intermediary to both provide technical procedural assistance and facilitate pro bono placement for indigent pro se litigants on appeal. Having these functions handled by the same independent, neutral specialist, accessible at the courthouse yet not paid or supervised by the Court of Appeal, has been of immense value in managing, prioritizing, and streamlining both tasks. Public Counsel hence appropriately describes the program's role as one of "triage."[13] The cost to the court system has been minimal, and the Public Counsel Appellate Law Program offers a model that, with the right local leadership and funding, has the potential to be transferable to courts of appeal nationwide.

Part I provides an overview of the needs addressed by the Public Counsel Appellate Law Program and the history of its formation. Part II gives a detailed description of the Appellate Law Program's model and operation and describes how the Program is meeting its twin goals of improving equal access to justice and increasing efficiencies of the appellate judicial system. Part III compares the Public Counsel model to other pro bono/pro se appellate projects. Part IV discusses the advantages and challenges of the Public Counsel model and its potential for replication by other courts of appeal, and the Article concludes with suggestions for courts, bar associations, and public interest organizations interested in creating similar programs.

12. The Appellate Law Program is directed by Lisa Jaskol, a certified appellate specialist. She graduated from Yale Law School and clerked for the Honorable Harry Pregerson of the U.S. Court of Appeals for the Ninth Circuit. See Part I-C, *infra*, for more on Ms. Jaskol's expertise.

13. "Triage," a familiar term in medicine, refers to the systematic sorting, assigning of priority order, and allocation of resources to those in need. *See e.g. Merriam-Webster Online Dictionary* (2011), http://www.merriam-webster.com/dictionary/triage (defining "triage") (copy on file with Journal of Appellate Practice and Process).

I. HISTORY, NEEDS, AND GOALS

A. Background

The Public Counsel Appellate Law Program emerged from a concerted, collaborative effort by judicial, bar, and public interest leaders in Los Angeles to respond to the needs of indigent pro se[14] litigants involved in appellate matters in the state's Second Appellate District. The Second Appellate District of the California Court of Appeal is the largest and busiest of the state's six appellate districts. The Second Appellate District is made up of four counties—Los Angeles, Ventura, Santa Barbara, and San Luis Obispo—and has eight Divisions of four justices each. Seven of the eight Divisions of the Second Appellate District are located in Los Angeles; they handle all general jurisdiction matters arising from the Los Angeles County Superior Court.[15] The Second Appellate District files over 5,000 appellate opinions and disposes of over 3,700 writ petitions per year.

Given this large volume of appeals, it is not surprising that the Second Appellate District receives a sizeable number of appeals involving indigent pro se litigants. About thirty percent of all civil cases involve one or more parties who are self-represented. (Statewide, over 4.3 million of all California court users are self-represented.[16]) Approximately fifty percent of the pro se appeals filed in the Second Appellate District are filed with fee waivers for indigency, and it is believed that a significant number of the remaining individuals who file pro se appeals are nevertheless indigent under existing Interest on Lawyers' Trust Accounts ("IOLTA") income eligibility standards.[17]

14. In California legal parlance, self-represented litigants are referred to as *in propria persona*, or "*pro per*." For consistency and to avoid confusion for readers outside of California, however, this Article refers to self-represented litigants as "pro se" throughout.

15. The Los Angeles emphasis of the Second Appellate District is for good reason: Los Angeles County is the largest and most populous of the state's fifty-eight counties, with approximately one third of the state's population.

16. *Statewide Action Plan*, *supra* n. 2, at 2.

17. Local IOLTA income eligibility limits for 2009–2010 equal seventy-five percent of the Los Angeles County "lower income" figure determined by the U.S. Department of

Luckily, important leaders were motivated to respond to the challenges posed for, and by, this population of litigants. The current Appellate Law Program is a direct result of the initiative taken by a handful of influential members of the Los Angeles legal community six years ago.

B. Collaborative Planning by the California Court of Appeal, Public Counsel, and the Los Angeles County Bar Association Appellate Courts Committee

In 2005, Second Appellate District Associate Justice Laurie Zelon convened a small group of key stakeholders—from the judiciary, court administration, and the local appellate bar—"to brainstorm how to deliver pro bono legal services to unrepresented appellate litigants."[18] In addition to Justice Zelon, the initial group included Joseph Lane, the Clerk of the Court of the Second Appellate District, the current and immediate past chairs of the Appellate Courts Committee of the Los Angeles County Bar Association, the President of Public Counsel, and a prominent Los Angeles appellate attorney who had served as Chair of the Board of Directors of Public Counsel, President of the Los Angeles County Bar Association, and President of the California Academy of Appellate Lawyers.[19] The driving force behind this joint effort was the recognition that low-income pro se litigants face significant hurdles and could greatly benefit from technical assistance and pro bono representation. At the

Housing and Urban Development. Memo. from Cathy E. Cresswell, Dep. Dir., Cal. Dept. Hous. & Community Dev., *Official State Income Limits for 2010* (June 17, 2010) (available at http://www.hcd.ca.gov/hpd/hrc/rep/state/inc2k10.pdf) (copy on file with Journal of Appellate Practice and Process). All income figures are for gross income.

18. Robin Meadow, *A New Pro Bono Frontier: California's Court of Appeal*, App. Advoc. 9 (Dec. 2007) (available at http://www.gmsr.com/article/A%20New%20Pro%20Bono%20Frontier.pdf) (copy on file with Journal of Appellate Practice and Process); *see also Innovations*, *supra* n. 3, at 16; Laura Ernde, *Appellate Clinic Guides Hundreds*, L.A. Daily J., http://www.publiccounsel.org/tools/assets/files/Unique-Clinic-Guides-Hundreds-Through-The-Appellate-Maze-Daily-Journal-2.8.10.pdf (Feb. 8, 2010) (copy on file with Journal of Appellate Practice and Process) (profiling the clinic and Justice Zelon's encouragement of court officials to partner with Public Counsel to create the program).

19. Meadow, *supra* n. 18, at 9. As stated later by Justice Zelon, "We're all here because we want to decide cases on their merits; it's really nice to have that additional comfort level that something hasn't fallen through the cracks because the party didn't know how to bring it forward." Ernde, *supra* n. 18.

same time, the Court of Appeal believed that providing assistance to indigent pro se appellate litigants would improve efficiencies in the court system and benefit all parties by reducing record preparation time, decreasing other administrative delays, and improving the quality of briefing.

The leaders agreed that the need to better serve and manage indigent pro se litigants was certainly there, but the structure of a suitable program was open to the imagination. As the group studied ways to provide assistance to pro se appellate litigants, certain limitations had to be recognized, including the fact that the Second Appellate District was uncomfortable with the court taking on any significant level of supervision and in any event lacked the funding and staffing to do so.[20] Various questions were raised: whether to limit cases only to certain matters; how or whether to screen litigants for indigency or cases for merit; whether the program would have paid staff or be run entirely by volunteers; how best to connect qualifying litigants with pro bono lawyers.[21]

At first, the group decided to restrict cases to those involving family law, housing, benefits, and consumer issues—programmatic mainstays of Public Counsel's work—and to those matters involving only one pro se party, in order not to contribute to the dynamic of pitting pro se parties against parties with the benefit of counsel. The initial approach was also centered primarily on placement of cases with pro bono counsel, rather than on self-help assistance, and it required time-intensive, proactive outreach measures to individual litigants: "The Clerk of the Court would identify [self-represented] candidates via the Civil Case Information Statement that every California appellant must file, and forward the names to Public Counsel. Public Counsel would then call the parties to conduct an indigency screening and to learn basic information about the case."[22] "Once Public Counsel identified a potential client and

20. *See* Meadow, *supra* n. 18, at 9. For these reasons the nearby, well-established Ninth Circuit Pro Bono Program was a less useful model to emulate, as it involved levels of funding, staffing, and court supervision beyond that with which the Second Appellate District was capable or comfortable. *Id.*; *see also id.* at 11; Part III, *infra* (further comparing the Ninth Circuit and Public Counsel programs).

21. *See id.*

22. *Id.* at 10.

case, a member of the [Los Angeles County Bar Association Appellate Courts] Committee would conduct a preliminary review of the case to determine whether there were arguably meritorious issues. . . . Then, if the case passed this test, Public Counsel would seek a volunteer attorney through its usual channels[,]"[23] with a Committee member available as a mentor. Screening of cases began in 2006.

This limited and time-consuming initial approach was short-lived, and it was substantially modified in the implementation of the current Appellate Law Program. As described in Part II-A, *infra*, the Appellate Law Program is now open to all types of civil matters and it conducts indigency screenings *after* rather than *at* the first point of contact with a pro se litigant. The Program can also provide procedural information and technical assistance to either side (or both sides) of a matter in which both parties are pro se, although it still refrains from seeking pro bono counsel for any party in such situations.[24] The outreach to pro se litigants had to be rethought, too, as litigants "were turned off by getting cold calls from someone they didn't know asking if they needed a lawyer."[25] Plus, the initial version of the Program was dependent upon volunteer and voluntary efforts, and it lacked a central locus of coordination or the ability to provide in-person self-help assistance to indigent pro se litigants until sufficient funding was secured.

C. Initial Funding and Staffing

In 2006, Public Counsel obtained funding for a full-time staff attorney dedicated to the Appellate Law Program. This initial funding came from a State Bar of California Equal Access Fund Partnership Grant, administered by the California Legal Services Trust Fund Program of the State Bar of California.[26]

23. *Id.* at 9–10.

24. *See* Part II-B, *infra*.

25. Meadow, *supra* n. 18, at 10.

26. The Legal Services Trust Fund Program "makes grants to nonprofit organizations that provide free civil legal services to low-income Californians." *See* St. B. Cal., *Legal Aid Grants*, http://calbar.ca.gov/AboutUs/LegalAidGrants.aspx (accessed Mar. 24, 2011) (copy

This breakthrough allowed the formation of a first-of-its-kind self-help clinic on site at the Second Appellate District courthouse in downtown Los Angeles, using office space provided by the Court of Appeal. In addition to providing drop-in assistance to unrepresented civil appellate litigants, the staff attorney could do preliminary screenings of cases and facilitate the placement of appropriate cases with pro bono counsel.

The background, credentials, and public service involvement of the staff attorney hired to direct the Appellate Law Program facilitated the community support for and efficient implementation of the Program. Director Lisa Jaskol is a certified appellate specialist and a former partner at Los Angeles civil appellate law firm Horvitz & Levy LLP. In addition to her extensive appellate expertise, Ms. Jaskol was the Directing Attorney of Public Counsel's Homelessness Prevention Law Project from 2001 to 2004, and she has many years of experience in advocacy and volunteer recruitment. Her appellate bar involvement and connections are also substantial; she is currently Vice-Chair of the Appellate Courts Committee of the Los Angeles County Bar Association and a member of the Association's Amicus Briefs and Access to Justice Committees. Volunteer attorneys and law students assist with the work of the Appellate Law Program under Ms. Jaskol's supervision.[27]

The appellate self-help clinic officially began operation on February 14, 2007.

Although Public Counsel has overall responsibility for the Appellate Law Program, the project remains collaborative, and the founding working group, chaired by Justice Zelon, continues to serve an oversight capacity. The planning and oversight collaborative group consults electronically and by phone to discuss progress and issues as they arise and to review the Program's goals and sustainability. In addition, the Clerk's Office of the Second Appellate District provides critical ongoing support for the clinic's work.

on file with Journal of Appellate Practice and Process). The Equal Access Fund provides financial support to programs improving services to low-income, self-represented individuals.

27. The author worked with the Public Counsel Appellate Law Program in 2009–2010 as a Pro Bono Fellow sponsored by the Los Angeles office of Sidley Austin LLP.

II. THE PUBLIC COUNSEL APPELLATE LAW PROGRAM MODEL: IMPROVING EQUAL ACCESS TO JUSTICE AND INCREASING JUDICIAL SYSTEM EFFICIENCY

The core functions of the Public Counsel Appellate Law Program are to provide assistance to pro se indigent litigants in navigating the civil appeals process, in tandem with coordination of pro bono referrals.[28] Through these activities, the Appellate Law Program seeks (1) to improve equal access to justice—by helping pro se indigent litigants effectively represent themselves; and (2) to increase the efficiencies of the judicial system—by reducing record preparation times, reducing administrative delays caused by pro se errors, and improving the quality and cogency of pro se appellate briefing. The primary entry point for these services is the Program's staffed self-help clinic at the Second Appellate District of the California Court of Appeal.

A. Free Appellate Self-Help Clinic On Site at Court of Appeal

Public Counsel's appellate self-help clinic is housed at the California Court of Appeal (Second Appellate District), in downtown Los Angeles. It is conveniently located inside the court's Settlement and Mediation Center, down the hall from the Clerk's Office. The clinic is staffed by Appellate Law Program Director Lisa Jaskol. This location on site at the Court of Appeal makes the clinic exceptionally accessible to pro se civil appellate litigants. The free clinic is open three days a week from 9:00 a.m. to 3:00 p.m., although in practice the clinic often remains open later if there are litigants waiting to be seen. A sign is posted outside the clinic listing its days and hours of operation. The Court of Appeal provides the use of an office, waiting room, telephone, copier, computer with internet access and printer, filing cabinet, and easy access to Clerk's Office services. As such, "[s]tartup and upkeep costs to the court have

28. The Public Counsel Appellate Law Program also participates in activities such as submitting amicus curiae briefs and participating in moot courts or as counsel in cases that have not come to the Program's attention through the appellate self-help clinic.

been minimal."[29] The clinic's supplies and email service are purchased and provided by Public Counsel.

The Appellate Law Program and the Court of Appeal work closely to ensure that eligible litigants are aware of the clinic's services. When an appeal is filed, the Clerk's Office of the Second Appellate District mails each unrepresented litigant a flier providing information about the appellate self-help clinic. The flier advises litigants of the clinic's location and hours, and it explains how to contact the clinic by phone and email. The Second Appellate District's website prominently mentions the clinic and provides this same contact information.[30] The Clerk's Office keeps copies of the flier on hand for in-person distribution, and its staff regularly directs litigants to the clinic. Copies of the flier have also been distributed to Superior Courts in Los Angeles County and to the Los Angeles County Law Library.

Because an appointment system proved unworkable, individuals are now seen on a first-come, first-served basis during clinic hours. The staff attorney can review litigants' paperwork, help them fill out court forms, guide them in the appeal process, and answer procedural questions. The clinic provides pro se litigants with appellate rules and forms, appellate exemplars (including publicly-filed sample briefs and other filings), simplified practice guides, and detailed explanations of the many rules and procedures they can expect to encounter in their civil appellate matters. The staff attorney can easily access these and other helpful materials on line, as well as search the Court of Appeal and Superior Court online dockets. Spanish-to-English interpretation services and other bilingual language services can be provided by the clinic when necessary and feasible.[31]

The self-help clinic is open to all pro se civil litigants with appellate matters, although the majority of users are indigent.

29. *Innovations*, *supra* n. 3, at 17.

30. *See Appellate Pro Bono Pilot Project*, http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/probono.htm (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

31. Upon arrangement and appointment, and through its pro bono network, Public Counsel can provide language services in Korean, Mandarin, Chinese, Hindi, Hebrew, Farsi, French, and German.

Initially, indigency screenings were conducted before litigants could receive clinic assistance at all, but the screening added time to the drop-in process, and only a very small number of pro se litigants coming to the clinic turned out not to be indigent. Now, formal indigency screenings are conducted after the initial visit, as part of the screening process for placing eligible cases with pro bono counsel.[32] There is no subject-matter limitation on the types of civil appellate matters for which litigants may receive assistance. Litigants who do not qualify for the clinic's services, such as criminal defendants[33] and those with trial court[34] or administrative matters, receive appropriate referrals.[35]

Common topics on which the clinic gives information and technical assistance include the following: reviewing applicable deadlines; completing case information statements; filling out and filing fee waiver applications; designating the record on appeal, including procuring the clerk's and reporter's transcripts; and curing defaults. Other general advice concerns brief writing, citations (to facts and to the law), preparation of appendices; dealing with service requirements; information on motions, applications, and stipulations; and general advice on oral argument. The support provided to appellate litigants can be extremely time-consuming, and many litigants seek ongoing assistance, returning repeatedly for help as their appeals progress. Clinic staff also update and disseminate self-help materials created by the Court of Appeal, Public Counsel, the Appellate Courts Committee, and the Judicial Council of

32. *See* Part II-B, *infra*.

33. Indigent state criminal defendants have a right to appointed counsel, including on appeal, *see Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963), and in California generally qualify for representation by the office of the county public defender. In 2009, California enacted Assembly Bill 590, the Sargent Shriver Civil Counsel Act (signed by the governor on October 12, 2009), which provides funding for a two-year pilot project, slated to start in 2011, to appoint free counsel in certain serious civil cases for indigent litigants. It is unclear whether the pilot project will fund counsel at the appellate level.

34. The Los Angeles Superior Court's Appellate Division handles appellate matters involving less than $25,000, and the Public Counsel Appellate Law Program sometimes provides limited assistance in such cases.

35. Where applicable, clinic attorneys also make referrals to various services for clients with specialized needs, such as veterans, or disabled or mentally ill clients.

California.[36] They coordinate with the Clerk's Office on administrative issues relating to the handling of pro se litigants. On days the self-help clinic is not open, the director continues to assist indigent unrepresented litigants in person, over the phone, and via email from Public Counsel's headquarters.

The assistance offered by the clinic demystifies the appellate process and enables indigent pro se litigants to better represent themselves in appellate court, while stopping short of proffering actual legal advice. No direct representation of clients occurs at the clinic, and no attorney-client relationship is formed there. The Court of Appeal and Public Counsel agree that it is critical that the clinic and its operation not affect—or be perceived as affecting—the court's impartiality and independence. To this end, the Court of Appeal established early on that Public Counsel may not represent clinic litigants. After the clinic opened, the Administrative Office of the Courts also issued rules that formalized the procedures for self-help clinics in California state courts, making clear that representation and legal advice were prohibited.[37] Through a written memorandum of understanding ("MOU") and ongoing review, procedures and practices have been established to ensure that the court's independence is not compromised.

The self-help clinic clearly conveys that it is operated and staffed by Public Counsel and that the Court of Appeal is not, in any manner, advising or representing pro se litigants regarding their appeal or other legal matter. Indigent litigants are told at the clinic that the clinic staff attorney is not their counsel of record, and prominent written disclaimers posted at the clinic inform all individuals seeking assistance that Public Counsel is not their attorney and that no confidential relationship is formed

36. The Judicial Council is the policymaking arm of the California Courts, and is "responsible for ensuring the consistent, independent, impartial, and accessible administration of justice." *Judicial Council of California*, http://www.courtinfo.ca.gov/jc/ (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

37. A complete bar on staff attorneys' representation of clinic customers is not necessarily critical to the integrity of a self-help clinic, and other jurisdictions may observe different rules regarding the propriety of self-help clinic staff also handling cases. For instance, Public Counsel's Proskauer Rose Federal Pro Se Clinic, which assists indigent pro se civil litigants with matters in the federal District Court for the Central District of California, provides legal advice and representation in some cases, with no objection from the court.

when they visit the clinic.[38] Court personnel also notify the pro se litigants of the clinic's relationship to the court and that neither the Court of Appeal nor Public Counsel represents them. Public Counsel staff attorneys are prohibited from representing Second Appellate District litigants encountered through the Program; they exclusively serve a liaison or triage function with regard to representation: Cases may be farmed out to volunteer pro bono lawyers, but they are not handled "in-house" by staff attorneys.

This careful distinction between the Appellate Law Program's provision of information and technical assistance versus direct representation is a limitation in certain ways, but necessary under the rules of the Administrative Office of the Courts. It also offers certain benefits. For instance, because Public Counsel does not establish an attorney-client relationship with individuals using the clinic's services, the clinic can provide technical assistance to both sides of a matter if both sides are pro se. And qualifying litigants still may receive assistance with obtaining representation, due to the Program's functions of screening cases to determine if they are appropriate for pro bono counsel and communicating with pro bono counsel to place cases.

38. Large posters at the self-help clinic read:

Notice

The attorneys and staff at this Self-Help Clinic are available to help all indigent parties who have questions regarding a pending appeal.

The attorneys and staff can help you in preparing your own court filings and can give you general information about the appellate process.

The attorneys and staff cannot go with you to court.

THE ATTORNEYS AT THIS CLINIC ARE NOT YOUR LAWYERS. THERE IS NO ATTORNEY-CLIENT RELATIONSHIP BETWEEN YOU AND THE ATTORNEYS AT THE CLINIC. COMMUNICATIONS BETWEEN YOU AND THE ATTORNEYS AND STAFF AT THE CLINIC ARE NOT CONFIDENTIAL.

You should consult with your own attorney if you want personalized advice or strategy, to have a confidential conversation, or to be represented by an attorney in court.

The attorneys and staff of the Clinic are not responsible for the outcome of your case.

B. Identifying and Referring Matters for Pro Bono Representation

Through the clinic, the Appellate Law Program identifies qualifying indigent litigants with civil appellate matters that may be appropriate for pro bono representation. In order to have their matter placed with pro bono counsel, individuals seeking assistance must meet Public Counsel's standards of indigency,[39] and their appeal must be screened for merit. Because the majority of pro se litigants are eligible for fee waivers, most individuals seeking assistance are income-eligible. If litigants do not meet the guidelines, the clinic directs them to the Los Angeles County and Beverly Hills Bar Associations' lawyer referral services or similar services available in other counties. A qualifying matter exists where an income-eligible unrepresented individual has one or more arguably meritorious positions on appeal. Pro se indigent litigants who are respondents in their civil appellate matters are generally eligible for placement with pro bono counsel (because their success in the trial court already indicates an arguably meritorious position); appellants demand a closer inquiry.

To determine whether an indigent appellant in a civil matter can present one or more arguably meritorious issues to the appellate court, it is necessary to conduct a thorough

39. Litigants are screened for indigency under state law standards:

> "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project which provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

Cal. Bus. & Prof. Code Ann. § 6213(d) (West Supp. 2010). Public Counsel is fully knowledgeable and experienced in this form of income screening because it applies these standards for eligibility in its other program areas. Anyone eligible for Supplemental Security Income ("SSI"), Los Angeles County General Relief, or free services under the Older Americans Act or the Developmentally Disabled Assistance Act is eligible for Public Counsel services.

evaluation of the appeal. "Meritorious" does not mean the appellant will necessarily prevail but rather that the issue deserves serious consideration by the appellate court and may warrant a ruling in the appellant's favor.[40] The staff attorney's initial review of a matter at the clinic sometimes reveals quickly that there is no possible merit to a case. In other cases, the Appellate Law Program may need to request further information (although litigants do not always provide it) or conduct appropriate legal research. Indigent litigants who qualify for representation may be referred to Public Counsel for an interview at the Public Counsel office, or they may be referred to members of the Appellate Courts Committee of the Los Angeles County Bar Association, so that an appellate attorney may obtain more detailed information about their matter. The Appellate Law Program's initial triage of matters in this way saves time and allows staff and volunteer attorneys to focus on those appeals of arguable merit.[41]

Attorneys evaluating an appeal will review the entire record on appeal, including trial court documents and, where relevant, hearing transcripts, conduct appropriate legal research, and inform the Appellate Law Program whether, in light of the applicable standard of appellate review, the appellant can present one or more arguably meritorious issues to the appellate court. In evaluating the appeal, an attorney is assisting the Appellate Law Program only. The attorney is not forming an attorney-client relationship with the litigant. In fact, the appellant will not know the identity or law firm of the attorney evaluating the appeal; the primary interface remains with the Appellate Law Program staff attorney until the matter is placed.[42]

40. By contrast, an appellant's argument lacks merit if it would be frivolous as that term has been interpreted under California Code of Civil Procedure section 907 (West 2009).

41. As noted by Robin Meadow, a member of the initial steering committee convened by Justice Zelon in 2005, "[s]elf-represented litigants . . . frequently file meritless appeals. It would be hard to generate enthusiasm if the pro bono lawyer were to open the file and immediately discover that there was no possible basis for the appeal." Meadow, *supra* n. 18, at 9.

42. If a volunteer attorney evaluating an appeal determines that the appellant can present arguably meritorious issues to the appellate court, the attorney is welcome to handle the appeal as the appellant's pro bono appellate counsel. Alternatively, the attorney

If, after screening, Public Counsel concludes an appeal is appropriate for pro bono representation and receives the litigant's permission, Public Counsel submits the matter to the Appellate Courts Committee for additional assistance or to lawyers recruited by Public Counsel who are willing to handle appeals pro bono. In cases that are deemed not suitable, Public Counsel sends a letter to the litigants informing them of the decision not to seek pro bono counsel on their behalf. Also, regardless of merit or respondent status, the Program will not seek pro bono counsel for a pro se litigant in any matter in which the other side is also unrepresented.

Both Public Counsel and the Appellate Courts Committee of the Los Angeles County Bar Association recruit and train pro bono attorneys and law student volunteers to provide assistance in reviewing and handling appeals. Taking on cases referred through the self-help clinic provides valuable opportunities for junior practitioners to gain experience under the guidance of veteran appellate attorneys.[43] Because in California oral argument is a matter of right rather than at the appellate courts' discretion, every pro bono attorney who takes on a case and completes briefing receives the opportunity to argue. The leadership of the Appellate Courts Committee is committed to recruiting and mentoring attorney volunteers for appeals referred through the Appellate Law Program, and it has created a special listserve of its non-court members that Public Counsel uses to seek pro bono appellate counsel.

The decision to take or reject a case referred by the Program is in the sole discretion of the potential volunteers. A conflict check is conducted with the potential volunteer attorney to ensure compliance with all applicable statutory and case law. If a check reveals a conflict with a particular attorney, Public Counsel attempts to place the appeal with another volunteer, or if none can be found, refers the litigant to a list of third-party

may return the appeal to the Appellate Law Program, which will place it with other pro bono counsel.

43. *See also Report on Pro Bono Appellate Programs*, *supra* n. 1, at 6–8 (discussing the practical benefits to volunteer attorneys of taking pro bono appeals, while emphasizing that "the fundamental reason to represent appellate clients on a pro bono basis . . . is the important objective of insuring that access to justice is available to all persons, regardless of wealth or influence").

referral agencies and sources. When an individual retains counsel, Public Counsel provides no further assistance to the litigant in that matter.

The Public Counsel Appellate Law Program provides a notable increase in the level of access and quality of service provided to self-represented parties, and it relieves the pressure on Court of Appeal staff to facilitate pro se litigants' every interaction with the court. The coordination role played by the clinic serves litigants' needs and effectively relieves the Clerk's Office of being the "go-to" for every pro se litigant concern. The structure of the Program further comports with the Judicial Council of California Task Force on Self-Represented Litigants' recommendations that self-help centers should "conduct initial assessment of a litigant's needs (triage) to save time and money for the court and parties";[44] "serve as focal points for countywide or regional programs for assisting self-represented litigants in collaboration with qualified legal services, local bar associations, law libraries, and other community stakeholders";[45] and "provide ongoing assistance throughout the entire court process";[46] and that space in court facilities near the clerk's office should be made available to self-help centers for pro se litigants.[47]

Having a competent appellate specialist on site to guide pro se litigants in negotiating the appellate system and coordinate pro bono placement has provided an accessible one-stop shop that addresses both litigants' needs and the court's desire for efficiency. Internal and external evaluation measures bear out this success, as detailed in Part IV, *infra*. These findings are consistent with the report of the Task Force on Self-Represented Litigants, which has recognized both fiscal benefits to the courts and benefits to the greater community produced by pro se assistance programs.[48] Although not without its challenges, the

44. *Statewide Action Plan*, *supra* n. 2, at 13.

45. *Id.* at 14.

46. *Id.* at 15.

47. *Id.* at 25–26.

48. Fiscal benefits recognized by the Task Force include time saved in courtrooms; reduction of inaccurate paperwork; increased ability to identify conflicting orders; fewer inappropriate filings and unproductive court appearances; lower continuance rates; expedited case management and dispositions; promotion of settlement of issues; and

Public Counsel Appellate Law Program's integrated model of technical assistance and pro bono triage has proven effective in the Second Appellate District and presents unique benefits compared with other pro bono/pro se appellate models.

III. COMPARISON WITH OTHER PRO BONO/PRO SE APPELLATE MODELS

The Public Counsel Appellate Law Program model of court-based assisted self-help for indigent pro se civil appellate litigants contrasts with other legal services and pro bono appellate project models. Self-help centers are one of the most popular forms of assistance for pro se litigants in trial courts,[49] and the Judicial Council of California Task Force on Self-Represented Litigants has found that "[c]ourt based self-help centers, supervised by attorneys, are the optimum way for courts to facilitate the timely and cost-effective processing of cases involving self-represented litigants, to increase access to the

increased ability of courts to handle their entire caseloads. *Id.* at 2. Benefits to the greater community recognized by the Task Force include improved climate for conducting business, minimized employee absences due to unsettled family conflicts or repeated court appearances; relieved court congestion allowing all cases to be resolved more expeditiously; more timely disposition of contract and collection matters; promotion of public safety through increased access to orders to prevent violence; support of law enforcement through clear written orders related to custody, visitation, and domestic violence; lessened trauma for children due to homelessness or family violence; and significant contribution to the public's trust and confidence in the court and in government as a whole. *Id.* at 3.

49. Public Counsel has a number of collaborative self-help clinics at the courts, including the Pro Per Litigants Legal Clinic Program to assist indigent pro se litigants with guardianship and conservatorship matters in state court, and the Proskauer Rose Federal Pro Se Clinic to assist indigent pro se litigants with matters in the United States District Court for the Central District of California. The Conference of Chief Justices and Conference of State Court Administrators Joint Task Force on Pro Se Litigation noted several models of assistance programs for self-represented litigants in state and local courts, including self-help centers, programs and court rules encouraging "unbundled" legal services, "technological improvements in the delivery of legal information," and collaborative programs between the private bar, community organizations, and legal services agencies. *Joint Task Force Report*, *supra* n. 4, at 2; *see also* John A. Clarke, Bryan Borys & Joi Sorensen, *Doing Things without Bureaucracy*, 23 Ct. Manager 31, 32 (Winter 2008) ("There is a variation in services offered [by self-help programs] (from the simple provision of written materials to workshops that last the life of a case) and in the way the services are provided (from court staff attorneys to MOUs with community-based organizations).").

courts and improve delivery of justice to the public."[50] Despite the success of these models at the trial level, the Public Counsel clinic appears to be the first of its kind on site at any state or federal court of appeal. The combination of an on-site civil appellate clinic and pro bono "triage" bridges some significant gaps in the services offered by other appellate programs that depend solely on court staff to assist pro se litigants, primarily provide online or print self-help materials, or emphasize the placement of litigants with pro bono representation on appeal.[51]

In 2005, the Pro Se–Pro Bono Committee of the American Bar Association Council of Appellate Lawyers, co-chaired by Thomas H. Boyd and Stephanie A. Bray, surveyed appellate courts around the country on "programs they had developed to either address the increase of pro se litigation or promote the availability of pro bono appellate legal services."[52] Their report noted a variety of responses, "ranging from efforts to provide informal instruction and assistance to pro se parties, to self-help materials, to extensive studies and reports prepared by outside consultants on the issues, to elaborate and well-developed pro bono programs."[53] The Pro Se–Pro Bono Committee declined to endorse any prototypical program, concluding that a "one size fits all" approach would not effectively address the challenges of pro se and pro bono appellate matters in different jurisdictions,[54] but it did characterize common types of programs within the spectrum of activity reported by courts and bar organizations. Although new pro se and pro bono appellate programs have

50. *Statewide Action Plan*, *supra* n. 2, at 1.

51. Other public interest appellate programs focus on advocacy to further important social objectives. *See e.g.* Pub. Just. Ctr., *Our Work/Current Focus Areas: Appellate Advocacy*, http://www.publicjustice.org/our-work/index.cfm?pageid=69 (accessed Mar. 24, 2011) ("The PJC's Appellate Advocacy Project seeks to influence the development of poverty and discrimination law before state and federal appellate courts. . . . We work to identify cases that have the potential for accomplishing systemic change of the legal and social systems that create or permit injustice for our clients.") (copy on file with Journal of Appellate Practice and Process).

52. *Report on Pro Bono Appellate Programs*, *supra* n. 1, at 1. Portions of the discussion in the ABA report draw significantly from Thomas H. Boyd's 2004 article, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, *supra* n. 2.

53. *Report on Pro Bono Appellate Programs*, *supra* n. 1, at 1–2; *see also id.* Appendix at 1–22 (listing pro bono civil appellate programs in state and federal courts of appeals).

54. *Id.* at 2.

been developed since the ABA report, and others further developed or abandoned, the primary categories of programs noted remain relevant. The main types of programs highlighted in the ABA report were informal instruction by court staff, provision of written self-help materials, and formal pro bono appointment programs in some federal and state appellate courts.[55]

As the "first point of contact between pro se parties and the justice system,"[56] the clerk's office is often the primary interface for the questions of pro se appellate litigants. The ABA report indicated that a number of courts have educated their clerk's office staff on providing procedural information, forms, and other relevant resources to pro se parties.[57] One court had "initiated a program where senior staff attorneys are 'on call' to take questions from pro se litigants."[58] However, these informal instructional activities "are tempered by concerns that court employees should not provide legal advice,"[59] and the report found that some courts have expressly prohibited their clerk's staff from advising pro se litigants or providing pro bono representation.[60] As described in Part II, *supra*, by providing an accessible third-party liaison at the court, the Public Counsel Appellate Law Program relieves court staff of the time and ethical concerns inherent in providing more comprehensive assistance to pro se litigants navigating the civil appeals process. Pro se litigants can receive help with deadlines, forms, and filings without unduly burdening court resources, and court staff enjoy the benefits of more comprehensible and timely submissions, as well as less contentious interactions with pro se litigants. Court personnel also need not worry as much about

55. *See id*. at 8–14.

56. *Id*. at 9.

57. *Id.*

58. *Id.* at 14 (describing program of the New Mexico Court of Appeals).

59. *Id.* at 9.

60. *Id.* at 9–10 (reporting that the clerk's staff of the Texas Court of Appeals may not advise pro se litigants or provide pro bono representation, by order of the Council of Chief Justices for the State of Texas). *See also Joint Task Force Report*, *supra* n. 4, at 5 (discussing courts' historical reluctance to provide assistance to self-represented litigants) ("Rather than take the risk that assistance might be construed as the unauthorized practice of law, many court policies advised staff to err on the side of caution and not provide any assistance at all.").

crossing "the grey line between legal information and legal assistance."[61] These benefits are borne out in Public Counsel's surveys and focus groups of both court personnel and pro se litigants, as summarized in Part IV, *infra*.

The Appellate Law Program also provides additional guidance beyond that offered merely by written materials developed for pro se litigants. The ABA report found that many courts and bar associations have developed written appellate guides and pamphlets, self-help handbooks, procedural descriptions, frequently asked questions and answers, sample forms, checklists, and other relevant materials for print distribution or online availability.[62] For example, one court created an instructional CD about the appellate process, with interactive instructions for filling out appellate forms.[63] Clear guides written in accessible language (and accessible languages, for non-English speakers) are certainly a helpful minimum resource for appellate courts to provide. Such instructional materials also offer an initial way for court clerks to offset some of the burden of guiding pro se litigants; it is more efficient if court staff can direct litigants to straightforward written directions rather than explain everything anew for each pro se litigant. The Public Counsel Appellate Law Program itself depends on and distributes a host of useful written materials,[64] including an extensive self-help manual,[65] a simplified practice guide for both attorneys and pro se litigants,[66] and the online

61. *Joint Task Force Report, supra* n. 4, at 3.

62. *See Report on Pro Bono Appellate Programs, supra* n. 1, at 10 (giving examples).

63. *See id.* at 13 (describing CD being created by New Mexico Court of Appeals).

64. Many of the resources mentioned may be accessed through the Second Appellate District's *Resources for Attorneys and Self-Represented Litigants* web page, at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/selfhelp.htm (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

65. Cal. 2d Dist. Ct. App., *Civil Appellate Practices and Procedures for the Self-Represented* (revised Jan.1, 2008) (available at http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/proper/ProPerMan2008.pdf) (copy on file with Journal of Appellate Practice and Process)). The Second Appellate District's self-help manual is based on the *Step-by-Step* self-help manual published by Division One of the Fourth Appellate District of the California Court of Appeal (last modified Mar. 3, 2011) (available at http://www.courtinfo.ca.gov/courts/courtsofappeal/4thDistrictDiv1/4dca_stepbystep.htm) (copy on file with Journal of Appellate Practice and Process).

66. L.A. Co. B. Assn., App. Cts. Comm., *Basic Civil Appellate Practice in the Court of Appeal for the Second District* (2003) (available at http://www.lacba.org/Files/Main%20

resources of the California Courts Online Self-Help Center.[67]

The appellate process is complicated, however, and many pro se litigants find it difficult to understand filing requirements and fill out forms despite having detailed written instructions.[68] Even sophisticated litigants can be baffled by the intricacies of the appellate process. Some litigants have the added barrier of limited literacy skills, or they are not native English speakers, and online or interactive computer resources are less accessible to low-income and homeless individuals without computers or computer skills. Court staff do not always have adequate time or patience to provide the level of technical assistance that such litigants need. The Public Counsel Appellate Law Program clinic can hence better meet the need for tangible step-by-step guidance through the appellate process. The on-site staff attorney may spend up to an hour or more with individual litigants and can help type up forms correctly, print out completed forms and make the proper number of copies, and advise litigants exactly how, when, and where to file their documents.

The ABA report also described a number of formal volunteer programs for the appointment of pro bono counsel in civil appeals, organized by federal and state appellate courts, bar associations, and community organizations. Some federal circuit courts have expanded their procedures for criminal appellate representation under the Criminal Justice Act to include selected civil appeals, or they have put panels of pro bono attorneys in place to appoint as counsel in complex pro se cases or cases that raise issues of first impression.[69] Administration of these programs often depends on court funding for dedicated court staff members, as well as volunteer attorneys who help

Folder /Areas%20of%20Practice /AppellateCourts/Files/070522_Appellate%20Courts%20 Committeeprimer.pdf) (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process)).

67. *See* Cal. Jud. Council, *Self-Help Center*, http://www.courtinfo.ca.gov/selfhelp/ (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

68. *See e.g.* Part IV-A-3, *infra* (quoting Court of Appeal staff member stating, "[R]eading the information is not enough . . . . [T]he last thing they need is a form to tell them how to fill out this form.")

69. *See Report on Pro Bono Appellate Programs*, *supra* n. 1, at 10–12 (discussing programs of the United States Courts of Appeals for the Seventh, Second, and Ninth Circuits).

coordinate appointments to the panel. State courts have enacted programs ranging from compiling lists of willing pro bono attorneys and court screening of pro se litigants who might benefit from counsel to collaborative bar/court development of "very effective pro bono programs through which the bar coordinates a pool of volunteer lawyers who will provide pro bono representation in appeals where the court has deemed pro se parties should have legal counsel."[70]

The Public Counsel Appellate Law Program has much in common with these collaborative pro bono programs, with the addition of a community organization, Public Counsel, to screen and coordinate pro bono cases in tandem with the court and bar. Compared with pro bono counsel appointment programs that depend on court staff to screen cases for placement, the Public Counsel Appellate Law Program's pro bono placement process has the advantage of relieving the appellate court of the responsibility for case screening. This placement process has obvious financial, time, and neutrality benefits for the court. Court-based screening processes also tend to kick in after briefing, whereas Public Counsel is in a position to connect with litigants early on and to screen their cases based on a review of the record, getting pro bono counsel in place earlier in the briefing process. Additionally, many other programs lack the Appellate Law Program's focus on indigency, instead basing their screening criteria solely on whether a pro se litigant's case raises significant legal issues (in part to provide an incentive for volunteers).

A comparison of the Public Counsel Appellate Law Program with its neighbor the Ninth Circuit Pro Bono Program highlights some of these differences.[71] As summarized by Robin Meadow,

> The Ninth Circuit's program is staffed and funded by the Court.

70. *Id.* at 14.

71. *See* U.S. 9th Cir. Ct. App., *Pro Bono Program Handbook* (revised Oct. 15, 2009) (available at http://www.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf) (copy on file with Journal of Appellate Practice and Process).

> The [Ninth Circuit Pro Bono Program] handbook does not identify any indigency requirements and there does not appear to be any financial screening process. Rather, the program focuses on "only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument." Pro Bono Handbook, at 1. . . .
>
> The Ninth Circuit program generally kicks in after briefing, when staff personnel review the case to determine whether further briefing or oral argument would be helpful.
>
> Ninth Circuit pro bono counsel are appointed by order of the Court and can seek reimbursement of out-of-pocket costs from the court.[72]

Another benefit is that litigants who do not receive pro bono counsel still have access to the procedural information and technical assistance offered through the self-help clinic at the Court of Appeal. The ABA report notes a program that does the same and even goes a step further: the Veterans Consortium Pro Bono Program, which provides assistance to pro se appellants in the U.S. Court of Appeals for Veterans Claims: "Even where appointment of counsel is not eventually made, veterans who request legal services will receive substantive legal advice and direction through the program."[73] Public Counsel, as described in Part II-A, *infra*, is precluded by court rules from providing legal advice and strategy to pro se appellate litigants. On par, though, the Public Counsel Appellate Law Program model appears to provide a more comprehensive array of services, in a more efficient manner, than most programs in other jurisdictions.

IV. EVALUATION AND POTENTIAL FOR REPLICATION

In its four years of existence, the Public Counsel Appellate

72. Meadow, *supra* n. 18, at 11.

73. *Id.* at 12–13; *see also The Veterans Consortium Pro Bono Program* website at www.vetsprobono.org (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

Law Program has been well received by court employees, judges, litigants, and members of the bar. The Program's success is not just anecdotal. Ongoing recordkeeping and internal evaluation procedures, including eight formal focus groups conducted by Public Counsel, reveal tangible positive results for both litigants and court employees, as described below. In providing an on-site, neutral appellate specialist both to give self-help technical assistance and to coordinate pro bono placement, the Program has demonstrably reduced the burden on court staff, improved the quality of record preparation and briefing (at least when pro bono lawyers prepare the briefs), and improved meaningful access to the appellate judicial system. Other California appellate districts have contacted Public Counsel with interest in replicating the Appellate Law Program model, which should prove to be highly transferable to other jurisdictions in California and around the country.

A. Recordkeeping, Evaluation, and Focus Groups

Public Counsel keeps careful records of the work of the Appellate Law Program and analyzes the processes and procedures that are effective in appellate case triage. Regular recordkeeping tracks the number of people assisted, the number of self-help clinic sessions held, the number of appeals placed with pro bono counsel, the number of pro bono attorneys who have worked on those cases, and the outcomes of those cases. The Equal Access Fund Partnership grant that helps fund the clinic also requires Public Counsel to gather feedback from clinic customers and court personnel to help evaluate the clinic's effectiveness. The feedback is collected through annual focus groups and ongoing questionnaires.

1. Appellate Law Program Statistics to Date

As of December 31, 2010, the Public Counsel Appellate Law Program has held 523 sessions of the self-help clinic at the Court of Appeal. Procedural information and technical assistance has been provided to 1,104 litigants. Another approximately 250 individuals who did not qualify for the clinic's services were turned away or received referrals. Of the

1,104 litigants assisted, many have obtained ongoing assistance from the Program, returning multiple times to the clinic over the course of their appeals.

To date, the Program has placed thirty-six cases with pro bono counsel for representation on appeal, three cases with pro bono counsel for representation in appellate mediation, and thirty-two cases with pro bono counsel for evaluation only. A total of 117 pro bono attorneys have worked on these appeals in some capacity. In 2008, pro bono attorneys donated 2,833 hours to the Appellate Law Program, adding up to $1,095,540 worth of free legal aid. Of the appeals that have gone on to decision, six appellants won an outright reversal of the judgment, ten appellants experienced affirmances, and three appellants obtained a partial reversal and partial affirmance. Each of the six respondents whose appeals were placed with pro bono counsel won an affirmance of the judgments in their favor. One of the cases placed with pro bono counsel was settled, and settlements were obtained in two other appeals without the use of mediation.

The specifics of two successful appellants' cases illustrate the issues that can be at stake for pro se litigants. In one case, a litigant became the owner of real property in 1995 when his elderly aunt transferred the title to him. However, in 2006, unbeknown to the litigant, someone forged the signatures of the aunt and a notary on a grant deed purporting to transfer the property to a third party. As a result, the litigant was rendered homeless and was forced to live out of his car for two years. Acting pro se, he filed a handwritten complaint in Los Angeles Superior Court against the purchaser, the purchaser's realty company, and the title company that searched the county recorder's records in advance of the purchase. The trial court sustained the defendants' demurrers without leave to amend and dismissed the lawsuit, saying the plaintiff did not adequately explain why he was entitled to relief. The litigant appealed and sought assistance from the Appellate Law Program, which evaluated the appeal and placed it with a pro bono appellate attorney, Sarvenaz Bahar.[74] Ms. Bahar argued that the trial court

74. Ms. Bahar was later awarded the 2010 Public Counsel Appellate Law Program Volunteer of the Year Award for most pro bono cases handled with the Program. To watch

erred in dismissing the action because the facts established that the defendants committed actionable wrongs that harmed the litigant. Subsequently, the defendants quitclaimed the title to the property back to the litigant, effectively conceding that he had been the property's true owner all along.

In another case, a disabled indigent individual representing himself filed a personal injury lawsuit in November 2005 against the other driver in an auto accident. In December 2006, the trial court dismissed the case under California Code of Civil Procedure § 583.410, which provides that a "court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case."[75] However, this provision is limited by the subsequent section, which prohibits dismissal during the first two years that an action is pending.[76] The Public Counsel Appellate Law Program first helped the litigant reinstate his appeal, as the Court of Appeal had dismissed it for failure to comply with a court rule. The Appellate Law Program then arranged for pro bono counsel at Arnold & Porter LLP to evaluate the merits of the appeal. The Arnold & Porter lawyers determined that the litigant had a strong argument that the trial court erred in dismissing his case, and they agreed to represent him, pro bono. On August 1, 2008, the Second Appellate District reversed the judgment, agreeing that the trial court erred in dismissing the case under § 583.410 where only thirteen months had passed since the complaint was filed.

These case outcomes are an encouraging measure of the Public Counsel Appellate Law Program's value for litigants.

2. Surveys of Self-Help Clinic Customers and Court of Appeal Personnel

Public Counsel's comprehensive evaluation process gauges the effectiveness of the Appellate Law Program by surveying

a video interview with Ms. Bahar concerning this award, go to http://www.publiccounsel.org/video?id=0037 (Jan. 6, 2011).

75. Cal. Civ. Proc. Code Ann. § 583.410 (West Supp. 2010).

76. Cal. Civ. Proc. Code Ann. § 583.420(a)(2)(B) (West Supp. 2010).

litigant perceptions regarding their experiences at the self-help clinic and determining how and to what extent the clinic benefits the court. Questionnaires have been a targeted way to collect this kind of feedback. Public Counsel distributes them in person at the Court of Appeal and via email, routinely evaluating the surveys and conducting comprehensive reviews of survey data as needed for internal reviews and external grant reports.

From pro se litigants, Public Counsel seeks to discover the following:

> How did they learn about the self-help clinic?
>
> Did the clinic make the appellate process easier?
>
> Did litigants receive information and assistance that helped them understand their situation better?
>
> Were litigants satisfied with the quality of service they received such as helpfulness of staff, accessibility, and responsiveness?
>
> Would they recommend the clinic to others?

From the Court of Appeal, Public Counsel seeks to discover information such as whether administrative delays due to self-represented litigant error were reduced, and how the appellate administrative process may be made more accessible, equitable, and responsive.

The surveys of court personnel reveal that the clinic has been of tremendous assistance to Court of Appeal staff. In every evaluation conducted since the program began, court staff members have expressed their appreciation for the Appellate Law Program's services and have confirmed that the presence of the appellate self-help clinic has greatly reduced the burden on them. As one court staff member puts it, "After speaking with [the clinic attorney], litigants are more educated about the process, and they're more receptive to what we have to say."[77] Court personnel describe pro se litigants as "more informed" in their questions and better prepared in their paper filings as a result of the self-help clinic and increased access to pro bono counsel. One response stated that pro se litigants "may still have some challenges with some of the components of the filing but

77. This and the following several responses are from court personnel questionnaires on file with Public Counsel.

we are generally seeing a significant overall improvement for Self-Represented litigants who utilize the Clinic."

Counter traffic at the Clerk's Office has also been relieved, and having an office near the Court of Appeal is seen as an important benefit by court personnel. "It visibly cuts down on appellants' frustrations" when they realize they can receive more detailed advice even though they are at a court, and court personnel spend "less time having to explain procedures to litigants." "In short, [the clinic] provides a buffer and helps the parties have a better understanding of the appeal process/system." Court staff members are grateful to be able to refer litigants to a "totally impartial" appellate specialist who "does not work for the courts and is not looking for clients"—she is just a "liaison between the appellant and the court." The primary suggestion for improvement by court staff has been to continue and further expand the clinic to five days per week.

Litigant survey feedback has also been overwhelmingly positive. Self-help clinic customers routinely report that they would have been unable to proceed with their appeal (or defend against another party's appeal) without the clinic's assistance. Gratitude is a common theme of the evaluations ("This place is great a life saver . . . Thank you!!!"),[78] and the staff attorney is described as "a great asset to citizens working through the Appeal process." Suggestions for improvement most frequently include provision of legal advice and guidance with substantive legal arguments—services, obviously, beyond the capacity of the clinic's neutrality. One litigant acknowledged, "I don't think they could do any more without actually representing the person looking for help. The service was most helpfuly [sic] informative and outstanding. I COULD NOT HAVE COMPLETED IT without the Clinic."

3.Annual Litigant and Court Personnel Focus Groups

Formal focus groups have furnished another useful way to capture information and suggestions for improvement. Public Counsel conducted the first round of in-person focus groups, one

78. This and the following several responses are from litigant questionnaires on file with Public Counsel.

each for small groups of clinic users and Court of Appeal personnel, in August 2007. Similar focus groups have been repeated annually.[79] Public Counsel uses a variety of methods to recruit focus group participants, including in-person requests at the clinic and telephone and email requests. There have been three to five participants in each focus group, which are confidential and facilitated by Public Counsel staff members unaffiliated with the Appellate Law Program. The Court of Appeal personnel focus groups have taken place at the courthouse, and the clinic-user focus groups have been held at Public Counsel headquarters. Indigent litigant participants have received incentives such as gift cards, metro tokens, and a meal during the focus group to encourage their participation. With participants' informed consent, the focus group discussions are audiotaped and later transcribed for Public Counsel's review.

Discussion topics for the litigant focus groups have included the following:

> How did you find out about the Public Counsel appellate clinic?
>
> Did the self-help clinic help you with your appeal, and if so, how?
>
> If not, in what way did the clinic fail to help?
>
> How can the self-help clinic be improved?
>
> What would you have done if the clinic did not exist?

Discussion topics for the court personnel focus groups have asked these questions:

> Is the self-help clinic making a difference in helping unrepresented litigants correctly fill out forms and comply with court rules?
>
> What are the most and least helpful aspects of the self-help clinic?
>
> What can Public Counsel do to improve the clinic?

79. Public Counsel conducted the second round of focus groups with clinic customers and court personnel in August 2008, the third litigant focus group in August 2009, and the third court personnel focus group in September 2009. Public Counsel conducted the fourth round of focus groups in October 2010.

In the first focus group, litigants reported hearing about the appellate self-help clinic primarily from the Clerk's Office at the Court of Appeal, with a few learning about the clinic from other sources such as the Los Angeles County Law Library or from Public Counsel fliers posted at the Los Angeles Superior Court.[80] In the 2009 focus group, litigants had generally learned about the clinic through the mailed flier from the Court of Appeal after their matter was filed pro se. They liked the in-person aspect of the self-help assistance offered ("[B]esides the internet, it helps to be able to speak to someone and visually see someone and get some kind of help through the process"). Most litigants had multiple interactions with the clinic and expressed appreciation for the directing attorney's communication style ("[S]o nice!"). "What a surprise" to come across a "very decent, very professional person," said one litigant. Focus group litigants also liked the clinic attorney's responsiveness such as calling back right away when contacted by phone.

The litigants were aware that the help they were receiving was not legal advice. As one noted, the clinic attorney "can't help you with the case, but can guide you in the right direction and give you information to help you out." This procedural assistance was still invaluable for many, though. A litigant stated that "without their help I doubt I can have pursued this appeal. And if I hadn't ran into the help of the Clinic I probably would have lost the appeal by one of the built-in defaults that the system unfortunately has."

Focus group litigants suggested that the clinic be advertised more, including distribution in public libraries and churches. Litigants also complained about sometimes waiting long hours to see a clinic attorney, and they expressed disappointment that the clinic did not give out legal advice and could not provide pro bono counsel for everyone. The inability to give legal advice was an especially frustrating limitation for some: "I have asked questions and she would come out and say: I'm not your attorney, I'm not representing you. But she could—she has answers." Another litigant who expected legal advice complained, "[W]hat I wound up doing is spending the money I

80. This and the following several responses are from transcriptions of litigant focus groups on file with Public Counsel.

didn't have because I couldn't get the resources that I thought I was gonna get. . . . [I]t was a little misleading."[81] In general, though, the clinic's efforts were appreciated. As one litigant put it, "[I]ndigent litigants . . . don't really have the firepower to go up against judges and all these lawyers that are out there. But the one thing that we can get here through Public Counsel is an education to get back into that courtroom, and a lot of help, and a lot of moral support."

Participants in the court personnel focus groups have included intake clerks, handlers of predocket appeals (before the appeals are assigned to one of the eight Divisions of the Second Appellate District), settlement and mediation program coordinators, divisional support personnel, and other clerks and staff. Court personnel report fairly constant contact with the program director, and they give frequent in-person referrals to the clinic.[82] Court staff find that the clinic services have soothed pro se litigant confusion, suspicion, and frustrations: "The skepticism and the conspiracy is kind of laid to rest when I let them know she's not with the court; she's a separate entity all her own, pro bono project, with Public Counsel and nothing to do with the Court of Appeals." "[O]nce they've had a chance to talk to her, I find that they stick with it and feel very at ease." "It helps them to have someone to vent their frustrations with the system," then "they'll come back [to the Clerk's Office] and they're more receptive to what we're saying." The on-site location is a bonus, and staff members say that litigants seem relieved "[w]hen you can give them another place to go, which is right down the hall, they don't have to repark their car, find Mapquest how to find it." Court personnel report virtually never hearing complaints about the clinic from litigants, saying that

81. Another issue that came up in the litigant focus groups was that the cost of reporter's transcripts on appeal was a big barrier for indigent appellate litigants, who have to pay for their transcripts out of pocket before their matter can go forward on appeal or be screened for pro bono placement in appeals where reporters' transcripts are required (for example, after trials). Although this is a matter outside of Public Counsel's control, it highlights one of the many financial barriers to appellate justice for low-income litigants.

82. This and the following several responses are from transcriptions of court personnel focus groups on file with Public Counsel.

the feedback they did receive indicated that "[e]verybody is getting equal treatment."[83]

The focus groups confirmed that the liaison function of the clinic is of great value to court personnel. They see the clinic as a useful coordinator for accommodating the special needs of pro se litigants, after which "they're more receptive to what we have to say." Court staff reported having quite a bit of communication with clinic attorneys, but did not see it as a burden, since it took the place of more time-consuming and frustrating direct interactions with litigants: "[I]t's a cohesive triangle. Instead of me and him battling . . . [,] we have another person that's kind of a coordinator." "[J]ust having her there is a buffer." "[H]aving someone to maybe explain the process [and] what's going to happen down the road, probably helps a lot." Court personnel acknowledge difficulty posed by the intricacies and length of the appellate process for pro se litigants ("[T]he appeals process is tough to navigate. It's completely different." "[R]eading the information is not enough . . . . [T]he last thing they need is a form to tell them how to fill out this form."), and said that the accuracy of litigant filings and documents is improved by access to the clinic. One staff member said he found himself also having to write somewhat fewer explanatory letters to pro se litigants who submit incorrect filings ("probably 15 percent [fewer] at best"). Court personnel in the 2009 focus group stated that they had seen a noticeable improvement in filings and litigant attitude over the (then) three years of the program.

Court of Appeal personnel suggested that they would like to see the full range of clinic services open to a wider range of income levels—"in pro per, fee waiver or not. . . . [I]t would be nice if it were open to more people who can pay the $655 to get in the door if they don't qualify for a fee waiver but they just can't afford the $20,000 that it takes." This recommendation was already somewhat implemented by the Appellate Law Program's removing the indigency screening process for initial

83. Court staff members in one focus group elaborated: "I want to say on the record that I get the sense that everybody over there gets fair treatment regardless of what their social status is, what the hierarchy is, what their case is about, religion, race, gender." "Crazy, not crazy." "Homeless, showered, not showered. . . . [Director Lisa Jaskol] just sees everybody just like it's not even you know [sic]—and that's a great thing, I think." "Her first reaction is always open, friendly, and the same, whoever you are."

visitors to the clinic. Placing more cases with pro bono counsel was also recommended; court personnel noted that litigants often "come in with the expectation that [the staff attorney is] gonna represent them" but that the clinic "quells that belief right off." Court staff members also advocated for increased hours of the clinic, since pro se litigants turn up at the Court of Appeal with needs every day and hour of the week and often take time off work and may travel great distances via public transportation to do so ("[T]he fact that it's not open every day is to me the biggest drawback." "[T]he only complaint, if there is a complaint[,] is that it would be nice if they were here five days a week.").

Court personnel additionally remarked that some litigants who arrived less prepared took up lots of valuable consultation time with the clinic attorney. They suggested including more initial information on the referral flier so that litigants would know what to bring with them on their first visit, or creating an initial intake questionnaire to target the clinic's services most effectively. Some staff members who had attended conferences on other self-help programs suggested the addition of a stand-alone computer for litigants to use when filling out forms with clinic assistance. Court staff members in the first focus group were sometimes unsure exactly what range of services the clinic offered, were unaware of changes such as dropping the indigency screen for initial visits, or thought that the clinic attorneys could offer legal advice and represent litigants. They agreed they would like to be better informed about developments ("As the project has grown, we're a little unclear as to all the services that are available."). Later focus groups showed more familiarity with the program.

Although time-consuming, these evaluation measures are critical to assessing and improving the Appellate Law Program, and they have assisted Public Counsel in securing and maintaining funding for the Program. Overall, careful recordkeeping and evaluation processes via survey and focus groups have indicated the success of the Public Counsel Appellate Law Program both for the Court of Appeal and for pro se indigent litigants.

B. Awards

In addition to these important internal measures of success, the Public Counsel Appellate Law Program has been publicly recognized for its innovation and leadership. In June 2008, Director Lisa Jaskol received an award from the Los Angeles Chapter of the National Lawyers Guild for her work with the Appellate Law Program, and in 2010 she was honored with the Los Angeles County Bar Association's Pamela E. Dunn Appellate Justice Award "to recognize significant contributions to public service and appellate practice."[84]

In 2009, the Second Appellate District was awarded a Ralph N. Kleps Award for Improvement in Administration of the Courts for its implementation of the self-help clinic.[85] This biennial awards program, administered by the Judicial Council of California, recognizes programs in the state's courts that are innovative, replicable in other courts, and have demonstrated results.[86]

The Judicial Council's decision to honor the Second Appellate District for its partnership with Public Counsel and the Appellate Courts Committee of the Los Angeles County Bar Association speaks to the success of the clinic's collaborative,

84. *See* Janet Shprintz, *National Lawyers Guild Honors Jaskol, Blasi*, Variety (June 19, 2008) (available at http://www.variety.com/article/VR1117987806.html?categoryid=1985&cs=1) (copy on file with Journal of Appellate Practice and Process)); *see also Lisa Jaskol*, http://www.publiccounsel.org/pages/?id=0013 (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process); *General Information About the Los Angeles County Bar Association Appellate Courts Committee*, http://www.lacba.org/Files/Main%20Folder/Areas%20of%20Practice/AppellateCourts/Files/ACC%20Lacba%20faq%20_2_.pdf (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process). Ms. Jaskol has also been honored by the Impact Fund.

85. *See Innovations*, *supra* n. 3, at 16–17; Jud. Council Cal., *California Court Programs Win Top Awards*, News Release No. 21 (Apr. 24, 2009) (available at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR21-09.PDF) (copy on file with Journal of Appellate Practice and Process)); *see also Kleps Award Recipient 2008–2009 Appellate Self-Help Clinic*, http://www.courts.ca.gov/2195.htm; select Appellate (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process).

86. The Kleps Award also evaluates programs on the extent to which they address or incorporate key elements of "procedural fairness" such as respect, voice, neutrality/impartiality, and trust. For history and complete description of the Kleps Award Program, see *Innovations*, *supra* n. 3, at 4–8; *Kleps Award Recipient*, *supra* n. 85.

on-site program model and its potential to be transferable to other courts of appeal.

C. Advantages and Challenges of Replicating the Appellate Law Program Model

Public Counsel welcomes the opportunity to share its experience in creating the Appellate Law Program with courts and organizations in other jurisdictions. Public Counsel has consulted on creating similar programs in other districts of the California Court of Appeal, but as of early 2011, no others yet exist.[87] Now that the Appellate Law Program has demonstrated its own success and sustainability over a four-year span, it is a useful model for other pro se/pro bono appellate programs. In addition to the substantive benefits discussed above, the Public Counsel model has certain characteristics that give it an advantage as a replicable program, along with certain challenges for replication.

Among the advantages of the Public Counsel Appellate Law Program are its simplicity and its neutrality. At its core, the Program's success consists of placing one neutral appellate specialist in person at the court, to provide technical assistance to pro se litigants and help them connect with and navigate a web of volunteer and judicial resources. Assuming a functional and supportive local appellate bar and court of appeals, the straightforward act of getting an attorney in place to fill such a triage role provides almost instantaneous relief for litigants and court staff. Pro se litigants have a friendly helper to go to for tangible procedural assistance, who can additionally mobilize, connect, and coordinate community resources and service networks as needed.

87. In April 2007, the First Appellate District of the California Court of Appeal, based in San Francisco, launched a more limited pilot program, in partnership with Bay Area Legal Aid, to match indigent pro se appellate litigants with pro bono counsel. *See* Meadow, *supra* n. 18, at 11. This program did not include a clinic or self-help component; it was discontinued in 2008. According to Tiela Chalmers, executive director of the San Francisco Bar Association's Volunteer Legal Services Program, the First District program's failure to thrive was due to the way it was structured as well as reluctant justices who worried that litigants might get unfair advantage from the program's services. *See* Ernde, *supra* n. 18.

Even a part-time person can add a great deal of value, in a way that is easy to explain, understand, and quantify for courts and funders. Funding, of course, is another story, as discussed below; although theoretically the staff attorney role could be filled by a volunteer appellate attorney or team of volunteers, the benefits and stability are greatest with a dedicated staff member in place. Although the strict walling off of the Appellate Law Program from representation of clinic litigants is in large part a function of the policies of the jurisdiction, the Program's neutrality and limitation on representation and direct legal advice certainly provide an advantage for court buy-in for similar programs, as well as a possible advantage in securing funding from state or bar funds in place for court partnership programs.

Primary challenges for replicating the Public Counsel Appellate Law Program model in other jurisdictions include funding, court support and leadership, collaborative planning, and institutional and staff capacity. Funding is always a key issue for the founding and longevity of any public service project, especially in leaner economic times when many court systems and nonprofit community organizations are struggling financially. The Judicial Council of California's Task Force on Self-Represented Litigants has proclaimed that "[i]t is imperative for the efficient operation of today's courts that well-designed strategies to serve self-represented litigants, and to effectively manage their cases as all stages, are incorporated and budgeted as core court functions"[88] The Task Force points out that "[t]he same economic trends currently creating adverse fiscal conditions for courts are also working to increase the population of self-represented litigants,"[89] but all budgetary bets are off in the current era of furloughs and court closures. The Appellate Law Program's founding collaborative had the good fortune of securing a State Bar of California Equal Access Fund Partnership Grant to staff the Program,[90] but that grant itself is time-limited and unable to ensure program continuity beyond the start-up years. Public Counsel must seek support from

88. *Statewide Action Plan*, *supra* n. 2, at 1.

89. *Id.* at 10.

90. *See* Part I-C, *supra*.

foundations, corporations, and individual donors to fund the Appellate Law Program's ongoing operations, and any similar program will need to anticipate the same.

However, as the largest pro bono public interest law firm in the country, Public Counsel also commands resources beyond those of many public interest legal organizations. In Public Counsel's forty-year history, no program has been discontinued for lack of funding, and the organization has substantial unrestricted funds available to support its work.[91] Public Counsel's institutional capacity includes community networks and organizational reputation as well as financial resources. As a well-respected organization with connections to major Los Angeles law firms, public and business leaders, and the larger public interest community, Public Counsel's involvement brings legitimacy and security to a new public interest legal project in a way that may be difficult for smaller organizations to replicate.

Judicial initiative and leadership are also key challenges for replicating the Appellate Law Program. In the Second Appellate District, the Program owes its existence to the foresight of Justice Zelon, who has a "career-long commitment to equal access to justice," and has served as chair of the California Commission on Access to Justice.[92] In other jurisdictions, the

91. Unrestricted funds are generated from Public Counsel's annual William O. Douglas Award Dinner (raising approximately $2 million each year or roughly thirty-two percent of Public Counsel's operating budget), an annual fund drive (raising approximately $300,000 or five percent of Public Counsel's operating budget), and other fundraising campaigns throughout the year.

92. *See* Meadow, *supra* n. 18, at 9. Among other career honors, Justice Zelon received the 2010 Benjamin Aranda Access to Justice Award, sponsored by the State Bar of California, California Commission on Access to Justice, Judicial Council and California Judges Association. *See Justice Laurie Zelon Honored with Benjamin Aranda Award*, Cal. Bar J. (Nov. 2010), *available at* http://www.calbarjournal.com/November2010/TopHeadlines/TH2.aspx (accessed Mar. 24, 2011) (copy on file with Journal of Appellate Practice and Process). "The award, named for the founding chair of the Judicial Council's Access and Fairness Advisory Committee, honors a trial judge or an appellate justice whose activities demonstrate a long-term commitment to improving access to justice." *Id.* In 2000, the Pro Bono Institute in Washington, D.C., named the Laurie D. Zelon Pro Bono Award in Justice Zelon's honor and made her its first recipient, and in 2009, the Los Angeles County Bar Association awarded her the organization's highest honor, the Shattuck-Price Outstanding Attorney Award for "outstanding dedication to the high principles of the legal profession and the administration of justice." *See* Sherri M. Okamoto, *LACBA Selects Justice Zelon for Shattuck-Price Award*, Metro. News-Enterprise

judiciary may view pro se litigants as an annoyance and be resistant to the idea of assisting them on appeal, or may be unwilling to commit to any allocation of facilities and staff assistance to support such a program. The Public Counsel Appellate Law Project also was founded in California, a state with a demonstrable commitment to addressing the issues of pro se and indigent litigants through statewide bar and judicial initiatives and task forces. The Appellate Law Program's founding and success is also due to years of dedication and coordination by Public Counsel, the Court of Appeal, and the Appellate Courts Committee of the Los Angeles County Bar Association.[93] Without bench and bar buy-in and the right community organization to administer the program and provide a staff attorney, effective collaborative planning cannot occur.

Finally, staff capacity is important. Recruiting the right directing attorney for the Public Counsel Appellate Law Program was a breakthrough for the project. Director Lisa Jaskol has years of civil appellate expertise, a long commitment to doing work on behalf of low-income and underrepresented individuals, and she is a well-known and respected leader in the Los Angeles appellate bar and public interest community.[94] Finding a staff attorney of appropriate appellate experience and commitment—and one willing to accept the modest salary concomitant with public interest work—could be a challenge for other programs.

CONCLUSION

Unrepresented indigent litigants constitute a large number of court users, and their numbers are growing.[95] Pro se litigants

(Los Angeles, Cal.) (Mar. 27, 2009) (available at http://www.metnews.com/articles/2009/zelo032709.htm).

93. *See* Part I-B, *supra*.

94. *See supra* n. 12 *and* Part I-C.

95. "A number of social, economic, and political factors—especially the rising cost of legal representation relative to inflation, decreases in funding for legal services for low-income people, and increased desire on the part of litigants to understand and to actively participate in their personal legal affairs, are believed to be at the root of the increase." *Joint Task Force Report*, *supra* n. 4, at 3. *See also Statewide Action Plan*, *supra* n. 2, at 9–

often approach the court system with distrust, which may stem in part from courts' inability to give legal advice and the limited time that court staff members generally have to guide unrepresented litigants through the appellate process.[96] The Public Counsel Appellate Law Program significantly enhances equal access to the judicial, service, and quality of justice for this population, by providing pro se litigants with the tools and technical assistance they need to represent themselves more effectively in the appellate process, and by coordinating the placement of appropriate cases with pro bono appellate counsel. These services also help reduce delays in the Court of Appeal administrative system caused by improper or inaccurate filings, thereby improving the quality and efficiency of the judicial services that can be provided to the public.

The Judicial Council of California, in honoring the Second Appellate District with a Kleps Award for instituting the appellate self-help clinic, made the following helpful suggestions for replicating the program in other courts of appeal:

- Develop a local working group of individuals from the bar and community to brainstorm a list of resources that can be tapped.

- Obtain funding to staff the clinic with an attorney who is not paid by or answerable to the court.

- Find space in or near the courthouse to make the clinic as accessible as possible to litigants.[97]

To this list, we would also add:

- Solicit judicial support for the program and ensure that the working group includes at least one

10, 11–12 (discussing the growth in numbers of pro per litigants and those unable to afford private representation in California and elsewhere).

96. *See e.g.* Clarke et al., *supra* n. 49, at 33 ("The standard response of self-help staff [is] that, although it is clear to the litigants that we know something they don't, we won't tell them[.]").

97. *Innovations*, *supra* n. 3, at 17.

appellate justice and key court personnel such as the Clerk of Court.

- Contact Public Counsel for resources and consultation on establishing a similar program in your jurisdiction.[98]

- Build in recordkeeping and evaluation measures from day one, in order to gauge the success of the program and demonstrate the program's impacts to the court and to funders.

The Public Counsel Appellate Law Program meets an important community need and has been a boon to the Court. A neutral coordinator on site at the Court of Appeal puts indigent pro se litigants more at ease with appellate practices and procedures, provides an efficient way to triage and trouble-shoot litigant issues, and eases the burden on court staff of dealing with pro se litigants. As the Judicial Council of California's Task Force on Self-Represented Litigants has noted, there is "a unity of interest between the courts and the public with respect to assistance for self-represented litigants."[99] With the growing national awareness of the need to provide additional service to self-represented civil appellate litigants by the courts and bar, collaborations to install similar programs can expect to meet with interest and success.

98. Public Counsel Appellate Law Program Director Lisa Jaskol may be reached at ljaskol@publiccounsel.org for further information about the Appellate Law Program.

99. *Statewide Action Plan supra* n. 2, at 1.

LSC
America's Partner For Equal Justice

Report of

The Summit on the Use of Technology to Expand Access to Justice

December 2013

Report of The Summit on the Use of Technology to Expand Access to Justice

Table of Contents

Background

It has been widely estimated for at least the last generation that all the programs and resources devoted to ensuring access to justice address only 20%[1] of the civil legal needs of low-income people in the United States. This is unacceptable in a nation dedicated to the rule of law and to the principle of justice for all.

The Legal Services Corporation (LSC) has found through its experience with its Technology Initiative Grant program that technology can be a powerful tool in narrowing the justice gap—the difference between the unmet need for civil legal services and the resources available to meet that need. Drawing on this experience, in late 2011, LSC decided to convene a summit of leaders to explore how best to use technology in the access-to-justice community. LSC formed a planning group with participants from its grantees, the American Bar Association, the National Legal Aid and Defender Association, the National Center for State Courts, the New York State Courts, the Self-Represented Litigation Network, and the U.S. Department of Justice's Access to Justice Initiative to design the summit.

The group adopted a mission for The Summit on the Use of Technology to Expand Access to Justice (Summit) consistent with the magnitude of the challenge:

> "to explore the potential of technology to move the United States toward providing some form of effective assistance to 100% of persons otherwise unable to afford an attorney for dealing with essential civil legal needs."

The planning group decided on a two-step process to accomplish this mission. In June 2012, LSC hosted the first session of the Summit with 50 participants (all participants are listed in the Appendix). This group was asked to explore a technology vision for expanding access to justice without regard to cost or practicality. In preparation for this first session, the planning group commissioned a series of white papers, six of which are available in the *Harvard Journal of Law and Technology*[2] and five more are available online.[3] The participants in the first session identified 50 distinct technology activities that could be useful in improving access to justice.

The group attending the second session of the Summit in January 2013 was asked to develop a concrete plan for moving forward using the ideas developed in the first session. The second session had to consider factors such as cost, feasibility, and likelihood of adoption. In preparation for the second session, the planning group deployed a process called "Choiceboxing" to reduce the list of options. Using a website developed for this purpose, first session participants were given lists of 26 possible objectives and 50 possible technology activities and asked to identify their top 10 priorities from each list.

The planning group decided that the second session should focus on the top six activities identified in this process: (1) Document assembly for self-represented litigants; (2) better "triage"—that is, identification of the most appropriate form of service for clients in light of the totality of their circumstances; (3) mobile technologies; (4) remote service delivery; (5) expert systems and checklists; and (6) unbundled services.

The 51 attendees at the second session included 24 from the first session and 27 new participants (*see Appendix*). After an overview of the six areas of focus, the attendees divided into smaller groups to discuss strategies for overcoming obstacles and implementing the six areas of focus.

This report reflects the results of a process involving 75 leaders in legal services, the private bar, courts, libraries, IT development, legal academia, and other communities involved in providing access to justice; two one-and-a-half day working sessions; and preparation of numerous papers and analyses.

This report proposes a national vision that must of necessity be achieved locally. The proposal is ambitious. It must overcome challenges not only of technology, but of leadership, funding, and resistance to change. While the Legal Services Corporation has sponsored this process, from its inception the participants have recognized that the leadership necessary to implement the Summit's recommendations must come jointly from a broad spectrum of entities involved in providing access to justice.

A Vision of an Integrated Service-Delivery System

Technology can and must play a vital role in transforming service delivery so that all poor people in the United States with an essential civil legal need obtain some form of effective assistance.

The strategy for implementing this vision has five main components:

1. Creating in each state a unified "legal portal" which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process

2. Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves and linking the document creation process to the delivery of legal information and limited scope legal representation

3. Taking advantage of mobile technologies to reach more persons more effectively

4. Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable

5. Developing "expert systems" to assist lawyers and other services providers

The vision for achieving this is:

- Every state will create a statewide access portal that provides an easy way for a person to obtain assistance with a civil legal issue.

- The portal will use an automated process to refer each requester to the lowest-cost service likely to produce a satisfactory result in her or his case.

- The automated process will ultimately be informed by a sophisticated "triage" algorithm continually updated for each state by feedback data on the outcomes for persons who have previously sought assistance through the portal.[4]

- The portal will support a broad variety of access-to-justice services provided by courts, the private bar, legal aid entities, libraries, and others who collaborate in implementing the initiative. The systems of all collaborating entities will exchange information automatically to support each other's applications and to enable the accumulation and analysis of information on the functioning of the entire access-to-justice process.

- The baseline service available in a state will be a website accessible through computers, tablets, or smartphones that provides sophisticated but easily understandable information on legal rights and responsibilities, legal remedies, and forms and procedures for pursuing those remedies.[5] The statewide access portal will link a requester with the most appropriate section of the website.

- All of the collaborating entities in a jurisdiction will employ the same document assembly application, which will generate plain-language forms through an interview approach. Litigants will use the application themselves, or with lay or legal assistance, to choose a legal form or forms appropriate for their personal objectives and to complete the form by entering all required information through an on-line interview process.

- The document assembly application will employ automated "smart document" tags for the information entered by a requester so that the information can be reused by all access-to-justice entities without requiring re-entry of the information.

- The document assembly application will be linked to:

  - the website for access to detailed information about the legal principles and terms underlying the form

  - legal services providers, court self-help centers, and libraries and other support entities for assistance that does not include legal advice

  - legal aid lawyers or private lawyers providing pro bono services (or private lawyers providing unbundled legal services if the requester is unable or unwilling to receive free legal services) for legal advice on some aspect of the requester's legal situation

  - the court's electronic filing and electronic payment applications

  - the access-to-justice entity's case management application to store all tagged data for reuse

- Forms generated by the document assembly application will be universally accepted by courts in the state.

- All access-to-justice entities will employ a variety of automated and non-automated processes to make the best use of lawyers' time to assist requesters with their cases, including:

  - conducting business process analyses to streamline their internal operations and their interactions with all collaborating entities

  - having clients/litigants perform as much data entry and handle as many of the functions involved in their cases as possible (given the nature of the case and the characteristics of the client/litigant)

  - having lay staff perform a broad range of assistance activities not requiring the expertise of a lawyer

  - having expert systems and checklists available to assist and save time for lawyers and lay service providers

  - maximizing the extent to which services are provided remotely rather than face-to-face, to save the time of both the clients/litigants and the service providers

- The level of legal representation in a case will be guided by the state "triage" algorithm, which will be reviewed and revised regularly to make it as accurate as possible.

- Persons seeking more extensive legal services will be linked to legal aid offices, pro bono attorneys, court self-help centers, or lawyer referral services.

- Mobile applications will be deployed to assist requesters/clients/litigants.

- Evaluative information will be generated by automated systems routinely, presented to all collaborating entities regularly, and assessed collaboratively to refine and improve the access-to-justice process.

Components of the Integrated System

This section sets forth a detailed vision and implementation outline for each of the five main components. Many of the strategies will require funding and are therefore contingent on finding the resources to implement them. We have no current commitments to fund any of the strategies suggested. Securing financial support will be part of the hard work needed to make the vision a reality.

1. Statewide Legal Portals

The Vision

Each state now has multiple websites providing information on the courts, legal services, and private bar resources. The variety of choices can be confusing for the user and wasteful of scarce resources when multiple entities are providing information on the same topics. The better approach would be a single, statewide mobile web access portal in each state to which a user will be directed no matter where he/she comes into the system. The portal will support computers, tablets, and smartphones.

When an access-to-justice portal is implemented:

- Information will be available anywhere, any time to every person seeking assistance.

- Assistance from a person—lawyer or otherwise—will be available anywhere, if resources are available.

- The portal will use methods such as branching logic questions and gamification[6] to generate information on the capabilities of an inquirer, which will be part of the referral logic.

- The portal will generate information on the legal needs of persons within the state, aggregate it, and provide it regularly to all participating entities.

The key to this portal will be an integrated system of resources, rules, and recommendations through which users can be matched with available services. The site will apply branching logic to users' responses to questions and direct them to the most appropriate resource, considering factors such as case complexity, litigant capacity, strength and representation of the opponent, the importance of the litigant's stake in the case, and the availability of the resource (updated in real time).

All access-to-justice entities in a state (including legal aid entities, courts, the organized bar, interested law firms and lawyers, law schools, libraries, pro bono legal services support entities, and other interested community entities) will develop the portal and will receive appropriate referrals from it. If a referral proves inappropriate, the entity to which the referral was made may make a different referral. The confidentiality of information provided by an inquirer will be preserved.

Service options will include:

- Link to a specific section of a website for substantive and procedural information and access to document assembly forms
- Connection to a legal services, court, or library staff person for information and navigation assistance (including a personal assessment of the capability of the service requester)
- Connection to a self-help center or legal services attorney
- Connection to a lawyer providing unbundled services on a pro bono or compensated basis (if the client is able to pay)

If the inquirer is connected to a person, that person will have the capability to change the referral. Responses from a person will take the initial form of an email, text message, or live chat. Escalation can take the form of a phone call or video conference.

An essential function of the portal will be the accumulation of data on how cases progress and, based on outcome data, the relative efficacy of various service delivery mechanisms. The goal is to employ technology that is smart enough to refine referrals based on the data collected, but human review will be essential to the evaluation process.

It is unrealistic to propose that every referral be reviewed, but the system designers will build in a statistically valid system of review that will spot-check referrals and help to improve their efficacy. After the initial portal implementations are evaluated, the model will be modified as necessary, and the template will be provided for other states interested in replicating the process.

Implementation Plan

LSC will work with others to secure funding to develop portals in up to three pilot jurisdictions, selected competitively. The pilot portals will be designed for maximum potential reuse in other states. Although LSC currently requires its grantees to have a statewide website for each state, and although many court websites have good information for self-represented litigants, the portal will be a new site that (1) aggregates the resources already available, (2) delivers new resources to fill any gaps that exist, and (3) provides the new functionality envisioned by the triage and expert systems.

To compete for the pilot program, jurisdictions should demonstrate that the portal will be created and supported as a collaborative effort of the major access-to-justice entities within the state and that they are committed to sustaining funding for the portal after the grant.

2. Document Assembly

The Vision

Plain language forms will be produced through plain language interviews for all frequently used court and legal forms (e.g., a consumer letter). Users will answer questions regarding their legal matter, and the intelligent forms system will use the information to generate the appropriate form and display it for review. The forms will be translated into all locally appropriate languages (but produce English language forms for filing). The systems will employ "smart form" XML tagging[7] to deliver information in the form for recording and reuse in court and other entity case management systems. The document assembly system will provide "just in time" legal information (such as the definition of legal terms used

in the form, as questions in the interview are reached), links to fuller discussions of legal options and implications, and links to unbundled legal advice providers to enable users to obtain professional assistance with specific issues at affordable rates.

Documents in process will remain on the system for a limited time to allow users to complete them in multiple sessions. Completed documents may be e-filed and filing fees paid through the system using a credit card. Court orders and notices will be generated using the tagged information and the same document assembly process (augmented by court workflow systems). Document assembly/e-filing systems will deliver filed documents electronically to process servers for service.

Implementation Plan

Unlike some other parts of this plan, document assembly is a relatively mature process in use by many access-to-justice entities. The biggest challenge is not a technological one, but the lack of uniform court forms in most states. The access-to-justice entities in each state must make the development of uniform statewide forms a priority, but that undertaking is outside the scope of this report.

Document assembly technology can benefit from additional development. For example, there is still a need for XML tagging standards for the data elements used in "smart forms," for compliance with or expansion of the National Information Exchange Model (NIEM) data model for those data elements, and for the cooperation of the courts, legal services providers, and vendors to implement support for those data standards in document assembly, e-filing, case management, and other types of applications and products. These standards are essential so that the various data systems used by legal services providers and the courts can share information without the need to reenter it. Creating links from document assembly to limited scope legal assistance requires the cooperation of unbundled legal services providers and, in many states, state or local bar associations or other legal referral entities.

To support our vision, we encourage those funders that provide resources to implement document assembly within a jurisdiction to make that funding contingent on commitments to:

- Implement the "full scope" document assembly vision described above
- Create a collaborative structure involving at least legal services organizations and courts that will ensure the system is developed and used by all access-to-justice entities within the jurisdiction
- Adopt court rules that will ensure universal acceptance of forms generated by the system by the courts within the jurisdiction
- Obtain extensive input from court users and from staff with the most frequent interaction with users, and from access-to-justice providers, in developing interviews and forms

Document assembly funding should cover:

- Technical support
- Support for a full-time internal position to manage the development and deployment process and to promote use of the application by staff and clients/litigants
- Resources for ongoing maintenance and support of document assembly applications, not just for their initial development and deployment

It should be possible to reuse interviews and forms developed in one state or jurisdiction by adapting them to the laws and requirements of other jurisdictions.

Much of the information needed to evaluate the effectiveness of a document assembly application should be built into the system itself—obtaining evaluative information from users and as a by-product of system operations, such as assessing the understandability of particular parts of an interview based on the likelihood that users change the information they enter, take longer than usual to complete an interview part, activate help functions, or seek in-person staff assistance.

3. Mobile Technologies

The Vision

Access-to-justice services will be location-independent and accessible using smartphones, tablets, and other mobile devices. Because the US population is becoming accustomed to remote delivery of banking, shopping, information retrieval, and support services, access-to-justice service providers may also need to adopt remote service delivery approaches. Use of computers, tablets and, increasingly, smartphones is becoming the expected medium for accessing services of all kinds. Eighty-six percent of adults earning less than $30,000 per year own cell phones, and 43 percent own smartphones.[8]

Implementation Plan

Information websites will be redesigned for easy access by, and interaction with, mobile devices by providing information in smaller, simplified sections that are readable on a smartphone screen. The new statewide legal portal and other automated systems should automatically detect the nature of a querying device and deliver information in the format appropriate to the device.

Access-to-justice entities should record user communication preferences and use them for sending reminders or alerts (e.g., email or text message). They should take advantage of smartphone capabilities by developing applications such as:

- A courthouse map application to find the right courtroom
- Use of a QR code (which can be saved on a smartphone) to link to location-specific information, to access a user's case and schedule information, or to add information to a user file when an access-to-justice professional has a client contact in the field
- Credit card transaction payments for court services using mobile devices
- Checklists of documents needed for interview or court appearance
- Smartphone scanning for document submission (e.g., pay stub or tax return)
- Video capability for court appearances, interviews, hearing preparation, and explanations of information
- Automated translation capabilities
- Linkage to court scheduling
- Use of geo location to provide resources
- Preventive information and tools

The Legal Services Corporation has already funded several mobile technology projects. It will assess existing projects and identify those that can be reused or replicated by other access-to-justice entities.

The implementation strategy for the vision should identify funding for three types of mobile technology projects and choose the projects competitively:

- Redesign of websites for mobile access
- Replication of successful current mobile projects
- Development of new applications such as those listed above

Once funding is obtained, LSC will negotiate one (or a few) national support contract(s) for mobile technology services to redesign websites and to develop mobile applications and mobile web applications for the specific jurisdictions selected in the competition. Support contracts should be awarded to jurisdictions based on the comprehensiveness of applications, including cross-entity collaboration. Each contract should be negotiated so that any access-to-justice entity that does not qualify through the competition can still procure services under its rates, terms, and conditions.

Individuals and small organizations now have the resources and capability to develop sophisticated mobile applications. "Hackathons" and other "crowdsourcing" means should be used to stimulate creativity and individual initiative in developing useful mobile apps for access-to-justice purposes. For instance, a state could challenge students to develop courthouse map apps for every courthouse in the state.

To ensure that poor people do not miss important, time-sensitive information provided by mobile applications, the initiative should undertake a campaign to convince telecommunications carriers to exclude specified access-to-justice addresses from the computation of chargeable usage counts—both minutes and data.

4. Business Process Analysis

The Vision

Business process analysis involves the disciplined "mapping" of how a task or function is performed, using standard conventions for depicting different aspects of the process. The process is often led by an outside expert in the use of the analysis, but it engages enough members of the organization to ensure a complete understanding of how the task or function is performed at all levels of the organization.

Application of business process analysis enables the participants to:

- Better understand the work they do in specific case types
- Simplify and improve their own processes and improve coordination with processes of other relevant entities
- Identify new processes that can improve case handling and provide additional capabilities
- Assign appropriate tasks to clients/litigants and to staff other than lawyers
- Apply the best available technology to substitute for or augment the work of staff and lawyers

- Increase understanding of, engagement with, and adoption of best practices and technology through the analysis process itself, which is inherently collaborative across staff and stakeholders

- Reduce costs, handle more cases, and meet the needs of more clients/litigants by ensuring that each case is handled efficiently

When the business process analysis is conducted with participants from multiple entities (such as courts, legal services providers, private lawyers, libraries, etc.), the benefits expand to include:

- Analyzing the optimal roles that each entity can perform in providing access-to-justice services (in particular, identifying where and how private lawyers can make the best contribution on both volunteer and fee-generating models and how to create incentives for the increased participation of the private bar)

- Maximizing the systemic impact of process improvements, rather than confining the improvements to a single entity

- Minimizing the duplication of effort across entities

- Expanding provider knowledge of others' processes

Process analysis can be conducted on a statewide basis to maximize the return on the participants' involvement. For instance, all of the legal services providers within a state could analyze the process for a particular case type, because the laws governing the process are the same (although how cases are handled by the courts may vary from county to county).

The purpose of business process analysis is not to identify one "best way" for handling a type of case. Rather, it provides a method by which individual programs, jurisdictions, and states can identify the process that will best meet the needs of the stakeholders in that place and time, given the existing legal and organizational structures and resources available. Knowledge about process, represented as process map templates in standard formats, can be shared across the access-to-justice community. It takes less time to modify an existing map to reflect local practices than to create one from scratch. Reusability can be maximized by:

- Using a single technical standard, such as Business Process Modeling Language, for documenting business process analyses

- Documenting the legal and organizational context for each analysis

- Recording the identities and contact information of the authors of such analyses to facilitate reuse of expertise

Implementation Plan

Implementation starts with a pilot project or projects: States will be invited to apply to create process map templates in several of the most common areas of poverty law practice. Applicants must commit to implementing and evaluating these business process results.

We contemplate that expert services will be provided to successful applicants pro bono by consulting firms, law firms, or legal services providers that have already gone through the process and learned its techniques and nomenclature. The legal services community will develop a cadre of

expert support available at little or no cost to each program. These experts will not only examine existing practices but also endeavor to identify new capabilities that would benefit the systems.

The expectation is that the pilot projects will clearly demonstrate the benefits of business process analysis, both with increased access and a positive return on investment, so that other states join in these efforts. The National Center for State Courts is already working with state court systems and individual courts to conduct similar analyses. The leaders of the initiative will strive to encourage collaborative process analysis efforts at the state and local level.

LSC will create a website to collect completed process maps and to organize them for review by other entities beginning their analysis of a process.

5. Expert Systems and Intelligent Checklists

The Vision

Expert systems use information provided by a client to create personalized legal information tailored for her or him or the advocate/assistant. Such systems can be envisioned for a wide variety of topics, including benefits eligibility, identification of necessary forms and procedures, alternative approaches to problem solutions, and preventive law.

Intelligent checklists guide clients and advocates through the steps in processes, such as initiating or responding to court actions and dealing with government agencies.

Implementation Plan

The strategy to achieve the vision should include the development of a generic tool or tools that use the alternative types of logic needed for effective expert systems and checklists.

As access-to-justice entities conduct business process analyses for specific case types in their jurisdictions, they may identify a specific expert system or intelligent checklist application that would help deploy a revised business model for providing services. They could seek help for identifying existing tools experts capable of developing an application appropriate for their needs and funding for pilot efforts that could then, if successful, be publicized and reused elsewhere. Development of high-level expert systems will be governed by a state's rules governing the practice of law.

Next Steps for Reaching the Vision

Create a Steering Committee to Provide Leadership for Achieving the Integrated System

LSC will reconvene the group that planned the Summit to discuss how to achieve the goals identified in this document. It is anticipated that this group will present the vision for an integrated system to other national organizations supporting access-to-justice entities, urging their endorsement and asking for their support and guidance.

Activities for the steering committee may include designating:

- A small group to provide day-to-day direction to the initiative
- An appropriate supporting entity that can receive and administer funding raised to support the effort

- A more detailed action plan and timeline for the initiative revised on at least an annual basis

- A plan for generating and dispensing the funding that will be necessary to implement the initiative

Develop an Ongoing Outreach Process

It will be essential for the steering committee to communicate with the national organizations that represent access-to-justice stakeholders. The committee must reach out to, and obtain the support of, Access to Justice Commissions in every state in which they exist. These entities are natural allies, because they invariably have cross-organizational memberships and missions.

The steering committee must inform the trial court community of the vision to develop a general level of acceptance and to prepare a receptive environment for overtures from local legal services programs and bar associations to participate in pilot program activities. The Steering Committee must also engage with representatives of the joint committees on Access, Fairness and Public Trust of the Conference of Chief Justices and the Conference of State Court Administrators, with the National Center for State Courts, and with the National Association for Court Management to develop a strategy for reaching a significant part of the courts community.

This vision calls on legal services organizations to rethink a service delivery model that has been in place for more than a generation. LSC will need to reach out to and work closely with legal services leaders to obtain their input and assistance.

Develop a Funding Strategy

The steering committee will conduct an analysis of the costs associated with developing, deploying, and maintaining the pilot projects proposed. This analysis will produce an estimate sufficient to provide the basis for developing a funding strategy.

The committee will develop a funding strategy to seek financial support from multiple sources with the goal of leveraging congressional appropriations through additional private funding, including:

- LSC's Technology Initiative Grant program for essential initial activities, provided TIG funds are within the framework of the TIG program and awarded using the existing competitive process

- The State Justice Institute

- State legislatures and courts

- IOLTA programs

- Private foundations

- Corporate sponsors

- Individual donors

- Private venture capital investment in supportive applications that involve lawyers in the provision of unbundled legal services.

The strategy should include periodic meetings of all entities that supply financial support for the initiative to provide them with progress reports.

Develop a Replication Strategy

Even if all of the pilot projects prove successful, the initiative might fail unless the pilots are replicated in other jurisdictions. It is unrealistic to expect any funding strategy to find enough new money to do this replication. The pilots should be able to demonstrate not only that they improve access to justice, but that they are cost-neutral or result in savings. Therefore, a component of each pilot's evaluation needs to be a study of the return on investment for the project. To be most effective, these pilots will need an evaluation strategy that establishes the business case for their replication with hard data.

Develop a Communications Process

The initiative will need a communications program to provide progress reports on projects and to keep the access-to-justice community (both IT specialists and legal practitioners) informed concerning emerging best-of-breed applications, technology trends and developments, and strategic analyses of the implications of larger technology trends for the initiative and for the access-to-justice community more broadly.

Conclusion

The Summit resulted in a blueprint for using technology to provide some form of effective assistance to 100% of persons otherwise unable to afford an attorney for dealing with essential civil legal needs. We look forward to working with the broader legal services community to implement the Summit's vision for an unprecedented expansion of access to justice in the United States.

Endnotes

[1]Legal Services Corporation, ***Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans***, 2009, p.13.

[2]http://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech241.pdf

[3]http://jolt.law.harvard.edu/symposium/

[4]The term "triage" is placed in quotations because its use here is different from its source meaning in battlefield and other medical emergency situations, where a large number of casualties are sorted into groups to make the most effective use of limited treatment resources in medical circumstances. One of the groups is people whose wounds are so grievous that they are abandoned. This initiative, by contrast, has as its mission ending the current practice of abandoning (i.e., providing no service to) large numbers of poor people with essential civil legal needs. We use the term "triage" as it is commonly used today, including in the access-to-justice community, to characterize a range of strategies for allocating scarce resources most effectively.

[5]Such websites are already in place in every state. The initiative will ensure that they are accessible through smartphones and tablets as well as computers.

[6]Computer games use various techniques such as competition and rewards to keep users engaged. Similar tactics are being introduced into other software and websites to encourage users to complete the tasks and thus maximize their learning. This technique is called "gamification."

[7]Data "tags" are standardized notations identifying the nature of the data in a particular data field so that the data can be exchanged among different computer systems—e.g., so that information concerning "apples" in one application can be placed into the location for "apple" information in another application.

[8]As of May 2013, according to Pew Internet & American Life Project, http://pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx

Attendees from the First Session of the Summit

Name	Title	Company	City	State
IV Ashton	President & General Counsel	LegalServer	Chicago	IL
Jorge Basto	CIO, Judicial Council of Georgia	Administrative Office of the Courts	Atlanta	GA
David Bonebrake	Program Counsel	Legal Services Corporation	Washington	DC
James Cabral	Senior Manager	MTG Management Consultants LLC	Seattle	WA
Abhijeet Chavan	CTO	Urban Insight, Inc	Los Angeles	CA
Thomas Clarke	Vice President, Research & Technology	National Center for State Courts	Williamsburg	VA
Lisa Colpoys	Executive Director	Illinois Legal Aid Online	Chicago	IL
Leonard DuCharme	Chief Strategy Officer	HotDocs Corporation	Lindon	UT
Fern Fisher	Deputy Chief Administrative Judge NYC	New York State Unified Court System	New York	NY
Eric Fong	IT Supervisor	Legal Assistance Foundation of Chicago	Chicago	IL
Jeff Frazier	Senior Director	CISCO	RTP	NC
Jamie Gillespie	Director of Operations, Odyssey	Tyler Technologies	Plano	TX
Richard Granat	President	DirectLaw, Inc.	Palm Beach Gardens	FL
John Greacen	Principal	Greacen Associates, LLC	Regina	NM
Pamela Harris	Court Administrator	Montgomery County Circuit Court	Rockville	MD
Steven Hollon	Administrative Director	Conference of State Court Administrators	Williamsburg	VA
Bonnie Hough	Managing Attorney	Administrative Office of the Courts	San Francisco	CA
Molly Jennings	Outreach Editor	Harvard Journal of Law and Technology	Cambridge	MA
Bill Jones	Technology, Information & Content Coordinator	American Bar Association Center for Pro Bono	Chicago	IL
Stephanie Kimbro	-	Kimbro Legal Services, LLC	Wilmington	NC
Marcia Koslov	Executive Director	LA Law Library	Los Angeles	CA
Lisa Krisher	Director of Litigation	Georgia Legal Services Program	Atlanta	GA

Name	Title	Company	City	State
Karen Lash	Senior Counsel	US Department of Justice	Washington	DC
Marc Lauritsen	President	Capstone Practice Systems	Harvard	MA
Susan Ledray	Pro Se Services Manager	4th Judicial District Court, MN	Minneapolis	MN
Lora Livingston	District Judge	Travis County	Austin	TX
Andrea Loney	Executive Director	South Carolina Legal Services	Columbia	SC
David Maddox	Assist. IG for Management & Evaluation	LSC/OIG	Washington	DC
Phil Malone	Clinical Professor of Law	Harvard Law School	Cambridge	MA
Ed Marks	Executive Director	New Mexico Legal Aid	Albuquerque	NM
Michael Mills	CEO	Neota Logic	New York	NY
Mark O'Brien	Executive Director	Pro Bono Net	New York	NY
Snorri Ogata	Chief Technology Officer	Orange County Superior Court	Santa Ana	CA
David Otte	CIO	Sidley Austin LLP	Chicago	IL
Alison Paul	Executive Director	Montana Legal Services Association	Helena	MT
James Pierson	Director Center for Innovation, PeaceHealth	PeaceHealth	Bellingham	WA
Laura Quinn	Executive Director	Idealware	Portland	ME
Glenn Rawdon	Program Counsel for Technology	Legal Services Corporation	Washington	DC
Linda Rexer	Executive Director	Michigan State Bar Foundation	Lansing	MI
Jane Ribadeneyra	Program Analyst	Legal Services Corporation	Washington	DC
James Sandman	President	Legal Services Corporation	Washington	DC
Maria Soto	Sr. VP Operations	NLADA	Washington	DC
David Tait	Professor	University of Western Sydney	Picnic Point	-
David Tevelin	-	Tevelin Consulting Group	Arlington	VA
James Waldron	Clerk of Court	United States Bankruptcy Court	Newark	NJ
Paul Wieser	-	Nunc Software LLC	Boardman	OH
Richard Zorza	Founder	Self-Represented Litigation Network	Washington	DC

Attendees from the Second Session of the Summit

Name	Title	Company	City	State
IV Ashton	President & General Counsel	LegalServer	Chicago	IL
David Bonebrake	Program Counsel	Legal Services Corporation	Washington	DC
Kevin Bowling	Court Administrator	20th Circuit Court	West Olive	MI
Kevin Burke	District Court Judge	Hennepin County District Court	Minneapolis	MN
Peter Campbell	CIO	Legal Services Corporation	Washington	DC
Alan Carlson	CEO	Orange County (CA) Superior Court	Santa Ana	CA
Thomas Clarke	Vice President Research & Technology	National Center for State Courts	Williamsburg	VA
Lisa Colpoys	Executive Director	Illinois Legal Aid Online	Chicago	IL
Jane Curran	Executive Director	The Florida Bar Foundation	Orlando	FL
Dina Fein	Judge	Massachusetts Trial Court	Springfield	MA
John Greacen	Principal	Greacen Associates, LLC	Regina	NM
Pieter Gunst	Founder and COO	LawGives	San Francisco	CA
Jeff Hogue	Supervising Attorney	LawNY	Geneva	NY
Will Hornsby	Staff Counsel	American Bar Association	Chicago	IL
Bonnie Hough	Managing Attorney	Administrative Office of the Courts	San Francisco	CA
Ronke' Hughes	Intake Managing Attorney	LSNV	Fairfax	VA
Bill Jones	Technology, Information & Content Coordinator	American Bar Association	Chicago	IL
Mark Juhas	Judge	Los Angeles Superior Court	Los Angeles	CA
Stephanie Kimbro	-	Burton Law LLC	Wilmington	NC
Karen Lash	Senior Counsel	US Department of Justice	Washington	DC
Marc Lauritsen	President	Capstone Practice Systems	Harvard	MA
Susan Ledray	Pro Se Services Manager	4th Judicial District Court, MN	Minneapolis	MN
Jon Levy	Justice	Maine Supreme Judicial Court	Portland	ME
Phil Malone	Clinical Professor of Law	Harvard Law School	Cambridge	MA

Name	Title	Company	City	State
Ed Marks	Executive Director	New Mexico Legal Aid	Albuquerque	NM
John Mayer	Executive Director	CALI	Chicago	IL
Michael Mills	CEO	Neota Logic	New York	NY
Eric Mittelstadt	Deputy Director	Utah Legal Services	Salt Lake City	UT
Vince Morris	Director	Arkansas Legal Services Partnership	Little Rock	AR
Mark O'Brien	Executive Director	Pro Bono Net	New York	NY
Snorri Ogata	Chief Technology Officer	Orange County Superiro Court	Santa Ana	CA
Alison Paul	Executive Director	Montana Legal Services Association	Helena	MT
Andrew Perlman	Professor	Suffolk University Law School	Boston	MA
Michael Prince	IT Manager	Legal Aid of NorthWest Texas	Dallas	TX
Laura Quinn	Executive Director	Idealware	Portland	ME
Glenn Rawdon	Program Counsel for Technology	Legal Services Corporation	Washington	DC
Elizabeth Reppe	State Law Librarian	MN State Law Librarian	St. Paul	MN
Linda Rexer	Executive Director	Michigan State Bar Foundation	Lansing	MI
Jane Ribadeneyra	Program Analyst	Legal Services Corporation	Washington	DC
Lisa Rush	Law Library Manager	Travis County Law Library	Austin	TX
James Sandman	President	Legal Services Corporation	Washington	DC
Don Saunders	Vice President, Civil Legal Services	NLADA	Washington	DC
Ron Staudt	Professor	Chicago-Kent College of Law	Lake Bluff	IL
Betty Torres	Executive Director	Texas Access to Justice Foundation	Austin	TX
Kristin Verrill	Practice Innovation Manager	Atlanta Legal Aid Society, Inc.	Atlanta	GA
Laurie Zelon	Associate Justice	California Court of Appeal	Los Angeles	CA
Richard Zorza	Founder	Self-Represented Litigation Network	Washington	DC

For further information

Legal Services Corporation
3333 K Street, NW
Washington, DC 20007
202.295.1617
www.lsc.gov

Follow LSC on Facebook at **facebook.com/LegalServicesCorporation**
Twitter at **twitter.com/LSCtweets**
Vimeo at **vimeo.com/user10746153**
YouTube at **youtube.com/user/LegalServicesCorp**


LSC
America's Partner For Equal Justice

Why I Support Appellate Pro Bono Services (and Why You Should Too)

Michael S. Truesdale, *Law Office of Michael S. Truesdale, PLLC, Austin*[1]

Introduction

Many great organizations work to make legal services more accessible to Texans who cannot afford to pay for them. These groups match pro se individuals with lawyers willing to volunteer their time to help solve problems that would otherwise go unaddressed. Members of the bar often help Texans in a variety of contexts. In the courtroom and out, lawyers frequently donate their time and services to provide access to the judicial system for lower income Texans. Yet, despite the substantial number of hours of free or discounted legal services donated annually by volunteer lawyers, the needs of far too many Texans go unanswered—four-fifths of all those financially eligible for volunteer legal services are turned away for want of enough resources to help them.

Low-income Texans face litigation and nonlitigation matters of tremendous personal significance. Often a parent's right to child custody or visitation, or a family's right to remain in housing in the face of a dispute with a landlord hang in the balance. Without the assistance of lawyers, all too many Texans are denied meaningful access to their day in court. And when a case involves litigation, often the need for assistance does not end with the entry of a trial court

[1] On behalf of the Appellate Section, the Editors wish to thank Mike for his outstanding service as Co-Chair of the Section's Pro Bono committee, as coordinator for the Section's ad hoc program, and as the Section's liaison to the Texas Supreme Court's Pro Bono Pilot program.

judgment. Not surprisingly, appellate lawyers see these needs manifest as cases move from the trial courts to the courts of appeals. That is where appellate pro-bono services come into play.

I. Pro Bono Services in the Courts of Appeals

Over the years, the Appellate Section of the State Bar of Texas has taken a proactive stance to help match volunteer attorneys with parties who want to appeal a trial court ruling but cannot afford to hire appellate lawyers. The Appellate Section has worked with various courts of appeals creating programs to identify cases that may be suitable for pro bono assistance and to match volunteer lawyers with those who qualify for assistance. The Appellate Section's efforts have benefitted from the input of the participating courts and their staffs in discussing ideas for effective pro bono programs, incentivizing lawyers to volunteer, and helping identify cases that may be eligible for placement. And members of the Appellate Section have been generous with their time, volunteering to serve on screening committees or to serve as counsel on appeal.

Pro bono programs are designed to identify cases involving parties who are not represented by counsel. In those cases, the pro se parties are identified by their docketing statements and then asked whether they are interested in participating in the program. If a party elects to do so, the clerk of the court notifies the pro bono coordinator for the program, who then screens the applicant and the case for eligibility. When a party is eligible, the coordinator provides basic public information about the case to a pool of volunteers. Volunteers interested in handling the case notify the coordinator and the pro se applicant is then matched with counsel. If no volunteer is found, the party proceeds on a pro se basis. Since its inception, the appellate court pro bono programs have matched hundreds of Texans with volunteer lawyers who have donated tens of thousands of hours of services at no charge.

Many volunteers come from "big firm" practices and routinely handle appeals involving business disputes among clients who can afford to pay for the record on appeal and for countless hours spent researching and writing briefs and preparing for oral argument. Their eyes are often opened in the course of handling pro bono appeals, where cases may involve life-altering issues for the parties involved. And while the financial stakes may not be as high as those raised in multi-million dollar contract disputes, the issues are no less important to the pro se clients who otherwise would not have meaningful access to the appellate courts without assistance from a volunteer. Barring the pro bono programs, these parties, often single parents working several jobs and trying to raise children, would be left to have perhaps the most important issues in their lives decided without the benefit of counsel in highly technical forums.

To date, pro bono appellate programs have been established in the most populous appellate districts in the state. In fact, 70% of all civil appeals perfected in 2011 were filed in appellate courts with pro bono programs or with programs in the works. The Appellate Section is proud of such statewide coverage, made possible by participating local bar groups, state-wide volunteers, and the participating courts.

But 70% coverage means that 30% of appeals are taken in courts that do not have established pro bono programs. This reality for low income Texans means that a parent contesting a child-custody ruling in one part of Texas may not have access to help from an appellate lawyer that would be readily available to a similarly situated parent in another part of the state.

The Appellate Section employs an "ad hoc" pro bono program to help fill this gap. This program attempts to match pro se litigants with appeals in nonparticipating appellate courts with volunteers from a statewide pool of volunteers.

Many appeals have been placed through this program, but because it operates ad-hoc, oftentimes pro se litigants do not know about it. Unlike the more formal programs, no mechanism exists to identify the availability of the program when parties file their appeals. During the upcoming year, the Appellate Section will work to make it easier for courts without pro bono programs to participate in the ad hoc program, so that a system can be put in place to provide appellate pro bono access to all pro se Texas litigants regardless of which court of appeals may be involved.

II. Pro Bono Services in the Supreme Court of Texas

The need for pro bono counsel does not necessarily end once an appellate court issues its decision in a case. Cases are often dismissed in the courts of appeals because parties cannot afford the costs associated with preparing a record (paying to have a transcript of a trial or hearing prepared or to have pleadings filed with the trial court copied and compiled) and fail to qualify as "indigent" litigants entitled to a record at no cost. Or pro se appeals may be dismissed on other procedural grounds involving briefing or the presentation of clearly articulated errors to the courts. Pro se parties intent on obtaining review frequently try to challenge such dismissals by filing petitions in the Texas Supreme Court. But the reality is that not every case can be accepted for review by that court, leaving many without recourse for additional review.

Several years ago, the Texas Supreme Court, in conjunction with the Appellate Section, established a pilot program to help match qualified pro se litigants with volunteer appellate counsel. Under the program, when the court requests briefing on the merits in a case involving a pro se litigant, the court informs the parties of its pilot program. If the pro se party is interested in participating and qualifies, the program liaison will then work to find a volunteer appellate lawyer to serve as counsel in the Texas Supreme Court. The program benefits not only the pro se parties, by providing

them access to volunteer lawyers, but also provides a service to the court, by providing professional briefing on what may be issues of great significance to Texas law and to the citizens of Texas. Recent examples include matching counsel with a party whose appeal was dismissed based upon the failure to file a record, a record the party could not afford as an indigent. Not every pro se case qualifies for inclusion in the program, and there is no guarantee that a volunteer will be found in every qualifying case. Even so, the program has been a great success in terms of helping frame important issues for the court's review.

The efforts of the Appellate Section and its members, local bar groups, the Texas courts of appeals, and the Texas Supreme Court have been laudable in providing assistance to those who cannot afford appellate counsel. But gaps still exist affecting the ability of those who cannot afford a lawyer to obtain access to full review on appeal. During the first three months of 2012, over one-fifth of all new cases filed in the Texas Supreme Court were brought by pro se parties, without the benefits of counsel (and this statistic only focuses on pro se petitioners—it does not account for cases in which a represented party seeks review of a judgment in favor of a pro se respondent). As noted, the cases brought by pro se petitioners frequently raise issues of the utmost importance to individual Texans, such as child custody/visitation, the loss of a family home, or the denial of disability benefits. And these parties are often forced to litigate on their own in a forum where the odds are significantly against receiving review, even when sought by veteran lawyers.

The first hurdle a party faces before becoming eligible to participate in the Supreme Court Pro Bono Pilot Program is the preparation of a petition for review that will garner enough interest by the court to generate a request briefing on the merits. The Texas Rules of Appellate Procedure set forth the format for a petition and what must be included, but at times

even seasoned trial lawyers have difficulty in preparing petitions that comply with all the rules.

To help pro se litigants pass this hurdle, the Texas Supreme Court, in coordination with the Appellate Section, has prepared an instruction booklet for use by pro se litigants explaining what must be included in a petition, what a petition looks like, and how it is organized. The instructions accompany a set of templates available online for use in preparing a petition. These templates set forth the requirements for a petition for review, and provide a tool for the pro se litigant to organize and present issues to the court. They are designed as a resource for the inevitable portion of cases filed with the court by parties who have attempted unsuccessfully to retain appellate counsel or who could not afford to do so. It is hoped that these templates and instructions will allow pro se litigants to focus on framing issues that the court will deem significant enough to warrant briefing on the merits, rather than becoming overwhelmed by the mechanics for preparing a compliant brief.

III. Why Appellate Pro Bono is Important to Me

Over the years I have provided pro bono services through bar-related organizations, serving as co-chair of the Appellate Section's Pro Bono committee, as coordinator for the Section's ad hoc program, and as the liaison for the Supreme Court Pro Bono Pilot program. I served as faculty for an appellate-advocacy program designed for legal-aid providers, and I have represented the Appellate Section at programs advocating for legal aid. And beyond providing these administrative services, I have also served as pro bono counsel in various appeals in the Third Court of Appeals as well as before the Supreme Court.

My appellate pro bono experiences have led me to the following three observations. First, providing pro bono legal services is personally rewarding. The clients I have represented have been truly grateful to have someone stand

beside them, listening and advocating for their cause. Only recently, an applicant called me in tears to thank me for placing her case with a volunteer, a call I will surely remember for years.

Second, appellate pro bono not only serves the legal needs of individual litigants, but also confirms the legitimacy of the appellate process. When parties lacks access to meaningful appellate review for want of counsel, it may appear to them as though the system is stacked against them. The dignity of the process is diminished when parties feel they lose simply because they could not present their case and be heard. But even a losing client can walk away with more faith in the system when they feel they have had their day in court represented by volunteer counsel.

Third, I have come to realize how great a need exists for appellate pro bono services. As noted, almost a quarter of all cases brought before the Texas Supreme Court are brought by pro se parties, without the benefit of assistance of counsel. The vast majority appear pro se not by choice but out of necessity, not having the means to retain and pay an attorney to prepare a petition for review. Indeed, as liaison for the Supreme Court's Pro Bono Pilot Program, I receive numerous inquiries from parties whose efforts to retain appellate counsel have gone unsatisfied and who are desperately seeking pro bono assistance at the petition stage. I routinely reply that the Texas Supreme Court's Pilot Program is designed to provide assistance at the merits-briefing stage, but not at the petition stage. But the reality is that in the absence of a coherent petition that clearly identifies important issues, most pro se petitions will never make it to the point where they can receive assistance under that program. It is hoped that the template initiative will help parties position their cases so that they can obtain assistance through the court's pilot program. But a need will always exist for assistance, even at the petition

stage, and even though no formal system exists to match counsel with potential petitioners.

IV. And Why it Should be Important to You

As noted, the Appellate Section continues to explore new ideas for expanding pro bono services to all Texas courts of appeals and for improving existing programs. We are working on plans to make our statewide pool of volunteers accessible to pro se parties in all state courts of appeals, without regard to geography. And we are also considering ideas to expand the services our volunteers provide in matters before the Texas Supreme Court.

But efforts to expand current programs are constrained by the number of volunteers available to match with pro se parties. Our appellate-court programs currently struggle to avoid overwhelming our pool of volunteers, with many lawyers taking case after case. And an expansion of current programs to other courts, without additional volunteers, would prove to be an accomplishment on paper alone. Without more volunteers, any expanded program could not serve the needs of all new pro se participants, and we would still have to turn away those in need.

Any pro bono services provided by Texas attorneys should be applauded. As a young lawyer interested in developing an appellate practice I recall wanting to volunteer my time, but struggled to find opportunities that would allow me to develop professionally as well. Those options exist through the Appellate Section's pro bono programs for the aspiring appellate lawyer as well as the appellate veterans. And through the cooperation of the participating courts, pro bono cases may provide opportunities to receive oral arguments that are otherwise hard to come by.

Conclusion

The stakes for the individuals are high and the needs are great. Our programs can continue to succeed and expand with

your help. I invite you to visit the pro bono page of the Appellate Section's website (www.tex-app.org/probono.php) and add your name to the ranks of volunteers willing to assist with appellate matters so we can reach the goal of ensuring no pro se litigant must go it alone on appeal.

PROPOSAL FOR A PRO BONO INITIATIVE

SUBMITTED TO THE SUPREME COURT OF TEXAS

BY

THE STATE BAR OF TEXAS APPELLATE SECTION

PRO BONO COMMITTEE

OCTOBER 1, 2007

TABLE OF CONTENTS

THE PRO BONO PILOT PROGRAM

The following is a proposal from the Pro Bono Committee of the Texas Bar Association Appellate Section for a joint pilot program with the Supreme Court of Texas to deliver appellate services to indigent or nearly indigent clients at risk of losing important rights. Our goal is to match clients who are financially unable to procure legal representation with volunteer lawyers who agree to serve without expectation of compensation. We believe that supplying willing and able appellate lawyers to prepare and present the legal arguments in proceedings before the Court will assist the Court in the decision-making process while affording our members valuable experience and exposure to the Court. Below we present the Committee's proposal for the Pro Bono Pilot.

A. Overview

The Program is triggered when the Court requests full briefing of a pro se litigant's appeal and refers it to the Committee. Only after a pro se litigant's case receives three votes from the Court will it be eligible for referral. The Clerk's office will notify the parties and the Committee's Program Liaison of the referral.

The Committee's Program Liaison will then send a letter to the pro se litigant: (1) explaining the Program requirements; (2) providing an application; and (3) ascertaining his/her financial eligibility for the pro bono representation. If the litigant chooses not to apply or does not satisfy the financial eligibility requirements for the Program, the appeal proceeds pro se. Otherwise the Committee disseminates basic facts and information about the case, including parties and background, through selected Internet sites and a Listserv sent to a pool of volunteer attorneys that have previously signed up to participate in the Program. An attorney is selected from that pool, and the litigant is informed of the match by the Committee and afforded fourteen (14) days to object to the match. Barring objection, an engagement letter is executed, and the

volunteer attorney notifies the Court that he or she is counsel of record. The Court will then order a briefing schedule. The volunteer attorney can file a motion for extension of time to file the merits brief if needed to fully review the record and draft a brief on the merits. Oral argument is not guaranteed. A more detailed account of how we envision the Program to work follows.

B. Placement of Pro Bono Cases

1. Recruiting volunteer attorneys

The Committee has already undertaken a substantial and successful recruiting effort to enlist pro bono appellate lawyers willing to volunteer their time to take on cases selected for inclusion in the Pro Bono Program, as well as other specialty pro bono programs that the Committee is sponsoring. The Committee has amassed a list of volunteers to serve as pro bono counsel in matters deemed appropriate for inclusion in the Pro Bono Program. The questionnaires we have been using to recruit volunteers are fairly detailed so that we can be in a position to make appropriate matches between cases and volunteer attorneys according to their areas of interest, experience, and availability. We are pleased to report that we have more than 40 lawyers who have signed up based upon our first recruiting effort and expect to recruit many more as this and other pilot programs develop. We are continuing our marketing efforts throughout the bar.

Notably, we have been successful in obtaining volunteer commitments from a wide variety of appellate lawyers. It has been our experience that younger appellate lawyers are willing to devote the often substantial amounts of time involved in pursuing pro bono appeals in order to enhance their knowledge and skills, as well as to obtain the opportunities for greater exposure to, and oral argument before, the Court. The more seasoned appellate lawyers typically

have less time to contribute, but we believe their input and insight can be invaluable to the process both in terms of mentoring young lawyers and honing and enhancing the overall presentation of the issues. As a result, we have created a "Mentor" role designed to permit our most experienced appellate practitioners to participate in an advisory capacity, while preserving the young lawyer's ability to take the lead on the appeal, including presentation of oral argument, if granted. It is from this pool of volunteers that the Committee will match the cases it selects for inclusion in the Program.

2. Qualifications/Financial Eligibility

The Court has indicated that it will determine whether a given case should be included in the Pro Bono Program at the time it considers the petition for review. Based on our understanding of the Court's objectives, it is the Committee's recommendation that the two criteria for inclusion in the Program are: (i) the petition presents one or more issues on which at least three Justices have requested merits briefing; and (ii) the pro se litigant meets the financial eligibility criteria for the Program. It is our belief that Pro Bono Program should be offered to parties who meet the criteria for indigence under the Texas Rules of Civil and Appellate Procedure or otherwise would satisfy the requirement for representation by an IOLTA-funded program, such as Legal Services Corporation or Volunteer Legal Services. Insuring that a pro se litigant satisfies one or both of these financial eligibility requirements is important to the Committee because its malpractice coverage requires that we insure that at least half of our Program clients are within 175% of federal poverty guidelines.[1]

[1] We are working with the Executive Director of the Task Force for the Delivery of Legal Services to the Indigent to increase the percentage to 200% of federal poverty guidelines to be consistent with Legal Services Corporation and other IOLTA providers.

The Committee emphasizes that it is willing and able to place cases for parties whose income might exceed these requirements, but who cannot afford appellate counsel—especially because the cases selected by the Court for briefing on the merits will likely be ones having potential for meriting the Court's review and setting precedent. However, we also believe the Program may function more smoothly if financial eligibility is established in advance by objective criteria. We propose that the financial eligibility requirement for participation in the Program be defined as follows:

> Participation in the Supreme Court's Pro Bono Pilot Program is available to litigants who satisfy the Program's financial eligibility requirements. For purposes of the Program, "financial eligibility" means that the party has filed an affidavit of indigence in accordance with Texas Rule of Appellate Procedure 20, is proceeding without paying costs of court, and either no contest was made to the affidavit, or the contest was sustained in favor of the indigent party.
>
> Pro se parties can also satisfy the financial eligibility requirement for the Program if, due to their financial circumstances, they are receiving, or are eligible to receive, free legal services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts ("IOLTA") program. In this circumstance, the attorney must file an IOLTA certificate confirming that the

---

The following table depicts the relevant income levels for various categories of families based upon 175% of the 2006 Poverty Guidelines from the U.S. Department of Health and Human Services:

Persons in Family or Household	175% of Federal Poverty Guidelines
1	$17,150.00
2	$23,100.00
3	$29,050.00
4	$35,000.00
5	$40,950.00
6	$46,900.00
7	$52,850.00
8	$58,800.00
For each additional person, add	

ORIGINAL SOURCE: The 2006 Federal Poverty Guidelines are taken from Federal Register, Vol. 71, No. 15, January 24, 2006, pp. 3848-3849. Further information can be found at http://aspe.hhs.gov/poverty/06poverty.shtml.

IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines.

With regard to the IOLTA certificate, we have been informed by the directors of Legal Services Corporation, an IOLTA-funded program, that they will handle the screening process for potential participants in the Pro Bono Program, thus satisfying Texas Rule of Civil Procedure 145 and Texas Rule of Appellate Procedure 20 and avoiding the need for a contested hearing on indigence in the Supreme Court.[2]

3. Selection and referral process

As noted, if three members of the Court decide to request briefs on the merits in a case involving parties who are pro se, it will refer that case to the Committee. The case will then proceed on the usual procedural course in terms of briefing, oral argument, and ultimate disposition with the appointed attorney serving as lead counsel—with a few exceptions, as noted below.

a. Referral of individual cases

Once the Court identifies a case for inclusion in the Pro Bono Program—by way of internal vote sheets or otherwise and presumably after the petition for review briefing has been completed—the Court would direct the Clerk's office to refer the matter to the Committee. That referral process would result in notification to the parties who have previously appeared, as well as to the Committee, of the case's selection for inclusion in the Program. This letter will also include a one-page application for the pro se litigant to fill out A proposed form of this letter as well as the application is attached as Exhibit A.

---

[2] According to Texas Rule of Civil Procedure 145(c) and the proposed amendment to Texas Rule of Appellate Procedure 20, where an affidavit of inability to pay is coupled with an attorney's IOLTA certificate, the affidavit may not be contested.

b. Explanation of Program to the pro se party

The Committee would then notify the pro se litigant by letter (a proposed form of which is attached as Exhibit B), that:

- The case has been initially selected for inclusion in the Pro Bono Program
- Participation in the Program is purely voluntary, and the pro se litigant must apply by filling out and returning the one-page application within thirty (30) days from the date of the letter.
- Participation in the Pro Bono Program is conditioned upon a showing of financial eligibility, as that term is defined in the Program (see part B.2, *supra*)
- If the pro se litigant elects to be included in the Program, the State Bar of Texas will seek placement of the case with its pro bono volunteer attorneys, and this process will likely involve the transmission of background information about the case through email distribution to potential volunteers, as well as posting of minimal, publicly available facts about the case on the Internet, solely for the purpose of locating a volunteer

Once (1) the application is sent to the Committee indicating the pro se litigant's desire to participate in the program, (2) financial eligibility is confirmed, and (3) a placement is made, the pro se litigant will receive a letter from the Committee with the identity of the appointed counsel and will have fourteen (14) days to object to the particular counsel chosen by the Committee. A copy of the proposed Committee's letter to the pro se litigant notifying him or her of the match is attached as Exhibit C.

- The Committee's second letter will set forth the scope of the representation, making clear that the appointment is for the duration of a particular appeal and/or other appellate proceeding in the captioned cause in this Court, ends upon the conclusion of any motion for rehearing, and does not include any obligation to carry the case forward to the United States Supreme Court.
- In the letter, the volunteer attorney will be instructed to contact his or her client and a proposed form of communication with the client is attached as Exhibit D.

If an objection is made, financial eligibility cannot be confirmed, or a match cannot be made for any reason, the Program Liaison will send a letter to the pro se litigant indicating that

the Committee has notified the Court that placement in the Pro Bono Program was unsuccessful, allowing the case to continue from that point forward as a pro se case.

c. Ascertainment of Financial Eligibility

When the Clerk notifies the Committee of the referral, he would also make available to the Committee copies of the petition and any responses and replies—either electronically or in paper form, according to the Court's preferences. Upon receipt of a copy of the Court's referral letter and petition (and responses/replies), the Pro Bono Committee will first identify whether the financial eligibility requirements have been or can be met. As noted, we anticipate in most cases that we will be able to obtain a copy of the docketing statement from the court of appeals, which has a section devoted to the indigence issue that includes information as to date of filing for any affidavit of indigence, any contest, and the result of that contest. As a result, the status of the party should be easily ascertainable in most cases. If the docketing statement does not establish indigence, and neither the court of appeals nor Supreme Court's docket (nor the petition itself) reflects indigence, we would then contact the pro se party after receiving his/her application to determine whether the pro se party meets the Program's standards for financial eligibility, and if so, facilitate the steps necessary to screen the pro se party as to the income requirements for issuing an IOLTA certificate.

d. Selecting pro bono counsel

Once the pro se litigant agrees to be included in the Program by affirmatively indicating his or her intention to do so, the Committee will disseminate limited information about the case, such as the parties, the issues presented, and any urgency of the proceedings, to our members to solicit a volunteer for the case. As part of this process, we plan to take advantage of available technology to get the information to our volunteers so that they can sign up for individual cases

based on their availability and interest. In this regard, we are in the process of setting up a specialized webpage and tailored email lists to disseminate information regarding particular cases to our volunteers through the Texas Lawyers Help webpage, http://www.texaslawyershelp.org, as well as the Appellate Section's webpage. We will also send out a Listserv email to the attorneys who have signed up for pro bono referrals containing information about the nature and posture of the case, including impending deadlines, and the parties (for purposes of checking potential conflicts of representation). A copy of proposed information to be used in the web posting and email alert is attached as Exhibit E. The benefit of this process is that we are likely to expedite the matching process by insuring that the information gets to a wide number of attorneys quickly and avoiding the inefficient process of calling attorneys one-by-one.

The Committee will then evaluate the attorney responses and contact the lead attorney to confirm his or her willingness to serve before making the selection. We will also select a mentor counsel to assist the lead pro bono attorney, but we do not recommend that this information be included in the formal appointment papers out of concern that the client may look to the mentor and bypass the lead lawyer.

When we confirm a match, we will advise the Court via email or through any other mechanism of communication the Court prefers. The selection notice will contain the style of the case, including both trial and appellate cause numbers (if available), the name and contact information of the pro bono lawyer, the name and contact information for the pro bono litigant, and any additional volunteer appellate lawyer(s). At this point, the Court would designate the case as being included in the Pro Bono Program if the match were successful and direct the clerk

to order a briefing schedule. The volunteer will also file a notice with the Court that states that he or she is counsel of record. *See* TEX. R. APP. P. 6.1(c).

If, however, the pro se party fails to satisfy the financial eligibility requirements, objects to the volunteer attorney, or we are for other reasons unable to make a match, we will advise the Court that we were unable to place the pro se party with counsel so that the case can continue as pro se and the Court can order a briefing schedule.

e. Requests for inclusion to the Pro Bono Committee

The procedure outlined above will likely capture the majority of cases that would be most desirable for inclusion in the Pro Bono Program. However, we are concerned that another category of meritorious cases might be missed simply because they were able to find a counsel to file their petition for review. Specifically, we are aware of a number of cases in which pro bono counsel have represented a party at the intermediate appellate court, but cannot devote the additional time necessary to seek discretionary review—especially if that review includes briefing on the merits, which is a very time-consuming effort. In these cases, appellate counsel is willing to prepare the 15-page petition for review, believing that an issue raised by the court of appeals' disposition merits this Court's consideration, but would be more than willing to hand off the representation to another counsel if merits briefing is requested. We would like for the Court to consider allowing another avenue to Program participation for this narrow category of cases through application to the Committee. The same core eligibility requirements would apply: the litigant must meet the financial eligibility requirement, and the Court must first request briefing on the merits, in order to be considered by the Committee. But if these requirements are met, we recommend that the Court consider allowing this group of pro se litigants to participate in the Pro Bono Program as well. As one of the requirements is a request

for briefing on the merits, we do not believe this category will substantially increase the number of cases in the Program, and the posture presents the same attraction to our volunteers who would be willing to take over the representation.

This alternative path to the Program could be structured as follows:

- The Committee notifies counsel and potential pro se litigants of this alternative in *A Guide to Practice Before the Supreme Court of Texas* ("Guide") (Exhibit F).

- The pro se litigant or counsel fills out a form Request for Inclusion in the Pro Bono Program, *see* Exhibit G, as a formal means of notifying the Committee that the pro se litigant fulfills the financial eligibility requirements for the Program and that merits briefing has been requested by the Court (although we would not necessarily need a formal, written request if counsel contacts us directly with that information and we are able to independently verify the information).

- The Committee determines that the financial eligibility requirements either have been or can be satisfied (and facilitates the filing of any necessary documents). A proposed form of Affidavit is attached as Exhibit H.

- The Committee either receives the petition and responses/replies from pro se litigant's counsel or contacts the Court to obtain copies.

- The Committee locates pro bono counsel through the same procedure outlined in part B.3.d; and the Committee notifies the Court of the inclusion of the case in the Program, including the same information outlined in part B.3.d, above.

After that point, the case would progress according to the Court's schedule, although it would be designated as a Program case by the Court.

4. Post-placement procedures

a. Obtaining the record

One logistical problem that may affect the timing of a brief on the merits is the pro bono counsel's ability to access the record. Typically, the Court requests the record from the court of appeals at the time it requests briefing on the merits. The record will be critical to pro bono counsel, who presumably has not been involved in prior proceedings, and we want to insure that counsel have access to the trial court record as soon as possible; any time lapse between the time

the court of appeals sends the record to the Court and the receipt of that record by the Court may affect counsel's ability to prepare the brief on the merits. If pro bono counsel is in a city other than Austin, it may prove even more difficult to obtain the record because the Court typically does not permit the record to be checked out for copying. Although there are couriers in Austin who can make copies, that process is expensive. Access to the record could be handled in Program cases in various ways: (i) the Clerk's office could make special accommodations to pro bono counsel in a Program case to facilitate access to the record; (ii) the Committee will work with the local courier companies to see if they can donate all or part of their costs of making a copy of the record; (iii) where possible, the law firms of pro bono counsel will likely carry the copying and courier costs as part of the pro bono contribution, but a number of our volunteers are solo practitioners or associated with small law firms, and we would not want the cost of obtaining the record to be a barrier to representation.

b. Extensions of time

Although the Court is very reasonable about extensions of time generally for filing briefs and other documents, we hope that the Court would consider these circumstances in connection with requests for extensions from Pro Bono Program participants, especially at the commencement of their representation and if the record is not readily available at the time of the appointment.

C. Mentoring

As noted, we have implemented a mechanism for involving our more seasoned, experienced appellate practitioners in the pro bono process. We are quite fortunate to have a number of "the best" appellate practitioners in this State involved in our Section, and they have expressed interest in mentoring younger lawyers through the pro bono process. One obvious

benefit to the younger lawyers is that they would receive direct training from top appellate lawyers, many of whom they would not have been able to access absent such a program. The mentor appellate lawyers would be able to contribute their time and experience in brainstorming about the issues, reviewing and editing briefs, and assisting with oral argument preparation (*e.g.*, moot courts) without having to undertake full responsibility for the case. This proposal has been enthusiastically received by the Section members.

D. The Committee's Continuing Role After Placement

Administratively, the Committee would maintain contact with our volunteer attorneys through "progress report" emails, much like the ones used by Volunteer Legal Services of Central Texas to communicate with their volunteers. As noted, the Committee will designate one of its members to be the Program Liaison to serve as the point of contact for the Court, the pro bono clients, and the volunteer lawyers. As noted above, once a case has been accepted into the Pro Bono Program, the Program Liaison will notify the client regarding the Committee's role in assisting the pro bono lawyer and provide contact information for the Program Liaison so that the client can make contact if an issue arises. This letter would also explain the limits on the scope of the representation and the fact that we cannot guarantee replacement counsel if the client rejects the counsel provided or if a substitution becomes necessary.

The Program Liaison will also follow up regularly with the volunteer attorneys to insure that we receive periodic reports of the appeal's progress and to remind the volunteer lawyer that we are here to help. In this regard, the Committee will offer a support network for volunteer lawyers to access resources, such as mentors in appropriate cases, treatises, sample appellate briefs, and other materials. We believe that the knowledge that the Committee will provide

support and materials to its volunteers will enhance their confidence in taking on pro bono appeals, as well as the final work product that the Court receives.

E. Substitution of Pro Bono Counsel

Although we have been fortunate that our attorneys have typically handled pro bono appeals through the entire appellate process, we also recognize that there may be situations where an attorney who originally undertakes representation may have to withdraw, due to acceptance of a public position, illness or other personal situations, client conflict, and the like. Our proposal is that, in these instances, the attorney advise both the Court and the Committee, and, if the Court deems it appropriate to permit the withdrawal of the appointed attorney, the Committee will attempt to place the client with a new volunteer attorney, although we cannot guarantee a replacement volunteer. The Committee will take into account the circumstances necessitating the withdrawal in soliciting and recommending a reassignment. If substitute counsel is found and reassignment is recommended, the Committee will notify the Court through the same procedure described above in part B.3.d, above. This process will be explained in the Guide.

F. Winding Up the Representation

After completion of the representation, we recommend that the following steps be taken around the time the mandate issues.

1. Recognition of the Pro Bono Commitment

Official recognition of the time and contribution of pro bono attorneys is something that the Court may want to consider. As noted, our experience has been that our appellate lawyers put a great deal of time and care into their pro bono representation, and official appreciation of that sacrifice goes a long way to make an attorney feel that it was "all worth it." It could be as

simple as having the Chief or senior Justice make mention of the pro bono representation at the conclusion of oral argument (as the Fifth Circuit does in its appointed docket) or perhaps some language acknowledging the Court's appreciation of the pro bono representation in a letter accompanying issuance of the opinion or otherwise concluding the case.

Another idea is to indicate on the docket sheet or in the style of the case that it is "Pro Bono." The Ninth Circuit apparently designates a case in the program as "PRO BONO" in the caption of the case under the cause number.

Finally, at the conclusion of the appellate proceeding, the Committee will follow up with a certificate of appreciation to the attorney for his or her efforts in the case.

2. Evaluation Process

We believe that the Pro Bono Program would benefit from feedback from the attorney participants and have proposed a form for evaluating various aspects of the Program from the standpoint of the attorney. *See* Exhibit I.

We have also considered the idea of asking the clients for evaluation input. One concern is that their views of the Program will be heavily influenced by outcome and may not reveal benefits or problems with the process. If there are real communication problems between attorney and client, the Pro Bono Committee is available to address them, and we believe that the informal process will allow more candid discussion by all involved. If, however, the Court believes that formal client feedback as to the Program and the volunteer attorneys would be beneficial, we are willing to monitor that process and report back to the Court the results of both sets of evaluations in any format the Court prefers.

3. Reporting

The Committee will report to the Court on an annual basis as to the utilization of the Pro Bono Program, including cases pending assignment, the developmental stages of all cases pending in the Program, the identities of the volunteer lawyers, the ultimate termination/disposition of Program cases, and feedback from the evaluation process. We are willing and able to compile and communicate this and any other information that would be useful in any format that the Court desires.

G. Appellate Education

A number of the appellate pro bono programs that we have studied have included an educational component, complete with proposed forms, to make it easier on pro se parties to preserve and pursue their right to appeal. Several courts provide written materials to help guide pro se parties through the appellate process, similar to the self-help kit for domestic violence created by Texas Access to Justice and the Court, and/or the varying pro se packets for divorce, child custody, etc. that many district courts make available on their websites.

As noted above, the Committee has prepared *A Guide to Practice Before the Supreme Court of Texas*, that could be available in the Clerk's office in paper form and on the Committee's website. A draft of the Guide is attached as Exhibit F. The Guide contains an overview of the process and practice before the Court, provides answers to commonly asked questions, and refers the party to appellate forms and specimens, such as a motion for extension of time to file a petition or brief, petition for review and response, waiver letter, and briefs on the merits, as well as other documents necessary to proceed with the case. The Guide, together with these forms and specimens, would be posted on the Committee's webpage on the State Bar of

Texas Appellate Section website, http://www.tex-app.org/com-probono.html, and the Court's website, http://www.supreme.courts.state.tx.us, could contain a link to these materials.

The Guide is designed to present the appellate process before the Court in layperson's terms. The Guide and form documents could also be used by attorneys who are not as familiar with practice before this Court. It is our hope that providing this information and making the proper forms available will give litigants greater confidence in the process, reduce the burden on the Clerk's office in answering routine questions, and otherwise assist pro se litigants in navigating the appellate process.

A part of the Guide will educate the public about the Pro Bono Program. Pro se parties should be aware that their cases could be considered for inclusion in the program in deciding whether to file a petition for review. It is also possible that trial and/or appellate counsel, believing that the case contains an issue meriting this Court's consideration, would be willing to assist a pro se party in preparing a petition for review if they knew that pro bono counsel might be available to handle the briefs on the merits and argument if the Court were to request it. Finally, as outlined in part B.3.e above, we recommend that the Committee have the ability to recommend cases for inclusion in the Program where a pro se litigant has been represented by pro bono counsel during the petition phase if the pro se litigant satisfies the financial eligibility requirements and the Court requests briefs on the merits.

EVALUATION AND COMMENTS FORM

Thank you for participating in the Supreme Court of Texas and the State Bar of Texas Appellate Section's Pro Bono Committee's and the Section's Pro Bono Pilot Program. The Court appreciates your efforts and dedication in representing pro se litigants on a pro bono basis. Please help us to ensure an efficient and successful program for the long term by providing your comments and suggestions below. (Feel free to attach additional pages.)

1. How much time did you spend working on this appeal? Did the time commitment you actually made comport with your expectations? If not, was the amount of time you spent on this appeal more than you would have liked to commit?

2. Did you have trouble communicating with your client? If so, did it significantly impede your ability to represent him/her? How could the court simplify or ease this situation?

3. Did you feel that you had enough support from Court Staff? If not, how could the Court have further assisted your?

4. Did you feel that you had enough support from the Pro Bono Committee? If not, how could the Pro Bono Committee have further assisted you?

5. Would you have benefited from specialized training? What kind of training or assistance programs would you like the Committee to undertake in connection with the program?

EXHIBIT I

6. Please describe any problems, delays, or special concerns that arose during your representation. What could the Court or the Pro Bono Committee do to alleviate these concerns?

7. Would you be willing to be appointed again through the program? Why or why not?

8. Please provide any comments or suggestions you have regarding the program.

9. If you participated in mediation, please comment on your experience.

Your Name:_____ Appeal Name:_____

Today's Date:_____ Docket Number:_____

Date Appointed:_____

AFFIDAVIT OF FINANCIAL CIRCUMSTANCES

THE STATE OF TEXAS :

COUNTY OF _____:

The undersigned makes this affidavit in connection with the filing of the above-numbered and entitled cause without the posting of a security deposit and for the purpose of having citation issued in accordance with Texas Rule of Civil Procedure 145 and Texas Rule of Appellate Procedure 20.1. (The items applicable to the undersigned and checked and the information called for is furnished under penalties of perjury.)

1. Basis for indigence: I am unable to pay a court cost because:

[ ] I am presently receiving a government entitlement based on indigence as follows (describe nature and amount of government entitlement):

and

I have no ability to pay court costs based on facts set out below.

2. Employment information:

[ ] I am not now employed; the last time I was employed was at

[ ] I am employed: I work for

The nature of the job is . The income I receive from this job is $ per .

3. Income from sources other than employment:

[ ] I have no income with is derived from sources other than employment, such as interest, dividends, annuities, etc.

[ ] I have income derived from sources other than employment as follows:

Type of income Amount per period

4. Spouse's Income

[ ] My spouse has no income.

[ ] My spouse has income as follows:

Type of income Amount per period

5. Property:

[ ] I own no property and no interest in any property.

[ ] I own the following interests in property:

EXHIBIT H

Real Estate:

Motor Vehicles:

Stock and/or bonds:

Cash
Other:
6. Bank Accounts:

Bank	Type of Account	Amount

7. Dependents:
[ ] I have no dependents.
[j I have the following dependents:

Name	Aqe	Relationship

8. Debts:
[ ] I have no debts.
[ ] I have the following debts:

Creditor	Amount

9. I have the following monthly expenses:

Type of Expense:	Amount per month

10. Loans:

I have attempted to obtain a loan for these costs from the following financial and/or lending institutions, but have been unable to secure such a loan.

Financial Institution/Lender:	Address:

11. Attorneys:

EXHIBIT H

[ ] I was not represented by an attorney in this court.

[ ] I was represented by an attorney in this court, but my attorney did not charge me a legal fee for this representation.

[ ] I was represented by an attorney in this court under a contingent fee arrangement.

12. Costs:

[ ] No attorney has agreed to pay or advance my court costs.

[ ] An attorney has agreed to pay or advance my court costs under the following circumstances (explain here): _____
_____
_____.

I am unable to pay the costs of court. I verify that the statements made in this affidavit are true and correct.

Signed this the ____day of _____, 20___.

_____
Affiant

Sworn and Subscribed to before me the ____ day of _____, 20___

Name Printed: _____

Notary Public, _____County, Tex.

My commission expires: _____

ATTORNEY FOR THE AFFIANT SHALL CERTIFY THE CONDITIONS UNDER WHICH HE REPRESENTS THE AFFIANT.

`

Date: _____ _____, 20___.

_____
Signature of Attorney

EXHIBIT H

[date]

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Law Office of Michael S. Truesdale
515 Congress Avenue, Suite 2355
Austin, Texas 78701

Re: No. [Supreme Court docket number], [name of case]

Dear Mr. Truesdale:

Petitioner requests that the State Bar of Texas Appellate Section's Pro Bono Committee consider this request for inclusion in the Supreme Court of Texas' Pro Bono Pilot Program.

[Include all that apply:]

[Currently, Petitioner is proceeding pro se and will file/has filed a petition for review in this matter.]

[Currently, Petitioner is being represented by the undersigned counsel and will file/has filed a petition for review. If the Court deems it advisable that further briefing and/or argument be provided, Petitioner requests that his/her case be considered for the appointment of pro bono counsel.]

[Petitioner is proceeding as an indigent in this proceeding and/or meets the financial eligibility requirements for the Program.]

[Petitioner is submitting the attached affidavit of indigence for the Committee's consideration.]

EXHIBIT G

[The Supreme Court of Texas requested that the parties submit briefs on the merits by letter dated _____ ___, 200__.]

Very truly yours,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

EXHIBIT G

A GUIDE TO PRACTICE BEFORE THE SUPREME COURT OF TEXAS

BY

THE STATE BAR OF TEXAS APPELLATE SECTION

PRO BONO COMMITTEE

OCTOBER 2007

EXHIBIT F

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

I. INTRODUCTION

This guide from the State Bar of Texas Appellate Section's Pro Bono Committee ("Committee") is designed to provide a simplified guide to the Texas Rules of Appellate Procedure that apply in civil appeals to the Supreme Court of Texas ("Supreme Court" or "Court"). We have prepared this guide to help laypersons and attorneys with little or no appellate experience. But it is not intended to replace the Texas Rules of Appellate Procedure and should not be cited as legal authority. Litigants are required to comply with the rules and the case law. Litigants should consult the Supreme Court's website, which includes links to information about filing requirements and fees, and also answers to frequently-asked questions, at http://www.supreme.courts.state.tx.us.

This guide reflects the rules and case law as they exist in **October 2007**. The rules and case law are always subject to change and should be consulted for changes. This guide is available in an alternative format, upon request.

II. DOCUMENTS IN THE SUPREME COURT

All documents submitted to the Supreme Court must be filed with:

In Person:
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701.

By Mail:
Clerk, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711-2248.

The Court requires the filing of an original and eleven copies of all documents. TEX. R. APP. P. 9.3(b). In addition, a copy of all documents filed with the Court must be served (mailed or hand-delivered) on all other parties to the appeal. TEX. R. APP. P. 9.5. All papers filed with the Court must be 8 ½ x 11 inches. TEX. R. APP. P. 9.4(b). The typeface or font size for the document

must be at least 10-character-per-inch (cpi) nonproportionally spaced Courier typeface or at least 13 point or larger proportionally spaced typeface. TEX. R. APP. P. 9.4(e). Rule 9 contains other filing requirements as well.

III. WHAT IS A SUPREME COURT APPEAL?

A Supreme Court appeal begins with a petition for review asking the Court to review the judgment of the court of appeals to determine whether an important error occurred and, if so, whether the petitioner[1] is entitled to relief. An appeal is not a new trial. You cannot present new evidence, call witnesses, or conduct discovery in an appeal. The Supreme Court decides an appeal strictly on the basis of the record from the court of appeals. The record is a compilation of papers that were filed in the trial and appellate courts in your case. It will include the written transcription of any pretrial and trial proceedings that are necessary to determine the appeal ("Reporter's Record"), documents such as the pleadings, motions, briefs, and any decisions, orders or judgments filed in the trial court ("Clerk's Record"), and any materials filed with the court of appeals. Generally, a complaint about error in the trial court must have been raised in the court of appeals before the Supreme Court will review it. TEX. R. APP. P. 53.2(f).

IV. WHEN CAN THE SUPREME COURT HEAR AN APPEAL?

A. Discretionary Review of Final Judgments from the Courts of Appeals

The Supreme Court has the authority to review most final judgments from the courts of appeals. Parties that did not win in the court of appeals may petition the Supreme Court to review the court of appeals' decision. The Supreme Court exercises discretionary jurisdiction over these appeals, which means that it does not have to decide all the appeals filed but can decide whether or not it wants to hear a case. TEX. GOV'T CODE § 22.001(a). The Court agrees

[1] A "petitioner" is the party who files a petition for review. TEX. R. APP. P. 3.1(e). A "respondent" is the party adverse to the petitioner. TEX. R. APP. P. 3.1(h)(1).

to hear only about ten percent of the cases that are filed. The primary consideration is whether the legal issues involved in the case have state-wide importance, which means that deciding the issue will affect not just the parties in the case but will affect other situations and other cases. *See* TEX. GOV'T CODE § 22.001(a)(6). The appellate rules list the factors the Court considers in deciding whether to grant discretionary review: (1) whether one of the court of appeals' justices has filed a dissenting opinion—one that disagrees with the majority on an important point of law; (2) whether the court of appeals' decision conflicts with a decision of another court of appeals on an important point of law; (3) whether the case involves the construction or validity of a statute; (4) whether the case involves constitutional issues; (5) whether the court of appeals has made a mistake of law that is of such state-wide importance that it should be corrected; and (6) whether the court of appeals has decided an important question of state law that should be, but has not been, decided by the Supreme Court. TEX. R. APP. P. 56.1(a).

B. Special Case: Discretionary Review of Interlocutory Appeals

Supreme Court review ordinarily requires a final judgment from a court of appeals reviewing a final judgment of the trial court. Texas courts of appeals may sometimes be authorized by statute to review some trial court rulings that are "interlocutory," meaning that they are interim orders in the case and not a final decision on the merits.[2] The Texas Supreme Court can sometimes but not always review a court of appeals' decision in an interlocutory appeal. It can review these appeals if a court of appeals' justice has filed a dissenting opinion disagreeing with the majority on a material question of law or if the court of appeals' decision conflicts on a material question of law with a decision from another court of appeals or the Texas

[2] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014(a).

Supreme Court.[3] It can also review interlocutory appeals involving class action certification orders, the denial of summary judgment based on the First Amendment filed by a member of the media, and the failure to dismiss an asbestosis or silica exposure claim for failure to file an expert report.[4] The Supreme Court has discretion whether to hear these cases, and looks to the factors listed in the previous paragraph explaining discretionary review of final judgments of the courts of appeals.

C. Special Case: Direct Appeals From the Trial Court

In very rare cases, a case can be appealed to the Texas Supreme Court directly from the trial court. The most common type of direct appeal is taken when the trial court grants or denies injunctive relief based on the constitutionality of a state statute.[5] Because direct appeals are unusual, they are not addressed in this paper. It is important to understand that these appeals have very different procedures and very different time limits. The procedure for these appeals is set out in TEX. R. APP. P. 57.

V. TIME LIMITS FOR SUPREME COURT APPEAL

A party asking the Supreme Court to review a court of appeals' decision must file a petition for review in the Supreme Court within certain time limits or the court cannot hear the case. If no party has filed a motion for rehearing in the court of appeals, the deadline for seeking Supreme Court review is no later than 45 days from the date of the court of appeals' judgment. TEX. R. APP. P. 53.7(a)(1). If a party has filed a motion for rehearing in the court of appeals, the deadline for seeking Supreme Court review is 45 days from the date the court of appeals denies rehearing. TEX. R. APP. P. 53.7(a)(2).

---

[3] TEX. GOV'T CODE § 22.225(c).

[4] *See* TEX. GOV'T CODE § 22.225(d); TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3), (6), (11).

[5] TEX. GOV'T CODE § 22.001(c).

Sometimes, both sides want to appeal from different alleged errors in the same court of appeals' judgment. If your opponent seeks review in the Supreme Court by filing a petition for review, you may file a "cross-petition" to assert any errors you feel the court of appeals made as to your side of the case. Any cross-petition must be filed within the 45-day deadlines just discussed or, if another party has filed a petition for review, 30 days after that petition was filled. TEX. R. APP. P. 53.7(c).

The time to file a petition for review or a cross-petition can be extended by the Supreme Court by filing a motion within 15 days of the deadline. TEX. R. APP. P. 53.7(f). A motion for extension of time to file a petition for review is filed with the Supreme Court and must state: (1) the court of appeals' docket number and the name of the case in the court of appeals; (2) the date of the court of appeals' judgment; (3) the date the petition for review is due; (4) the amount of extra time requested to file the petition for review; (5) facts showing why the extra time is reasonably needed; (6) a certificate showing whether the other parties object to the request for extra time; and (7) a certificate showing that a copy of the request was sent to the other parties. TEX. R. APP. P. 10.5(b)(1), (3); TEX. R. APP. P. 10.1(a). An example of a motion to extend time for filing a petition is attached as Form 1. There is a filing fee of $10.00. We recommend that you do everything you can to file your appeal within the deadlines set forth in the Rules because extensions to file a late appeal are not automatically granted.

VI. HOW TO START A SUPREME COURT APPEAL

To start a Supreme Court appeal, you must file a petition for review with the Clerk of the Court and pay the filing fee of $125.00. If you are proceeding under an affidavit of indigence, you need not pay the filing fee.

You do not file the record with the Court; if it wants the record, it will ask the clerk of the court of appeals to forward it. You may not file new evidence with the Court.

VII. PETITION FOR REVIEW, RESPONSE, AND REPLY

A. The Petition for Review

The Petition for Review is a written document explaining what you think was wrong with the court of appeals' decision and why those errors are important enough for the Texas Supreme Court to agree to hear your case. Texas Rule of Appellate Procedure 53.1 describes the necessary parts of a Petition for Review. Your petition must have:

> (1) A list of the identities of parties and counsel in both the trial and appellate courts;
>
> (2) A table of contents and a table of cases, statutes, and other legal authorities discussed in your petition (The cases must be listed in alphabetical order.);
>
> (3) A statement of the case that, in less than a page, provides the following information: (a) a short description of the type of case (such as personal injury, contract, or a suit on a note); (b) the name of the judge who signed the trial court judgment; (c) the designation of the trial court and the county in which it is located; (d) what the trial court decided; (e) the parties in the court of appeals; (f) the district of the court of appeals; (g) the names of the justices who participated in the court of appeals' decision, who wrote the opinion, and who wrote any dissenting or concurring opinion; (h) the citation[6] for the court of appeals' opinion, if available; and (i) what the court of appeals decided;
>
> (4) A statement of jurisdiction citing the statute allowing the Supreme Court to hear the case (usually TEX. GOV'T CODE § 22.001(a)(6));
>
> (5) A statement of the issues or points of error presented for review (note that any complaints about the trial court's action must have been raised in the brief in the court of appeals);
>
> (6) A statement of the facts supported by record references;
>
> (7) A summary of the argument;

[6] The "citation" is the volume and page reference to the Southwest Reporter or other publication service that has published the opinion. Not all opinions are published in a reporter service, and so your case may not have an official citation.

> (8) An argument section, which includes a legal discussion of why the court of appeals' decision is wrong and an explanation of why those errors are important enough that the Supreme Court should hear the case; and
>
> (9) A "prayer" or short conclusion that tells the Court what relief you are seeking.

TEX. R. APP. P. 34.2. In addition, you must either include or separately bind an "Appendix," which must contain these documents: (1) the trial court's judgment; (2) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; (3) the opinion and judgment of the court of appeals; and (4) a copy of any contract, rule, statute, constitution, or similar provision that is central to the argument in the petition. TEX. R. APP. P. 53.2(k). The Appendix may include other materials from the record that you believe would be helpful to the Court in deciding your case, but it may not include evidence that was not made part of the record in the trial court and the court of appeals.

Generally speaking, the Statement of the Facts should explain to the Court what the case is about and what happened in the trial court and the court of appeals in objective terms—*i.e.*, without taking sides or making arguments. It should only present the facts from the trial court record that are relevant to the issues to be decided on appeal. ***You may not discuss facts that were never presented to the trial court or that are not included in the record.*** Every statement of fact must be accompanied by an appropriate and specific reference to the record. The trial court clerk typically paginates the Clerk's Record to make it easier to cite to specific pages.

When referring to the parties in your brief, you should use their names, rather than referring to their party designations. For example, use "Jane Smith" not "the petitioner."

The Petition for Review cannot be longer than 15 typewritten pages. TEX. R. APP. P. 53.6. However, only the statement of the facts, the summary of argument and argument sections, and the prayer count toward the 15-page limit. TEX. R. APP. P. 53.6.

The petition must be printed on 8½ by 11 inch paper that is white (or nearly white) and opaque, meaning that it is not transparent. TEX. R. APP. P. 9.4(b). The text must be double-spaced (except as to block quotes, which can be single-spaced), with 1-inch margin on all sides. 9.4(c) & (d). As noted above, you can use 10-character-per-inch, "nonproportionally spaced Courier typeface" (each character uses an equal amount of horizontal space) or 13-point or larger font if you use "proportionally spaced" typeface (horizontal space used by a character varies). TEX. R. APP. P. 9.4(e). Each petition must be signed by the person filing it. TEX. R. APP. P. 9.1.

B. Response to the Petition for Review

After the Petitioner for Review is filed, the respondent has 30 days to do one of two things: (1) file a Response to the Petition for Review, or (2) file a letter saying that the Respondent will not file a Response unless the Court requests one (this is called a "waiver letter"). TEX. R. APP. P. 53.3; *see also* Form 2 attached. If you are the Respondent, you may want to consider filing a waiver letter. The Court denies review in about half the cases filed with it without asking for a response. If you file a waiver letter, and the Court asks for a response, the letter from the Court requesting the response will state the deadline for filing.

If you choose to file a response, or if the Court later asks for one, the Response is your opportunity to tell the Court why the court of appeals' decision should be affirmed or allowed to stand. The Response to the Petition for Review must have the same parts as the Petition for Review, ***except*** that a statement of the issues, a statement of jurisdiction, a statement of the case, and an appendix are optional. TEX. R. APP. P. 53.3. The page limit for the Response to the Petition for Review is the same as that for the Petition for Review—15 pages. TEX. R. APP. P. 53.6. A signature by the person filing the brief is also required. TEX. R. APP. P. 9.1.

C. The Petitioner's Reply

The Petitioner may file a reply to a response if one is filed. The Petitioner's Reply is limited to 8 pages. TEX. R. APP. P. 53.6. The Reply must be filed within 15 days of the filing of the Response to Petition for Review. TEX. R. APP. P. 53.7(e). However, the Clerk's office typically forwards the Petition and any Response or Waiver to the justices of the Court on the Tuesday morning after the Response or Waiver is received without waiting on the reply. So, you may want to consider filing the reply brief earlier so that it is included in the briefing package for your case when it is first forwarded to the Court.

D. Number of Copies

You must file an original and eleven copies of the Petition for Review, a waiver letter or the Response to the Petition for Review, or the Petitioner's Reply and any separately bound Appendix with the Supreme Court and serve the other party or parties with one copy each. TEX. R. APP. P. 9.3(b), 9.5. Rule 9.5(b) provides that you can serve the other parties by personal delivery, U.S. mail, commercial delivery service, or facsimile. TEX. R. APP. P. 9.5(b).

E. Binding, Covers, and Other Formatting Requirements

The Petition, the Response, the Reply, and any separate Appendix must have opaque, durable front and back covers, which should not be plastic or dark colored (*e.g.*, red, black, or dark blue) so that the clerk can affix a permanent and legible file-stamp to the cover showing the date of the filing. TEX. R. APP. P. 9.4(f). If you file your Appendix as a separate document, rather than attaching it to your Petition or Response, it must also have a durable, light-colored cover. TEX. R. APP. P. 9.4(h). The front cover of every copy of your Petition, Response, or Reply (and the cover for any separately bound Appendix) must state:

(1) the style of the case (the names of the parties on appeal);

(2) the case number for the case assigned by the Supreme Court (if no number has yet been assigned, the number can be left blank);

(3) the title of the document and the name of the party filing it; and

(4) the name, mailing address, telephone, fax number, and any State Bar identification number for the lead counsel, if any, filing the document; and

TEX. R. APP. P. 9.4(g). The Court Clerk recommends that the case number be printed in 34-point font.

The Petition, the Response, the Reply, and any separate Appendix must be securely bound "so as to ensure that it will not lose its cover and fall apart in regular use." TEX. R. APP. P. 9.4(f). We recommend either using a heavy strength staple on the left top corner or durable GBC (plastic spiral) binding along the left side of the brief. Rule 9.4(f) requires that it be bound in such a way that it lays flat when open.

VIII. ACTION ON PETITION

A. Court May Request Further Briefing

If the Respondent has filed a waiver letter, the justices will review the Petition for Review to determine whether they would like a response. The Court may also ask the court of appeals' clerk to forward the record. The Petitioner is required to pay the cost of forwarding the record from the court of appeals to the Supreme Court.

If a Response is filed initially, or if one is filed after the Court requests it, the Court will review the case to determine whether to deny review or to request further briefing. If the Court requests further briefing, the parties will be allowed to file another set of briefs, as explained in the next section. TEX. R. APP. P. 55.1. If the Court asks for additional briefing, it will also ask the clerk of the court of appeals to forward the record at Petitioner's expense. Typically, the

Court will request further briefing without deciding whether to grant review, but a request for briefing indicates that at least three justices are interested in learning more about your case.

B. Court May Deny Review

Either with or without a Response, the Court may decide not to hear a case and deny the petition for review. TEX. R. APP. P. 56.1(b). The court clerk will send the parties a notice that the petition has been denied. TEX. R. APP. P. 56.4. The Court's ruling will also be announced on a list of orders that the Court issues most Fridays. You can also sign up for the "Case Mail" service on the Court's website, which will send you an email notice when certain events occur with respect to your case, such as a ruling on the petition.

IX. BRIEFING ON THE MERITS

If the Court requests further briefing, the parties will have the opportunity to file more extensive argument with the Court in briefs that have longer page limits than allowed at the petition stage of the review process. TEX. R. APP. P. 55. If, as either Petitioner or Respondent, you feel you have no more to add to what you have already told the Court in your earlier papers, you can submit an original and eleven copies of a letter to the Clerk of the Court stating that you have opted not to file any additional briefing. The rules also provide that a party may file twelve copies of its brief from the court of appeals instead of filing a new brief on the merits in the Supreme Court. TEX. R. APP. P. 55.5.

A. Petitioner's Brief on the Merits

The Petitioner's Brief on the Merits follows the same form as the Petition for Review, with the same required contents. TEX. R. APP. P. 55.2. The page limit is 50 pages; only the statement of the facts, the summary of argument and argument sections, and the prayer count toward the 50-page limit. TEX. R. APP. P. 55.6. The letter from the Court requesting full briefing should state a date by which the Petitioner's Brief on the Merits must be filed. TEX. R. APP. P.

55.7. If no date is specified, the brief is due 30 days from the date of the letter requesting briefing on the merits. TEX. R. APP. P. 55.7.

B. Respondent's Brief on the Merits

The Respondent's Brief on the Merits follows the same form as the Response to Petition for Review, with the same required contents. TEX. R. APP. P. 55.3. The page limit is 50 pages; only the statement of the facts (which is optional), the summary of argument and argument sections, and the prayer count toward the 50-page limit. TEX. R. APP. P. 55.6. The letter from the Court requesting full briefing should state a date by which the Respondent's Brief on the Merits must be filed. TEX. R. APP. P. 55.7. If no date is specified, the brief is due no later than 20 days after the date of receiving the Petitioner's Brief on the Merits. TEX. R. APP. P. 55.7.

C. The Petitioner's Reply Brief on the Merits

The petitioner may file a reply brief. TEX. R. APP. P. 55.4. Petitioner's Reply Brief on the Merits is limited to 25 pages. TEX. R. APP. P. 55.6. The letter from the Court requesting full briefing should state a date by which the Petitioner's Reply Brief on the Merits must be filed. TEX. R. APP. P. 55.7. If no date is specified, the brief is due no later than 15 days after the date of receiving the Respondent's Brief on the Merits. TEX. R. APP. P. 55.7.

D. Extension of Time

If you are unable to prepare your brief on the merits in the time frame allowed, you can seek an extension of time. Again, it is advisable that you seek the extension long before the brief is due. Please refer to the requirements set out in Rule 10.5(b) and part V, above. An example of a motion to extend time for filing a brief on the merits is Form 3.

X. ACTION AFTER FULL BRIEFING

After full briefing, the Court will decide whether or not to hear the case. The Court denies review of most cases, agreeing to hear only about ten percent of the cases filed.

A. Court May Grant Review

If the Court decides the hear the case, it will take one of two actions: (1) it will set a date for oral argument to the Court and then issue an opinion later after the argument; or (2) it will issue an opinion deciding the case, called a per curiam opinion, without hearing oral argument.

1. Oral Argument Followed By Opinion. If the Court believes that oral argument will help it decide the case, it will send a notice to the parties setting a date and time for hearing oral argument. TEX. R. APP. P. 59.2. The person presenting argument should be thoroughly familiar with the record, the legal issues and arguments presented, and the authorities cited by both parties when making an oral argument. Remember that the purpose of the argument is to answer the Court's questions, not to make a speech about why your side should win. *See* TEX. R. APP. P. 59.3. You can watch videotapes of oral argument in cases heard by the Court on the website of the St. Mary's School of Law at: http://www.stmarytx.edu/law/webcasts.

After the argument, the Court will prepare a written opinion explaining the Court's final decision, including its reasons. On average, an opinion in a case issues about one year after oral argument. The opinion will be mailed to you. TEX. R. APP. P. 63. You can also sign up for the "Case Mail" service on the Court's website, which will send you an email notice when certain events occur with respect to your case, such as the issuance of an opinion.

2. Per Curiam Opinion Without Oral Argument. The Court may issue an opinion without hearing argument. TEX. R. APP. P. 59.1.

B. Court May Deny Review

After requesting full briefing, the Court may decide not to hear a case and deny the petition for review. TEX. R. APP. P. 56.1(b). The court clerk will send the parties a notice that the petition has been denied. TEX. R. APP. P. 56.4.

XI. MOTIONS

A motion is a written request asking the Court to make a special ruling in the appeal. Either the petitioner or the respondent may file a motion with the Court. For example, if you want to obtain an extension of time to file your brief, you would make your request by filing a motion (original and eleven copies) with the Court and serve a copy of the motion on the other party to the appeal. Your motion should state the reasons why you are making a particular request. TEX. R. APP. P. 10.1. Be specific about what relief you need and why you need it. Rule 10.5.(b) sets forth specific requirements for motions for extensions of time.

If your motion will not be opposed, you should state that it is "Unopposed" in the title of the motion. Every motion must contain a certificate stating that you have conferred with the other parties and that they do or do not oppose the relief sought. TEX. R. APP. P. 10.1(a)(5). If you are unable to reach your opposing party or their counsel (if they are represented), then state in your certificate that you have made reasonable attempts to confer with the other parties to determine their position on the substance of the motion. Motions can be rejected by the Clerk's office if the certificate of conference is not included. Do not submit a proposed order.

The Court will inform you of its decision by mailing you and the other parties to the appeal notice of the order granting or denying your motion. The Court's rulings are also posted on the Court's website under the case information/docket sheet for the appeal, and you may also receive notice of the ruling if you are signed up on "Case Mail" to receive such notices.

XII. MOTION FOR REHEARING

Once the Court renders its judgment or renders an order disposing of your petition for review, you have the option to file a motion for rehearing. Such a motion must be filed within 15 days from the date of the final decision, TEX. R. APP. P. 64.1, and an extension of time may be sought up to 15 days after that period by filing a motion in compliance with Rule 10.5(b). *See*

TEX. R. APP. P. 64.5. We recommend that you attempt to meet the deadline or if you know an extension will be needed, file your request for the extension as soon as possible. The motion for rehearing must specify the grounds for reconsidering the decision or judgment and be no longer that 15 pages. TEX. R. APP. P. 64.2, 64.6. The other side need not file a response unless the Court requests one. TEX. R. APP. P. 64.3.

XIII. AWARD OF COSTS AND SANCTIONS IN THE SUPREME COURT

If the Court agrees to hear a case and issues an opinion, it will also decide who pays the costs incurred in the appeal. Recoverable costs include:

(1) Fees charged by the Clerk of the Court;

(2) Cost of the preparation of the Clerk's Record and Reporter's Record;

(3) Other costs as directed by the Court.

Texas Rule of Appellate Procedure 60.4 explains the procedure for awarding costs by the Supreme Court. "Prevailing parties" are generally awarded their costs on the appeal. TEX. R. APP. P. 60.4. If you are the petitioner, and the Supreme Court reverses the court of appeals' judgment, you are the "prevailing party," and the Court will most likely award you your appeal costs from the respondent. If you are the petitioner, and the Court affirms the court of appeals' judgment, the Court will probably order that you pay the appellate costs of the respondent. The Court may decide not to award costs to either side. It also has the discretion to tax costs otherwise as required by law or for good cause. TEX. R. APP. P. 60.4.

You need to check the judgment, which is a separate document from the Court's opinion, to insure that costs were awarded appropriately. If you want to request the Court to reconsider the award of costs, you must do so in the form of a motion for rehearing filed within 15 days after the judgment is rendered. TEX. R. APP. P. 64.1.

If the Supreme Court finds that the filing of a petition for review is frivolous, it can award the other party damages, including costs, fees and reasonable attorney fees on appeal. TEX. R. APP. P. 62.

XIV. SUPREME COURT OF TEXAS' PRO BONO PROGRAM

The Court and the Pro Bono Committee have recently implemented a joint pilot program ("Pro Bono Program" or "Program") to help pro se parties who are unable to pay for appellate counsel by matching them with volunteer lawyers who agree to represent them without charging fees for the legal services. Cases are potentially eligible for the Program when the Court requests full briefing of a pro se litigant's appeal and refers it to the Committee. Even if you were assisted by counsel in filing your petition for review, you may be eligible for the Program if you meet the financial eligibility requirements and the Court requests further briefing. As explained above at part VIII.A, when three justices of the Court vote for more comprehensive briefing in a particular case, the Court will order full briefing on the merits of the appeal.

The two criteria for inclusion in the Program are: (i) the petition presents one or more issues on which at least three Justices have requested merits briefing; and (ii) the pro se litigant meets the financial eligibility requirement for the Program. The Pro Bono Program is available to parties who meet the criteria for indigence under the Texas Rules of Civil and Appellate Procedure or otherwise would satisfy the requirement for representation by certain organizations providing legal services to the poor, such as Legal Services Corporation or Volunteer Legal Services.

The financial eligibility requirement for participation in the Program is defined as follows:

> Participation in the Supreme Court's Pro Bono Pilot Program is available to litigants who satisfy the Program's financial eligibility requirements. For purposes of the Program, "financial eligibility" means that the party has filed an

> affidavit of indigence in accordance with Texas Rule of Appellate Procedure 20, is proceeding without paying costs of court, and either no contest was made to the affidavit, or the contest was sustained in favor of the indigent party.
> Pro se parties can also satisfy the financial eligibility requirement for the Program if, due to their financial circumstances, they are receiving, or are eligible to receive, free legal services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts ("IOLTA") program. In this circumstance, the attorney must file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines.

To participate in the Pro Bono Program, you may be required to execute an affidavit under oath as to your financial circumstances.

Participation in the Program is purely voluntary, and if your case qualifies for inclusion, you must apply to the Pro Bono Committee in order to participate in the Program. A sample request for inclusion in the Program is attached as Form 4. If you decide to be included in the Program, the Committee will seek placement of the case with its pro bono volunteer attorneys. You should be aware that the process of locating a volunteer lawyer will likely involve the transmission of background information about the case through email distribution to potential volunteers, as well as posting of minimal, publicly available facts about the case, such as the parties, the issues presented, and any urgency of the proceedings, on the Internet, solely for the purpose of locating a volunteer.

If your case qualifies and you are interested in applying, you must contact the Program Liaison, Michael S. Truesdale, Law Office of Michael S. Truesdale PLLC, at 515 Congress Avenue, Suite 2355, Austin, Texas, 78701.

If a volunteer lawyer is matched with your case through the Program, that lawyer will be your lawyer in handling the appeal on your behalf in the Supreme Court from that point forward. He or she will prepare the briefs and any necessary motions and present oral argument to the Court if argument is ordered. The scope of the attorney's representation of you is limited to the

appeal in the Supreme Court of Texas and terminates once those proceedings are concluded—typically after the opinion issues or the Court rules on any timely filed motions for rehearing. If you are unsuccessful in this Court and desire to go forward to the United States Supreme Court, you will need to make other arrangements for counsel to represent you in that court unless your appointed counsel agrees in writing to undertake the further representation.

Please note that the Committee only attempts to provide volunteer lawyers for cases that meet the Program requirements. Members of the Committee do not act as lawyers for anyone in the Program. There is no guarantee that pro bono counsel can be found to represent you.

For questions or comments about the Pro Bono Program, please contact webmaster@tex-app.org.

XV. SAMPLE FORMS

To help you with your Supreme Court appeal, sample forms are attached to provide guidance. These forms are:

Form 1 Motion for Extension of Time to File Petition for Review

Form 2 Sample Waiver Letter for Respondent

Form 3 Motion for Extension of Time to File Brief

Form 4 Application for Inclusion in Pro Bono Program

In addition, sample petitions for review, responses to petitions for review, replies, and briefs on the merits can be viewed on the internet through the Supreme Court's website at: www.supreme.courts.state.tx.us/ebriefs/ebriefs.asp.

No. _____

IN THE
SUPREME COURT OF TEXAS

NAME OF PETITIONER,
Petitioner,

V.

NAME OF RESPONDENT,
Respondent.

FIRST [UNOPPOSED] MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner files this First [Unopposed] Motion for Extension of Time to File Petition for Review under Tex. R. App. P. 10.1, 10.5(b), and 53.7(f). In support of this motion, Petitioner shows the following:

1. The Court of Appeals for the [insert number] district in [insert city] rendered its opinion and judgment in [insert name of case in court of appeals], No. [court of appeals' docket number], on [date]. The petition for review is due no later than [date].

2. Petitioner requests an extension of time of thirty days, to [date]. This is Petitioner's first request for an extension of time in this case.

3. Petitioner relies on the following facts as a reasonable explanation for the requested extension of time. Petitioner's counsel [or pro se Petitioner], in addition to

preparing a brief on the merits in this case must also devote time to the following additional matters: [list matters here].

4. The undersigned has conferred with opposing counsel, who indicated there was no opposition to this request. [Alternative: The undersigned has conferred with opposing counsel, who indicated this motion is opposed.]

Therefore, Petitioner prays that this Court grant this motion for extension of time.

Respectfully submitted,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

CERTIFICATE OF CONFERENCE

As required by Tex. R. App. P. 10.1(a)(5), I certify that I have conferred with [counsel for other parties], who indicated that this motion is unopposed. [Alternative: I certify that I have conferred with [counsel for other parties], who indicated that this motion is opposed.]

_____
Name of person filing motion

CERTIFICATE OF SERVICE

I certify that, on [date of mailing], I served a copy of this motion by First Class, United States mail on the following:

[Names and addresses of all counsel and unrepresented parties]
Counsel for [identify party represented]

_____
Name of person filing motion

Form 1: Motion for Extension of Time to File Petition for Review

[date]

Mr. Blake Hawthorne
Clerk, Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: No. [Supreme Court docket number], [name of case]

Dear Mr. Hawthorne:

By this waiver letter, the respondent respectfully waives the filing of a response to the petition for review. It is respondent's understanding that the Court will not grant the petition without first requesting a response.

Sincerely,

_____
Name of person filing letter
State bar number, if any
Address
Phone number
Telecopy

CERTIFICATE OF SERVICE

I certify that, on [date of mailing], I served a copy of this motion by First Class, United States mail on the following:

[Names and addresses of all counsel and unrepresented parties]
Counsel for [identify party represented]

_____
Name of person filing letter

Form 2: Waiver Letter

NO. 99-9999

IN THE
SUPREME COURT OF TEXAS

NAME OF PETITIONER,
Petitioner,

V.

NAME OF RESPONDENT,
Respondent.

[UNOPPOSED] MOTION FOR EXTENSION OF TIME TO FILE
PETITIONER'S BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner files this [Unopposed] Motion for Extension of Time to File Petitioner's Brief on the Merits and in support shows the following:

1. Petitioner's Brief on the Merits is due on [date]. Petitioner requests an extension of time of thirty days, to [date], to file its Brief.

2. Petitioner relies on the following facts as a reasonable explanation for the requested extension of time. Petitioner's counsel [or pro se Petitioner], in addition to preparing a brief on the merits in this case must also devote time to the following additional matters: [list matters here].

Form 3: Motion for Extension of Time to File Petitioner's Brief

3. The undersigned has conferred with opposing counsel, who indicated there was no opposition to this request. [Alternative: The undersigned has conferred with opposing counsel, who indicated this motion is opposed.]

Therefore, Petitioner prays that this Court grant this motion for extension of time.

Respectfully submitted,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

CERTIFICATE OF CONFERENCE

As required by Tex. R. App. P. 10.1(a)(5), I certify that I have conferred with [counsel for other parties], who indicated that this motion is unopposed. [Alternative: I certify that I have conferred with [counsel for other parties], who indicated that this motion is opposed.]

_____
Name of person filing motion

CERTIFICATE OF SERVICE

I certify that, on [date of mailing], I served a copy of this motion by First Class, United States mail on the following:

[Names and addresses of all counsel and unrepresented parties]
Counsel for [identify party represented]

_____
Name of person filing motion

Form 3: Motion for Extension of Time to File Petitioner's Brief

[date]

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Law Office of Michael S. Truesdale
515 Congress Avenue, Suite 2355
Austin, Texas 78701
mike@truesdalelaw.com
Re: No. [Supreme Court docket number], [name of case]

Dear Mr. Truesdale:

Petitioner requests that the State Bar of Texas Appellate Section's Pro Bono Committee consider this request for inclusion in the Supreme Court of Texas' Pro Bono Pilot Program.

[Include all that apply:]

[Currently, Petitioner is proceeding pro se and has filed a petition for review in this matter.]

[Currently, Petitioner is being represented by the undersigned counsel and has filed a petition for review. If the Court deems it advisable that further briefing and/or argument be provided, Petitioner requests that his/her case be considered for the appointment of pro bono counsel.]

[Petitioner is proceeding as an indigent in this proceeding and/or meets the financial eligibility requirements for the Program.]

[Petitioner is submitting the attached affidavit of indigence for the Committee's consideration.]

[The Supreme Court has requested that the parties submit briefs on the merits by letter dated _____ ___, ____.]

Form 4: Request for Inclusion in Pro Bono Program

Very truly yours,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

Form 4: Request for Inclusion in Pro Bono Program

Attorney, Volunteer

From: Michael S. Truesdale

Sent: [Date]

To: [Pro Bono Listserv]

Subject: Pro Bono Appellate Opportunity—Supreme Court of Texas Pro Bono Pilot Program

Calling All Volunteer Appellate Counsel: Here is a potential pro bono appellate opportunity for the Supreme Court Pro Bono Pilot Program. Please contact me if you are interested, and I will put you in touch with the potential client. Portions of the record are attached:

Mary Williams sued the city of Stubblefield, Texas, because of personal injuries she sustained after raw sewage backed up into her home. She claims that the raw sewage caused her to contract Hepatitis C. Specifically, her theories include negligence, nuisance, and trespass. Additionally, she claims Stubblefield waived sovereign immunity. The 999th District Court, Magnolia County, Texas, signed an order that granted summary judgment on all claims on June 11, 2006, that was affirmed by the court of appeals on April 3, 2007. Williams has filed a petition for review with the Texas Supreme Court, and the Court has requested briefing on the merits. Williams needs an attorney to represent her in the Supreme Court in preparing the brief on the merits and presenting oral argument if the Court requests it.

The parties are: Mary Williams, the City of Stubblefield, Texas, and Joe Friday in his Official Capacity as Mayor of Stubblefield, Texas.

The Court has not yet set a briefing schedule, and there are no pending requests for emergency relief.

[attachments]

EXHIBIT E

[LETTERHEAD]

[Date]

[Client and address]

Re: Case No._____; [Petitioner] v. [Respondent]__; In the Supreme Court of Texas; On Appeal from Cause No. _____; in the Court of Appeals for the _____ District of Texas at _____, Texas

Dear [Client]:

My name is __[Name]__, and I am pleased to accept the opportunity to represent you with regard to the above-referenced proceeding before the Supreme Court of Texas ("Court"). The purpose of this letter is to set forth the basic terms upon which I will represent you, including the anticipated scope of our services and the nature of my pro bono representation.

1. Scope of Engagement. I have been appointed as pro bono counsel by the Court to represent you in the above referenced proceeding. My appointment is limited and includes only the handling of this matter.

2. Pro bono Representation. Please be advised that I am representing you as a participant in the Court's pro bono project. You will not be responsible for any attorney's fees incurred in our representation of you.

You will be responsible for the costs of court, such as filing fees and copying expenses, unless you are proceeding in this matter under an affidavit of indigence, meaning that you have certified to the lower courts that you cannot afford the costs of these appellate proceedings and either no one contested your right to do so or you were successful in convincing the trial or intermediate appellate court that you should be entitled to proceed without paying costs.

If you have not yet filed an affidavit of indigence, but believe that you cannot afford to pay the costs of the Court, I may request you to submit an affidavit regarding your financial circumstances. Additionally, the State Bar of Texas Appellate Section's Pro Bono Committee may request you to submit such an affidavit or other documentation regarding your financial circumstances as a condition to your participation in the Pro Bono Project.

3. Procedures Before the Texas Supreme Court. At this time, the Court has asked that you submit a Brief on the Merits that further explains the legal basis for your appeal to this Court. The request means that some members of the Court have taken an interest in your case, but it does not mean that the Court will ultimately grant review and decide the merits. I will prepare and submit the brief on the merits on your behalf, as well as any reply briefs, in accordance with the Court's deadlines. Please be aware that extensions of time may be sought by either party as to the merits briefing deadlines. The Appellate Standards, which are the Code by which we practice in this State, require that we not oppose any reasonable request for extension by the other side, and extensions are typically granted by the Court. I will also present

EXHIBIT D

oral argument on your behalf if the Court requests it. I will also keep you apprised of the progression of the briefing and any rulings by the Court.

4. Other Issues. For all engagements undertaken by our firm, our firm performs a conflict check, *i.e.*, a review of its records to determine whether or not the firm is currently involved in the engagement. We have performed the requisite conflict check and wish to advise you of its results. The check revealed that: [Indicate any potential conflicts or state that none were found.] We do not believe that a conflict of interest exists with regard to our representation of you in this matter; however, we make the foregoing disclosure so that you may have all relevant facts before you in determining whether or not to go forward with this engagement. Should we learn any additional information that leads us to believe that a potential or actual conflict of interest does exist, I will of course inform you promptly of that fact in writing.

For best results, I look forward to a high degree of cooperation from you. Although I will endeavor to achieve a satisfactory result and to keep you apprised of the status of these matters, no guarantees of any kind can be made concerning the outcome of any litigation, or of any other legal services in which the voluntary consent or action of another party is involved.

Please review this letter carefully and, if it is acceptable to you, please so indicate by returning a signed copy at your earliest convenience. Enclosed is an additional copy of this letter for your files.

I look forward to working with you on this engagement. Please do not hesitate to call me if you have any questions.

Very truly yours,

[Your Name]

Encl.

ACCEPTED AND AGREED:

_____ Dated:_____
[Client's Name]

EXHIBIT D

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

[Date]

[Pro Se Party & Address]

RE: Case Number: [ ]
Court of Appeals Number: [ ]
Trial Court Number: [ ]

STYLE: [ ]

Dear [Pro Se Party]:

On behalf of the State Bar of Texas Appellate Section Pro Bono Committee, I am pleased to inform you that we have been able to match your appeal, referenced above, with a volunteer lawyer who has agreed to represent you in preparing your briefs on the merits and presenting oral argument, if the Court requests it, to the Supreme Court. You will not be responsible for paying any legal fees for this representation.

The contact information for the volunteer lawyer who has agreed to represent you is:

[Name and contact information]

You will be receiving information from this lawyer shortly.

If you do not wish to be represented by the counsel identified above, you must send me notice in writing to the following address within fourteen (14) days from the date of this letter objecting to the placement:

EXHIBIT C

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Law Office of Michael S. Truesdale
515 Congress Avenue, Suite 2355
Austin, Texas 78701
mike@truesdalelaw.com

Otherwise, the volunteer lawyer will file notice with the Supreme Court that he or she will be representing you in the matter. Please be advised that, if you do object to the counsel identified above, we cannot guarantee that we will be able to locate a replacement volunteer attorney. Additionally, if the volunteer attorney is unable to continue representation of you in this matter for any reason, the Committee will seek to find a replacement attorney, but again, cannot guarantee that we will be able to do so.

As always, if you have questions, or need additional information, please do not hesitate to contact me.

Very truly yours,

Michael S. Truesdale

Cc: [Volunteer Lawyer]

EXHIBIT C

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

[Date]

[Pro Se Party & Address]

RE: Case Number: [ ]
Court of Appeals Number: [ ]
Trial Court Number: [ ]

STYLE: [ ]

Dear [Pro Se Party]:

The State Bar of Texas Appellate Section Pro Bono Committee has been informed that your case has been referred to the Supreme Court of Texas' Pro Bono Pilot Program ("Pro Bono Program"). If you are financially eligible and choose to participate in the Program, we will work to find a volunteer lawyer to represent you in preparing your briefs on the merits and presenting oral argument, if the Court requests it, to the Supreme Court. You will not be responsible for paying any legal fees for this representation. Additional information about the Pro Bono Program can be found at www.tex-app.org., or I can send you our *Guide to Practice Before the Supreme Court of Texas*, which explains the procedures before the Court and the Pro Bono Program if you request it.

If you want to participate in the Pro Bono Program, please be advised that we will be sending background information about this case that is publicly available, including copies of the briefs previously filed, to our volunteer lawyers via an electronic Listserv, and also post this information on the Internet, in an attempt to match you with a volunteer lawyer. We will also be discussing this information with potential volunteers.

Your participation in the Pro Bono Program is conditioned upon a finding that you are financially eligible. What that means is that you either: (a) filed an affidavit of indigence in accordance with Texas Rule of Appellate Procedure 20, are proceeding without paying costs of court, and either no contest was made to the affidavit, or the contest was sustained in your favor; or (b) your income level satisfies the requirements for the appointment of pro bono counsel under a

EXHIBIT B

program funded by the Interest on Lawyers Trust Accounts ("IOLTA") program. If you do not currently have an affidavit of indigence on file with the Court, the Committee will work with you to determine your financial eligibility. You may be required to submit an affidavit and/or documentation regarding your financial circumstances as a condition to your participation in the Pro Bono Project.

Participation in this Program is purely voluntary, and as the Court has indicated, if you would like to participate, please complete the attached application within thirty (30) days of the letter you received from the Court and send to the Program Liaison at the following address:

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Law Office of Michael S. Truesdale
515 Congress Avenue, Suite 2355
Austin, Texas 78701
mike@truesdalelaw.com

If you inform me that you would like to participate in the Pro Bono Program we will work on finding a volunteer lawyer to represent you before the Texas Supreme Court. In the next two weeks, I will send you a letter that indicates the results of our efforts. If we are successful in placing your case, I will provide information regarding the name and contact information for the volunteer attorney, and you will have fourteen (14) days from the date of that letter to object to the placement. Otherwise, the volunteer lawyer will contact you and file notice with the Supreme Court that he or she will be representing you in the matter.

In the meantime, if you have questions, or need additional information, please do not hesitate to contact me.

EXHIBIT B

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

Very truly yours,

Michael S. Truesdale

EXHIBIT B

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

[date]

Marcy Hogan Greer
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Fulbright & Jaworski L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701

Re: No. [Supreme Court docket number], [name of case]

Dear Ms. Greer:

Petitioner requests that the State Bar of Texas Appellate Section's Pro Bono Committee consider this request for inclusion in the Supreme Court of Texas' Pro Bono Pilot Program.

[Include all that apply:]

[Currently, Petitioner is proceeding pro se and has filed a petition for review in this matter.]

[Currently, Petitioner is being represented by the undersigned counsel and has filed a petition for review. If the Court deems it advisable that further briefing and/or argument be provided, Petitioner requests that his/her case be considered for the appointment of pro bono counsel.]

[Petitioner is proceeding as an indigent in this proceeding and/or meets the financial eligibility requirements for the Program.]

[Petitioner is submitting the attached affidavit of indigence for the Committee's consideration.]

[The Supreme Court has requested that the parties submit briefs on the merits by letter dated _____ ___, ____.]

EXHIBIT B

STATE BAR OF TEXAS

APPELLATE SECTION
Pro Bono Committee

Very truly yours,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

EXHIBIT B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Austin, Texas 78711
(512) 463-1312

[Date]

[Pro Se Part(ies), All Counsel of Record & addresses]

RE: Case Number: [ ]
Court of Appeals Number: [ ]
Trial Court Number: [ ]

Style: [ ]

Dear [ ]:

Pursuant to TEX. R. APP. P. 55.1, the Court has determined that briefs on the merits would benefit its consideration of the above-styled case. Because one or more of the parties is appearing pro se at this time, the Court is referring the matter to the State Bar of Texas Appellate Section's Pro Bono Committee ("Pro Bono Committee") in accordance with its Pro Bono Pilot Program. For more details about the Supreme Court's Pro Bono Pilot Program, please go to www.tex-app.org., or you can request a free copy from the Clerk's office.

If the pro se party desires to be included in the Pro Bono Program and satisfies the financial eligibility requirements for the Program, the Pro Bono Committee will attempt to locate a volunteer lawyer to prepare the briefs on the merits and present any oral argument that might be ordered on behalf of the pro se party. This representation will be pro bono, meaning that the volunteer lawyer will not charge you legal fees for his or her services. If the pro se party wants to participate in the Pro Bono Program, he or she must advise the Pro Bono Committee Program Liaison in writing within thirty (30) days of the date of this letter. To do so, please fill out the attached application and send it to the following address:

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Law Office of Michael S. Truesdale
515 Congress Avenue, Suite 2355
Austin, Texas 78701
mike@truesdalelaw.com

Additionally, the Court requests that the parties submit a copy of all briefs on the merits (including amicus and post-submission briefs) and the respective petitions, responses, and replies—that have previously been filed with the Court in paper form—***in electronic form*** within ten days of the date of this letter. Please submit an electronic copy of each filing when filing the hard copies of any brief. Please see the enclosed information for guidelines.

EXHIBIT A

Sincerely,

Blake A. Hawthorne, Clerk

Enclosures

cc: Michael S. Truesdale
Program Liaison

INFORMATION ON SUBMISSION OF ELECTRONIC BRIEFING

In order to make more information available to the public via the Court's website, we request that all briefs on the merits (including amicus and post-submission briefs) be submitted electronically. Additionally, in all cases (such as this case) in which the Court requests full briefing on the merits, the Court requests that you submit and electronic copy of your previously filed petition for review, petition for writ of mandamus, response, or reply, etc., as applicable. Please submit an electronic copy of each filing in the following form and format when filing the hard copies of any brief.

The Court asks the parties to submit each electronic brief in the following form and format:

1. Each efiling should be submitted either by email attachment or on a separate 3 ½ inch floppy disc/CD.

2. Each email attachment or disc/CD must include information or a label, respectively, that identifies the case name, the docket number, type of filing (i.e. petition for review, response, reply, petitioner's brief, respondent's brief, brief in reply, amicus brief) and the word-processing software and version used to prepare the brief. If submitting by email, please attach a Certificate of Compliance. A link to the certificate can be found on the Supreme Court's Website at http://www.supreme.courts.state.tx.us/ebriefs. If submitting an efiling on floppy disc/CD, please enclose a Certificate of Compliance with the disc/CD.

3. If available, the Court prefers the use of **searchable** PDF files because files in this format generally may not be altered. If this format is not available to you, please use either Microsoft Word (up to Word 2002 (Word XP)) or WordPerfect version 7 through 11.0. Documents submitted in these versions will be converted to searchable PDF by the Clerk's office.

4. The email attachment or disc/CD must contain only an electronic copy of the submitted filing. The email attachment or disc/CD **must not** contain any document or material that is not included in the original hard copy of the filing with the Court.

5. The **email attachment or disc/CD must be free of viruses** or any other files that would be disruptive to the Court's computer system.

6. If submitting an efiling as an email attachment at the time the brief is filed, please advise the Clerk's office **in your transmittal letter accompanying hard copies**; please send efilings to scebriefs@courts.state.tx.us.

CERTIFICATE OF COMPLIANCE

At the request of the Court, I certify that this submitted computer disc/CD (or email attachment) complies with the following requests of the Court:

1. This filing is labeled with or accompanied by the following information:

   a. Case Name: _____

   b. The Docket Number: _____

   c. The Type of Brief: _____

   d. The Word Processing Software and Version Used to prepare the filing: _____
   _____

2. This disc/CD (or email attachment) contains only an electronic copy of the submitted filing and does not contain any appendices, any portion of the appellate record (other than a portion contained in the text of the filing) hypertext links to other material, or any document that is not included in the filing.

3. The **electronic filing is free of viruses or any other files that would be disruptive to the Court's computer system**. The following **software**, if any, was used to ensure the filing is **virus-free**: _____,

4. I understand that a copy of this filing will be posted on the Court's web site and becomes part of the Court's record.

5. Copies have been sent to all parties associated with this case.

_____
(Signature of filing party and date)

_____
(Printed name)

_____
(Firm)

[date]

Marcy Hogan Greer
Program Liaison
Supreme Court Pro Bono Pilot Program
c/o Fulbright & Jaworski L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701

Re: No. [Supreme Court docket number], [name of case]

Dear Ms. Greer:

Petitioner requests that the State Bar of Texas Appellate Section's Pro Bono Committee consider this request for inclusion in the Supreme Court of Texas' Pro Bono Pilot Program.

[Include all that apply:]

[Currently, Petitioner is proceeding pro se and has filed a petition for review in this matter.]

[Currently, Petitioner is being represented by the undersigned counsel and has filed a petition for review. If the Court deems it advisable that further briefing and/or argument be provided, Petitioner requests that his/her case be considered for the appointment of pro bono counsel.]

[Petitioner is proceeding as an indigent in this proceeding and/or meets the financial eligibility requirements for the Program.]

[Petitioner is submitting the attached affidavit of indigence for the Committee's consideration.]

[The Supreme Court has requested that the parties submit briefs on the merits by letter dated _____ ___, ____.]

Very truly yours,

_____
Name of person filing motion
State bar number, if any
Address
Phone number
Telecopy

[Date]

[Pro Se Part(ies), All Counsel of Record & addresses]

RE: Case Number: [ ]
Court of Appeals Number: [ ]
Trial Court Number: [ ]

Style: [ ]

Dear [ ]:

Pursuant to TEX. R. APP. P. 55.1, the Court has determined that briefs on the merits would benefit its consideration of the above-styled case. Because one or more of the parties is appearing pro se at this time, the Court is referring the matter to the State Bar of Texas Appellate Section's Pro Bono Committee ("Pro Bono Committee") in accordance with its Pro Bono Program. For more details about the Supreme Court's Pro Bono Program, please go to www.tex-app.org., or you can request a free copy from the Clerk's office.

If the pro se party desires to be included in the Pro Bono Program and satisfies the financial eligibility requirements for the Program, the Pro Bono Committee will attempt to locate a volunteer lawyer to prepare the briefs on the merits and present any oral argument that might be ordered on behalf of the pro se party. This representation will be pro bono, meaning that the volunteer lawyer will not charge you legal fees for his or her services. If the pro se party wants to participate in the Pro Bono Program, he or she must advise the Pro Bono Committee Program Liaison in writing within thirty (30) days of the date of this letter. To do so, please complete the attached application and statement of financial circumstances and send them to the following address:

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Program
c/o Law Office of Michael S. Truesdale
801 West Avenue, Suite 201
Austin, Texas 78701
mike@truesdalelaw.com

If you do not forward the application and statement of financial circumstances within 30 days, the Court may consider withdrawing its reference of this case to the Pro Bono Committee and may proceed to set a briefing schedule to govern the case without the involvement of pro bono counsel.

Sincerely,

Blake A. Hawthorne, Clerk

Enclosures

cc: Michael S. Truesdale
Program Liaison

[date]

Michael S. Truesdale
Program Liaison
Supreme Court Pro Bono Program
c/o Law Office of Michael S. Truesdale
801 West Avenue, Suite 201
Austin, Texas 78701

Re: No. [Insert Supreme Court docket number], [name of case]

Dear Mr. Truesdale:

The case identified above has been referred to the Supreme Court of Texas' Pro Bono Program.

I am a party to that case and am currently proceeding on a pro se basis. I would like to be considered for the appointment of pro bono counsel. The basis for my request is that I am either proceeding as an indigent in this proceeding and/or meet the financial eligibility requirements for the Program.

I am including with this request a Statement of Financial Circumstances as a part of my application.

Very truly yours,

_____
Name:
Address:
Phone number:
e-mail:

STATEMENT OF FINANCIAL CIRCUMSTANCES

1. Basis for indigence: I am unable to pay a court cost because:

[ ] I am presently receiving a government entitlement based on indigence as follows (describe nature and amount of government entitlement):

and

I have no ability to pay court costs based on facts set out below.

2. Employment information:

[ ] I am not now employed; the last time I was employed was at

[ ] I am employed: I work for

The nature of the job is . The income I receive from this job is $ per .

3. Income from sources other than employment:

[ ] I have no income with is derived from sources other than employment, such as interest, dividends, annuities, etc.

[ ] I have income derived from sources other than employment as follows:

Type of income Amount per period

4. Spouse's Income

[ ] My spouse has no income.
[ ] My spouse has income as follows:

Type of income Amount per period

5. Property:

[ ] I own no property and no interest in any property.
[ ] I own the following interests in property:

Real Estate:

Motor Vehicles:

Stock and/or bonds:

Cash

Other:

6. Bank Accounts:

Bank	Type of Account	Amount

7. Dependents:

[ ] I have no dependents.
[ ] I have the following dependents:

Name	Age	Relationship

8. Debts:

[ ] I have no debts.
[ ] I have the following debts:

Creditor	Amount

9. I have the following monthly expenses:

Type of Expense:	Amount per month

10. Loans:

I have attempted to obtain a loan for these costs from the following financial and/or lending institutions, but have been unable to secure such a loan.

Financial Institution/Lender: Address:

11. Attorneys:

[ ] I was not represented by an attorney in this court.

[ ] I was represented by an attorney in this court, but my attorney did not charge me a legal fee for this representation.

[ ] I was represented by an attorney in this court under a contingent fee arrangement.

12. Costs:

[ ] No attorney has agreed to pay or advance my court costs.

[ ] An attorney has agreed to pay or advance my court costs under the following circumstances (explain here): _____
_____
_____
_____.

I am unable to pay the costs of court. I verify that the statements made in this statement are true and correct.

Signed this the ____ day of _____, 20___.

_____

Vexatious Litigants

Monday, July 14, 2014 **3:30 p.m. - 4:30 p.m.** **James River Salon C**

Speaker: Russell Carparelli, Executive Director
American Judicature Society

Russell Carparelli, Executive Director

In December 2013, Russell Carparelli retired from the Colorado Court of Appeals after serving in that capacity for 11years. In January 2014, Judge Carparelli became the Executive Director of the American Judicature Society, which is an independent non-profit membership organization that, for more than 100 years, has been a leader of nation-wide efforts to improve America's courts and to ensure that they remain fair and impartial.

Judge Carparelli has been an active leader in projects regarding attorney professionalism and civility. His presentation for lawyers regarding civility skills and his presentation for judges about how to address attorney misbehavior are regarded as innovative and effective. In his capacity as a member and working group chair of the Colorado Chief Justice's Commission on the Legal Profession, Judge Carparelli helped develop Colorado's October Legal Professionalism Month.

Judge Carparelli has also been an innovator with regard to adult education about the Rule of Law and the role of the courts in preserving it. He is a co-founder of Colorado's *Our Courts* adult public education project. In February 2010, the American Bar Association Coalition for Justice awarded the *Our Courts* project its 2010 national award for public education regarding the role of fair and impartial courts. Judge Carparelli also co-founded of *Our Courts America*, which is now a project of the American Judicature Society, and was a designer and drafter of content for the Learning Center at Colorado's Ralph Carr Colorado Judicial Center, and a co-founder of Colorado's *Our Courts* adult public education project.

In 2008, Judge Carparelli received the Denver Bar Association's award for Judicial Excellence. In January 2012, he received the University of Virginia William J. Brennan, Jr. Award in recognition of his of the outstanding skills as a member of the judiciary as well as his contributions to the National Trial Advocacy College and the legal profession. And in October 2012, he received the American Bar Association Dispute Resolution Section Civility and Law Award.

He received his Bachelor of Science degree from the U.S. Air Force Academy, a Juris Doctor degree from the University of Denver College of Law, and a Master of Laws degree from the University of Virginia School of Law.

Judge Carparelli lives in Nashville, Tennessee with his wife Sue. Their daughter, Jessica, and her family live in Parker, Colorado, and their son, Christopher, recently graduated with a Master of Science degree from the University of Nebraska.

Vexatious Litigants

Russell Carparelli
Executive Director

vex·a·tious

causing or tending to cause annoyance or frustration;

denoting an action or the bringer of an action that is brought without sufficient grounds for winning, purely to cause annoyance to the defendant.

Examples

Why do litigants behave that way?

They are having a bad day.
They do not understand the process.
They cannot control the process.
They are angry.
They are afraid.
It's just who they are.

In the Moment

Three Phases

1. Manage your reaction.
2. Listen Actively
3. “Transmit”

ALWAYS:

Be aware indicators of
your own stress reactions.

ALWAYS:

Manage your reaction first.

STOP!

Take a breath – 6 secs.

FOCUS

Give the person your complete attention.

Manage Your Reaction

STOP!

Focus

LISTEN ACTIVELY

LISTEN & LEARN

"Receive"

before

"Transmitting"

LISTEN & LEARN

What is the person ultimately trying to accomplish?

LISTEN & LEARN

What is the person trying to accomplish today?

LISTEN & LEARN

What emotion is the person expressing?

EMPATHIZE & APOLOGIZE

It will help you determine
how to fix the problem.

EMPATHIZE & APOLOGIZE

Express regret that
the situation has occurred.

(You did not cause the problem,
but the person needs an apology
from somebody.)

ASK QUESTIONS

- to make sure you understand the problem the person wants fixed;
- to make sure you understand the consequences the person believes he or she will experience if the problem is not fixed;
- to understand the outcome the person is seeking.

ASK QUESTIONS

Asking questions will convey

that you are in listening

and want to understand.

MESSAGE RECEIVED

- Describe the problem as you understand it.
- Listen again . . . for clarification . . . for new information.
- Describe the problem as you now understand it.

MESSAGE RECEIVED

Convey empathy with

the specific emotion

the person is expressing.

LISTEN ACTIVELY

Listen & Learn

Empathize & Apologize

Ask Questions

Message Received

LISTEN ACTIVELY

Listen & Learn

Empathize & Apologize

Ask Questions

Message Received

TRANSMIT

8. TRANSMIT

1. Intentions
2. Information
3. Actions

Three Phases

1. Manage your reaction first.
2. Listen Actively
3. “Transmit”

Manage Your Reaction

STOP!

Focus

LISTEN ACTIVELY

Listen & Learn

Empathize & Apologize

Ask Questions

Message Received

TRANSMIT

1. Intentions
2. Information
3. Actions

Vexatious Litigants

Russell Carparelli
Executive Director

Russell Carparelli
Executive Director

Interacting with Vexatious Litigants

Phase 1 – Manage Your Reaction

- **STOP!** – Take a breath.
- Focus on the person

Phase 2 – Listen Actively

- Listen & Learn
- Empathize & Apologize
- Ask questions
- Message Received

Phase 3 – Transmit

- Intentions
- Information
- Actions

What's Bugging You?

Tuesday, July 15, 2014 **8:30 a.m. – 10:00 a.m.** **James River Salon C**

Speakers: Polly Brock, Chief Deputy Clerk of Court
Colorado Court of Appeals
Douglas Robelen, Chief Deputy Clerk
Virginia Supreme Court

Polly Brock, Chief Deputy Clerk of Court

Pauline Brock has been with the Colorado Court of Appeals since 1996 and is currently the Chief Deputy Clerk of Court. Her responsibilities include supervising the processing of motions and orders and jurisdictional screening in the 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.

Douglas Robelen, Chief Deputy Clerk

Doug Robelen has served as Chief Deputy Clerk of the Supreme Court of Virginia for most of the 21st century. Prior to coming to the Supreme Court, he worked as an associate with the law firm of Mays & Valentine, as an appeals examiner with the Virginia Employment Commission, as a staff attorney with the Court of Appeals of Virginia, and as an informal appeals agent with the Virginia Department of Medical Assistance Services. He is a graduate of Davidson College and the University of Virginia School of Law.

Substance Abuse

Tuesday, July 15, 2014 **10:15 a.m. - 11:15 a.m.** **James River Salon C**

Speaker: Rogelio Flores, Superior Court Judge
Superior Court of California

Rogelio Flores, Superior Court Judge

Superior Court Judge Rogelio Flores began his judicial duties in January 1987 as the first court commissioner for the North Santa Barbara County Municipal Court. In 1997, he was appointed to the municipal court bench and in 1998 he was elevated to the Santa Barbara County Superior Court. He received his law degree from the UCLA School of Law in 1979.

From 1997 through 2012 Judge Flores was assigned to various collaborative courts in Santa Maria including the Substance Abuse Treatment Court-SATC, (Drug Court), and drug treatment mandated by passage of Proposition 36. He was also responsible for the Mental Health Court and calendars specializing in co-occurring disorders. He presided over the DUI Treatment Court and helped organize the first Veteran's Treatment Court in Santa Barbara County. He continues to preside over the Veterans' Treatment Court, the first of its' kind in Central California. Judge Flores is a guest lecturer at The National Judicial College in Reno, Nevada.

Judge Flores is the vice-chairperson of the Collaborative Justice Courts Advisory Committee for the Judicial Council of California. He is a past president of the Latino Judges of California, and he is a member of the National and California Association of Drug Court Professionals. Judge Flores was elected to the Board of Directors of the National Association of Drug Court Professionals in 2008 and he sits on their Executive Committee. He has lectured extensively both nationally and internationally on the topic of collaborative jurisprudence. Judge Flores was elected as a Class A (non-alcoholic) Trustee to the General Service Board of Alcoholics Anonymous in New York in 2007. Recently, Judge Flores has been serving as a consultant to the Office of National Drug Control Policy and the United States Department of State, Bureau of Narcotics Affairs in overseeing the creation of drug courts in Mexico. Additionally, he has worked with the Organization of American States in helping develop drug treatment courts in Latin America, Central America and the Caribbean.

He has previously received Certificates of Recognition from the California State Legislature, Congresswoman Lois Capps, the National Latino Peace Officers Association, the County of Santa Barbara, the Santa Barbara County Probation Peace Officers Association, the City of Santa Maria, the Santa Maria Chamber of Commerce, the City of Santa Barbara, the Community Recovery Network and he was granted the Achievement Award for 2001 by the Santa Barbara Hispanic Achievement Council. In 2012 he was presented the "Hero of Justice Award" from the Legal Aid Foundation of Santa Barbara County. In December of 2012 he was recognized as the Judicial Officer of the Year by the Chief Probation Officers of California. In 2013, Judge Flores was awarded the Social Justice Award from the Santa Barbara County Community Action Network, and in 2014 he received the Outstanding Community Service Award from Santa Barbara County Sheriff Bill Brown.

Creating a Forest from the Trees: Why Case Counting Practices Matter

Tuesday, July 15, 2014 **11:15 a.m. – 11:45 a.m.** **James River Salon C**

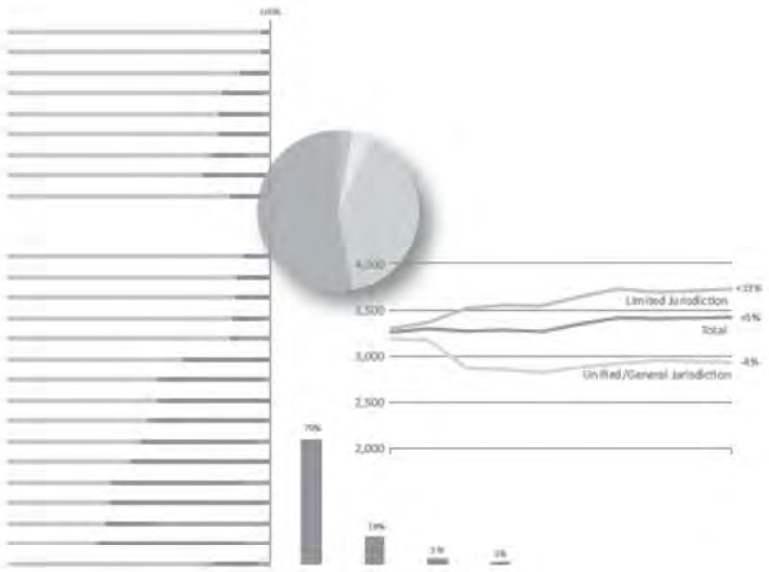
Speaker: Shauna M. Strickland, Senior Court Research Analyst
Research Division of the National Center for State Courts

Shauna M. Strickland, Senior Court Research Analyst

Shauna M. Strickland is a Senior Court Research Analyst within the Research Division of the National Center for State Courts. She currently works on the Court Statistics Project as the manager of data collection efforts and assists both trial and appellate courts with implementation of the *State Court Guide to Statistical Reporting*. Additional work includes serving as project director for both Self-Represented Litigants: Standardized Definitions and Counting Rules and Improving Completeness of Firearm Background Checks through Enhanced State Data Sharing, as project manager for both State Court Organization and the Survey of State Court Criminal Appeals, and as primary staff on the NICS Improvement Amendments Act: State Records Estimates Development and Validation Project and the Census of Problem-Solving Courts. Ms. Strickland served as project manager for the 2005 Civil Justice Survey of State Courts: Supplemental Survey of Civil Appeals and was involved in data collection for the three previous Civil Justice Surveys of State Courts, a pilot study of Criminal Cases on Appeal, and she led the data collection efforts for *State Court Organization, 2004*.

Ms. Strickland contributes to the Court Statistics Project's annual publications, *Examining the Work of State Courts* and State Court Caseload Statistics and is the lead editor for State Court Organization. Additional publications include Developing Standardized Definitions and Counting Rules for Cases with Self-Represented Litigants, *final report for the Self-Represented Litigants: Standardized Definitions and Counting Rules project (National Center for State Courts, 2013)*; Mental Health Court Culture: Leaving Your Hat at the Door, *final report and Executive Summary for the Judicial Decision-Making in Mental Health Courts project (National Center for State Courts, November 2009);* "State Trial Courts: Achieving Justice in Civil Litigation," (a chapter in *Exploring Judicial Politics*, (Ed.) Mark Miller (Oxford University Press, 2009)); "Beyond the Vanishing Trial: A Look at the Composition of State Court Dispositions" (an article in *Future Trends in State Courts 2005*); and "Examining Trial Trends in State Courts: 1976-2002" (an article in the *Journal of Empirical Legal Studies*, vol.1 no. 3, November 2004).

Ms. Strickland holds a MPA from Old Dominion University (VA) and has worked at the NCSC since 2002, receiving the Jeanne A. Ito Staff Award in 2006.



CSP
Court Statistics Project

State Court Guide to Statistical Reporting

Draft Version 2.0

State Court Guide to Statistical Reporting

A joint project of the Conference of State Court Administrators and the National Center for State Courts

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
1.800.616.6109
www.courtstatistics.org

Project Staff
Richard Y. Schauffler, Director
Kathryn A. Holt, Court Research Analyst
Robert C. LaFountain, Senior Court Research Analyst
Shauna M. Strickland, Senior Court Research Analyst
Alice Allred, Program Specialist

Acknowledgments

The *State Court Guide to Statistical Reporting* was developed over a ten-year period. Along the way, the Court Statistics Project staff members have benefited greatly from the assistance and guidance of many groups and individuals within the court community, and we gratefully acknowledge the commitment of time and creative energy of everyone who contributed to this work.

This project would not have been possible without the initial leadership of the previous director of the Court Statistics Project, Brian Ostrom, under whose direction the first edition of the *Guide* was designed and completed in 2003. The members of the Conference of State Court Administrators (COSCA) Court Statistics Committee gave generously of their time, talent, and experience, and their participation was invaluable to project staff. Also critical to the project's success was the participation of the COSCA/National Association for Court Management (NACM) Joint Technology Committee and the Technology Staff of the National Center for State Courts. The National Conference of Appellate Court Clerks (NCACC) worked extensively and tirelessly with the project to define meaningful appellate court reporting categories.

Finally, we are grateful to the State Justice Institute (SJI) for its financial support of the original 2003 version of the *Guide.*

Overview

The *State Court Guide to Statistical Reporting* (hereafter, the *Guide*) is a standardized reporting framework for state court caseload statistics designed to promote intelligent comparisons among state courts. The statistics reported through this framework are compiled, analyzed, and published by the Court Statistics Project (CSP), a collaborative effort of the Conference of State Court Administrators (COSCA) and the National Center for State Courts (NCSC). Since 1975, the CSP has served as the de facto national archive of state court caseload information.

Comparable data from the state courts allows the CSP to publish national trends and analyze caseload statistics for use by state court leaders, policy makers, and local court managers. Being able to put each state's caseload in a jurisdictional, regional, or national context provides useful insights that inform policy, budgetary, and court management decisions.

State courts vary, sometimes dramatically, in their organizational structure and constitutional and statutory frameworks. But regardless of how the courts are organized in each state, the task the state court leadership has set for itself is the same in every state: to map the caseload data used in that state to the reporting framework defined by the *Guide*.

The CSP began compiling national court caseload statistics in 1975. At that time, it was evident that there were profound differences in how states defined and reported their caseload data. Without common caseload definitions and a standard format for classifying and reporting data, the goal of the CSP could never be achieved.

The *Guide* has been designed to provide a comprehensive set of model reporting matrices, case type definitions, and counting rules. Terms used in the reporting matrices are defined in order to ensure comparable reporting.

The *Guide* is divided into two main sections—one for trial courts and one for appellate courts. Within each section, subsections are organized by case category and each of these follows a similar outline.

Note that all case categories, case types, case status categories, manners of disposition, and case characteristics are defined as they apply to the *Guide*, and therefore may vary somewhat from other definitions or common usage in any particular state.

Appellate Court Statistical Reporting

Introduction

Appellate courts review cases appealed from trial courts, intermediate appellate courts, and administrative agencies; preside over original proceedings and disciplinary matters involving the bench and bar; and serve in a supervisory capacity in the administration of the lower courts.

The term "appellate court" is used broadly in the *Guide* and encompasses both courts of last resort and intermediate appellate courts. Courts of last resort, most commonly named supreme courts, are the highest courts in the state, meaning that they are the final arbiters of disputes at the state level. Any additional appeals of a case that has been heard by a court of last resort are made to federal-level courts. Intermediate appellate courts, most commonly named court of appeals, often hear the majority of the state's appeals since states with a two-tier appellate system tend to restrict the type of cases that can be appealed directly to the court of last resort.

For the purposes of reporting in the national framework, appellate matters are reported by case type, and case types are divided into four major case categories: Appeal by Right, Appeal by Permission, Death Penalty, and Original Proceeding/Other Appellate Matter. Within each case category, the *Guide* contains specific decision rules for how cases should be classified and counted. (See the Unit of Count and Case Type Definitions for each case category that follows for detailed descriptions.)

Appellate court caseload data is divided into three sections: Status Category (e.g., Pending, Incoming, Outgoing); Case Characteristics (e.g., Interlocutory); and Manners of Disposition (e.g., Decided, Dismissed Prior to Decision, Settled/Withdrawn), including Type of Court Opinion (e.g., Full Opinion, Memorandum Opinion) and Case Outcome (e.g., Affirmed, Reversed, Modified). Each gathers detailed information regarding the caseload during the reporting period.

The appellate court reporting framework described in the *Guide* is to be used when reporting the caseloads of appellate courts to the Court Statistics Project. Reporting is accomplished by completing the Appellate Court Reporting Matrix (Excel spreadsheet) for the calendar year being requested and returning the same to the CSP. An example of the Appellate Matrix is included in the Appendix.

CASE CATEGORIES

Case type data is reported in four major case categories: Appeal by Right, Appeal by Permission, Death Penalty, and Original Proceeding/Other Appellate Matter. Each case category and the case types that comprise each category are outlined in the pages to follow.

Appeal by Right Case Reporting

Introduction

An appeal by right is a case that the appellate court *must* review. This mandatory review (also referred to as mandatory jurisdiction) is set by constitution, statute, or court rule and varies from court to court. For the purposes of national reporting, the Appeal by Right case category has been divided into three subcategories, with each subcategory further divided into different case types.

Unit of Count

A notice of appeal begins an appeal by right in most courts. The notice of appeal informs the trial court or administrative agency, the appellate court, and all parties to the case that the appellant intends to have the appellate court review an interlocutory decision or the final judgment of a trial court, intermediate appellate court, or administrative agency.

The statistics reported in the Status Category section are a count of *cases* (appeals), not of litigants or legal issues or causes of action. An appeal by right case with multiple parties or multiple causes of action is counted as one appeal.

- Count the *filing of the notice of appeal, or its functional equivalent, with the appellate court clerk* as the beginning of an appeal by right.

- Report the activity (e.g., Filed, Placed Inactive, Disposed, etc.) for such appeals by case type, according to the subject matter at issue as defined in the Appeal by Right Case Type Definitions (below). Information on the manner of disposition should also be reported by case type.

Notes Specific to Appeal by Right Cases

Mandatory versus Discretionary Jurisdiction: For statistical purposes, count as an Appeal by Right those appeals for which the court has mandatory jurisdiction as well as those appeals in which permission to appeal to the reviewing court is granted by *some other* court (often through the use of orders granting leave to appeal). Count as an Appeal by Permission only those cases in which permission is granted through the *discretion of the reviewing court* itself.

Death Penalty Appeals: The Criminal subcategory does not include death penalty appeals. All death penalty-related appeals are to be reported in the Death

Penalty case category of the Appellate Court Reporting Matrix, either as appeals by right or by permission.

Administrative Agency Appeals: Reviews of administrative agency decisions are to be reported as appeals, either by right or by permission. Such appeals may come directly from the administrative agency or from a lower court that has issued an opinion about an administrative agency decision. While those appeals that come directly from an administrative agency may be considered, by the court, as original proceedings, all administrative agency appeals should be included in the appropriate Appeal by Right or Appeal by Permission case category.

Permission Denied: In the Manner of Disposition section of the Appellate Court Reporting Matrix, a disposition of Permission Denied is not appropriate for Appeals by Right since the appeals reported in this appellate case category are those over which the court has mandatory jurisdiction.

Appeal by Right Case Type Definitions

Felony (non-Death Penalty): An appeal of a trial court conviction, non-death penalty sentence, or both for violation of an offense that, by state criminal law, is classified as a felony. Appeals from felony cases in which the death penalty was sought, but *not* imposed, are included in this definition.

Misdemeanor: An appeal of a trial court conviction, sentence, or both for violation of an offense that, by state criminal law, is classified as a misdemeanor.

Criminal–Other: Use this case type for criminal appeals of unknown specificity, when criminal appeals are not attributable to another previously defined criminal appeal case type, or when all criminal appeal cases are reported as a single case type.

Tort, Contract, and Real Property: An appeal of a trial court civil judgment concerning a dispute over the interpretation or application of tort, contract, or real property laws.

Probate: An appeal of a trial court civil judgment concerning the establishment of guardianships, conservatorships, and trusteeships and the administration of estates of deceased persons who died testate or intestate, including the settling of legal disputes concerning wills.

Family: An appeal of a trial court civil judgment concerning actions between family members (or others considered to be involved in a domestic relationship), such as marriage dissolution/divorce, paternity, custody/ visitation, support, adoption, civil protection/ restraining orders, and other family law issues. These may include actions by unmarried individuals to resolve issues of support or custody.

Juvenile: An appeal of a trial court civil judgment concerning the adjudication of a youth as a delinquent or dependent child or as a status offender. An adjudication of delinquent occurs when a juvenile is found to have committed an act which, if committed by an adult, would result in prosecution in criminal court. An adjudication of dependent occurs when it has been determined that a child has been abused or neglected or is otherwise without proper parental care. An adjudication as a status offender occurs when a juvenile is found to have been involved in non-criminal misbehavior that is an offense because of the youth's status as a minor.

Civil–Other: Use this case type for civil appeals of unknown specificity, when civil appeals are not attributable to another previously defined civil appeal case type, or when all civil appeal cases are reported as a single case type.

Workers' Compensation: An appeal of an administrative agency decision concerning a dispute over the eligibility and terms of compensation for workers injured on the job. Workers' compensation includes the areas of permanent total disability, permanent partial disability, temporary total disability, and temporary partial disability.

Revenue (Tax): An appeal of an administrative agency decision concerning a dispute over issues involving tax laws and their application.

Administrative Agency–Other: Use this case type for administrative agency appeals of unknown specificity, when administrative agency appeals are not attributable to another previously defined administrative agency appeal case type, or when all administrative agency appeal cases are reported as a single case type.

Note:
For cases involving judicial agencies (such as bar admission/discipline or judicial

qualifications/discipline) see Original Proceeding/Other Appellate Matter.

Appeal by Right–Other: Use this case type for appeal by right cases of unknown specificity, when appeal by right cases are not attributable to another previously defined appeal by right case type, or when all appeal by right case types are reported as a single case type.

Appeal by Permission Case Reporting

Introduction

An appeal by permission is a case that the appellate court *can choose to* review. This discretionary review (also referred to as discretionary jurisdiction) is set by constitution or statute and varies from court to court. For purposes of national reporting, the Appeal by Permission case category has been divided into three subcategories, with each subcategory further divided into different case types.

An appeal by permission is the means used to present a case to an appellate court when the case is within the court's discretion. The court's discretion is exercised through a two-stage decision process. First, the court must decide whether or not to review the case, i.e., to either grant or deny permission. If the court chooses to review the case (i.e., permission is granted), the appeal is subject to the second stage of the decision process and may be decided on the merits, using the same procedures as those used to process an appeal by right. For the purposes of national reporting, this two-stage decision process is being represented in one reporting matrix, using dispositional information to determine the number of requests for review that were granted or denied.

Unit of Count

An application for leave to appeal (also called, among other names, an application for permission to appeal) begins an appeal by permission in most courts. The application for leave to appeal informs the trial court or administrative agency, the appellate court, and all parties to the case that the appellant intends to ask the appellate court to review an interlocutory decision or the final judgment of a trial court, intermediate appellate court, or administrative agency.

The statistics reported in the Status Category section are a count of *cases* (appeals), not of litigants or legal issues or causes of action. An appeal by permission case with multiple parties or multiple causes of action is counted as one appeal.

- Count the *filing of the application for leave to appeal, or its functional equivalent, with the appellate court clerk* as the beginning of an appeal by permission.

- Report the activity (e.g., Filed, Placed Inactive, Disposed, etc.) for such appeals by case type, according to the subject matter at issue as defined in the Appeal by Permission Case Type Definitions (below). Information on the manner of disposition should also be reported by case type.

Notes Specific to Appeal by Permission Cases

Writ of Certiorari: For the purposes of national reporting, a request to review a lower court or administrative agency decision that is made by writ of certiorari should be counted as an Appeal by

Permission rather than as an Original Proceeding.

Mandatory versus Discretionary Jurisdiction: For statistical purposes, count as an Appeal by Right those appeals for which the court has mandatory jurisdiction as well as those appeals in which permission to appeal to the reviewing court is granted by *some other* court (often through the use of orders granting leave to appeal). Count as an Appeal by Permission only those cases in which permission is granted through the *discretion of the reviewing court* itself.

Death Penalty Appeals: The Criminal subcategory does not include death penalty appeals. All death penalty-related appeals are to be reported in the Death Penalty case category of the Appellate Court Reporting Matrix, either as appeals by right or by permission.

Administrative Agency Appeals: Reviews of administrative agency decisions are to be reported as appeals, either by right or by permission. Such appeals may come directly from the administrative agency or from a lower court that has issued an opinion about an administrative agency decision. While those appeals that come directly from an administrative agency may be considered, by the court, as original proceedings, all administrative agency appeals should be included in the appropriate Appeal by Right or Appeal by Permission case category.

Permission Denied: In the Manner of Disposition section of the Appellate Court Reporting Matrix, a disposition of Permission Denied has been added so that courts can track, by case type, the number of applications for leave to appeal that are denied, allowing for a better understanding of how a court uses its discretionary authority.

Permission Granted: For the purposes of national reporting, the granting of an application for leave to appeal is not a dispositive action. The dispositive action in the case occurs when the court either makes a decision (i.e., decides the merits of the case) or disposes the case prior to decision (e.g., by dismissal, withdrawal, or transfer), and the granting of permission is simply a step within the court's processing of the case. If the court requires the appellant to file a notice of appeal (which is a request for an appeal by right) before proceeding with the case, the court should make every effort to link the newly filed notice of appeal to the previously granted application for leave to appeal. This will allow the court to report the dispositive action of the case within the appropriate *Appeal by Permission* case type.

Appeal by Permission Case Type Definitions

Felony (non-Death Penalty): An appeal of a trial court conviction, non-death penalty sentence, or both for violation of an offense that, by state criminal law, is classified as a felony. Appeals from felony cases in which the death penalty was sought, but *not* imposed, are included in this definition.

Misdemeanor: An appeal of a trial court conviction, sentence, or both for violation of an offense that, by state criminal law, is classified as a misdemeanor.

Criminal–Other: Use this case type for criminal appeals of unknown specificity, when criminal appeals are not attributable to another previously defined criminal appeal case type, or when all criminal appeals are reported as a single case type.

Tort, Contract, and Real Property: An appeal of a trial court civil judgment concerning a dispute over the interpretation or application of tort, contract, or real property laws.

Probate: An appeal of a trial court civil judgment concerning the establishment of guardianships, conservatorships, and trusteeships and the administration of estates of deceased persons who died testate or intestate, including the settling of legal disputes concerning wills.

Family: An appeal of a trial court civil judgment concerning actions between family members (or others considered to be involved in a domestic relationship), such as marriage dissolution/divorce, paternity, custody/ visitation, support, adoption, civil protection/ restraining orders, and other family law issues. These may include actions by unmarried individuals to resolve issues of support or custody.

Juvenile: An appeal of a trial court civil judgment concerning adjudication of a youth as either a delinquent or dependent child or as a status offender. An adjudication of delinquent occurs when a juvenile is found to have committed an act which, if committed by an adult, would result in prosecution in criminal court. An adjudication of dependent occurs when it has been determined that a child has been abused or neglected or is otherwise without proper parental care. An adjudication as a status offender occurs when a juvenile is found to have been involved in non-criminal misbehavior that is an offense because of the youth's status as a minor.

Civil–Other: Use this case type for civil appeals of unknown specificity, when civil appeals are not attributable to another previously defined civil appeal, or when all civil appeals are reported as a single case type.

Workers' Compensation: An appeal of an administrative agency decision concerning a dispute over the eligibility and terms of compensation for workers injured on the job. Workers' compensation includes the areas of permanent total disability, permanent partial disability, temporary total disability, and temporary partial disability.

Revenue (Tax): An appeal of an administrative agency decision concerning a dispute over issues involving tax laws and their application.

Administrative Agency–Other: Use this case type for administrative agency appeals of unknown specificity, when administrative agency appeals are not attributable to another defined administrative agency appeal case type, or when all administrative agency appeal cases are reported as a single case type.

Note: For cases involving judicial agencies (such as bar admission/discipline or judicial qualifications/discipline) see Original Proceeding/Other Appellate Matter.

Appeal by Permission–Other: Use this case type for appeal by permission appeals of unknown specificity, when appeal by permission appeals are not attributable to another previously defined appeal by permission appeal case type, or when all appeal by permission cases are reported as a single case type.

Death Penalty Case Reporting

Introduction

A death penalty case is an appeal or other action taken from a capital criminal case in which the death penalty *has* been imposed. A death penalty case can be an appeal by right, appeal by permission, or original appellate court proceeding. For the purposes of national reporting, the Death Penalty case category has been divided into two subcategories, with each subcategory further divided into different case types.

Unit of Count

A notice of appeal, application for leave to appeal, or application for writ begins a death penalty case. Depending on the document filed, the defendant notifies the court and the prosecuting attorney that the appellate court will review the final judgment of a trial or intermediate appellate court (notice of appeal), that the appellate court has been asked to review the final judgment of a trial or intermediate appellate court (application for leave to appeal), or that the appellate court has been asked to review the constitutionality of the process through which the death penalty was imposed or the conditions of the defendant's confinement (application for writ).

The statistics reported in the Status Category section are a count of cases (appeals/original proceedings), not of litigants or legal issues or causes of action. A death penalty case with multiple parties or multiple causes of action is counted as one appeal/ proceeding.

- Count the *filing of the notice of appeal, application for leave to appeal, application for writ, or their functional equivalents, with the appellate court clerk* as the beginning of a death penalty case.

- Report the activity (e.g., Filed, Placed Inactive, Disposed, etc.) for such proceedings by case type, according to the subject matter at issue as defined in the Death Penalty Case Type Definitions (below). Information on the manner of disposition should also be reported by case type.

Notes Specific to Death Penalty Cases

Bifurcated Proceedings: If the appellate review of a death penalty case is bifurcated (i.e., the review of the conviction is done prior to and separate from a review of the sentence), count the review as one appeal.

Interlocutory: The Interlocutory Case Characteristic is not applicable to death penalty cases. Since the death penalty has been imposed in all of these cases, the proceedings of the lower tribunal are complete, thus negating the option for an interlocutory appeal.

Permission Denied: In the Manner of Disposition section of the Appellate Court

Reporting Matrix a disposition of Permission Denied has been added so that courts can track the number of death penalty-related proceedings that are denied. Also of note is that a disposition of Permission Denied is not appropriate for the Death Penalty Appeal by Right case type since the appeals reported in this case type are those over which the court has mandatory jurisdiction.

Permission Granted: For the purposes of national reporting, the granting of an application for leave to appeal/application for writ is not a dispositive action. The dispositive action in the case occurs when the court either makes a decision (i.e., decides the merits of the case) or disposes the case prior to decision (e.g., by dismissal, withdrawal, or transfer), and the granting of permission is simply a step within the court's processing of the case. If the court requires the appellant to file a notice of appeal (which is a request for a death penalty appeal by right) before proceeding with the case, the court should make every effort to link the newly filed notice of appeal to the previously granted application for leave to appeal. This will allow the court to report the dispositive action of the case within the Death Penalty *Appeal by Permission* case type.

Death Penalty Case Type Definitions

Appeal by Right: An appeal that invokes the *mandatory jurisdiction* of the appellate court. These appeals may challenge the conviction, sentence, or both that resulted in the imposition of the death penalty.

Appeal by Permission: An appeal that invokes the *discretionary jurisdiction* of the appellate court. These appeals may challenge the conviction, sentence, or both that resulted in the imposition of the death penalty.

Habeas Corpus Writ: An application for a writ that challenges the legality of detention following the imposition of the death penalty when no other avenues for a remedy (e.g., Appeal by Permission) are available. Habeas corpus writ applications may also challenge the validity of the conviction, sentence, or both that resulted in the imposition of the death penalty by claiming that the criminal trial or state appellate process involved violations of the convicted defendant's constitutional rights.

Note: Appeals of lower court decisions on death penalty-related applications for habeas corpus should be reported as death penalty appeals, either by right or by permission.

Writ Application–Other: An application for a writ that challenges the constitutionality or conditions of confinement or the actions of state and/or local officials (e.g., writ of mandamus, coram nobis, quo warranto, prohibition, etc.) that resulted in or followed the imposition of the death penalty. Use this case type for writs of unknown specificity, when writs are not attributable to another defined writ case type, or when all writs are reported as a single case type.

Note: Appeals of lower court decisions on death penalty-related applications for writ should be reported as death penalty appeals, either by right or by permission.

Death Penalty Matter–Other: An appeal, writ, or other appellate matter that challenges the validity of the conviction, sentence or both that resulted in the imposition of the death penalty or the actions of state and/or local officials that resulted in or followed the imposition of the death penalty. Use this case type for death penalty matters of unknown specificity, when death penalty matters are not attributable to another previously defined death penalty case type, or when all death penalty matters are reported as a single case type.

Original Proceeding/Other Appellate Matter Case Reporting

Introduction

An original proceeding is an action that comes to the appellate court in the first instance. These cases do not originate in trial courts or administrative agencies; instead, the appellate court has jurisdiction over these cases from inception. For the purposes of national reporting, the Original Proceeding/Other Appellate Matter appellate case category has been divided into three subcategories, with each subcategory further divided into different case types.

Unit of Count

An application for original jurisdiction (e.g., an application for writ, certified question, advisory opinion, etc.) begins an original proceeding/other appellate matter. Depending on the document filed, the application either informs the appellate court that it will accept jurisdiction for a case (if the court has mandatory jurisdiction) or requests that the court accept jurisdiction of the case (if the court has discretionary jurisdiction).

The statistics reported in the Status Category section are a count of cases (original proceedings), not of litigants or legal issues or causes of action. An original proceeding/other appellate matter case with multiple parties or multiple causes of action is counted as one proceeding.

- Count the *filing of the application for original jurisdiction, or its functional equivalent, with the appellate court clerk* as the beginning of an original proceeding/other appellate matter.

- Report the activity (e.g., Filing, Disposed, Placed Inactive, etc.) for such proceedings by case type, according to the subject matter at issue as defined in the Original Proceeding/Other Appellate Matter Case Type Definitions (below). Information on the manner of disposition should also be reported by case type.

Notes Specific to Original Proceeding/Other Appellate Matter Cases

Writ of Certiorari: For the purposes of national reporting, a request to review a lower court or administrative agency decision that is made by writ of certiorari should be counted as an Appeal by Permission rather than as an Original Proceeding.

Interlocutory: The Interlocutory Case Characteristic is not applicable to original proceedings. Since original proceedings

come to the appellate court in the first instance, there are no lower tribunal proceedings, thus negating the option for an interlocutory action.

Permission Denied: In the Manner of Disposition section of the Appellate Court Reporting Matrix, a disposition of Permission Denied has been added so that courts can track, by case type, the number of original proceeding/other appellate matter cases that are denied, allowing for a better understanding of how a court uses its discretionary authority.

Permission Granted: For the purposes of national reporting, the granting of an application for leave to appeal/application for writ is not a dispositive action. The dispositive action in the case occurs when the court either makes a decision (i.e., decides the merits of the case) or disposes the case prior to decision (e.g., by dismissal, withdrawal, or transfer), and the granting of permission is simply a step within the court's processing of the case.

Original Proceeding/Other Appellate Matter Case Type Definitions

Habeas Corpus Writ: An application for a writ that challenges the legality of detention when no other avenues for a remedy (e.g., Appeal by Permission) are available. The application may be filed in a criminal law context by offenders who are inmates in a jail or prison or by a person involuntarily committed for psychiatric treatment. Habeas corpus writ applications may also challenge the validity of the criminal conviction, sentence, or both by claiming that the criminal trial or state appellate process involved violations of the convicted defendant's constitutional rights.

Note: Appeals of lower court decisions on non-death penalty applications for habeas corpus should be reported as appeals, either by right or by permission.

Writ Application–Other: An application for a writ that challenges the constitutionality or conditions of confinement or the actions of state and/or local officials (e.g., writ of mandamus, coram nobis, quo warranto, prohibition, etc.). Use this case type for writ applications of unknown specificity, when writ applications are not attributable to another defined writ case type, or when all writ applications are reported as a single case type.

Note: Appeals of lower court decisions on non-death penalty applications for writ should be reported as appeals, either by right or by permission.

Bar Admission: A case concerning a dispute over an individual's application for admission to practice law.

Note: Do not include in the count of Bar Admission cases the number of attorneys admitted to the bar. The Bar Admission case type is reserved for cases in which an attorney or other citizen disagrees with the decision to admit/not admit an attorney to the practice of law in that state or jurisdiction.

Bar Discipline/Eligibility: A case concerning a dispute over the discipline of an individual admitted to practice law or an individual's eligibility to continue to practice law. Underlying the dispute is an allegation of unethical conduct by an attorney, which has led to charges, a trial-like proceeding, and recommendations regarding discipline (e.g., reprimand, disbarment).

Judicial Qualification: A case concerning a dispute over alleged improprieties by a judge. Generally, a judicial ethics board or judicial qualification commission will investigate the allegation and forward its recommendations to an appellate court.

Bar/Judiciary Proceeding–Other: Use this category for bar/judiciary proceedings of unknown specificity, when bar/judiciary proceedings are not attributable to another previously defined bar/judiciary proceeding case type, or when all bar/judiciary proceedings are reported as a single case type.

Certified Question: A case, filed by a state or federal court, which asks a state appellate court to interpret or resolve a question of state law that is part of a case before the requesting court.

Advisory Opinion: A case filed by a state officer (e.g., a governor or an attorney general) or the legislature asking an appellate court for an answer to a question of law.

Original Proceeding/Appellate Matter–Other: Use this category for original proceedings/appellate matters of unknown

specificity, when original proceedings/appellate matters are not attributable to another previously defined original proceeding/appellate matter case type, or when all original proceeding/appellate matter cases are reported as a single case type.

CASELOAD DATA

Caseload data is reported in three sections: Status Category, Case Characteristic, and Manner of Disposition (including Type of Court Opinion and Case Outcome). Each caseload section and the elements that comprise each section are outlined in the pages to follow.

Case Status Category

The Appellate Court Reporting Matrix captures detailed information about case status during the calendar year reporting period. The case status categories are consistent for each of the four major case categories: Appeal by Right, Appeal by Permission, Death Penalty, and Original Proceeding/Other Appellate Matter.

The court's **Begin Pending** caseload is divided between Begin Pending-Active cases and Begin Pending-Inactive cases. The definitions below articulate the distinction between active and inactive cases. Making this distinction is essential for the court to be able to accurately manage its caseload and to be able to accurately compute performance measures such as *Appellate CourTools* Measure 2: Time to Disposition, Measure 3: Clearance Rates, and Measure 4: Age of Active Pending Caseload.

Incoming cases are those cases that have been added to the court's caseload during the reporting period and include Filed and Reactivated cases.

Outgoing case status categories include Disposed and Placed Inactive.

At the end of the reporting period, the court's pending caseload is summarized in the **End Pending** categories: End Pending-Active and End Pending-Inactive.

Case Status Definitions

Begin Pending-Active: A count of cases that, at the start of the reporting period, are awaiting disposition.

Begin Pending-Inactive: A count of cases that, at the start of the reporting period, have been administratively classified as inactive. Business rules for this classification may be defined by a rule of court or administrative order.

Incoming Cases: The sum of the count of Filed and Reactivated cases (see below).

Filed: A count of cases that have been filed with the court for the first time during the reporting period.

Reactivated: A count of cases that had previously been Placed Inactive, but have been restored to the court's control during the reporting period. Further court proceedings in these cases can now be resumed during the reporting period, and these cases can once again proceed to disposition.

Note:
The rules for reactivating a case (sometimes referred to as restoring the case to the court's control) are the reverse of those listed below for placing a case on inactive status, (e.g., the lifting of a stay, the end of private arbitration). The key is courts should use the Placed Inactive/Reactivated categories for specific reasons that are beyond the court's control and when events intervene that prevent the parties from being able to proceed. Other reasons for delay are not a legitimate basis for placing a case on inactive status.

Outgoing Cases: The sum of the count of Disposed and Placed Inactive cases (see below).

Disposed: A count of cases that have been resolved, irrespective of the manner of disposition (e.g., decided, dismissed prior to decision, withdrawn, etc.), during the reporting period.

Placed Inactive: A count of cases whose status has been administratively changed to inactive during the reporting period due to events beyond the court's control. These cases have been removed from court control, and the court can take no further action until an event restores the case to the court's active pending caseload.

Courts should refer to their local or statewide rules of court, statutes, or standards of administration and/or statistical reporting guidelines for precise definitions of the circumstances under which a case may be properly considered inactive. The following are illustrative examples of legitimate reasons for placing appeals and/or original proceedings on inactive status:

- A stay is issued due to military duty or incarceration of one of the parties;
- A stay is issued due to filing of a bankruptcy proceeding in Federal court;
- A stay is issued due to an agreement, by the parties, to enter into *private* ADR;
- A stay is issued from a higher court (Federal or state);
- A stay is issued from an equal court in another county, district, or state; or
- A stay is issued on the judgment due to an application for further appellate review.

Note: Courts should use the Placed on Inactive Status/Reactivated categories only for specific reasons beyond the court's control and when events intervene (e.g., bankruptcy) that prevent the parties from being able to proceed. Delays in a case for other reasons, including inefficiencies in other parts of the justice system (e.g., delays in getting transcripts) are not a legitimate basis for placing a case on inactive status.

End Pending–Active: A count of cases that, at the end of the reporting period, are awaiting disposition.

End Pending–Inactive: A count of cases that, at the end of the reporting period, have been administratively classified as inactive. Business rules for this classification may be defined by a rule of court or administrative order.

Case Characteristics

Introduction

Case Characteristics data capture information of key policy interest regarding the cases decided by an appellate court during the reporting period (i.e., during a calendar year). These Case Characteristic data provide additional details about cases that have already been counted in the court's caseload.

A characteristic of continued policy interest is:

- Interlocutory appeals

Unit of Count

Interlocutory

For each case type, count the number of Filed cases that included the Case Characteristic. The statistics reported in the Case Characteristic section are a count of cases (appeals), not of litigants or legal issues or causes of action.

- A notice of appeal or application for leave to appeal, or *its functional equivalent*, begins an appeal that is interlocutory in nature.
- Count, by case type, the filing of an interlocutory appeal in the Filed Case Status Category, and count the case, by case type, as interlocutory in the Interlocutory Case Characteristic.

Notes Specific to Case Characteristics

Interlocutory

Cases counted in this category must conform to the definition of an interlocutory appeal, as defined below.

Interlocutory appeals generally concern the procedures used during case processing. The resolution of these appeals in *not* dispositive of the lower tribunal's proceeding.

Interlocutory appeals cannot be filed in a death penalty or original proceeding/ other appellate matter case. By definition, a death penalty case is a case in which the death penalty *has been* imposed. Should an interlocutory appeal be filed in the criminal trial in which the death penalty is a sentencing option, the appeal would be reported in the Felony (non-death penalty) case type. An original proceeding/other appellate matter case, by definition, is a case that comes to the appellate court in the first instance. There is no lower tribunal and thus no lower tribunal decision from which an interlocutory appeal could be filed.

Case Characteristic Definitions

Interlocutory: A count of cases that have been filed with the court for the first time during the reporting period and that have been filed with the appellate court before the lower tribunal has disposed of the case at hand.

Manners of Disposition

Introduction

Manner of disposition reporting provides a means to report three distinct categories of disposition: Type of Disposition, Type of Court Opinion, and Case Outcome. The inclusion of these three categories into the Appellate Court Reporting Matrix takes into account the court's need for detailed information regarding the ways in which appellate matters are disposed.

Unit of Count

For each case type, count the number of cases that were disposed during the reporting period (i.e., the calendar year) by the disposition type. The statistics reported in the Manners of Disposition section are a count of cases (appeals/ original proceedings), not of litigants or legal issues or causes of action.

- For cases involving multiple parties/issues, the manner of disposition should not be reported until all parties/issues have been resolved. When there is more than one type of dispositive action in an appeal, count as the disposition that action which requires the most judicial involvement. For example, if the parties settle two issues through the court-annexed ADR program, but the third issue is resolved by the issuance of a Memorandum, the manner of disposition should be reported as Decided rather than Court ADR since the writing of a memorandum opinion required more judicial involvement than did the ADR proceedings.

Notes Specific to Manners of Disposition

Placed Inactive: Cases that have been Placed Inactive during the reporting period should not be counted in the Manners of Disposition categories. A case placed on inactive status is not disposed as there has been some action that has stopped the case from moving toward a disposition. Once reactivated, these cases can be counted in the Manners of Disposition categories when a final disposition is reached.

Decided Disposition: Only those appeals and original proceedings that are decided are to be counted in the Type of Court Opinion and Case Outcome categories. The definition of Decided (see below) requires that the merits of the case have been considered and that the court has issued an opinion regarding those merits. All other types of disposition (e.g., Dismissed Prior to Decision, Court ADR, Transferred) occur prior to the court's consideration of the merits of the appeal or original proceeding.

Type of Disposition Definitions

Decided: A count of cases deliberated on by the court; such deliberation is a consideration of the merits of the case and results in the issuance of an opinion.

Note: For the purposes of national reporting, an opinion may be a Full Opinion, Memorandum, or Summary/Dispositional Order. See Type of Court Opinion Definitions below for additional details.

Permission Denied: A count of cases for which the appellate court exercises its discretion and opts not to review the case. The reasoning for the denial of permission may or may not be stated. This manner of disposition is appropriate for use only when the court has discretionary jurisdiction over the case.

Dismissed Prior to Decision: A count of cases dismissed by the court; dismissal occurs due to some defect in the filings or a failure of one or both of the parties to file the next series of documents in the appellate process (i.e., default). [Similar terminology: involuntary dismissal]

Settled / Withdrawn: A count of cases removed from the court docket by the appellant or by agreement reached between the parties. These cases may or may not require action by the court. [Similar terminology: voluntary dismissal]

Court ADR: A count of cases referred *by the court* to programs such as mediation or arbitration and, through those processes, were successfully settled and/or withdrawn from the court docket.

Note:
When cases are referred by the court to alternative dispute resolution, the case is considered active. It is only when the parties enter into private *ADR that the appeal or original proceeding may be considered Placed Inactive.*

Transferred: A count of cases removed from the court docket by the court and sent to another court. These include “lateral” transfers (e.g., civil appeal filed in a court of criminal appeals) or “assignment” transfers (e.g., case filed in a court of last resort is sent by that court to the intermediate appellate court for first review).

Other Resolution: Use this category for dispositions of unknown specificity, when the disposition is not attributable to one of the other previously defined types of disposition, or when all dispositions are reported as a single.

Type of Court Opinion Definitions

Full Opinion: A count of decided cases for which the appellate court produced an expansive discussion and elaboration of the merits of the case. The discussion will detail the statements of fact, the issues presented for review, and the court's reasoning for its decision.

Memorandum: A count of decided cases for which the appellate court produced a limited discussion of the merits of the case. The discussion will provide minimal statements of fact, issues presented for review, and the court's reasoning for its decision.

Summary/Dispositional Order: A count of decided cases for which the appellate court produced no discussion of the merits of the case. The document will provide no statements of fact, no issues presented for review, and no reasons for the court's decision (e.g., "Affirmed. No opinion.").

Other Opinion: Use this category for opinions of unknown specificity, when the opinion is not attributable to one of the other previously defined types of court opinion, or when all court opinions are reported as a single type.

Case Outcome Definitions

Affirmed/Granted: A count of decided cases for which the appellate court upholds the result of the lower court or administrative agency decision. In writ application cases, a decision granting the relief requested.

Reversed/Denied: A count of decided cases for which the appellate court does not uphold the result of the lower court or administrative agency decision. Outcomes reversing the lower court judgment/administrative agency order under review often include corrective action awarding different relief than that awarded in the lower court and/or remitting the matter for a new trial or other appropriate action. In writ application cases, a decision denying the relief requested.

Modified/Granted in Part: A count of decided cases for which the appellate court affirms in part/reverses in part the lower court judgment or administrative agency order. Outcomes modifying the lower court judgment/ administrative agency order under review often include corrective action awarding different relief than that awarded in the lower court or administrative agency and/or remitting the matter for a new trial or other appropriate action. In writ application cases, a decision granting only some of the relief requested.

Dismissed: A count of decided cases for which the appellate court finds that review of the case should not have been granted (i.e., leave to appeal was improvidently granted) or that at some point in the review process a procedural defect occurred.

Other Outcome: Use this category for case outcomes of unknown specificity, when the case outcome is not attributable to one of the other previously defined case outcomes, or when all case outcomes are reported as a single type.

Appendix B:

Appellate Court Reporting

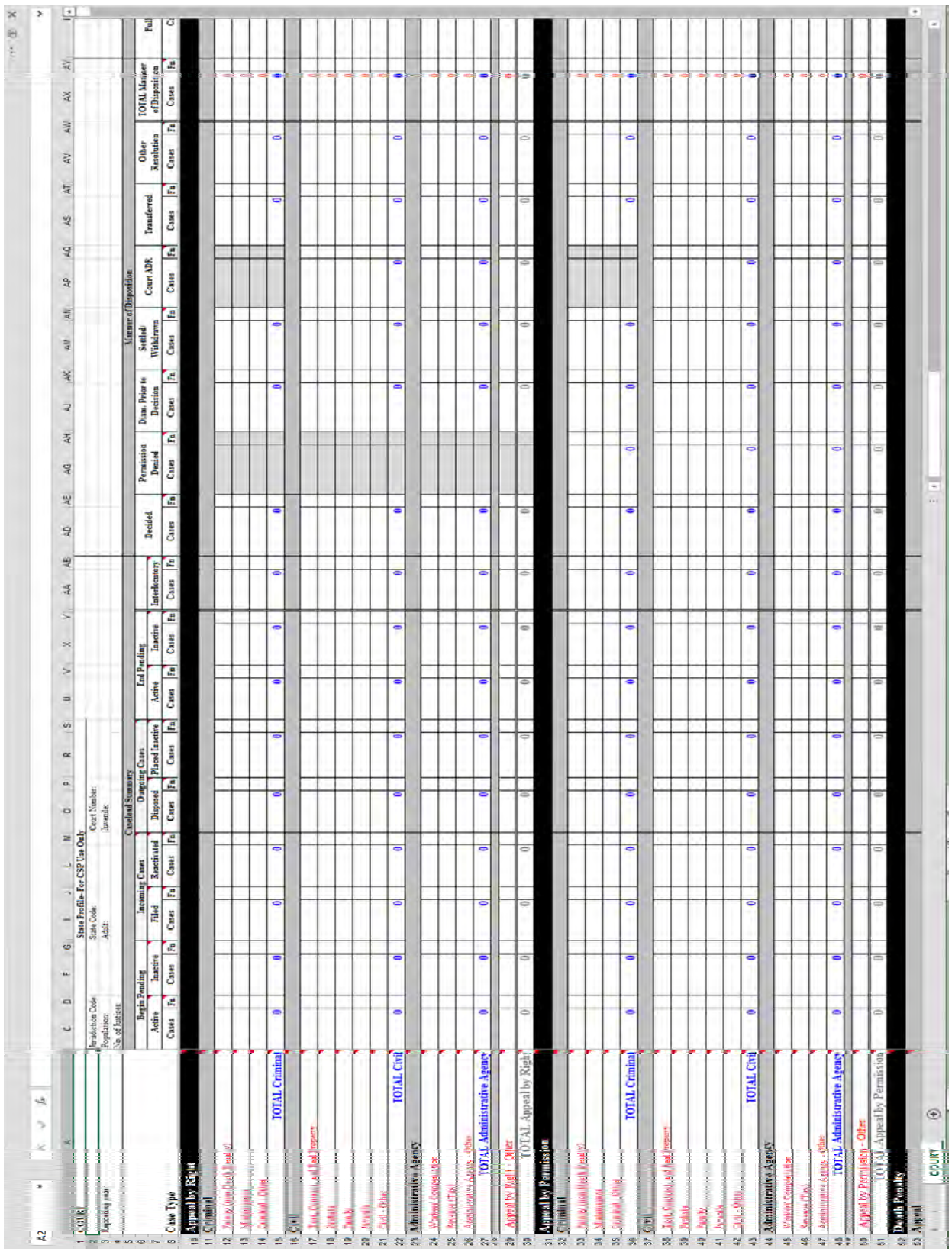
Appellate court reporting is completed by court personnel (data specialists) who act as liaisons to the Court Statistics Project. The following materials are provided to assist data specialists in completing and submitting calendar year statistics for each reporting unit.

- Appellate Court Reporting Matrix
- Appellate Court Coding Instructions
- Data Submission Instructions
- Other supporting materials
    - Calculating Pending Caseloads
    - Using the Interlocutory Case Characteristic
    - Disposed Cases and Manners of Disposition

Appellate Court Reporting Matrix

The Appellate Court Reporting Matrix (an Excel spreadsheet) is based on the model reporting framework outlined in the *State Court Guide to Statistical Reporting, v. 2.0.* This spreadsheet is the reporting format used for the Court Statistics Project's (CSP) annual data collection and therefore includes all the data elements to be submitted to the CSP. The terminology found within the Appellate Court Reporting Matrix may be different than terminology used in a specific state or court. For this reason, please reference the *Guide* for the recommended usage of all terms and for the appropriate unit of count information for each case type.

A snapshot of the Appellate Court Reporting Matrix



Appellate Court Coding Instructions

The codes that are used to denote caseload data availability and conformity to the *Guide* framework are defined below. Procedures for counting cases and examples of how to use the Appellate Court Reporting Matrix are also provided.

No Jurisdiction or No Data

When data are not applicable or not available for a specific case type or an entire case category, the data elements must be designated as either No Jurisdiction or No Data. This designation is made using one of the following *Z Codes*, where the negative integer is entered into the Cases column and the Z is entered into the Fn column of the Appellate Court Reporting Matrix.

Cases	Fn
-1	**Z** = The court does not have jurisdiction over the case type.
-2	**Z** = The court has jurisdiction over the case type, but data are not collected.
-5	**Z** = The court has jurisdiction over the case type, but data cannot be identified separately and are reported with a different case type.

Publishable or Not Publishable

Caseload data that are available should be reported to the CSP and designated as either Publishable or Not Publishable. This designation is made using one of the following *Qualifying Footnotes*, where the letter code indicates the completeness of the data submitted and is entered into the Fn column of the Appellate Court Reporting Matrix.

Fn	Explanation
A	Data are complete and publishable.
C	Data are overinclusive (contains data for cases other than that requested for the specific row and may contain case types from different appellate categories) and not publishable.
i	Data are incomplete (data was not reported from all courts for the entire reporting period and/or data from one or more requested case types is not included in the total) and not publishable.
O	Data are incomplete and overinclusive and not publishable.

Criteria for Determining Whether Data are Publishable

For any caseload data (Status Category, Case Characteristic, or Manner of Disposition) to be coded as Publishable, three factors must first be considered: definition, unit of count, and completeness. These criteria are discussed below, but final determination as to whether they are met is left to the data specialist and court administration.

Definition

Case Type: Each reporting unit's data must be mapped to the appropriate *Guide* case type for national reporting. When data are coded as Publishable, the data should align to the specific case type definition outlined in the *Guide*.

The CSP recognizes that some information systems prevent disaggregating and/or aggregating case types. When that is true, a data specialist may determine that the statistics for a particular case type are either overinclusive (multiple case types that are not part of the CSP case type definition are grouped together) or incomplete (case types that are part of the CSP case type definition are not combined with other appropriate case types). In these situations, a data specialist can report the aggregate case type information in the Other case type that is most closely aligned with the data available. For example, if civil appeal by right cases cannot be broken into individual civil case types, report all civil appeal by right data as Civil-Other and code as overinclusive. However, Total Civil can and should be coded as complete as all of the civil appeal by right case types are included there.

There may be instances when multiple case types are reported together and could still be considered publishable. For example, if Felony (non-Death Penalty) cases are thought to be the clear majority of criminal cases reported, yet it is known that a few rare types of other criminal appeals (e.g., misdemeanor cases) could also be included, discretion is left to the data specialist and court administration. Together they may make the decision to count Felony (non-Death Penalty) cases as complete ("A") since the known majority is correct (see completeness criteria below for further clarification), or if not, to report these cases in Criminal-Other (overinclusive) and Total Criminal could then be coded as complete if all other criteria are met.

Status Category: Each Status Category (e.g., Begin Pending, Filed, Placed Inactive) has a definition outlined in the *Guide*. When data are coded as complete ("A"), the data should align to the specific status category definition.

Case Characteristics: Each Case Characteristic (Interlocutory appeals) has a definition outlined in the *Guide*. When data are coded as complete ("A"), the data should align to the specific Case Characteristic definition.

Manners of Disposition: Each Manner of Disposition (e.g., Decided), Type of Court Opinion (e.g., Memorandum), and Case Outcome (e.g., Affirmed/Granted) has a definition outlined in the *Guide*. When data are coded as complete ("A"), the data should align to the specific Case Characteristic definition.

CSP recognizes that some information systems prevent disaggregating and/or aggregating case status information. For example, a CMS may not break Incoming caseload into Filed

and Reactivated. When that is true, a data specialist can still code the data as complete as long as the Filed caseload meets all the other criteria (see Applying Publishable/Not Publishable Codes to Status Category Data section below for further instruction).

Unit of Count

Each court's data must conform to the *Guide*'s unit of count to be considered complete. For example, when reporting appeals by right, the correct unit of count is the notice of appeal and it should be counted when the notice is filed with the appellate clerk. If appeals are not counted until briefing is completed, the data does not conform to the *Guide* and should be coded incomplete (i). Unit of count information for Case Categories, Case Characteristics, and Manners of Disposition can be found in the respective *Guide* sections.

Completeness

In addition to these rule-based determinations, each data specialist needs to evaluate the completeness of their caseload data. This is a judgment call that must be made by the data specialist in conjunction with court administration based on their knowledge of their data. Note that for purposes of national reporting, it is not essential that a state's CSP caseload statistics are identical to those appearing in a state's own publications. The CSP statistics for a state are not the official and authoritative version of a state's data; only the state itself can provide that version.

The CSP recognizes that it may be unrealistic to think that every single case will be accurately counted within a given calendar year since court information systems vary widely and since not all courts within a state always meet their reporting deadlines. Each data specialist is responsible for determining the extent to which data are representative of that state's caseload. For example, the absence of data from an entire quarter of the year might mean 30% of the data are missing while the absence of data from a single week might mean less than 3% of the state's data are missing. In the former scenario it is obvious that the case count does not represent the state's total caseload while in the latter scenario it does.

Applying Publishable / Not Publishable Codes to Status Category Data

When deciding whether data should be marked as complete, consider the completeness of each status category. If status category data cannot be broken into the detailed categories and only totals are available, report them using the following guidelines:

1. If Status Category data can only be reported at one level (e.g., if Total Incoming is the only breakdown available, and Filed and Reactivated are unable to be teased apart), place the Total data in the left most column within that Status Category section (e.g., Filed).
2. If some Status Category data are not collected, for example if Begin Pending-Inactive cases are not counted, it is up the data specialist and court administration to decide if the data should be coded as complete based on the completeness criteria outlined above.

In summary, when only one level of Status Category data are available (i.e., all status categories are rolled into one statistic), report in the following columns:

- Begin-Pending Active
- Filed
- Disposed
- End-Pending Active

Applying Publishable / Not Publishable Codes to Case Characteristics Data

In order to assign a complete code (“A”) to the Case Characteristic data for a particular case type, the Filed Status Category data for that case type must have been coded as complete. For example, if the unit of count for a certain case type (e.g., Criminal Appeal by Permission) is not correct, the caseload data are incomplete; therefore, statistics about the number of interlocutory criminal appeals by permission are also incomplete.

Applying Publishable / Not Publishable Codes to Manner of Disposition Data

In order to assign a complete (“A”) code to Manner of Disposition data for a particular case type, the Disposed Status Category data for that case type must have been coded as complete. For example, if the Disposed data do not meet the definition, and, therefore, the caseload data are incomplete, it follows that statistics about the number of cases disposed by Decided or Court ADR are also incomplete.

Example Scenarios

The following scenarios illustrate examples of how data would be reported in the Appellate Court Reporting Matrix.

Example Scenario 1

COURT	State Profile- For CSP Use Only									
	Jurisdiction Code:			State Code:						
Reporting year:	Population:			Adult:						
	No. of Justices:									
	Caseload Summary									
	Begin Pending 3				Incoming Cases 4					
	Active		Inactive		Filed		Reactivated		Interlocutory	
Case Type	Cases	Fn	Cases	Fn	Cases	Fn	Cases	Fn	Cases	Fn
Civil										
Tort, Contract, and Real Prop.	-2	Z	-2	Z	65	A	-5	Z	15	A
Probate 1	-1	Z	-1	Z	-1	Z	-1	Z	-1	Z
Family 2	-2	Z	-2	Z	12	C	-5	Z	2	C
Juvenile	-2	Z	-2	Z	-5	Z	-5	Z	-5	Z
Civil - Other	-2	Z	-2	Z	42	A	-5	Z	8	A
TOTAL Civil	**-2**	**Z**	**-2**	**Z**	**119**	**A**	**-5**	**Z**	**25**	**A**

*Note: This Matrix has been altered (columns hidden) for illustrative purposes.

In the Matrix above:

1) This reporting unit does not have jurisdiction over Probate appeals. In order to reflect that in the Appellate Reporting Matrix, the Cases and Qualifying Footnote (Fn) columns for the Probate case type were coded with the Z code of "-1."
2) This reporting unit cannot separately report Family and Juvenile appeals, but knows that there were about an equal number of each case type within the reported total. The total Family and Juvenile caseload was entered within the Family case type with a Fn of "C" in order to show that the Family appeals were overinclusive. The Juvenile case type was coded with the Z code of "-5" in order to show that these appeals were included in a different case type.
3) Begin Pending data are not collected so the Cases and Fn columns were coded with the Z code of "-2" for the Begin Pending-Active and Begin Pending-Inactive Status categories for all case types except Probate, which keeps its Z code for no jurisdiction ("-1").
4) Incoming data cannot be identified as Filed and Reactivated so the entire incoming caseload was reported in the left-most column, Filed, with a Fn of "A" since the Filed data includes all of the Reactivated data, thus making the Incoming caseload complete. The Cases and Fn columns for the Reactivated Status category are coded with the Z code of "-5" in order to show that these cases are included in a different status category.

Note: All Qualifying Footnotes that are not "A" need to be explained in the Explanatory Notes document. This reporting unit's Explanatory Notes document is included after the example scenarios.

Example Scenario 2

COURT Reporting year:												
	Decided		Permission Denied		Dism. Prior to Decision		Settled/ Withdrawn		Other Resolution 2		TOTAL Type of Disposition 3	
Case Type	Cases	Fn	Cases	Fn	Cases	Fn	Cases	Fn	Cases	Fn	Cases	Fn
Criminal												
Felony (non-Death Penalty) 1	20	A	40	A	-5	Z	-5	Z	22	C	82	A
Misdemeanor	-2	Z	-2	Z	-2	Z	-2	Z	-2	Z	-2	Z
Criminal - Other	-2	Z	-2	Z	-2	Z	-2	Z	-2	Z	-2	Z
TOTAL Criminal 3	**20**	**i**	**40**	**i**	**-5**	**Z**	**-5**	**Z**	**22**	**O**	**82**	**i**

*Note: This Matrix has been altered (columns hidden) for illustrative purposes.

In the Matrix above:

1) Data was separately identified for Felony (non-Death Penalty) cases that received dispositions of Decided and Permission Denied. The remaining five disposition types (Court ADR and Transferred are not shown above) could not be separated and were reported in Other Resolution. The missing disposition types were coded with a "-5" Z code, and Other Resolution was coded as overinclusive ("C"). The Total Type of Disposition for this case type was correctly coded as complete ("A") since all types of dispositions were included in the total number.
2) The Other Resolution column was coded as overinclusive and incomplete ("O") for Total Criminal. This is due to the fact that the total number reported includes cases that were disposed by disposition types that could not be separately identified, but does not include Other Resolution dispositions for Misdemeanor and Criminal-Other case types.
3) This reporting unit collected Manners of Disposition data, but only for Felony (non-Death Penalty) cases. The Misdemeanor and Criminal-Other case types were coded with the Z code of "-2" to show that data is not collected. Since data were missing, the totals for Criminal Type of Disposition were coded as "i" (Incomplete).

Explanatory Notes

The Explanatory Notes document contains a detailed description of the data that is submitted to the CSP. These descriptions explain why data are incomplete or overinclusive or do not conform to the recommendations provided in the *State Court Guide to Statistical Reporting*.

The following example Explanatory Notes describes the codes used in the Example Scenarios above.

Supreme Court
Court of last resort
5 justices sit en banc
January 1, 2014 to December 31, 2014

Units of count:
Appeal by Right casess are counted when the notice of appeal is filed with the appellate court.
Appeal by Permission cases are counted when the application for leave to appeal is filed with the appellate court.
Original Proceedings are counted when the application for original jurisdiction is filed with the appellate court.

See the qualifying footnote for each case type, status category, case characteristic, and manner of disposition. An "A" footnote represents complete data. All case type footnotes apply to status categoty, case characteristic, and manner of disposition data unless otherwise noted.

Case type qualifying footnotes
C: Data are overinclusive:
Appeal by right family data include all appeal by right juvenile cases.
(Example Scenario 1, #2)

Status category qualifying footnotes
C: Data are overinclusive:
Appeal by right filed data include all appeal by right reactivated cases.
(Example Scenario 1, #4)

Types of disposition qualifying footnotes:
C: Data are overinclusive:
Appeal by permission felony (non-death penalty) other resolution data include cases disposed by dismissed prior to decision, settled/withdrawn, court ADR and transferred.
(Example Scenario 2, #1)

i: Data are incomplete:
Appeal by permission total criminal decided, permission denied, and total type of disposition data do not include appeal by permission misdemeanor and criminal other cases.
(Example scenario 2, #3)

O: Data are incomplete and overinclusive:
Appeal by permission total criminal other resolution data include felony (non-death penalty) cases disposed by dismissed prior to decision, settled/withdrawn, court ADR and transferred, but do not include appeal by right misdemeanor and criminal-other cases disposed by other resolution.
(Example Scenario 2, #2)

Data Submission Instructions

The current method for submitting appellate data to the CSP is to email designated staff the updated Appellate Court Reporting Matrix and Explanatory Notes document. Additional material that may be requested, such as updates to the court's Structure Chart or other informational tables, can be included as text in the submission email or copies of marked-up documents can be attached.

Submission of appellate court caseload data will eventually change so that all data being submitted to the CSP will be electronically submitted via generated NIEM-compliant XML (Extensible Markup Language) data. Data specialists will have the option of choosing from an Excel add-in-generated or CMS-generated submission. The Excel add-in-generated XML submission allows the data specialist to complete the Appellate Court Reporting Matrix and, from the Excel Matrix, generate XML code to be submitted to the CSP. The CMS-generated XML submission requires the data specialist to work with IT staff to map a court's current case management system (CMS) to the CSP schema and, from the schema, generate an XML code to be submitted to the CSP.

Detailed instructions for the electronic submission of data will be included here when the methodology for submitting appellate data changes.

Other Supporting Materials

Calculating Pending Caseloads

When data are reported for the eight status categories, the calculation of pending caseloads is quite simple. The *End Pending–Active* caseload is calculated by adding the *Begin Pending–Active*, *Filed*, and *Reactivated* cases, then subtracting from that total the sum of *Disposed*, and *Placed Inactive*.

Begin Pending–Active	30
+ Filed	110
+ Reactivated	10
	150
Disposed	120
+ Placed Inactive	5
	(125)
End Pending–Active	**25**

The inactive caseload calculation is also straightforward. Add the number of *Begin Pending-Inactive* and *Placed Inactive* cases and subtract the number of *Reactivated* cases.

Begin Pending–Inactive	15
+ Placed Inactive	5
	20
Reactivated	10
	(10)
End Pending–Inactive	**10**

Using the Interlocutory Case Characteristic

The Interlocutory column is designed to capture a characteristic of filed cases.

Using the example caseload above, assume that 25 of the 110 cases filed are appeals that arise from tort cases, and, of those 25 appeals, 10 are being filed prior to receiving a trial court judgment. The court would report all 25 of the appeals as Filed (within the appellate case type of Civil: Tort, Contract, and Real Property, appeal by right or appeal by permission, as appropriate), but would also report 10 as Interlocutory (also within the appellate case type of Civil: Tort, Contract, and Real Property). Having the Interlocutory

column allows the court to track the number of appeals that are received prior to the end of trial court proceedings (i.e., the interlocutory characteristic of the appeal) without losing the detail of the appellate case type.

Disposed Cases and Manners of Disposition

Reporting the court's dispositions is a three-step process. First, the number of appeals/original proceedings that are disposed during the calendar year should be recorded in the Disposed Status Category. Second, the manner in which those cases are disposed should be reported in the Type of Disposition section of the Matrix. Third, for those appeals/original proceedings that the court Decided, the a) Type of Court Opinion and b) Case Outcome should also be reported.

Using the example caseload above, assume that 50 of the 120 disposed cases were for workers' compensation appeals. For Step 1, the court would report all 50 of those appeals as Disposed (within the appellate case type of Administrative Agency: Workers' Compensation, as appeal by right or appeal by permission, as appropriate). For Step 2, the court would report the ways in which those 50 appeals were disposed (also within the appellate case type of Administrative Agency: Workers' Compensation). For example:

Decided	20
Permission Denied	0
Dismissed Prior to Decision	5
Settled/Withdrawn	10
Court ADR	10
Transferred	5
Other Resolution	0

Now assume that the following types of opinions (Step 3a) were issued for the 20 **Decided** Workers' Compensation appeals:

Full Opinion	5
Memorandum	5
Summary/Dispositional Order	10
Other Opinion	0

And that those opinions espoused the following case outcomes (Step 3b):

Affirmed/Granted	10
Reversed/Denied	0
Modified/Granted in Part	5
Dismissed	5
Other Outcome	0

National Center for State Courts
www.ncsc.org
The mission of NCSC is to improve the administration of justice through leadership and service to state courts, and courts around the world. Through original research, consulting services, publications, and national educational programs, NCSC offers solutions that enhance court operations with the latest technology; collects and interprets the latest data on court operations nationwide; and provides information on proven "best practices" for improving court operations.

Court Statistics Project
www.courtstatistics.org
Since 1975, the Court Statistics Project (CSP) has provided a comprehensive analysis of the work of state courts by gathering caseload data and creating meaningful comparisons for identifying trends, comparing caseloads, and highlighting policy issues. The CSP obtains policy direction from the Conference of State Court Administrators.

Self-Represented Litigants Page
http://www.courtstatistics.org/Other-Pages/SRL_Main.aspx
The purpose of establishing a consistent approach to reporting cases with self-represented litigants (SRLs) is to allow comparative data to be produced within and among jurisdictions, facilitating the understanding of the nature and extent of self-representation in the state courts.

State Court Organization
www.ncsc.org/sco
Interactive online application presents detailed comparative data for state trial and appellate courts in the United States. Topics covered include: judicial branch governance, administrative staffing, the number of courts and judges, process for judicial selection, judicial funding, jury qualifications and verdict rules, and technology.

State Court Structure Charts
www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx
These charts summarize in one-page diagrams the key features of each state's court organization. The charts are comprehensive, showing all court systems in the state and their interrelationships and jurisdictions. The court structure charts employ the common terminology developed by the National Center for State Courts' Court Statistics Project (CSP) for reporting caseload statistics.

CourTools
www.courtools.org
CourTools is a set of ten trial court and six appellate court performance measures that offers court managers a balanced perspective on court operations. In designing the CourTools, the National Center integrated the major performance areas defined by the Trial Court Performance Standards with relevant concepts from successful performance measurement systems used in the public and private sectors. Published in a visual and accessible how-to format, the CourTools measures reflect the fundamental mission and vision of the courts, focus on outcomes, and are feasible, practical, and few.

High Performance Courts Framework
http://www.ncsc.org/information-and-resources/high-performance-courts.aspx
The High Performance Court Framework clarifies what court leaders and managers can do to produce high quality administration of justice. It consists of six key elements: administrative principles, managerial culture, perspectives, performance measurement, performance management, and the quality cycle.

Statewide Electronic Filing Initiatives: Status and Advice

Wednesday, July 16, 2014 **8:30 a.m. – 10:00 a.m.** **James River Salon C**

Speakers:
Bessie Decker, Clerk of the Court and State Reporter
The Court of Appeals of Maryland
Tom Hall, President & CEO
TLH Consulting Group
Michael Richie, Clerk of the Court
The Supreme Court of Oklahoma

Bessie Decker, Clerk of the Court and State Reporter

Bessie Decker has worked for the Court of Appeals of Maryland since 1984 where she served as Deputy Clerk from 1984 – 1999; Chief Deputy Clerk 1999 – 2008; and appointed Clerk of the Court and State Reporter in 2008 - present. Before joining the Court, she worked for the Standing Committee on Rules of Practice and Procedure with the Maryland Judiciary and previous to that time worked in the medical field.

Bessie graduated with honors from Chesapeake College with an AA Degree in Paralegal Studies in 1996 and graduated from Kaplan College in 1973 where in 2008 she received the Distinguished Alumni Award.

Bessie is an Associate Member of the Maryland State Bar Association. She also is a member of the Advisory Board for the Maryland Electronic Courts Project (MDEC) and served on the Selection Committee to purchase a single case management system for both trial and appellate courts which would accommodate electronic filing, electronic transfer of information between all four levels of courts and with justice partners in Maryland.

Bessie is an active member of the National Conference of Appellate Court Clerks (NCACC) having served on various Committees including Chair of the Awards Committee, Nominating Committee and Site Selection Committee. She has served on the Executive Committee for two terms which included one term serving as Secretary to the Conference. In addition, Bessie served as co-host for the 2011 Annual Conference which was held in Annapolis, MD.

Bessie has been married to her husband Darwin for over 36 years. They have one daughter, Nicole who is married to Mike and they have two grandchildren, Mackenzie and Nicholas.

Tom Hall, President & CEO

Firm principal Tom Hall has been driving improvements on the business side of Florida's court system for 25 years - leading the adoption of technological advancements and performance enhancements that make the Florida court system among the most efficient in the nation.

The statewide Florida Courts E-Filing Portal which began operation in 2012 is the most ambitious electronic court project that has been attempted to date by any large state in the nation. Tom has helped guide the project from its inception and was among the founding board members on the Florida Courts E-Filing Authority. The innovative public-private model created in Florida to implement e-filing is the only entity of its kind in the nation. The Authority has achieved remarkable success - processing filings during the transitional phase at a rate projected to amount to more than 67 million pages by the end of the year. The unprecedented cooperation between the clerks' association and the courts fostered by Hall has been singled out as the most critical factor to the project's continued success.

As Clerk of Court at the Florida Supreme Court during the Bush v. Gore presidential election battle in 2000 Tom was at ground zero establishing the model for handling high profile cases when the whole world is watching. That experience led to many innovations and started the Florida court systems' transition away from outdated means of processing cases. Over the next 13 years Tom was at the forefront of every major improvement the court system implemented. A recent special commendation presented by the Florida Court Technology Commission concludes "the state's judiciary will benefit from [Tom's] service for many years to come."

Tom received a B.A. degree from the University of West Florida in 1976. He attended Miami University (Ohio) for four years. In 1980 he received his J.D. degree from the University of Miami (Florida) School of Law.

Tom served as Chief Staff Attorney at the First District Court of Appeal, Florida from 1990 through 2000. Prior to that, he was in private law practice in Miami, Florida, for approximately eight years. He litigated complex commercial cases at the trial and appellate level. Immediately after graduation from law school, he clerked for Judge Daniel S. Pearson at the Third District Court of Appeal, Florida.
He served on the NCACC Executive committee from 2002 to 2004. He has presented at the annual education conference and currently presents the Morgan Thomas slide show every year.
Before becoming a lawyer, tom was a professional photographer. He served in the United States Navy as a photographer from 1966-1970, with service in Pensacola, Florida; Albany, Georgia; Washington, D.C.; San Diego, California and aboard the U.S.S. Constellation.

Tom is married to Lisa Hall. Lisa is a vice-president of a major public relations firm in Tallahassee. They have a son, Matthew. Tom also has a son, Troy, from a previous marriage.

Michael Richie, Clerk of the Court

Michael Richie received his J.D. from Tulane University School of Law in 1975 and has been a member of the Oklahoma Bar Association since 1975. He was in private practice for thirteen years. In 1994 became a Clerk on the Oklahoma Supreme Court – first for Justice Marion Opala and then for Justice Robert Lavender. On September 16, 2002, he became the 11th Clerk of the Supreme Court of Oklahoma, a position he still holds. He became a member of the NCACC in 2004 and has served on its Executive Committee and as its Program Chair at the Maryland conference.

In 2008 the Oklahoma Supreme Court appointed him to the Governance Committees created to implement a unified case management system for all courts in Oklahoma. Not only has he served on his Court’s Policy Committee, he has also served on its Business Committee, Standards Committee and E-Courts Committee.

E-Filing in State Appellate Courts: An Updated Appraisal (2014)

Originally by David Schanker, Clerk (retired),
Wisconsin Supreme Court and Court of Appeals

Updated and revised by Timothy A. Gudas,
Deputy Clerk, New Hampshire Supreme Court[1]

Introduction

In 2010, David Schanker, with the editorial assistance and contributions of NCACC members Polly Brock, Stuart Cohen, Carol Green, Trish Harrington, Blake Hawthorne, Judy Pacheco, Rex Renk, Rachelle Resnick, and Holly Sparrow, authored a White Paper entitled "E-Filing in State Appellate Courts: An Appraisal." The 2010 White Paper reported that electronic filing (e-filing) had been implemented in "every federal district court in the nation and in several federal courts of appeal, while in state appellate courts, electronic filing continued to be discussed far more than it had been realized." According to the 2010 White Paper, the states' progress toward appellate (as well as trial court) e-filing had been "agonizingly slow," with only fifteen states having implemented appellate e-filing systems of any kind.[2] The stated purpose of the 2010 White Paper was to "provide a

[1] This 2014 Updated Appraisal was written with the assistance and contributions of numerous NCACC members, including Tom Hall, Mike Richie, Bessie Decker, Jenny Kitchings, Blake Hawthorne, Joe Stanton, and countless others who reviewed sections summarizing the status of e-filing in their states. In addition, this 2014 Updated Appraisal is directly indebted to the work of those who contributed to the 2010 White Paper, substantial portions of which are repeated here with minimal or no change.

[2] The 2010 White Paper defined an appellate e-filing system as either (1) an Internet portal used for the transmission of electronically-filed documents from filers to the courts or (2) a scheme for the voluntary or required transmission of electronic documents to the court by e-mail. The definition excluded courts that request or require the submission of an electronic document by enclosure of a CD-ROM or diskette. The 2010 definition is used, for consistency purposes, in this 2014 Updated Appraisal.

snapshot of the current (and constantly changing) state of appellate e-filing, to suggest reasons for its lackluster growth, and to offer suggestions for sparking greater progress toward widespread implementation of appellate e-filing."

Since 2010, the number of states that have implemented some version of appellate e-filing has more than doubled, bringing the total to thirty-three states. Of those thirty-three states, twenty-seven have at least one appellate court that is receiving documents that are electronically submitted via an Internet e-filing portal; the other six states have procedures for receiving documents that are submitted via e-mail. Of the remaining seventeen states that do not currently have appellate e-filing of any kind, eleven have e-filing projects in the works, and many of those are expected to be in operation within the next two years.

The purpose of this 2014 Updated Appraisal is to provide a state-by-state report on the status of appellate e-filing, to suggest reasons for its recent growth, and to repeat the suggestions made in the 2010 White Paper for sparking continued progress toward widespread implementation of appellate e-filing. A state-by-state summary begins on page seventeen of this 2014 Updated Appraisal.

Background

In late 2013, the federal judiciary celebrated the twenty-fifth anniversary of its first PACER-system implementation (Public Access to Court Electronic Records). PACER's sibling system, the federal judiciary's CM/ECF (Case Management/Electronic Case Files), is nearing its fifteenth anniversary. With PACER and CM/ECF, e-filing has now been implemented in every federal district court and in all of the federal circuit courts of appeals. The spread of e-filing in federal courts proceeded smoothly thanks to a highly centralized Administrative Office that oversaw the project from its inception.

In contrast to the uniform and unified federal system, each state has been on its own in determining what type of e-filing system would best fit its laws and legal culture and in gathering the resources and technology to create and implement the system. "For better or worse," the 2010 White Paper reported, "each state has independently developed its court technology, and the widely varying level of sophistication of that technology reflects a number of factors, including each state's degree of interest in court automation, its financial health, and its ability to sustain technology projects."

In addition to that absence of uniformity among states, the 2010 White Paper identified several other reasons why appellate e-filing had not been more widespread at that time. Those additional reasons included (1) the post-2008 downturn in the economy and the consequent lack of funding for major court-technology projects, (2) a lack of awareness among the judiciary about the benefits of e-filing, (3) the public's perception that e-filing was a fad or a luxury and that the "courts could continue to do business, if necessary, with typewriters, copiers, and paper research tools," and (4) the lack of a clear choice in the field of vendors available to help states create e-filing systems or to bring in ready-made e-filing systems.

In 2014, many of those reasons carry less weight than they once did. Appellate judges can now see the benefits that e-filing has brought to their colleagues on the federal bench and in other states. Lawyers and non-lawyers alike are using technology in sophisticated ways in their professional and personal lives, such that the courts' reliance on paper filings and paper-driven processes is increasingly viewed as out of touch with the way people live and work today. In addition, although no e-filing vendor has emerged as a clear frontrunner, there are now several e-filing vendors with a demonstrated track record of appellate e-filing implementations. The funding situation, which in many states has not

shown significant improvement since 2010, is increasingly cited as a reason for an e-filing project because a legislature may be reluctant to fund, year after year, a paper-driven judicial system that the legislature perceives to be outdated, inefficient, labor-intensive, and not "customer friendly" in its operations.

Finally, e-filing has come to be seen as inevitable – a question of when, not if. Indeed, the National Association of Court Management at its midyear 2014 conference reported on a survey conducted of various justice-system participants concerning the "likelihood of the following scenarios occurring by the year 2025." Two of the highest scores (achieving "highly likely" to occur) related directly to e-filing: (1) "virtually all court forms will be available on the Internet (parties, particularly self-represented, will be able to complete forms online, and electronically file them)"; and (2) "virtually all courts will be 'paperless' (more and more courts will convert to document imaging or electronic filing, thereby going 'paperless')."

E-Filing Systems

Despite the absence of a single dominant e-filing vendor, the e-filing systems offered by most e-filing vendors resemble each other far more than they differ. Nearly all are based on the federal model and provide interfaces designed with the differing perspectives of filers, the clerk's office, and the courts in mind.

In a typical e-filing system, filers prepare the document using conventional word processing software, then save it as a PDF file. The filer then (1) logs into the system using a required user name and password, (2) enters basic information relating to the case and the document, (3) uploads the document, (4) submits it to the system, and (5) pays any applicable filing fees online. The filer receives a notice verifying the submission of the document.

The appellate court clerk's office receives notification that the document has been submitted to the system, usually by the appearance of the newly submitted document in an e-filing review queue. A clerk's office employee reviews the document for compliance with the rules and deadlines and either accepts it or rejects it. If the document is rejected, it is returned to the attorney electronically with a note describing the reason for rejection. If it is accepted, (1) the document is file-stamped or receive-stamped with an electronic stamp that is added to the PDF version of the document, (2) the document is added to the electronic case file, (3) the filing is noted on the appellate case docket, and (4) the other parties to the case receive notice of the filing. At that time, the other parties either receive a service copy of the PDF document or are given access to the document on the court's server. Ideally, each of those steps occurs automatically by the e-filing system's integration with the court's case management system and document management system. If the filing is a motion that requires immediate consideration by the court (e.g., a motion for extension of time), it is transmitted electronically to the appropriate court. The court then issues an order (through the clerk's office) electronically to the parties.

Once the document has been added to the electronic case file, it can also be made available to the public, depending upon the court's public-access policy. In a number of states, documents filed through the e-filing system are available on the court's website, either as part of the appellate docket case search or as a briefs database. In states where the court requires the filing of documents in text-searchable PDF, the database can be configured to be searchable by terms and phrases, making it a valuable tool for attorneys and judges who want to read how other attorneys have handled a particular issue.

If, in addition, the system had an interface with the trial court, it would enable the appellate court to receive not only case information (parties,

charges, case type, financial information, etc.) electronically but the trial court record as well. The trial court record could be as simple as a scanned version of the paper record, or it could be a set of links to electronic versions of trial court documents – including e-filed pleadings, scanned exhibits, and electronic transcripts. Most of this material could thereby be in text-searchable form.

The typical interface for judges would provide them with access to the electronic documents associated with a case in a straightforward manner; judges and their law clerks are interested, of course, in the content of the documents, not when and how they were filed. A simple web-based interface would permit a judge (wherever in the world he or she may be) to sign on to the system, enter a case number, and retrieve a list of the electronic documents in that case. Double-clicking on a document would open that document in Adobe Reader. Once open, the document can be saved, printed, downloaded, or e-mailed; it can be copied; pieces of text can be copied from within it; and, if hyperlinks have been included, cases or statutes can be accessed via the Internet from within the document. If the e-filing system is highly integrated with the appellate case management system, as it is in the Florida Supreme Court, judges can circulate proposed opinions, vote and finalize opinions within the case management system, and the clerk can then move those to the e-filing system and issue opinions (and orders) through the e-filing system.

E-Filing Vendors

Some of the primary players among e-filing vendors appear currently to be the following: File & ServeXpress for Courts; Tybera, with its "eFlex" system; Thomson Reuters Court Management Solutions (formerly LT Court Tech), with its "C-Track" system; American Cadastre LLC (AMCAD), with its "eUniversa" system; Tyler Technologies, with its "Odyssey File and Serve" system; and Intresys, with its "TurboCourt" system.

Vendor-Hosted Systems. The File & ServeXpress for Courts system (formerly part of LexisNexis) is a vendor-hosted system, meaning that the system is managed on a fee-per-filing basis by a private company. Under this model, the company provides a web-based interface accessible to attorneys, the clerk's office, judges, and subscribers. A fee is charged to the filer of the document and may be charged to others who wish to view the document. Access to the system by judges, justices, and the clerk's office would be free of charge, and there would be no development or other charges incurred in starting up the service. File & ServeXpress, which is used in the Delaware Supreme Court and is one of the e-filing service providers in Texas, claims to be the largest electronic processor of court filings and document exchanges in the United States. Tybera (discussed below), among other vendors, also offers the option of a vendor-hosted, transaction-based model.

Vendor-Created Systems. The other vendors earn their fees by creating systems to be hosted and managed by the court. A court-hosted system would employ purchased or court-developed software to provide the e-filing interface, and documents would be stored on the court's own servers. It would be up to the court to determine whether any fees would be charged to filers.

Tybera is a Utah-based company that offers an e-filing system for courts called eFlex; it is a stand-alone e-filing system that can work with an existing case management system or with a case management system created by another vendor. The eFlex system, which is used by the Nevada Supreme Court and the Ohio Tenth District Court of Appeals (Franklin County), includes interfaces differentiated for attorneys/litigants, the clerk's office, and judges, and it accommodates electronic notifications and service.

Another vendor holding a significant piece of the market is Thomson Reuters Court Management Solutions (formerly LT Court Tech), with its C-

Track system – an appellate case management system with an e-filing component. Like eFlex and other systems, C-Track's e-filing system allows parties to file documents in the standard word processing formats (Word, WordPerfect, etc.), converts them to PDF, and provides the option of watermarking, file-stamping, and electronic signature. Appellate courts using C-Track for e-filing include Oregon, Wyoming, and Montana (soon).

AMCAD is a Virginia-based company whose e-Universa system is touted as encompassing a Filer Interface, a Clerk Review, and integration with more than seven case management systems. eUniversa has also incorporated the Access2Justice (A2J) program into the eUniversa solution, which provides the ability for courts to expand e-filing to self-represented litigants by guiding them through a series of questions whose responses result in a completed form for filing. AMCAD counts the Florida E-Filing Authority among its customers.

Tyler Technologies' Odyssey File & Serve (which includes the business formerly operated as Wiznet) currently processes more than 4 million filings per year and supports more than 100,000 users nationwide. File & Serve is used in the Michigan Court of Appeals and in several statewide implementations, including Texas. Tyler is the largest provider of case management solutions in Texas and is providing a statewide e-filing portal in Texas that works with a variety of case management systems. Tyler is also working on statewide projects (including appellate e-filing) in Massachusetts, Rhode Island, and Maryland.

TurboCourt, which is used in Arizona in the Supreme Court and in the Court of Appeals, Division One, is a product of California-based Intresys. TurboCourt describes itself as an interactive electronic filing portal for attorneys, justice partners, businesses and pro se litigants, with support for bulk filings, free-form filing, interactive forms generation and filing, and electronic service.

Considerations in Choosing an Appellate E-Filing System

An appellate e-filing system can be as simple as an e-mail address to which documents are sent or as complex as a comprehensive case management/document management/e-filing system accessed through the Internet that provides a full range of electronic functionality, including electronic payment, electronic transfer of the trial court or agency record, electronic filing of the transcript, electronic integration with the bar association, electronic public access, workflow technology, and electronic service. In deciding which option to choose, factors to be considered include cost, functionality, and control.

One of the most important policy decisions to be made at the outset of the process is the degree to which the court wants to go fully "paperless." The question drives a number of important considerations such as (1) whether paper copies should be required to be filed at all, and, if not, who should bear the cost of printing the documents when requested by the court; (2) whether the court's official record is the paper or the electronic version of the document; (3) whether and how to archive the court's case records; and (4) whether, if a third-party vendor is involved, the official record should be under the control of that vendor. Among the many advantages to a paperless system is the ability to store, access, retrieve, and provide electronic copies of the official court record without the cost of printing and transporting paper.

In addition to the considerations surrounding the question of paperless-ness, the court must determine its priorities in terms of the system's functionality. For most appellate courts, the most basic and therefore most important function of an e-filing system is to permit attorneys to e-file documents with the appellate courts and to serve other attorneys electronically. The second priority is often the function of providing judges and justices with access to documents in electronic form. Third may be the

function of enabling the public to access appellate court documents online, and fourth, perhaps, the function of enabling attorneys to pay filing fees online, though for some courts this priority ranks much higher. Paying fees electronically can greatly reduce the amount of time attorneys and clerks spend handling and accounting for payments.

Factors considered in this prioritization include cost, feasibility, speed of implementation, and whether the court embraces a policy of permitting as much access to court records as is prudently consistent with privacy concerns. Because each additional item of functionality adds cost and time to the implementation of a system, the courts should consider the likelihood of receiving funding and the amount of such funding before committing to a particular system.

Another important issue is whether to consider using a purely vendor-hosted system. The temptation is strong – the development and implementation of such a system usually requires little or no up-front cost to the court and minimal personnel expense. Courts may find, however, that employing such a vendor-hosted system may ultimately involve too many compromises. Several red flags come to mind: First, the court would commit itself to a system where attorneys and other filers would pay for e-filing; while it is true that e-filing can save attorneys and parties money (reducing copying and service costs), the fee would be there and would be to some extent within the control of the vendor. Second, the vendor would have a monopoly as the exclusive provider of e-filing services to the appellate courts; courts may be uncomfortable with requiring filers to do business with a particular vendor. Third, the court would cede control of the system and case record data to the vendor; while the vendors provide assurance that safeguards are in place to protect court data, courts would be forced to rely on such assurances. Fourth, members of the public would probably need to provide some identifying information to the vendor to view

court documents online, which may run contrary to a court's goals of providing both openness and accountability and privacy to users of court services.

Regardless of the type of system a court chooses, the importance of contract negotiations with vendors cannot be overestimated. Courts must take great care when negotiating contracts to ensure that the product they receive complies with their unique requirements and provides cost-effective service to the public.

Paths to E-Filing

The widely varying experiences of state appellate courts suggest that there is no single path to appellate e-filing and there are many obstacles to be overcome. The obvious common denominator is perseverance.

The process of moving toward e-filing must begin with the court's attention being brought to the benefits of appellate e-filing for the courts, the bar, and the public, and to the necessity for the courts to maintain technological compatibility with the legal profession and the public. The benefits of e-filing are not difficult to see, and for each court a particular benefit may be more compelling than others. For some courts, the most important benefits of e-filing may relate to having case materials in electronic form – text-searchability, portability, ease of dissemination by e-mail or on the web, ability to copy and paste, and access to cases and statutes through links in electronic documents, among other things. For other courts, the primary benefit may be the environmental impact and cost-benefit of moving toward a paperless (or a less-paper) system where costs of copying, shipping, postage, and service are greatly reduced. For other courts, the ability to provide instantaneous public access to court documents may be paramount; this not only serves the court's interests in openness and accountability, it can also provide the courts with a great

savings of time and expense in fulfilling requests for copies of documents. The court must decide, as discussed above, what its priorities will be for the new system and how those priorities will be expressed in functionality.

It can be useful to involve a wide cast of stakeholders in the decision-making process. Representatives of the state department of justice, the state public defender's office, the appellate practice section of the state bar association, appellate judges and justices, the state legislature, the director of state courts' office, the clerk's office, and the court's information technology agency may have unique perspectives on the logistical and practical impact of e-filing on their agencies. It may be, as well, that the quality of the input provided by such stakeholders is less important than the fact that they were included in the project development and their voices heard. Some courts have convened a stakeholders' or advisors' committee to meet periodically during the pendency of the project and beyond to monitor progress and make decisions about refinements or changes to the system as progress is made.

An important function of this committee may be to recommend a plan of action to the court or the legislature. While the plan itself can be created by an in-house IT group or through a vendor, once the contours and limitations of the system have been established, it can be the job of the stakeholders or their representative to get a commitment to the project from the judiciary or the legislature.

Once a commitment to the project has been received, the next step is to design the system based on the courts' and the stakeholders' identified priorities; this must be done in conjunction with the courts' IT staff and/or the vendor. If the vendor has not yet been identified, the court will now need to write and issue its request for proposals and hope that a vendor (or multiple vendors, as in Texas) will come forward who will meet the courts' requirements within the proposed budget and time frame.

At this point, at least four tracks may be set in motion simultaneously. First, the courts' IT agency or the chosen vendor(s) must get to work building the system or adapting an existing system to the appellate courts' needs. Second, if new or amended procedural rules are needed to initiate e-filing, the rules must be written and presented to the court or the legislature for adoption. This task should proceed in conjunction with the creation of the system itself so that the necessary hardware and software can be created or purchased, tested, and implemented before the effective date of the new or amended rules.

Third, while the system is being built and the rules adopted, the bar and the public must be made aware of the coming advent of e-filing and educated in how to use the system. This training should begin with a warning about what is on the horizon – that is, the bar may be informed early on, perhaps in a bar association publication, that the court is considering instituting e-filing, that rule amendments have been proposed, and what the system entails. As the project progresses and more specifics are known, court personnel should teach continuing legal education classes in e-filing, give presentations to paralegal organizations, do training at stakeholder agencies like the department of justice and state public defender, and continue to publish articles on e-filing in bar and private legal publications.

And fourth, court staff – particularly clerk's office staff – must be trained not only in how to use the system from the clerk's office perspective (e.g., accepting and rejecting documents, etc.), but in how to answer the full range of questions that will be received from attorneys who are attempting to register for or to navigate the system for the first time.

Ideally, progress along these tracks should culminate with court staff and the bar well-prepared to use and troubleshoot the e-filing system by the

effective date of the new rules. Maryland, with its Maryland Electronic Courts project (MDEC), and Florida, with its Florida Courts E-Filing Portal, provide useful examples of paths to comprehensive statewide e-filing.

Maryland's Statewide Project (MDEC) (by Bessie Decker, Clerk, Maryland Court of Appeals)

The Maryland Judiciary is embarking on an enterprise-level project that will update the entire court management systems environment, including technology, business processes and management practices. The MDEC project will create a single judiciary-wide integrated case management system that will be used by all the courts in the state court system. Courts will collect, store and process records electronically, and will be able to instantly access complete records as cases travel from District Court to Circuit Court and on to the appellate courts. The new system will ultimately become "paper-on-demand."

Preliminary discussions began back in 2006 concerning problems associated with the nine existing case management systems, many of which were decades old. As a result of those discussions, an advisory committee was established in 2009 to investigate creating a single system for all levels of court, with all products (e-filing, CMS, ECM) being implemented at once in a county-by-county roll out for all case types.

After discussions on whether to "build v. buy," in 2010 the decision was made to buy, and a vendor fair was held along with an RFP being issued. After two site visits to Arizona and Minnesota, along with many phone interviews throughout the country, a contract was awarded to Tyler Technologies in 2011. In 2012, electronic case rules began to be drafted along with the beginning of gap/fit sessions and approval of the pilot list of roll out. In 2013, design sessions began and a site visit to New Mexico was done regarding implementation impacts. Drafted MDEC rules were adopted as well as different aspects of functions of this system.

Developing and training have continued in 2014 with the hopes that by October 2014, the roll out will start going live with all four levels of courts in Anne Arundel County, which will include both of the appellate courts. The county-by-county roll outs will continue after that, and it is projected that by November 2018 all counties will be completed.

Florida Courts E-Filing Portal (by Tom Hall, President of TLH Consulting Group, LLC, and formerly Clerk of Court of the Florida Supreme Court from 2000 through 2013)

Florida is in the process of implementing a single statewide e-filing system for its court system. When fully operational, it will be possible to file in any court in the state, both trial and appellate, through one web site using a single user name and password. Currently the system is operational for the Florida Supreme Court, one of the five intermediate appellate courts and all of the civil and criminal divisions of the trial courts throughout the state. The system is currently mandatory for all attorneys. Pro se (self-represented) litigants began using the system on a voluntary basis on June 20, 2014. Additional users such as court reporters, process servers, mediators, and expert witnesses are being phased in over time. The system is expected to provide for all of these additional users by the end of 2014.

There are two additional limitations to the current system. Case initiation in criminal courts cannot be done though the Portal. This restriction was actually requested as an exception by the criminal bar, particularly state attorneys and public defenders. Prior to implementation of the Portal, local court systems had developed systems that allowed state attorneys, law enforcement (who often initiate criminal proceedings directly based on an arrest) and public defenders to file electronically directly into the local clerk case management system. Those filers did not want to be required to file through the Portal until the Portal could replicate the full capability of all those systems, or the local system could adapt their CMS to

accept such pleadings directly from the Portal. One other limitation is that the electronic record is not transmitted via the Portal. It is not contemplated at this time that electronic filing of the record will ever be done through the portal in Florida. Separate File Transfer Protocol (FTP) sites have been established to allow the trial courts to transfer the record directly to the appellate courts through these sites. A new comprehensive standard for electronic records is scheduled to be implemented July 1, 2015.

Conclusion

Taking on an appellate e-filing project remains a daunting task, but the substantial progress made by various appellate courts since 2010 demonstrates that the task is not as daunting as it once was. In 2014, as in 2010, the sharing of information among appellate courts can make a huge difference by providing court clerks, administrators, judges, and justices – whoever is willing to spearhead the effort – with the tools necessary to advocate strongly for, and to achieve the successful implementation of, appellate e-filing.

Information should be widely disseminated through organizations like the NCACC and the NCSC on how to inform decision makers in state legislatures and the judiciary about the benefits and cost-savings of appellate e-filing. Courts should share information on their experiences with vendors and freely share drafts of requests for proposals, system requirements, draft rules, and technical information. While the hardware and software that make e-filing systems possible cannot be obtained without high cost, information about this critical technology can be shared cheaply and widely.

STATES IN WHICH E-FILING IS NOT AVAILABLE

As of May 15, 2014, e-filing is not available in the appellate courts of the following states:

Alaska, but the state is currently working on a new case management system that will include e-filing (possibly by mid-2015).

Arkansas, but the state is working on an e-filing project for its appellate courts. In the meantime, Rule 1-8 of the Rules of the Supreme Court and Court of Appeals governing "Courtesy electronic copies" provides:

(a) Motions, petitions, writs, briefs, responses, and replies filed in the appellate court, except those filed by a party proceeding pro se or by a party who by court order has been allowed to prosecute the suit in forma pauperis, shall be submitted with an electronic copy of those documents in Adobe Portable Document Format (PDF). Submission in PDF of circuit court records or parts of records filed in the appellate court is encouraged but not required. Submission of PDF documents in text-searchable Adobe Portable Document Format is also encouraged but not required.

(d) PDF documents submitted under this rule shall not contain any material that is not included in the original paper document. Submitting a PDF copy of the original paper document to the Clerk of the Court does not constitute filing of the original paper document. PDF documents filed pursuant to this rule are solely for the convenience of the court, attorneys, and parties. Parties and their attorneys must comply with the filing and service requirements for the original paper document provided by these rules.

(f) PDF documents shall be submitted on a Compact Disk (CD), Digital Video Disk (DVD), portable "flash" or "thumb" drive, or on other electronic media that may be commonly used for transporting digital information. Only one electronic media copy of PDF documents shall be submitted with the filing of the original paper documents. PDF documents shall not be submitted by email. Evidence of service upon opposing counsel of the electronic media containing the PDF documents must be furnished at the time of filing the original paper documents.

District of Columbia, but an appellate e-filing pilot program for attorney filers is anticipated to be in place by August 2014 in the Court of Appeals. The goal is for e-filing to be fully operational by the end of 2014.

Idaho, but e-filing is expected in the trial courts in late 2015 and in the appellate courts in 2016.

Indiana, but the state anticipates beginning appellate e-filing pilot projects in late 2015.

Kentucky, but the state is currently planning a new case management system as a precursor to e-filing.

Maryland, but Maryland has embarked on a multi-year project (Maryland Electronic Courts or MDEC) with Tyler Technologies, with the goal of making the entire Maryland judiciary 100% electronic ("paper on demand"). At this time, as various trial courts come on to the system through a planned roll-out, appellate filings will be done electronically in appeals from those courts.

Minnesota, but the appellate courts began a pilot project to test the feasibility of electronic transmission of the record on appeal from the trial court to the appellate court.

Montana, but e-filing in the Supreme Court is expected to commence in the middle of July 2014. E-filing will begin with prosecutor-initiated case types (criminal, mental commitment, abuse and neglect case types, etc.). The vendor is Thomson Reuters (C-Track product). E-filing will not be made mandatory initially, but the official record will be the electronic one in cases that are e-filed.

Nebraska, but the state is working on an appellate e-filing project and expects e-filing to be in place by late 2014 or early 2015.

New Hampshire, but the state has embarked on a multi-year project to achieve e-filing at all levels of courts. The first case type is scheduled to begin in the middle of 2014 in the trial courts. In the meantime, transcripts in Supreme Court appeals are filed electronically, and parties are encouraged (but not required) to submit an electronic copy of the party's brief, in Portable Document Format (PDF), on a computer-readable compact disk.

New Mexico

Oklahoma, but the state has begun a multi-year unified project to achieve e-filing at all levels of courts. At this time, the system is being piloted in one county.

Rhode Island, but the state has undertaken a multi-year project with Tyler Technologies to implement a new case management system and an

electronic filing system for all courts and all case types. In anticipation of e-filing, the Rhode Island Supreme Court has adopted Provisional Article X (Rules Governing Electronic Filing), which will make e-filing mandatory for attorneys and voluntary for self-represented parties. E-filing is expected to commence at the Supreme Court in 2015.

South Carolina

Tennessee, but the state implemented a new case management system in August of 2013 and is now working on a document management system, with plans to take up appellate e-filing after the document management system is implemented.

Utah, but the state hopes to have e-filing fully operational in its appellate courts by mid-2015. In the meantime, Utah Supreme Court Standing Order No. 8 (establishing a pilot program) requires a party filing a brief on the merits in the Utah Supreme Court or the Court of Appeal to submit a "Courtesy Brief" on compact disk in searchable Portable Document Format (PDF) to the appellate court and to the parties, in addition to complying with the general (paper) filing and service requirements set forth in the Utah Rules of Appellate Procedure. The filing party must include in the Courtesy Brief, the appendices, including relevant portions of the record, in PDF. As part of the pilot program, the Utah Supreme Court "urges" a filing party who has the technological capability to do so to submit a so-called Enhanced Courtesy Brief that includes hyperlinks to the cases, statutes, treatises, and portions of the record cited in the brief.

West Virginia

COURTS IN WHICH E-FILING IS AVAILABLE

A summary of the appellate courts in which e-filing is available, as of May 15, 2014, begins on page twenty.

ALABAMA (all appellate courts)

Availability: E-filing is operational in the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals through the "ACIS" system.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary, and only licensed Alabama attorneys and pro hac vice attorneys are authorized to e-file through the system. According to FAQs on the website, e-filing practices for pro se litigants will be addressed at a later time.

Types of Cases or Documents Included/Excluded from E-Filing: The Interim Electronic Filing and Service Rule does not categorically exclude any case types or document types from e-filing.

E-Service: E-service of court orders, notices, etc. and of party filings is authorized via use of e-mailing, but e-service is not performed automatically by the system.

Format of Filings: All e-filed documents must be filed in a PDF format that has been saved with a resolution of 200 DPI (dots per inch) or higher. E-filed documents must be saved as letter-size documents (8 ½ inches or 2550 pixels wide x 11 inches or 3300 pixels long) with black text on white background. E-filed documents must not contain any embedded files, scripts, tracking tags, and/or any type of executable files.

Requirement of Paper Copies: In addition to the e-filed document, the filer must mail or deliver paper copies to the court (9 in the Supreme Court and 5 in the Court of Criminal Appeals and in the Court of Civil Appeals).

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: Trial court judges, trial court clerks, and court reporters are also authorized to use the system to e-file documents and e-records in appellate court proceedings. An "e-record" means "a record on appeal that has been prepared, assembled, and filed with the clerk of an appellate court in an electronic format as prescribed in [the Interim Electronic Filing and Service Rule]." The Rule further states: "Unless otherwise ordered by an appellate court, in trial court locations equipped with the hardware and software necessary to produce e-records, the clerk of the trial court shall prepare and e-file an e-record in each case appealed to an appellate court." The trial court clerk offices have now reached the point that appellate records are being provided almost exclusively in an electronic format (e-record).

E-Filing Rules: Interim Electronic Filing and Service Rule.

ARIZONA (Supreme Court and Court of Appeals, Div. One)

Availability: E-filing has been operational in the Supreme Court and the Court of Appeals, Division One, through the AZTurboCourt system since 2010.

Voluntary/Mandatory; Authorized Users: Since 2012, all attorneys have been required to e-file documents through AZTurboCourt when filing into the Arizona Supreme Court and the Court of Appeals, Division One. Self-represented litigants may, but are not required to, file documents through AZTurboCourt.

Types of Cases or Documents Included/Excluded from E-Filing: All documents in all case types are within the scope of e-filing, with limited exceptions including "documents, any portion of a document, and exhibits filed under seal or in a sealed case."

E-Service: Effective March 8, 2014, any attorney of record may be electronically served through AZTurboCourt. Consequently, there is no longer the need to obtain that attorney's consent to electronic service through AZTurboCourt.

Format of Filings: All text-based documents shall be in .pdf, .odt, or .docx format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: A filer may include a hyperlink only to static textual information or documents. Materials accessed via hyperlinks are not part of the official court record. A filer may include a bookmark to another page within the same document. When multiple exhibits or attachments are contained in a document, the document shall contain a bookmarked index or table of contents to these exhibits or attachments.

Other Notable Features: The electronic documents in the court's document management system constitute the "official record."

E-Filing Rules/Orders: Supreme Court Administrative Order No. 2012-2 (In the Matter of: Implementing Mandatory E-Filing in the Arizona Supreme Court and Court of Appeals, Division One); Supreme Court Administrative Order No. 2014-23 (In the Matter of: Electronic Service of Case Documents by AZTurboCourt).

ARIZONA (Court of Appeals, Division Two)

Availability: E-filing has been operational in the Court of Appeals, Division Two, since 2001.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for both Arizona licensed attorneys and self-represented parties who register for e-filing. It is expected that the Court will make e-filing mandatory for attorneys by mid-2014.

Types of Cases or Documents Included/Excluded from E-Filing: No case types or document types are categorically excluded by court rule from e-filing.

E-Service: It remains the responsibility of the filing party to serve other parties with the document. Electronic service is permitted if the receiving party has consented to such service. By registering as an e-filer, a person agrees to receive notices, orders and decisions from the court electronically. It is expected that the e-filing system by mid-2014 will automatically accomplish e-service of party filings on other registered users.

Format of Filings: E-filed documents may be in any format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Hyperlinks to the record are encouraged, but not required.

E-Filing Rules/Orders: Administrative Order 2008-1 (Arizona Court of Appeals, Division Two Electronic Filing Rules for Attorneys).

CALIFORNIA (Supreme Court)

Availability: Starting in 2014, the California Supreme Court has allowed parties to "e-submit," which is different from "e-file," electronic copies of briefs and petitions. "Electronic submission" is explained as "the submission of an electronic copy of a document to the reviewing court. Briefs or writs submitted electronically are not a substitute for, but an addition to, the required paper filings which constitute the official court record." The e-submission is done through a portal.

Voluntary/Mandatory; Authorized Users: E-submission is voluntary for all filers.

Types of Cases or Documents Included/Excluded from E-Submission: Parties may e-submit various (specified) types of briefs and petitions, but other types of documents must be filed exclusively in paper. The Court's website lists the types of briefs and petitions that may be e-submitted.

E-Service:

Format of Filings: The e-submission must be submitted as a single, text-searchable PDF file that is an exact duplicate of the paper original.

Requirement of Paper Copies: Yes, but the e-submission reduces the number of paper copies that must be filed.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 8.44 of the California Rules of Court.

CALIFORNIA (First District Court of Appeals)

Availability: E-filing is operational in the First District.

Voluntary/Mandatory; Authorized Users: Use of the electronic filing system (EFS) operated by ImageSoft TrueFiling (TrueFiling) is mandatory for all attorneys filing in the District, unless an exemption is granted, and is voluntary for all self-represented litigants.

Types of Cases or Documents Included/Excluded from E-Filing: At this time, e-filing includes all filings in civil cases. E-filing in original proceedings, criminal cases, and juvenile cases is expected to follow.

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the Court.

Format of Filings: An e-filed document may be submitted in any format, and the system converts it to a searchable PDF.

Requirement of Paper Copies: No. Filings in electronic format constitute the official record of the court.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The Court is not capable at this time of receiving the clerk's and/or reporter's transcripts electronically.

E-Filing Rules: Rule 8.70 et seq. of the California Rules of Court; First District Local Rule 16.

CALIFORNIA (Second District Court of Appeal)

Availability: E-filing is operational in the Second District, as are "e-submission" and "e-briefs." E-filing is explained as "the filing of an electronic document in lieu of a paper original and any required paper copies with the reviewing court." E-submission is explained as the submission of an electronic copy of a document to the reviewing court, which reduces the number of required paper copies. An e-brief is a single disc (CD or DVD) containing linked and searchable copies of (a) the reporter's transcript, (b) the clerk's transcript or a joint appendix in lieu thereof, including all exhibits, (c) all cited authorities, and (d) all briefs, with all citations to the record, authorities and other briefs hyperlinked to the cited material.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for all miscellaneous filings (i.e., not briefs or petitions) by attorneys and is voluntary for self-represented parties. Briefs and petitions from attorneys and self-represented parties may be e-submitted through a portal.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all miscellaneous filings (i.e., not briefs or petitions).

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the Court.

Format of Filings: An e-filed document must be a single, text-searchable PDF file.

Requirement of Paper Copies: Not for e-filings, but yes for e-submissions and e-briefs.

Hyperlinks in Briefs and Appendices: An e-brief, if submitted, must contain hyperlinks to the record and to other cited materials.

Other Notable Features:

E-Filing Rules: Rule 8.70 et seq. of the California Rules of Court.

CALIFORNIA (Third District Court of Appeal)

Availability: E-filing is operational in the Third District, as is "e-submission." E-filing is explained as "the filing of an electronic text-searchable PDF document in lieu of a paper original and any required paper copies with the reviewing court." E-submission is explained as "the submission of an electronic text-searchable PDF copy of a document to the reviewing court," which reduces the number of required paper copies.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for both attorneys and self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for the following documents only: application for an extension of time in a criminal appeal (first 30-day extension only); application for an extension of time in a civil appeal (first 30-day extension only); stipulation for extension of time in a civil appeal (up to 60 days); recommendation for appointment of counsel sent from the Central California Appellate Program (CCAP) with application; change of address; change of defendant's address sent from the Central California Appellate Program (CCAP); substitution or association of counsel; copy from the superior court of the notice of designation of record; copy from the superior court of an omission letter; copy from the superior court of an abandonment; notice of settlement; request to dismiss with no briefs filed; request for oral argument; and a service copy of documents filed in the Supreme Court. Briefs, petitions, and oppositions may be e-submitted (not e-filed) through a portal.

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the Court.

Format of Filings: An e-filed document must be a text-searchable PDF file.

Requirement of Paper Copies: Not for e-filings, but yes for e-submissions and e-briefs.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 8.70 et seq. of the California Rules of Court.

CALIFORNIA (Fourth District Court of Appeal)

Availability: E-filing is operational in the Fourth District, as are "e-submission" and "e-briefs." E-filing is explained as "the filing of an electronic document in lieu of a paper original and any required paper copies with the reviewing court." E-submission is explained as the submission of an electronic copy of a document to the reviewing court, which reduces the number of required paper copies. An e-brief is a single disc (CD or DVD) containing linked and searchable copies of (a) the reporter's transcript, (b) the clerk's transcript or a joint appendix in lieu thereof, including all exhibits, (c) all cited authorities, and (d) all briefs, with all citations to the record, authorities and other briefs hyperlinked to the cited material.

Voluntary/Mandatory; Authorized Users: E-filing and e-submission are voluntary for attorneys and self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for various (specified) miscellaneous filings, but not for briefs or petitions. Briefs, petitions, and oppositions may be e-submitted through a portal.

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the court.

Format of Filings: An e-filed document must be a single, text-searchable PDF file.

Requirement of Paper Copies: Not for e-filings, but yes for e-submissions and e-briefs.

Hyperlinks in Briefs and Appendices: An e-brief, if submitted, must contain hyperlinks to the record and to other cited materials.

Other Notable Features:

E-Filing Rules: Rule 8.70 et seq. of the California Rules of Court.

CALIFORNIA (Fifth District Court of Appeal)

Availability: E-filing is operational in the Fifth District, as is "e-"submission." E-filing is explained as "the filing of an electronic document in lieu of a paper original and any required paper copies with the reviewing court." E-submission is explained as the submission of an electronic copy of a document to the reviewing court, which reduces the number of required paper copies.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for specified filings (particular types of appellants' opening briefs in adult criminal appeals, juvenile delinquency appeals, and conservatorship appeals) by attorneys. E-filing is available and voluntary for attorneys and self-represented parties for the following documents: first request for an extension of time in a criminal or juvenile appeal; and an informal response to a petition for writ of habeas corpus. Other briefs, as well as petitions and oppositions, from attorneys and self-represented parties may be e-submitted (not e-filed) through a portal.

Types of Cases or Documents Included/Excluded from E-Filing: The Fifth District does not accept any sealed documents electronically. Sealed documents must be filed in paper.

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the Court.

Format of Filings: An e-filed document must be a single PDF file.

Requirement of Paper Copies: Not for e-filings, but yes for e-submissions.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 8.70 et seq. of the California Rules of Court.

CALIFORNIA (Sixth District Court of Appeal)

Availability: E-filing is operational in the Sixth District, as are "e-"submissions" and "e-briefs." E-filing is explained as "the filing of an electronic document in lieu of a paper original and any required paper copies with the reviewing court." E-submission is explained as the submission of an electronic copy of a document to the reviewing court. An e-brief is a single disc (CD or DVD) containing linked and searchable copies of (a) the reporter's transcript, (b) the clerk's transcript or a joint appendix in lieu thereof, including all exhibits, (c) all cited authorities, and (d) all briefs, with all citations to the record, authorities and other briefs hyperlinked to the cited material.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory only for specified filings (including particular types of appellants' opening briefs in adult criminal appeals, juvenile delinquency appeals, and conservatorship appeals, and virtually all motions) by attorneys. E-filing is available and voluntary for attorneys and self-represented parties for the following documents: Civil Case Information Statement; First Request for Extension of Time (civil or criminal appeal only); Appellant's Request for Dismissal-Civil Case (before appeal fully briefed); Certificate of Interested Entities or Persons; Change of Address; Substitution/Association of Attorney; Appellant's Abandonment/Request for Dismissal – Criminal/Juvenile Case (before appeal fully briefed); Errata to a brief ; Informal Response to Petition for Writ of Habeas Corpus; Notice of Settlement; and Stipulation for Extension of Time. An electronic copy of other briefs, as well as petitions and oppositions, from attorneys must be e-submitted (not e-filed) through a portal; this is voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: See above.

E-Service: A party that e-files agrees to accept service at the electronic service address that the party has furnished to the court.

Format of Filings: An e-filed document must be a single, text-searchable PDF file.

Requirement of Paper Copies: Not for e-filings, but yes for e-submissions.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The Court receives for filing electronic clerk's transcripts from Monterey County in criminal appeals, and will soon have two other counties filing electronic clerk's transcripts. While the clerk's transcript is electronic only, the reporter's transcript is filed in paper due to

CCP Section 271(a), which states that the original reporter's transcript shall be on paper.

E-Filing Rules/Orders: Rule 8.70 et seq. of the California Rules of Court; and Sixth District Misc. Orders 12-2, 12-3, and 12-4.

COLORADO (Supreme Court and Court of Appeals)

Availability: E-filing through "ICCES" (Integrated Colorado Courts E-filing System) is operational in the Colorado Supreme Court and Court of Appeals.

Voluntary/Mandatory; Authorized Users: E-filing is not mandatory at this time, but is encouraged for all represented parties. Self-represented parties may not e-file in appellate cases.

Types of Cases or Documents Included/Excluded from E-Filing: All case classes and types are available for e-filing. E-filing of sealed documents is allowed.

E-Service: The e-filing system performs e-service.

Format of Filings: All documents must be submitted by either (1) directly uploading the document from a word processing format (such as Word or Word Perfect) to the e-filing system, or (2) electronically converting the document from a word processing format into a PDF format and then directly uploading the PDF document to the e-filing system.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Hyperlinks in briefs to the authorities cited therein, to the record, if in electronic form, and to any electronic appendices, are not required, but are highly desirable and strongly encouraged.

Other Notable Features:

E-Filing Rules/Orders: Chief Justice Directive 11-01 and Colorado Appellate Rule 30.

CONNECTICUT (Supreme Court and Court of Appeals)

Availability: The electronic submission of briefs through an e-services portal is operational in the Supreme Court.

Voluntary/Mandatory; Authorized Users: Attorneys may, but are not required to, electronically submit Supreme Court briefs.

Types of Cases or Documents Included/Excluded from E-Filing: Only Supreme Court briefs may be electronically submitted. Electronic submission of appendices or any other material is prohibited.

E-Service: An e-mail confirmation from the Supreme Court will be sent to the submitting party upon the successful electronic submission of a brief. A party who has electronically submitted a brief must notify counsel of record and self-represented parties of such submission. This may be done by e-mail or by conventional mail. If done by e-mail, a PDF copy of the brief must be attached. Proof of notice, in whatever form provided, must be retained for the pendency of the appeal. This does not supplant the certification requirement that must be satisfied when a paper brief is filed.

Format of Filings: An electronically submitted Supreme Court brief must be in Portable Document Format (PDF). Direct conversion of documents to .pdf format is strongly encouraged. Regardless of the method used to create the .pdf document (conversion or scanning), the file size may not exceed 1.5 megabytes.

Requirement of Paper Copies: Yes. Electronic submission of a Supreme Court brief does not eliminate the requirement of filing a paper brief and the appropriate number of copies in accordance with applicable rules.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: In addition to the availability of electronic submission for Supreme Court briefs, both the Supreme Court and the Court of Appeals permit the electronic mail filing, to a designated e-mail address, of motions for extension of time and oppositions thereto. E-mail filing is not allowed for any other type of filing. In addition, for motions for extension of time and oppositions, e-mail filing is not available unless all counsel and self-represented litigants of record have e-mail capability.

E-Filing Rules/Policies: Supreme Court Guidelines for Electronic Submission of Briefs; Technical Standards and Procedures for Filing Motions for Extension of Time and Opposition Thereto.

DELAWARE (Supreme Court)

Availability: E-filing has been operational in the Delaware Supreme Court since 2005.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: All categories of appeals and all categories of documents (including sealed documents) are subject to e-filing.

E-Service: The e-filing system performs service on all case participants who are registered with the system.

Format of Filings: Each electronically filed document must be filed in Word, WordPerfect, TIFF or PDF format. To the extent practicable, it must be formatted in accordance with the applicable rules governing formatting of paper documents, and in such other and further format as the clerk may require from time to time. A document may exceed page limitation rules to a maximum of two (2) additional pages when the additional pages are attributed to the electronic conversion or filing process. The e-filing system will automatically convert any Word, WordPerfect or TIFF file to PDF format, but the original format will also be available for downloading.

Requirement of Paper Copies: Yes. The required number of paper copies of a notice of interlocutory appeal, a brief, and/or an appendix must be filed by the next business day.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The PDF versions of e-filed documents constitute the official record of the court.

E-Filing Rules/Policies: Rule 10.1 and Rule 10.2 of the Rules of the Supreme Court; E-File Administrative Procedures.

FLORIDA (Supreme Court)

Availability: E-filing in the Supreme Court through the Florida Courts E-Filing Portal is operational.

Voluntary/Mandatory; Authorized Users: E-filing through the Portal has been mandatory for all attorneys since April 2013. Non-attorney parties and attorneys not in good standing with The Florida Bar are currently not permitted to file through the Portal and must continue to file in paper format pursuant to the Florida Rules of Appellate Procedure and the Florida Rules of Judicial Administration; as of June of 2014, however, non-attorneys parties will be permitted to e-file through the Portal.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, including transmittal and cover letters, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: The Portal provides the ability for registered participants who are e-filing documents to identify the name and up to a specified number of e-mail addresses of other attorneys or parties participating in that particular case to receive service of that document electronically. Electronic service through the Portal satisfies applicable court rules concerning service.

Format of Filings: Documents may be submitted in an Adobe portable document format ("PDF"), Microsoft Word 97 or higher, or Corel WordPerfect or other format which may be later specified by the Court. Each separate pleading or document filed electronically through the Portal must be submitted as a single complete document. Likewise, multiple documents must be submitted as separate documents.

Requirement of Paper Copies: No. No paper copy of any document filed through the Portal by an attorney is required to be filed and will not be accepted by the Court, absent a specific order by the Court. Any requirement for the filing of multiple paper copies that may remain in the rules of procedure is discontinued.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: No later than June 30, 2015, the clerks of the lower tribunals shall be required to provide the appellate courts an eRecord (an electronic record on appeal) in accordance with standards adopted on January 31, 2013, by the Florida Courts Technology Commission.

E-Filing Rules/Orders: Supreme Court Administrative Order No. AOSC13-7 (In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal); No. AOSC13-49 (In re: Electronic Service via the Florida Courts E-Filing Portal); No. AOSC14-28 (In re: Electronic Records on Appeal).

FLORIDA (First District Court of Appeal)

Availability: E-filing in the First District through the "eDCA" system is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for all attorneys and for other registered users of the system. Non-attorneys are encouraged, but not required, to become registered users. Non-attorneys who are not registered with eDCA may file pleadings in paper format.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, including transmittal and cover letters, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: Pleadings by parties are required to contain a certificate of service pursuant to Florida Rule of Appellate Procedure 9.420 and Florida Rule of Judicial Administration 2.516. If a pleading is served on the opposing side electronically by e-mail or some other electronic means, the certificate of service must state the electronic means used as well as the date of service. Electronic filings which do not contain a date of service may be rejected.

Format of Filings: All pleadings filed through eDCA must be in PDF format. Each separate pleading or document filed electronically through eDCA must be submitted as a single complete document. Likewise multiple documents must be filed separately.

Requirement of Paper Copies: No. Documents filed electronically are not required or permitted to be filed in duplicate paper format.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: Orders, opinions, and mandates of the court are delivered to registered users via links contained in automated e-mails from the court (Casemail) rather than via mailed paper copies.

E-Filing Rules/Orders: First District Administrative Order 10-3 (In re: Electronic Filing of Pleadings in the First District Court of Appeal); First District Administrative Order 10-4 (In re: Electronic Filing of Records on Appeal, Registration and Filing of Court Reporter Extensions of Time, and Other Pleadings Filed after September 1, 2010); First District Administrative Order 12-1 (In re: Electronic Transmission of Court Orders to Registered eDCA Users); First District Administrative Order 12-2 (In re: Electronic

Transmission of Court Opinions to Registered eDCA Users); and First District Administrative Order 12-3 (In re: Electronic Transmission of Court Mandates to Registered eDCA Users).

FLORIDA (Second District Court of Appeals)

Availability: E-filing in the Second District through the Florida Courts E-Filing Portal has been operational since 2013.

Voluntary/Mandatory; Authorized Users: E-filing by licensed attorneys is mandatory. Non-attorney parties and attorneys not in good standing with The Florida Bar are currently not permitted to file through the Portal and must continue to file in paper format pursuant to the Florida Rules of Appellate Procedure and the Florida Rules of Judicial Administration; as of June of 2014, however, non-attorneys parties will be permitted to e-file through the Portal.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, including transmittal and cover letters, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: The Portal provides the ability for registered participants who are e-filing documents to identify the name and up to a specified number of e-mail addresses of other attorneys or parties participating in that particular case to receive service of that document electronically. Electronic service through the Portal satisfies applicable court rules concerning service.

Format of Filings: Documents may be submitted in an Adobe portable document format ("PDF"), Microsoft Word 97 or higher, or Corel WordPerfect or other format which may be later specified by the Court. Each separate pleading or document filed electronically through the Portal must be submitted as a single complete document. Likewise, multiple documents must be submitted as separate documents.

Requirement of Paper Copies: No. No paper copy of any document filed through the Portal by an attorney is required to be filed and will not be accepted by the Court, absent a specific order by the Court. Any requirement for the filing of multiple paper copies that may remain in the rules of procedure is discontinued.

Hyperlinks in Briefs and Appendices: An appendix submitted with a brief, motion, petition or response must be properly indexed and either bookmarked or hyperlinked and fully searchable.

Other Notable Features: The Second District requires trial court clerks (in several counties) and agency clerks to transmit the record electronically. The electronic record must be properly indexed and either bookmarked or

hyperlinked and, if possible, fully searchable. Transcripts must also be filed electronically. In addition, the Second District requires lower tribunal clerks to file case-initiation documents and other "routine" clerk-to-clerk transmissions electronically through the Portal.

E-Filing Rules/Orders: Supreme Court Administrative Order No. AOSC13-29 (In re: Electronic Filing in the Second District Court of Appeal via the Florida Courts E-Filing Portal; Electronic Records on Appeal); Second District Administrative Order 2013-4 (In re: Electronic Filing of Appellate Records); Second District Administrative Order 2014-1 (In re: Electronic Transmission of Case Initiation Documents by Lower Tribunal Clerks).

FLORIDA (Third District Court of Appeal)

Availability: E-filing in the Third District through the "eDCA" system is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, including transmittal and cover letters, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: The Court uses the eDCA system to serve registered users with orders, notices, opinions, and mandates. Pleadings by parties are required to contain a certificate of service pursuant to Florida Rule of Appellate Procedure 9.420. If a pleading is served on the opposing side electronically by e-mail or some other electronic means, the certificate of service must state the electronic means used as well as the date of service. Electronic filings which do not contain a date of service may be rejected.

Format of Filings: All pleadings filed through eDCA must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: An appendix submitted with a brief, motion, petition or response must be properly indexed and either bookmarked or hyperlinked and fully searchable.

Other Notable Features: The Third District requires trial court clerks (in certain counties) to transmit the record electronically. The electronic record must be properly indexed and either bookmarked or hyperlinked and fully searchable. Transcripts must also be filed electronically. In addition, the Third District requires lower tribunal clerks to file case-initiation documents electronically.

E-Filing Rules/Orders: Third District Administrative Orders A03D13-03 (Re: E-Mail Service of Court Documents and E-Filing by Registered Users of eDCA); A03D13-02 (Re: Electronic Filing of Notices of Appeal by Lower Tribunal Clerks and Papers and Motions by Court Reporters); A03D13-04 (Re: Electronic Fling of Appellate Records); and A03D13-05 (Re: Electronic Filing of Appendices).

FLORIDA (Fourth District Court of Appeal)

Availability: E-filing in the Fourth District through the "eDCA" system is operational.

Voluntary/Mandatory; Authorized Users: E-filing has been mandatory for attorneys since 2013. Only attorneys with a bar number, court reporters, administrative agencies and judges may register with eDCA.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, other than the transmittal form required to be submitted with notices of appeal, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: The Court uses the eDCA system to serve registered users with orders, notices, opinions, and mandates. Pleadings by parties are required to contain a certificate of service pursuant to Florida Rule of Appellate Procedure 9.420. If a pleading is served on the opposing side electronically by e-mail or some other electronic means, the certificate of service must state the electronic means used as well as the date of service. Electronic filings which do not contain a date of service may be rejected.

Format of Filings: All pleadings filed through eDCA must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: An appendix submitted with a brief, motion, petition or response must be properly indexed and either bookmarked or hyperlinked and fully searchable.

Other Notable Features: The Fourth District requires trial court clerks (in certain counties) and agency clerks to transmit the record electronically. The electronic record must be properly indexed and either bookmarked or hyperlinked and fully searchable. Transcripts must also be filed electronically. In addition, the Fourth District requires lower tribunal clerks to file case-initiation documents electronically.

E-Filing Rules/Orders: Fourth District Administrative Orders AO2013-01 (Re: E-Mail Service of Court Documents and E-Filing by Registered Users of eDCA); A02013-02 (Re: Electronic Filing of Notices of Appeal by Lower Tribunal Clerks and Papers and Motions by Court Reporters); Corrected A02013-03 (Re: Electronic Fling of Appellate Records); and A02013-04 (Re: Electronic Filing of Appendices).

FLORIDA (Fifth District Court of Appeal)

Availability: E-filing in the Fifth District through the "eDCA" system is operational.

Voluntary/Mandatory; Authorized Users: E-filing has been mandatory for attorneys since 2013. E-filing is voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: All case types and all document types are subject to e-filing, except: letters and correspondence addressed to the Court or the Clerk of the Court, other than the transmittal form required to be submitted with notices of appeal, are not permitted to be filed electronically with the Court and may not be included with electronic pleadings.

E-Service: The Court uses the eDCA system to serve registered users with orders, notices, opinions, and mandates. Pleadings by parties are required to contain a certificate of service pursuant to Florida Rule of Appellate Procedure 9.420. If a pleading is served on the opposing side electronically by e-mail or some other electronic means, the certificate of service must state the electronic means used as well as the date of service. Electronic filings which do not contain a date of service may be rejected.

Format of Filings: All pleadings filed through eDCA must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: An appendix submitted with a brief, motion, petition or response must be properly indexed and either bookmarked or hyperlinked and, if possible, fully searchable.

Other Notable Features: The Fifth District requires lower tribunal clerks to file case-initiation documents electronically.

E-Filing Rules/Orders: Fifth District Administrative Orders AO5D13-05 (Re: E-Filing by Registered Users of eDCA); AO5D12-02 (Re: Electronic Filing of Notices of Appeal by Lower Tribunal Clerks and Papers and Motions by Court Reporters); and AO5D14-01 (Re: Electronic Filing of Appendices).

GEORGIA (Supreme Court)

Availability: E-filing in the Supreme Court through the "SCED" system has been operational since 2010.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for Georgia attorneys in good standing. Pro hac vice attorneys are eligible to use the system. Law students and self-represented parties are not eligible to use the system.

Types of Cases or Documents Included/Excluded from E-Filing: No case types or document types are categorically excluded by rule from e-filing.

E-Service: The e-mail notification feature generated by the electronic filing system does not constitute service and does not replace Supreme Court Rule 14's service requirements.

Format of Filings: All documents must be in pdf searchable format (300 dpi) and no larger than 15 MB.

Requirement of Paper Copies: No. Electronic filing of an electronic document in conformity with the Court's e-filing standards is in lieu of a paper original and copy.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The Georgia Supreme Court expects by mid-2014 to have implemented the technology to receive records on appeal electronically.

E-Filing Rules: Rules 13 and 15 of the Rules of the Supreme Court of Georgia.

GEORGIA (Court of Appeals)

Availability: E-filing in the Court of Appeals through the "EFast" system is operational.

Voluntary/Mandatory; Authorized Users: At this time, only members of the State Bar of Georgia are able to e-file, and e-filing is voluntary for them. The Court plans to expand use to permit pro hac vice attorneys and pro se litigants to use the system eventually.

Types of Cases or Documents Included/Excluded from E-Filing: The e-filing system is available for most pleadings except applications and certain emergency motions.

E-Service: The Court uses the system to electronically distribute its orders and opinions to registered users, who do not receive paper copies. Although the Court will provide notice to counsel of record of an e-filing by a registered user, the counsel e-filing the document is still responsible for official service of his or her document on the opposing counsel or pro se party.

Format of Filings: Documents can be submitted in portable document format (.pdf) only. A .pdf for editing is preferred over a scanned .pdf document because it permits the text of the document to be searched. These files should not contain embedded files, scripts, tracking tags or executable files.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices:

Other Notable Features:

E-Filing Rules: Rule 46 (Electronic Filing of Documents) of the Rules of Court of Appeals; see also Questions and Answers re EFast (Updated October 24, 2012), available on the Court's website.

HAWAII (Supreme Court and Intermediate Court of Appeals)

Availability: E-Filing in the Hawaii Supreme Court and the Intermediate Court of Appeals through the "JEFS" system is operational.

Voluntary/Mandatory; Authorized Users: Attorneys must e-file unless excused by court order. Self-represented parties may elect to e-file, but if the self-represented party elects to e-file, he or she must seek permission from the court to return later to paper filing.

Types of Cases or Documents Included/Excluded from E-Filing: Currently, all of the types of cases that may be heard by the Hawaii Intermediate Court of Appeals and the Hawaii Supreme Court may be initiated electronically. Once a case is initiated electronically, all subsequent filings by attorneys and by self-represented parties (if registered in the system) must be submitted electronically. This includes documents that are sealed by court order and documents proposed to be submitted under seal or for in camera review.

E-Service: Service is performed electronically by the JEFS system. A notice of electronic filing is e-mailed to parties who are JEFS users; the notice itself is sufficient to demonstrate service. The party who e-filed a document must conventionally serve parties who are not JEFS users.

Format of Filings: Only Adobe PDF documents may be e-filed.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: A notice of appeal filed through JEFS is deemed to have been properly filed in the court or agency from which the appeal is taken. E-filed documents constitute the official court record.

E-Filing Rules: Hawaii Electronic Filing and Service Rules.

ILLINOIS (Supreme Court)

Availability: E-filing is operational in the Supreme Court.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary. Attorneys admitted to and in good standing with the Court and other registered users, including pro se litigants and attorneys licensed in other jurisdictions appearing in a specific case pro hac vice, may file documents with the Court electronically over the internet as provided in the Supreme Court of Illinois Electronic Filing User Manual.

Types of Cases or Documents Included/Excluded from E-Filing: All cases on the Court's general docket and attorney disciplinary matters on the Court's miscellaneous docket are available for e-filing, including the following types of pleadings: administrator's statement of costs (MR Docket); answer; appearance; brief; hearing board report; motion; notice of filing; petition; petition for leave to file exceptions (MR Docket); petition for leave to appeal (General Docket); petition for rehearing; proof of service; reply; response; and review board report. Confidential, impounded and sealed documents must be submitted conventionally to the Clerk's office for filing; however, motions for leave to file a document under seal may be e-filed and designated as such at the time of e-filing.

E-Service: A document filed electronically by a party must be served on all parties and/or counsel of record in accordance with general Supreme Court Rules. The proof of service must advise all parties and/or counsel of record that the document was served and filed by electronic means on the Clerk's office.

Format of Filings: An e-filed document must be in text-searchable PDF format compatible with the latest version of Adobe Reader. Except as otherwise provided, an e-filed document created by a word processing program must not be a scan of the original but must instead be converted directly into a PDF file using Adobe Acrobat, a word processing program's PDF conversion utility, or another software program.

Requirement of Paper Copies: Yes. In addition to the electronically filed document, registered users must submit the original and the number of paper copies required by Supreme Court Rules in paper filings. The original and paper copies must be received by the Clerk's office, if payment is not applicable, within five (5) days following the electronic review notification indicating acceptance of the e-filed document or, if payment is applicable, within five (5) days following receipt of the electronic payment transaction receipt.

Hyperlinks in Briefs and Appendices: An e-filed document item may contain hyperlinks to another part of the same document, an external source cited in the document, an appendix item associated with the document, an embedded case, or a record cite. A hyperlink within an appendix item is also permitted. Any external material behind the link is not considered part of the e-filing.

Other Notable Features in Illinois: The Second, Third, Fourth, and Fifth District Appellate Courts are operating an "electronic transfer of record on appeal" pilot that allows the record on appeal for cases originating in specified counties to be transferred electronically to the District Appellate Court. Attorneys, parties and the Appellate justices can electronically view, access and work from a mirror copy of the official record on appeal.

E-Filing Rules/Orders: Supreme Court Order M.R. 18368 (In re: Electronic Filing Pilot Project in the Supreme Court of Illinois, effective March 1, 2013), which incorporates the Supreme Court of Illinois Electronic Filing User Manual.

IOWA (Supreme Court and Court of Appeals)

Availability: The Iowa Supreme Court and Court of Appeals began e-filing on a pilot basis in February 2014.

Voluntary/Mandatory; Authorized Users: Currently, e-filing is available on an invitation-basis only. Participating e-filers include the appellate defender and the attorney general (for criminal appeals), along with certain other attorneys and some self-represented prisoners who have requested and received permission.

Types of Cases or Documents Included/Excluded from E-Filing: In the invitation-based pilot program, approximately 25% of Iowa's appellate cases are e-filed; almost all cases involving the appellate defender are e-filed.

Other Notable Features: The Iowa appellate courts are currently working on the integration of the appellate system with the trial court system to achieve a comprehensive ability to electronically transfer documents and data between the systems. Once that is complete, appellate e-filing will be made more widely available to a greater number of users.

E-Filing Rules/Orders: Division XII of Chapter 16 of the Iowa Court Rules.

KANSAS (Supreme Court and Court of Appeals)

Availability: E-filing has been operational in the Supreme Court and Court of Appeals on a pilot basis since 2013.

Voluntary/Mandatory; Authorized Users: Currently, e-filing is in limited use in the appellate courts on an invitational basis to lawyers in private and public practice. Kansas expects to expand the availability of e-filing significantly by late 2014. A goal is to eventually open e-filing to self-represented litigants.

Types of Cases or Documents Included/Excluded from E-Filing:

E-Service: Under the Kansas Courts e-filing system, transmission of the "Notice of Electronic Filing" to a registered-user attorney who has appeared in the case constitutes valid service by electronic means.

Format of Filings: All documents filed electronically must be capable of being printed as paper documents without loss of content or appearance and must be stored in, or convertible to, a format that can be archived in accordance with Supreme Court specifications.

Requirement of Paper Copies: In the Court of Appeals, paper copies of e-filed documents are neither required nor accepted.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules/Orders: Supreme Court Administrative Order No. 268 (Re: Technical Standards Governing Electronic Filing and Transmission of Court Documents).

LOUISIANA (Supreme Court)

Availability: E-filing is operational in the Louisiana Supreme Court.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary, and only members in good standing of the Louisiana State Bar Association are eligible to become registered users of the e-filing system at this time.

Types of Cases or Documents Included/Excluded from E-Filing: Any document which may be filed by conventional filing may be electronically filed. A motion to electronically file sealed documents and the documents to be sealed, documents previously sealed by lower court order and/or documents that are confidential by operation of law may be filed electronically.

E-Service: The Louisiana Supreme Court's Data/Document Exchange will electronically mail a filing confirmation to the registered user who initiated the electronic filing of a document, as well as any other registered users designated in the electronically filed document. This notice cannot be substituted for the legal duty to serve the electronic document on parties and/or lower courts as required by order, rule or statute.

Format of Filings: An electronically filed document must be in text-searchable PDF-A format. Appendix and/or exhibit materials may be scanned if necessary, but should maintain 300 dots per inch when scanned.

Requirement of Paper Copies: Not required by rules.

Hyperlinks in Briefs and Appendices: An electronically filed document may contain hyperlinks to another part of the same document, a motion and order electronically filed with the document or an appendix and/or exhibit electronically filed with the document. No other hyperlinks are permitted.

Other Notable Features:

E-Filing Rules: Supreme Court Rule XLII (Electronic Filing).

LOUISIANA (Court of Appeal, Fourth Circuit)

Availability: The Court of Appeal, Fourth Circuit, began an e-filing pilot project on May 1, 2014 in criminal cases.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary and is restricted to those active members of the Louisiana State Bar Association who have been invited to participate in the pilot program. A filer who chooses to participate as an e-filer must thereafter file all documents electronically.

Types of Cases or Documents Included/Excluded from E-Filing: In the pilot program (which applies to both new and existing criminal cases), all documents filed by a participating attorney must be filed electronically, except for exhibits and sealed or confidential documents (which must be filed conventionally).

E-Service: The e-filer must serve other parties in the manner applicable to paper filings.

Format of Filings: An electronically filed document must be submitted in PDF with a minimum resolution of 200 dpi (dots per inch) that is not password protected or secured. Only black text on a white background is permitted. The size of an electronic document is limited to 20 MB; documents exceeding 20 MB must be divided into separate parts.

Requirement of Paper Copies: During the pilot program, an e-filing party must also file all documents in a paper format.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features in Louisiana: If the pilot program proves successful in criminal cases, the Fourth Circuit will consider expanding its program to include all cases in 2015. E-filing is not operational in the other Circuit Courts of Appeal, but the First Circuit and the Fifth Circuit have a voluntary e-notification program for attorneys. E-notification allows attorneys to receive notice through e-mail of filings and court orders.

E-Filing Rules: Louisiana Court of Appeal, Fourth Circuit, E-filing Pilot Program Rules.

MAINE (Supreme Judicial Court)

Availability: E-filing of briefs and appendices via e-mail is available in the Supreme Judicial Court of Maine.

Voluntary/Mandatory; Authorized Users: Parties are encouraged, but not required, to file an electronic copy of each brief filed. An electronic copy of a brief shall be e-mailed to the Clerk of the Law Court at the e-mail address provided by the Clerk in the written notice issued pursuant to the applicable rule.

Types of Cases or Documents Included/Excluded from E-Filing: Only briefs and appendices may be filed via e-mail.

E-Service: The e-mailed submission of an electronic copy of the brief does not constitute service of the brief on other parties.

Format of Filings: The electronic copy must be in the form of a single .pdf file. The electronic copy is due on the same date as the printed copies; however, only the filing of printed copies shall be considered in determining compliance with the filing deadlines set forth in the applicable rule.

Requirement of Paper Copies: Yes. The filing of an electronic copy is in addition to, and does not replace, the required filing of printed copies pursuant to the applicable rule.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: In 2014, the Legislature and Governor approved a $15 million bond for the judicial branch to establish a new case-management and electronic-filing system for all state courts.

E-Filing Rules: Rule 7 of the Maine Rules of Appellate Procedure.

MASSACHUSETTS (Appeals Court)

Availability: E-filing in the Appeals Court via e-mail is operational.

Voluntary/Mandatory; Authorized Users: E-filing via e-mail is mandatory for attorneys and self-represented parties (except for incarcerated self-represented parties) as to certain document types only, in both civil and criminal appeals.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing via e-mail is mandatory for attorneys and self-represented parties (except for incarcerated self-represented parties) for the following documents: docketing statements; all motions, oppositions, and letters after the case has been assigned to a panel for decision; and petitions for rehearing. For these documents, no paper original or copy is accepted without leave of court. Filing an electronic copy via e-mail (or on a CD-ROM) is mandatory for attorneys, but not for self-represented parties, for the following documents (among others): motions for leave to file late notice of appeal; motions to enlarge time to enter an appeal; and any other motions or oppositions to motions that are entered on the Single Justice docket. E-filing via e-mail is not available for the following documents (among others): briefs; appendices; motions to enlarge time to file briefs; and all motions, oppositions, and letters before the case has been assigned to a panel for decision.

E-Service: Upon agreement between the parties, a document that has been filed solely via e-mail may be served via e-mail.

Format of Filings: Documents submitted by e-mail must be in PDF format.

Requirement of Paper Copies: No for docketing statements, motions, oppositions, and letters after the case has been assigned to a panel for decision, and petitions for rehearing; yes for the e-filed documents on the Single Justice docket.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features in Massachusetts: Massachusetts recently signed a contract with Tyler Technologies for its Odyssey File & Serve e-filing product. The Appeals Court has been chosen as a pilot court. The Appeals Court expects to commence its pilot in early 2015, followed by the Supreme Judicial Court.

E-Filing Rules: Appeals Court Standing Order Requiring the Electronic Filing of All Motions and Letters Filed After Panel Assignment; Appeals Court Standing Order Governing Petitions to the Single Justice.

MICHIGAN (Court of Appeals)

Availability: E-filing in the Court of Appeals through Tyler Technologies' Odyssey File & Serve system is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for attorneys. Non-attorneys are not eligible to use the system.

Types of Cases or Documents Included/Excluded from E-Filing: The electronic filing and service program is available for all case types and can be used to initiate a new appeal or to submit documents in an existing appeal.

E-Service: The parties are responsible for accomplishing service of all filings as required by the applicable court rules. For this purpose, parties may accomplish service by first class mail, hand delivery, or e-mail pursuant to applicable rules. Alternatively, filers may use the Odyssey File & Serve electronic service option if they have the prior permission of the recipient to serve filings by e-service.

Format of Filings: All electronic filings must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Internal links, which point to other places within the same document, are permissible and will be accepted by the system. However, external links, which point to other documents, websites or other legal sources, can be risky and must be avoided in documents submitted to the Court. Use of external links can result in format errors preventing the document from being accepted by the system.

Other Notable Features:

E-Filing Rules/Policies: Michigan Court of Appeals Electronic Filing & Service Guidelines.

MISSISSIPPI (Supreme Court and Court of Appeals)

Availability: E-filing in the Supreme Court and Court of Appeals is operational.

Voluntary/Mandatory; Authorized Users: E-filing of briefs, motions, responses, and compliance documents is mandatory for attorneys. Only registered attorneys, as officers of the Court, are permitted to file electronically. Parties proceeding pro se are not eligible to file electronically unless the pro se party is a registered attorney in good standing and admitted to practice in the Court.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available only for briefs, motions, responses, and compliance documents. All other documents must be filed in paper (conventional) format at this time. All documents in sealed and confidential cases must be filed conventionally.

E-Service: The system will generate a Notice of Electronic Filing when any document is filed. This notice represents service of the document on attorneys who are registered participants with the system, but the filer must conventionally serve those parties who are not registered participants.

Format of Filings: Documents filed electronically must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules/Policies: Appellate E-Filing Administrative Procedures.

MISSOURI (Supreme Court and Court of Appeals)

Availability: E-filing in the Missouri Supreme Court and all districts of the Court of Appeals (Eastern, Southern, and Western) is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys. Only Missouri attorneys in good standing can file a case or document via the Missouri e-filing system. Self-represented litigants are not eligible to use the system at this time, but may be permitted to do so in a later phase.

Types of Cases or Documents Included/Excluded from E-Filing: The e-filing system is available for all filings in all appeals, with limited exceptions. Documents filed in confidential cases in the Supreme Court and in the Western District must be transmitted by electronic mail to the clerk's office rather than through the e-filing system. In the Eastern District, filings in confidential cases must be made through the e-filing system.

E-Service: Service of an e-filed document is made to registered users through the electronic filing system; parties who are not registered users must be served by other means.

Format of Filings: An e-filed document must be in PDF format.

Requirement of Paper Copies: No in the Supreme Court and in the Southern District; yes in the Eastern District and in the Western District.

Hyperlinks in Briefs and Appendices: Electronic documents that are part of the official court record must be self-contained and must not contain hyperlinks. An electronic copy of an e-filed document may be submitted on disc, and that electronic copy may "include hyperlinks to the complete text of any authorities cited therein and to any document or other material contained in the record on appeal. In order for the hyperlinks to function properly, the record (or the cited portions of the record) and authorities must be included on the same disc as the electronic document."

Other Notable Features:

E-Filing Rules/Orders: Rule 103 of the Rules of Civil Procedure; Supreme Court Operating Rule 27; Eastern District Local Rule 333; Southern District Local Rule 18; Western District Local Rule XII.

NEVADA (Supreme Court)

Availability: E-filing in the Nevada Supreme Court through the EFlex Electronic Filing System (by Tybera) is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary. Only attorneys admitted to practice law in the State of Nevada or Supreme Court settlement judges may e-file documents with the Nevada Supreme Court. Self-represented litigants are not eligible to e-file.

Types of Cases or Documents Included/Excluded from E-Filing: All documents may be filed electronically, except for sealed or confidential documents (which must be filed and served by conventional means).

E-Service: When the clerk's office accepts a document for filing, the electronic filing system automatically e-mails a notice to all counsel who are registered e-file users that the document has been filed and is available on the court's electronic filing system. This notice is considered valid and effective service of the document on e-file users and has the same legal effect as service of a paper document.

Format of Filings: An electronic document must be submitted in a portable document format (PDF) with a minimum resolution of 200 dpi (dots per inch). Only black text on a white background is permitted.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Each filed document must be self-contained, with links only to other documents submitted simultaneously or already in the court record. Thus, an e-filed document must not contain hyperlinks to external papers or websites, but hyperlinks to papers filed in the case are permitted.

Other Notable Features: For documents that have been electronically filed, the electronic version of the document constitutes the official court record.

E-Filing Rules: Nevada Electronic Filing Rules.

NEW JERSEY (Appellate Division)

Availability: E-filing in the Appellate Division through "eDATA" is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary, and is limited to licensed New Jersey attorneys.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all documents, except for certain types of sealed documents.

E-Service: Parties that e-file documents through eDATA may use e-mail to serve the e-filed document on other registered parties; service on non-attorneys and on non-registered attorneys must be done through mail or personal service.

Format of Filings: All documents filed through eDATA must be in PDF format.

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: E-filing is not available yet in the New Jersey Supreme Court.

E-Filing Rules: May 16, 2013 Notice to the Bar re Electronic Filing in the Appellate Division, with accompanying April 29, 2013 Supreme Court Order.

NEW YORK (Court of Appeals)

Availability: E-filing in the Court of Appeals through its "Court-PASS" system is operational.

Voluntary/Mandatory; Authorized Users: Parties with appeals, certified questions pursuant to section 500.27 of the Court of Appeals Rules of Practice, or judicial conduct matters before the New York State Court of Appeals must use the Court-PASS filing system for the submission of digital copies of records and briefs. The requirement applies to both New York attorneys and other filers.

Types of Cases or Documents Included/Excluded from E-Filing: At this time, e-filing through the Court-PASS system is available only for briefs and record material.

E-Service: The Court's rules do not require service of digital copies of briefs and record material. However, parties may agree among themselves to provide such documents to each other, in any mutually-agreeable fashion, including by e-mail.

Format of Filings: All digital submissions must be in text-searchable portable document format (PDF).

Requirement of Paper Copies: Yes. The Court requires the submission of briefs and record material in digital format as companions to the required number of copies of printed briefs and record material filed and served in accordance with its rules.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: Uploading digital submissions to Court-PASS does not satisfy the filing due dates set by the Clerk's Office in a scheduling letter or by operation of the Court's Rules of Practice. The filer is responsible for meeting applicable due dates by filing the required number of paper documents with the Clerk's Office. A document is "filed" with the Clerk's Office on the date of receipt of the paper document. The digital submissions must be uploaded to Court-PASS no later than the filing due date for paper documents.

E-Filing Rules: Rule 500.2 of the Court of Appeals Rules of Practice.

NEW YORK (Appellate Division, First Department)

Availability: E-filing in the Appellate Division, First Department, via e-mail is operational.

Voluntary/Mandatory; Authorized Users: Each party perfecting or answering an appeal must file, in addition to the requisite number of paper copies, one searchable PDF copy of the brief via e-mail, and each party filing an appendix (or record on appeal) must file, in addition to the requisite number of paper copies, one searchable PDF copy of the appendix (or record on appeal). Registration is not required to file via e-mail.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing via e-mail is available for briefs, appendices, and records on appeal.

E-Service: The party must serve opposing parties, through e-mail, with the e-mail filing at the time of the e-mail filing.

Format of Filings: Each brief, record on appeal or appendix filed and served by e-mail must be in a text-searchable portable document file (PDF) format, PDF/A compliant, not exceeding ten megabytes. The PDF document filed must conform to the filed original document submitted to the Court. Briefs and records (or appendices) must be bookmarked.

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: Although registration is not required to file via e-mail, attorneys are encouraged to register with the New York State Courts Electronic Filing System in anticipation of e-filing (as distinguished from e-mailing) PDF documents.

E-Filing Rules: Rule 600.11 of the First Department Rules.

NORTH CAROLINA (Supreme Court and Court of Appeals)

Availability: E-filing in the Supreme Court and the Court of Appeals through the NC Appellate Courts E-Filing site is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary. Attorneys, self-represented parties, and court reporters are eligible to register.

Types of Cases or Documents Included/Excluded from E-Filing: All documents may be filed electronically through the system, except: In the Court of Appeals, a filer cannot e-file TPR 3.1 cases, Records, 9(b)(5) Supplements, or Memos of Additional Authority (four paper copies must be sent).

E-Service: Service is not performed by the system. The filer is responsible for serving the other parties even when he/she electronically files a document.

Format of Filings: The only document format that is accepted is PDF.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The e-filing system is fully integrated with the case management system.

E-Filing Rules: Rule 26 of the North Carolina Rules of Appellate Procedure.

NORTH DAKOTA (Supreme Court)

Availability: E-filing in the North Dakota Supreme Court via e-mail is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for attorneys and self-represented parties. Parties may electronically file documents with the Supreme Court by submitting the documents via e-mail to a designated address.

Types of Cases or Documents Included/Excluded from E-Filing: No case types or document types are categorically excluded by rule from e-filing.

E-Service: If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service cannot accept documents served electronically.

Format of Filings: All documents submitted to the court in electronic form must be in approved word processing format or portable document format (PDF). All paragraphs must be numbered in documents submitted electronically. Reference to material in such documents must be to paragraph number, not page number.

Requirement of Paper Copies: No, but the Court charges the filer an "internal reproduction" fee based on the type and length of the document.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features: The Supreme Court previously required parties to file electronic copies of their briefs on a computer disk. Now, in instances of both paper-filed briefs and e-filed briefs, the Court receives the electronic version via e-mail.

E-Filing Rules/Orders: North Dakota Supreme Court Administrative Order 14.

OHIO (First Appellate District)

Availability: E-filing is operational in the First Appellate District (Hamilton County Court of Appeals).

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for attorneys and self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: Most pleadings and other papers may be filed with the clerk of courts electronically via the internet. However, any "entry that must be signed by a judge of the court or any filing for which a party is obligated to settle final case costs will not be accepted for electronic filing."

E-Service: Not addressed.

Format of Filings: An e-filed document must be in PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 13.1 of the Local Rules of the First Appellate District.

OHIO (Eighth Appellate District)

Availability: E-filing in the Eighth Appellate District through the Cuyahoga County Clerk of Courts E-Filing Portal is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: Any document to be filed in an appeal or original proceeding before the Eighth District Court of Appeals must be filed with the Clerk electronically, with limited exceptions. Documents filed under seal shall not be filed electronically or scanned by the Clerk into electronic format nor uploaded to the court's case management system; the Clerk shall maintain all documents filed under seal in paper form only.

E-Service: The system does not perform service. Service of documents filed electronically must be accomplished in the manner prescribed by applicable rules for paper filings.

Format of Filings: E-filed documents, including attachments, must be filed in searchable (but not editable) PDF format.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: External electronic links, to material outside the filed document, are strictly prohibited. Internal links to other parts of the same filing are permissible.

Other Notable Features:

E-Filing Rules: Rule 13.1 of the Local Rules of the Eighth Appellate District.

OHIO (Tenth Appellate District)

Availability: E-filing in the Tenth Appellate District through the Franklin County Clerk of Court's e-filing system is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for almost all document types, with specified exceptions (e.g., evidentiary materials in original actions must be filed in paper form).

E-Service: The e-mail notice of filing generated by the e-filing system does not constitute service in the Tenth District Court of Appeals. Service may be made by personal service, by mail, or, where the opposing party is an e-filing account holder, by attaching a copy of the pleading being served to an e-mail sent to an e-mail address registered in the e-filing system.

Format of Filings: All pleadings, briefs, and other papers filed or presented to the Court for consideration in appeals and original actions must be in writing. Writing for purposes of e-filed documents means that the documents when printed must produce a clear black image in at least 16 point type.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 1 of the Local Rules of the Tenth Appellate District.

OHIO (Eleventh Appellate District)

Availability: E-filing of electronic copies of briefs in the Eleventh Appellate District via e-mail is operational.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory unless good cause is shown as to why an electronic version of the brief cannot be submitted.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing through e-mail is available for briefs.

E-Service: Not addressed.

Format of Filings: The electronic copy of the brief must be submitted to the court in Microsoft Word format, either utilizing version 2007 or 2010, or in WordPerfect format and saved as a "Read-Only" document. The court has announced that it is not able to utilize a PDF file.

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Rule 16 of the Local Rules of the Eleventh Appellate District.

OREGON (Supreme Court and Court of Appeals)

Availability: E-filing in the Supreme Court and the Court of Appeals is operational

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for attorneys. Only Oregon licensed attorneys are eligible to register with the system

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all case types and document types, except sealed documents. A document filed under seal, including a motion requesting that a simultaneously filed document be filed under seal or a document with an attachment that is sealed by statute or court order, must be filed conventionally.

E-Service: Electronic service through the system is available only for service on other registered e-filers. The e-filer must serve others via conventional service. The system has a feature that permits an e-filer to view the e-filing status of other parties or attorneys on the case to determine who may be e-served. Registration as an e-filer constitutes consent to receive service via the e-filing system. Initiating documents (notice of appeal, petition for judicial review, etc.) can also be e-filed but cannot be electronically served through the e-filing system. Those documents must be conventionally served, even if all attorneys are registered e-filers.

Format of Filings: Any document filed via the e-filing system must be in Portable Document Format (PDF) that is compatible with the e-filing system requirements and that does not exceed 25 megabytes. The PDF document must allow text searching and must allow copying and pasting text into another document.

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: An e-filed document may contain one or more hyperlinks to other parts of the same document or hyperlinks to a location outside of the document that contains a source document for a citation. When a party e-files a brief or other memorandum that is accompanied by excerpts of the record or attachments, the party is encouraged to hyperlink citations to the relevant portions of the excerpts or attachments.

Other Notable Features:

E-Filing Rules: Chapter 16 of the Oregon Rules of Appellate Procedure.

PENNSYLVANIA (Supreme Court and Commonwealth Court)

Availability: E-filing in the Pennsylvania Supreme Court and the Commonwealth Court through the "PACFile" system is operational.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for both attorneys and self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all case types and document types. Sealed or confidential documents may be submitted for electronic filing in a manner that maintains confidentiality under applicable law.

E-Service: Service of electronic filings on registered attorneys and registered self-represented parties is made automatically by the PACFile system.

Format of Filings: The e-filing system supports the following formats: PDF, .doc(x), and TIFF. An e-filed document must not exceed 500 MB (soon to be increased), and should be in black text on a white background because color does not upload clearly. Scanned documents should have a minimum resolution of 300 dpi (dots per inch).

Requirement of Paper Copies: Yes, one paper version for archival purposes.

Hyperlinks in Briefs and Appendices: The e-filing system does not support hyperlinks.

Other Notable Features: E-filing in the Superior Court is scheduled to go live in late 2014 or early 2015.

E-Filing Rules: Supreme Court Order No. 418, Judicial Administration Docket (In re: Electronic Filing System in the Appellate Courts).

SOUTH DAKOTA (Supreme Court)

Availability: E-filing in the Supreme Court via e-mail is operational.

Voluntary/Mandatory; Authorized Users: E-filing of briefs and appendices is mandatory for attorneys. E-filing of any other notices, petitions, pleadings, motions or documents is optional for attorneys. For self-represented parties, e-filing is optional for all filings.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing via e-mail is available as to all case types and document types, including sealed and confidential documents.

E-Service: Any attorney not exempt from e-filing or a party filing electronically must designate an e-mail address for accepting electronic service and for receiving electronic service with the Supreme Court clerk. If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service has not designated an e-mail address for receiving electronic service. If a recipient cannot accept electronic service of a document, service by other means is required.

Format of Filings: All documents submitted to the Court in electronic form must be in approved word processing format which shall then be converted by the Supreme Court clerk to portable document format (.pdf). An appendix may be filed electronically in portable document format (.pdf).

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features:

E-Filing Rules: Supreme Court Order in the Matter of the Adoption of a New Rule Relating to Supreme Court Electronic Filing Rules.

TEXAS (all appellate courts)

Availability: E-filing is operational in the Supreme Court, the Court of Criminal Appeals, and the 14 Courts of Appeal.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and voluntary for self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all case types and document types. However, documents filed under seal, subject to a pending motion to seal, or to which access is otherwise restricted by law or court order must not be electronically filed. For good cause, an appellate court may permit a party to file other documents in paper form in a particular case.

E-Service: A document filed electronically must be served electronically through the electronic filing manager if the e-mail address of the party or attorney to be served is on file with the electronic filing manager. If the e-mail address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney by methods applicable to paper-filed documents.

Format of Filings: An electronically filed document must: (1) be in text-searchable portable document format (PDF); (2) be directly converted to PDF rather than scanned, if possible; (3) not be locked; (4) be combined with any appendix into one computer file, unless that file would exceed the size limit prescribed by the electronic filing manager; and (5) otherwise comply with the judiciary's technology standards.

Requirement of Paper Copies: No in the Supreme Court and in the Courts of Appeal; yes in the Court of Criminal Appeals.

Hyperlinks in Briefs and Appendices: The e-filing manual recommends: "Consider including cases and other authorities in your appendix and creating hyperlinks in the body of the brief to those authorities. Or you can hyperlink your citations to online resources like Westlaw, Lexis, and the legislature's website. Hyperlinks are not required by the rules, but justices and their staff frequently comment that they like hyperlinked briefs. If you have the time and the resources, you can provide the court with a brief that contains hyperlinks to every citation in the brief, including the citations listed in your Index of Authorities."

Other Notable Features: Unless the trial court clerk receives permission from the appellate court to file the record in paper form, the clerk must file the record electronically with electronic bookmarks to mark the first page of

each document in the clerk's record. Also, if proceedings were recorded stenographically, the court reporter or recorder must file the reporter's record electronically.

E-Filing Rules: Rules 9.1 – 9.5 of the Texas Rules of Appellate Procedure.

VERMONT (Supreme Court)

Availability: E-filing of briefs in the Supreme Court via e-mail is operational.

Voluntary/Mandatory; Authorized Users: A party represented by counsel must file one copy of each brief in Portable Document Format (PDF) in addition to the paper copies required, unless counsel certifies that submission of a PDF document is not practical or would constitute a hardship. Upon that certification, counsel may submit an electronic version of the brief using WordPerfect or Microsoft Word software. The electronic version of the brief may be submitted on a disk, CD-ROM, or as an attachment to an e-mail message to the Vermont Supreme Court's e-mail filing address. A self-represented party has the option to file one copy of each brief either in electronic or in unbound paper format, in addition to the required number of paper copies.

Types of Cases or Documents Included/Excluded from E-Filing: In the Supreme Court, e-filing is available only for briefs.

E-Service: The party e-filing the brief must serve other parties in the same manner applicable to paper filings.

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Not addressed.

Other Notable Features in Vermont: At this time, e-filing through a portal ("eCabinet") is mandatory for attorneys and voluntary for self-represented parties in two of the county superior (trial) courts. When the case on appeal contains an electronic case file, the appellant is not required to assemble and file a printed case. The parties' briefs shall instead directly cite the particular document in the trial court record, identified by document name and file date, as well as the relevant page number(s).

E-Filing Rules: Vermont Rules for Electronic Filing; Rules 30 and 32 of the Vermont Rules of Appellate Procedure.

VIRGINIA (Supreme Court and Court of Appeals)

Availability: Limited e-filing in the Supreme Court and Court of Appeals via e-mail has been operational since 2005.

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for attorneys and for self-represented parties, except for pro se prisoners and others who establish good cause to be excused.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for petitions for rehearing in both appellate courts and for electronic copies of paper-filed briefs in the Supreme Court. All petitions for rehearing must be filed as an attachment to an e-mail sent to an address created specifically for that purpose. In addition, a party filing a Supreme Court brief must file one electronic version, in Adobe Acrobat Portable Document Format (PDF) format, unless excused by the Court for good cause shown. The electronic version may be filed on CD-ROM or e-mailed to a Supreme Court address created specifically for that purpose.

E-Service: The party e-filing a document via e-mail is responsible for serving other parties, which may be done on opposing counsel via e-mail.

Format of Filings: An e-filed document must be in PDF.

Requirement of Paper Copies: No for petitions for rehearing; but yes for briefs because the electronic version is not the official filing.

Hyperlinks in Briefs and Appendices: Through case-processing orders (not by Rule), the Court of Appeals requires attorneys, but not self-represented parties, to file a "digital brief package," in PDF, on a CD or DVD in addition to the required paper copies. The digital brief package of the brief and appendix must be bookmarked and may be hyperlinked to cited legal authorities.

Other Notable Features: In lieu of the 15 tangible copies of an appendix that are otherwise required in the Supreme Court, the appellant may file 10 tangible copies of the appendix and 10 electronic copies of the appendix as an Adobe Acrobat Portable Document Format (PDF) document on CD-ROMs. If the appellant files 10 electronic copies with the Supreme Court, then he/she must also serve one electronic copy on counsel for each party separately represented in addition to the one tangible copy that is required.

E-Filing Rules: Rules 5:20, 5:20A, 5:26, and 5:32 of the Rules of the Supreme Court of Virginia.

WASHINGTON (Supreme Court)

Availability: E-filing in the Supreme Court via e-mail is operational.

Voluntary/Mandatory; Authorized Users: E-filing via e-mail is voluntary for both attorneys and self-represented parties. No registration is required. In addition, the submission of briefs and appendices on compact disc read-only memory (CD-ROM), referred to as "corresponding briefs" and filed as companions to printed briefs, is allowed and encouraged in the Supreme Court and in each of the three divisions of the Court of Appeals.

Types of Cases or Documents Included/Excluded from E-Filing: Any document (except original actions, petitions for review, personal restraint petitions or those pleadings that require a filing fee) may be filed as an attachment to e-mail.

E-Service: If all counsel and/or the parties agree to service by e-mail prior to the submission of a document to the court, then the filer may serve the document by sending it to the other parties using the "cc:" line of the e-mail and need not file an additional certificate of service. Otherwise, the filer must serve other parties in the same manner applicable to paper filings.

Format of Filings: The use of PDF format or Microsoft Word is encouraged, but not required, for attachments to e-mail filings. "Corresponding briefs" must come fully equipped with their own viewing program; or, if the disk does not contain its own viewing program, the briefs must be viewable within a version of a program such as Adobe Acrobat, Microsoft Word Viewer, or WordPerfect that is downloadable from the Internet at no cost to the user.

Requirement of Paper Copies: No for e-mail filings; yes for "corresponding briefs."

Hyperlinks in Briefs and Appendices: A CD-ROM with corresponding briefs must contain all appellate briefs filed by all parties. Corresponding briefs may provide hypertext links to the report of proceedings and clerks papers and to materials cited in the briefs such as cases, statutes, treatises, law review articles, and similar authorities. If any briefs are hyperlinked, all briefs must be similarly hyperlinked by the submitting party. All materials to which a hyperlink is provided must be included on the disc.

E-Filing Rules/Policies: GR 30 of the Washington State Court Rules (General Rules); RAP 10.9 of the Rules of Appellate Procedure; Supreme Court Clerk's Office Protocols for Electronic Filing.

Washington (Court of Appeals, Divisions II and III)

Availability: E-filing in the Court of Appeals, Divisions II and III, is operational via a portal.

Voluntary/Mandatory; Authorized Users: E-filing is voluntary for both attorneys and self-represented parties.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all case types and document types.

E-Service: The filer may use the e-service feature in the e-filing system or may serve via e-mail from the filer's own e-mail account.

Format of Filings: Only one file may be attached and the file type must be PDF and word searchable (optical character recognition).

Requirement of Paper Copies: No.

Hyperlinks in Briefs and Appendices: If a CD-ROM with "corresponding briefs" (an electronic version of a paper-filed brief is filed), it must contain all appellate briefs filed by all parties. Corresponding briefs may provide hypertext links to the report of proceedings and clerks papers and to materials cited in the briefs such as cases, statutes, treatises, law review articles, and similar authorities. If any briefs are hyperlinked, all briefs must be similarly hyperlinked by the submitting party. All materials to which a hyperlink is provided must be included on the CD-ROM.

Other Notable Features:

E-Filing Rules: GR 30 of the Washington State Court Rules (General Rules); RAP 10.9 of the Rules of Appellate Procedure.

WISCONSIN (Supreme Court and Court of Appeals)

Availability: E-filing in the Supreme Court and Court of Appeals has been operational since 2009.

Voluntary/Mandatory; Authorized Users: Use of the e-filing system is mandatory for attorneys filing appellate briefs, no-merit reports, petitions for review, and responses; these electronic copies are filed in addition to the paper filings. Self-represented litigants may file these documents electronically, but are not required to do so. E-filing of appendices is optional for both attorneys and self-represented litigants.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for appellate briefs, appendices, no-merit reports, petitions for review, and responses. At this time, no other types of documents may be e-filed.

E-Service: The e-filing system notifies users of the e-filing of documents by other parties in the case, but it does not notify users of other events, such as the court's issuance of rulings or orders. Thus, an e-filing party is not required to take any additional steps to serve other e-filing users.

Format of Filings: The rules require that electronically-filed briefs, no-merit reports, and petitions for review (and responses) be submitted in text-searchable Portable Document Format (PDF). Text-searchable PDF is created by converting a word processing document into PDF. An electronic appendix must be filed in PDF Image format, which is created by scanning the paper appendix.

Requirement of Paper Copies: Yes. The official court record is in paper form.

Hyperlinks in Briefs and Appendices: Not addressed by rule, but the 2008 Comment to the rules concerning e-filing of briefs states: "Electronic briefs may be enhanced with internal links (such as a table of contents with links to locations in the brief) or external links (links to websites containing the text of cases or statutes cited in the brief). External links in an electronic brief shall not require a password for access to the case or statute. No enhancement to an electronic brief shall alter the text of the brief."

Other Notable Features:

E-Filing Rules: Rules of Appellate Procedure §§ 809.19(8)(a), 809.19(12), 809.19(13), 809.32(1)(fm), 809.62(4)(b), (c), and (d), 809.80(3), and 809.80(5).

WYOMING (Supreme Court)

Availability: E-filing in the Wyoming Supreme Court has been operational since 2008 through the C-Track system (by Thomson Reuters).

Voluntary/Mandatory; Authorized Users: E-filing is mandatory for Wyoming attorneys in good standing, and they are the only persons authorized to use the system. Pro hac vice attorneys, self-represented litigants, and law students are not eligible to use the system.

Types of Cases or Documents Included/Excluded from E-Filing: E-filing is available for all case types and document types (including confidential cases and sealed documents), except that (1) attorney discipline and judicial discipline cases are not subject to e-filing and (2) notices of appeal and other case-initiating documents must be filed in paper form. It is expected that e-filing in attorney discipline cases will be mandatory in the future.

E-Service: A notice of electronic filing that is automatically generated by the Court's electronic filing system constitutes service of the e-filed document on registered users. Parties and/or attorneys who are not registered users must be served with a copy of any e-filed document in accordance with applicable rules. A non-registered filing party who files by conventional means must serve paper copies on all parties to the case.

Format of Filings: A document created with a word processor using Word or WordPerfect, or a paper document which has been scanned for attachment to an electronic document, will be converted to .pdf by the system to be electronically filed with the Court. Converted files contain the extension ".pdf." Documents that exist only in paper form may be scanned into .pdf for electronic filing.

Requirement of Paper Copies: Yes.

Hyperlinks in Briefs and Appendices: Hyperlinks to legal authority are allowed in documents filed with the Court only for the purpose of providing a convenient mechanism for accessing material cited in the document. The judiciary does not exercise any responsibility over the content or its destination. The functioning of a hyperlink reference is not guaranteed. The hyperlink is extraneous to any filed document and is not part of the Court's record. In order to preserve the Court record, attorneys wishing to insert hyperlinks in court filings shall continue to use the traditional citation method for the cited authority, in addition to the hyperlink.

E-Filing Rules/Policies: Electronic Filing Administrative Policies and Procedures Manual (Second Revision, September 2010).

Court Technology for Dummies: What You Need to Know About Technology in Plain English

Wednesday, July 16, 2014 **1:45 p.m. - 3:00 p.m.** **James River Salon C**

Speakers: Jorge Bastos, Chief Information Officer
Administrative Office of the Courts of Georgia
Casey Kennedy, Director of Information Services
Texas Office of Court Administration
John Reynolds, Internal Applications
South Carolina Judicial IT Department

Jorge Bastos, Chief Information Officer

Mr. Basto has served as the Chief Information Officer at the Administrative Office of the Courts of Georgia (AOC) since 2008. He oversees the Information Technology Division for the Agency which is responsible for Network Infrastructure, Applications Development, Support and Training and maintains Case Management Solutions for approximately 1/3 of Georgia's courts throughout the six levels of its court system. During his time with the AOC, he has overseen the development of CMS products for Municipal, Magistrate and Probate courts as well as several statewide data exchange projects with Citations and Child Support.

Jorge is a graduate of Georgia State University and has shared his career in the Finance and Technology fields. Jorge has completed several technology and management programs in the private sector as well as some offered by the state of Georgia including being the first Judicial Branch representative for the Carl Vinson (UGA) Executive Leadership Development Program. He received a Keystone Award from McKesson Provider Technologies for his work with Executive Reporting in the area of Business Intelligence. In 2010, he received a Governor's Commendation for "Excellence in Customer Service."

Jorge currently serves as Chair for the Court IT Officers Consortium (CITOC) and is an active member of the Joint Technology Committee (JTC). His work has been recognized and published by several industry periodicals including Computerworld and Government Technology.
Jorge has been happily married for 18 years to Abby Curbelo Basto and they have two daughters; Miranda and Nadia.

Casey Kennedy, Director of Information Services

Casey Kennedy joined the Texas Office of Court Administration ("OCA") as the Director of Information Services in 2010. His team provides direct IT support for the Texas Supreme Court, Court of Criminal Appeals, the 14 intermediate appellate courts and several judicial branch state agencies.

Casey is also the lead OCA staff for the Judicial Committee on Information Technology or JCIT. The committee is appointed by the Supreme Court and makes recommendations and sets standards for court technology in Texas. Casey is currently on the executive board of the Court Information Technology Officer Consortium, a national organization of Court IT professionals and last year placed 1st in the court technology "geek-off" competition.

He holds a BA in Computer Science from The University of Texas at Austin.

John Reynolds, Internal Applications

John has been with the South Carolina 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 IT team and LT Court Tech to migrate the South Carolina Office of Disciplinary Counsel to C-Track for greater efficiency in the appellate courts.

Court Technology FOR DUMMIES

Jorge Basto, Georgia
John Reynolds, South Carolina
Casey Kennedy, Texas

Different IT Roles

- **Executive Level – CIO, CTO, CSO, CxO**
- **Software**
  - **Programmer**
  - **Database Administrator**
  - **Business Analyst**
- **Hardware**
  - **Network Engineer**
  - **Server Administrator**
  - **Technical Support**

Court Technology Challenges



What we'll talk about

- **Basics of Technology**
  - **Workstations**
  - **Servers**
  - **Networks**
  - **Internet (aka "The Cloud")**
- **General IT Secrets**
- **Court Related IT**
- **Question and Answer**

History of Computing

x 578 =

UNIVAC (1951)
13 tons

iPhone 5 (2013)
3.95 ounces

Basic Technology - Workstations

Memory

Processor
(CPU)

Hard Drive

Basic Technology - Servers

Rack Mount

Stand Alone

Basic Technology - Servers

Single Blade Server

Blade Center (with 16 Blade Servers)

Storage Area Network
(SAN)

Virtual Machines (aka VMs)

+

=

Basic Technology - Servers

Web Servers

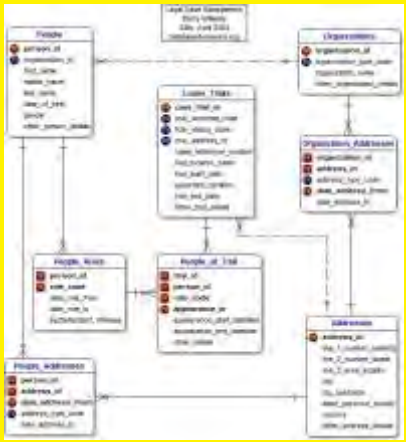
Application Servers

Database Severs

File Servers

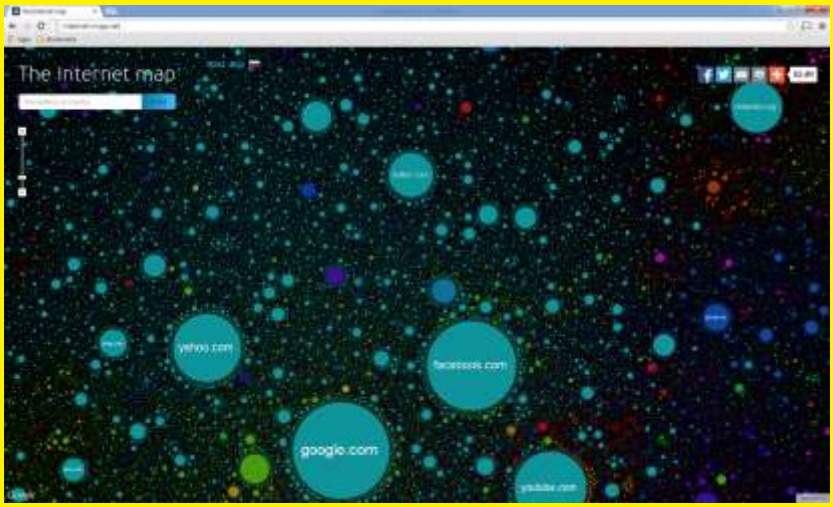
Basic Technology - Networks

Business Intelligence



What it looks like all together

Most traffic today is entertainment related (Netflix, YouTube, TV, etc)



General IT Secrets

IT Challenges / Q&A

Tablet Wars

Wednesday, July 16, 2014 **3:00 p.m. – 4:00 p.m.** **James River Salon C**

Speaker: Ron Bowmaster, Director
IT Division, Utah Administrative Office of the Courts

Ron Bowmaster, Director

Ron Bowmaster serves as the Director of the Information Technology Division for Utah's Administrative Office of the Courts, having been appointed to that position in December 2005. In this role, he manages the development, installation, and operation of the court's information systems and applications. Utah is a unified court system. All courts in the state are supported by the AOC IT Division. The systems include case and electronic document management for Utah's trial, juvenile, justice, and appellant courts. Included in the court system are the offices of the Guardian ad Litem and Juvenile Probation. Ron manages the development of web service integration between the juvenile court and the Division of Child and Family Services' case management systems as well as criminal disposition reporting to Public Safety and Driver Records. He also manages the court's local and wide area networks, redundant data center, and the desktop systems used by the court's 1,600 employees.

Utah's courts operate in a paperless records environment. Today, 78% of all cases are initiated electronically, 77% of all documents are submitted electronically, and 97% of all citations are submitted electronically. Approximately 76% of all collections are paid by credit card.

Before coming to Utah, Ron served as the project manager for the development of Nebraska's district and county court systems and Nebraska's child support enforcement. In addition, he served as the project manager for the development of other state computing services that are delivered through Nebraska's 93 courthouses. These services included motor vehicle title and registration and voter registration systems.

Ron is a graduate of Nebraska Wesleyan University and did his graduate work at the University of Nebraska - Lincoln. He is a member of the Court Information Technology Officers Consortium (CITOC) and has served as the chairman of the Oasis LegalXML Technical Committee.

Public Access to Court Records

Thursday, July 17, 2014 **8:30 a.m. – 10:00 a.m.** **James River Salon C**

Speakers: Barbara A. Bintliff, Professor in Law
University of Texas School of Law
Brian W. Carver, Assistant Professor
The University of California, Berkeley's I School
Harlan Yu, Creator
RECAP

Barbara A. Bintliff, Professor in Law

Barbara A. Bintliff is Joseph C. Hutcheson Professor in Law and Director of the Tarlton Law Library and the Jamail Center for Legal Research at the University of Texas School of Law. She received a Bachelor of Arts degree (with highest honors) from Central Washington State College in 1975, and a J.D. (1978) and M.L.L. (1979) from the University of Washington (Seattle). She is a nationally and internationally prominent law librarian and legal educator.

Professor Bintliff has many publications to her credit, especially in the areas of legal research and legal bibliography. She is a general author of Fundamentals of Legal Research, the dominant casebook treatise in the legal research field, and of Legal Research Illustrated. She serves on the editorial boards of Legal Reference Services Quarterly and Legal Information & Technology eJournal. She is a frequent presenter at regional, national, and international conferences. In 1996 she was a visiting professor at the University of Washington and in 2009 she was a visiting professor at the Shanghai International Law School.

Professor Bintliff is active in the American Association of Law Libraries (AALL), and completed a term as president of the association in 2002. She participates in the activities of the Southwestern Association of Law Libraries, of which she was president in 1987-88 and again in 1991-1992 and was local arrangements chair for the recent 2014 Annual Meeting. Professor Bintliff chaired the University of Colorado at Boulder Faculty Assembly from 2003-2006, and also served on several campus committees and boards. She is involved in the American Bar Association and the Association of American Law Schools, as a committee member and section officer. She has served on numerous ABA and AALS accreditation site evaluation teams, including an AALS site evaluation of the Kuwait University Law School in 2004, and ABA site evaluations in Moscow, Russia in 2010, and Venice, Italy in June, 2014. She is an elected member of the American Law Institute and an elected Fellow of the American Bar Foundation.

Professor Bintliff was named Distinguished Alumnus for the Sciences, Central Washington University, in October 2000, and in April 2012 she received the Distinguished Alumnus Award from the University of Washington School of Information. In 2005, she received the Frederick Charles Hicks Award for Outstanding Contributions to Academic Law Librarianship from AALL. In 2008, she received the Robert L. Stearns Award from the University of Colorado, in recognition of "outstanding teaching, extraordinary service to the University, and significant research." She has received several Presidential citations from AALL presidents, and was elected into the AALL Hall of Fame in 2012. She is listed in Who's Who in America, Who's Who in American Law, Who's Who in American Education, and other national directories.

From 2008 to 2011, Professor Bintliff worked with the Uniform Law Commission (also referred to as the National Conference of Commissioners on Uniform State Laws) on the creation of a uniform law on authentication and preservation of digital legal information. She served as Reporter to the Drafting

Committee from 2009-2011, which successfully developed the Uniform Electronic Legal Material Act. The UELMA has been approved in 9 states, and is pending before several more for legislative approval.

Brian W. Carver, Assistant Professor

Brian W. Carver is Assistant Professor at the University of California, Berkeley School of Information where he teaches about Intellectual Property Law and Cyberlaw. Before joining the Berkeley faculty, Brian practiced law in the Litigation group of Fenwick & West, focusing on Copyright, Trademark, Trade Secret, and general commercial litigation.

Brian is originally from Birmingham, Alabama and graduated cum laude with a degree in Philosophy from the University of Alabama. He received a Masters in Philosophy from the University of California, Irvine and his J.D. from the University of California, Berkeley School of Law (Boalt Hall). He is a member of the California Bar and its Intellectual Property and Litigation Sections.

Brian is a coeditor of a leading case book, Software and Internet Law (4th edition) published by Wolters Kluwer and has written about topics such as copyright's first sale doctrine and open source software licensing. He is a member of the OASIS Legal Citation Markup (LegalCiteM) Technical Committee, which is developing an open standard for machine-readable tagging of legal citations.

In 2010, Brian advised a Masters student at the School of Information, Michael Lissner, on the creation of a daily alert service for the federal appellate courts called http://courtlistener.com. After Michael's graduation they continued to improve and expand the site and in the fall of 2013 cofounded the nonprofit Free Law Project (http://freelawproject.org) to serve as an umbrella organization for all of their efforts in this space.

Free Law Project seeks to provide free access to primary legal materials, to develop legal research tools, and to support academic research on legal corpora. Its open source CourtListener platform now hosts over 2.5 million court opinions and collects more each weekday directly from federal and state court websites. Free Law Project intends to put the entirety of United States case law online, for the public, for free.

Harlan Yu, Creator

Harlan Yu is one of the creators of RECAP, a browser extension that liberates U.S. federal court records from PACER. He holds a Ph.D. in computer science from Princeton University and has extensive hands-on experience in technology policy.

Currently, he is a principal at Robinson + Yu, based in Washington D.C., which provides Internet expertise for policymakers on a wide range of social issues. Among his recent projects, he has been working with major civil rights organizations to examine how new technologies are eroding core social justice protections; with the U.S. House of Representatives to develop software to modernize the legislative drafting process; with the New America Foundation to advance Internet freedom abroad through censorship circumvention tools; and with Rock the Vote to help states improve online voter registration.

Previously, he has worked at Google in both engineering and public policy roles, at the Electronic Frontier Foundation as a technologist, and at the U.S. Department of Labor, where he helped develop

and implement the Department’s open government plan. He received his B.S. in electrical engineering and computer sciences from UC Berkeley.

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTIETH YEAR
VAIL, COLORADO
JULY 7 - JULY 13, 2011

WITH PREFATORY NOTE AND COMMENTS

October 4, 2011

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 120th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

DRAFTING COMMITTEE FOR UNIFORM ELECTRONIC LEGAL MATERIAL ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting this Act consists of the following individuals:

MICHELE L. TIMMONS, Office of the Revisor of Statutes, 700 State Office Bldg., 100 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155, *Chair*

JERRY L. BASSETT, Legislative Reference Service, 613 Alabama State House, 11 S. Union St., Montgomery, AL 36130

DAVID D. BIKLEN, 153 N. Beacon St., Hartford, CT 06105

DIANE F. BOYER-VINE, Office of Legislative Counsel, State Capitol, Room 3021, Sacramento, CA 95814-4996

STEPHEN Y. CHOW, 125 Summer St., Boston, MA 02110-1624

VINCENT C. DeLIBERATO, Jr., Legislative Reference Bureau, Main Capitol Bldg., Room 641, Harrisburg, PA 17120-0033

GENE H. HENNIG, 500 IDS Center, 80 S. 8th St., Minneapolis, MN 55402-3796

STEVEN L.WILLBORN, University of Nebraska College of Law, Ross McCollum Hall, 42 & Fair St., P.O. Box 830902, Lincoln, NE 68583-0902

BARBARA A. BINTLIFF, University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705, *Reporter*

EX OFFICIO

ROBERT A. STEIN, University of Minnesota Law School, 229 19th Ave. S., Minneapolis, MN 55455, *President*

JACK DAVIES, 1201 Yale Pl., Unit 2004, Minneapolis, MN 55403-1961, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

LUCY THOMSON, 915 N. Quaker Dr., Alexandria, VA 22302, *ABA Advisor*

PHYLLIS B. PICKETT, 401 Legislative Office Bldg., 300 N. Salisbury St., Raleigh, NC 27603, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

TABLE OF CONTENTS

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

Prefatory Note

Introduction. Providing information online is integral to the conduct of state government in the 21st century. The ease and speed with which information can be created, updated, and distributed electronically, especially in contrast to the time required for the production of print materials, enables governments to meet their obligations to provide legal information to the public in a timely and cost-effective manner. State governments have moved rapidly to the online distribution of legal information, in some instances designating a publication in electronic format to be an official publication. Some state governments are eliminating certain print publications altogether. The availability of government information online facilitates transparency and accountability, provides widespread access, and encourages citizen participation in the democratic process.

Changing to an electronic environment also raises new issues in information management. Electronic legal information moves from its originating computer through a series of other computers or servers until it eventually reaches the individual user. The information is susceptible to being altered, whether accidentally or maliciously, at each point where it is stored, transferred, or accessed. Any such alterations can be virtually undetectable by the consumer. A major issue raised by the change to an electronic format, therefore, is whether the information presented to consumers is trustworthy, or authentic.

"An *authentic* text is one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator." (American Association of Law Libraries, STATE-BY-STATE REPORT ON AUTHENTICATION OF ONLINE LEGAL RESOURCES 8 (2007)). In the context of this act, the content originator is the official publisher. When a document is authentic, it means that the version of the legal resource presented to the user is the same as that published by the official publisher. Authentication provides an electronic method to establish the integrity of the document, demonstrating that the information has not been tampered with or altered during the transfer between the official publisher and the end-user. Few state governments have taken the actions necessary to ensure that the electronic legal information they create and distribute remains unaltered and is, therefore, trustworthy or authentic.

Authenticity is a much larger concern in the electronic age than in the print age, where legal information typically exists in multiple copies. The content of a print work is "fixed" once printed, making the text easily verifiable and changes readily detectible. Many years of experience allow us to determine when we can trust the integrity of a printed document. It stands to reason, therefore, that before state governments can transition fully into the electronic legal information environment they must develop procedures to ensure the trustworthiness of their electronic legal information.

The ease with which electronic legal information is created and changed raises a second critical consideration: how is legal information with long-term, historical value (including, for example, amended statutes, repealed sections of regulations, and overruled cases) preserved for future use? In a print environment, information is preserved by maintaining paper copies of key

legislative documents, administrative materials, and judicial decisions and other resources. It is typical for more than one library, archive, or institution to keep a copy of these historical documents, further assuring their preservation.

Electronic information resides, however, on a computer or other storage device. New versions of computer hardware and software and changing storage media continually result in an inability to read or access older files, thereby making their content unavailable. As hardware, software, and storage media change, old documents are preserved by "migrating" to new formats. Electronic legal information of long-term value must be preserved in a usable format. Unfortunately, few states have addressed this critical need, and fewer still have an infrastructure in place to monitor older data and keep their storage methods up-to-date. The governmental and societal benefits of electronic creation and distribution are limited severely if state government information becomes unusable because of technological changes.

A third issue raised by the electronic creation and distribution of legal material flows from the necessity of preserving all forms of documents with long-term value: the issue is the responsibility of state government to make its legal resources easily, and permanently, accessible. Legal information is consulted by citizens, legislators, government administrators and officials, judges, attorneys, researchers, and scholars, all of whom may require access to both the current law and to older materials, including that which has been amended and superseded. Once properly preserved, electronic legal information of long-term value must also be easily accessible on the same basis as other legal information; that is, electronic legal information should be authenticated and widely available on a permanent basis. State governments must ensure an informed citizenry, which is essential for our democracy to function.

The issues that arise as state governments transition to an electronic legal information environment are common to every state. These issues are also encountered by subdivisions of state government, including municipalities and counties, as well as American Indian tribes. These governments face the same issues as the larger state government, and likewise must manage the entire life cycle of government information, from creation and publication to preservation. This act can be adapted for use by any governmental entity.

About the act. The Uniform Electronic Legal Material Act (UELMA) provides states with an outcomes-based approach to the authentication and preservation of electronic legal material. That is, the goals of the authentication and preservation program outlined in the act are to enable end-users to verify the trustworthiness of the legal material they are using and to provide a framework for states to preserve legal material in perpetuity in a manner that allows for permanent access.

The act does not require specific technologies, leaving the choice of technology for authentication and preservation up to the states. Giving states the flexibility to choose any technology that meets the required outcomes allows each state to choose the best and most cost-effective method for that state. In addition, this flexible, outcomes-based approach anticipates that technologies will change over time; the act does not tie a state to any specific technology at any time.

It should be noted that there are some important issues this act does not address, leaving them to other law or policy. First, this act does not mandate that states publish legal material electronically; choice of format is left entirely to a state's discretion. Second, the act does not require a state to convert older legal material from print format to electronic format. Print remains an accepted medium for preservation of and access to legal material. If, however, a state converts older legal material from print to electronic format, and if the state then designates that electronic format as official, the requirements of the act apply.

Third, this act does not deal with copyright issues, leaving those to federal law and state practice. Fourth, this act does not affect or supersede any rules of evidence; it only provides that electronic legal material that is authenticated is presumed to be a true copy. Fifth, the act does not affect existing state law regarding the certification of printed documents.

Sixth, this act does not interfere with the contractual relationship between a state and a commercial publisher with which the state contracts for the production of its legal material. The act requires that the official publisher be responsible for implementing the terms of the act, regardless of where or by whom the legal material is actually printed or distributed. For the purposes of the act, only a state agency, officer, or employee can be the official publisher, although state policy may allow a commercial entity to produce an official version of the state's legal material.

The UELMA is intended to be complementary to the Uniform Commercial Code (UCC, which covers sales and many commercial transactions), the Uniform Real Property Electronic Recording Act (URPERA, which provides for electronic recording of real property instruments), and the Uniform Electronic Transactions Act (UETA, which deals with electronic commerce). Each of these acts covers a unique topic, as does the UELMA, which addresses management of the most important state-level legal materials. The UELMA is not intended to conflict with any of these acts.

Conclusion. The use of digital information formats has become fundamental and indispensable to the operation of state government. This act addresses the critical need to manage electronic legal information in a manner that guarantees the trustworthiness of and continuing access to important state legal material. Technology changes quickly enough that state governments must address this issue, as existing electronic legal information is already in danger of being lost. A uniform act will allow state governments to develop similar systems of authentication and preservation, aiding the free flow of information across state lines and the sharing of experiences and expertise to keep costs as low as possible.

A uniform act should set forth provisions that can be efficiently followed and that achieve the stated purposes of the act. The Drafting Committee believes that this proposed uniform act meets these requirements. The act is straightforward in its terms, creates no additional administrative offices, and has no requirement of judicial or administrative oversight. The act was developed through extensive discussion and debate during five meetings of the Drafting Committee.

The Drafting Committee was assisted by numerous advisors and observers, representing a wide range of organizations. In addition to the American Bar Association advisors listed above,

important contributions were made by the observers who attended meetings, participated in conference calls, and submitted many comments on and suggestions for the various drafts of the act. The act is better for their contributions.

UNIFORM ELECTRONIC LEGAL MATERIAL ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Legal Material Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Legal material" means, whether or not in effect:

(A) the [insert name of constitution of this state];

(B) the [insert name of session laws];

(C) the [insert name of state code]; [or]

(D) a state agency rule that has or had the effect of law[;] [or]

[(E) the following categories of state administrative agency decisions [insert categories of decisions to be included]][;] [or]

[(F) reported decisions of the following state courts: [specify courts]][;] [or]

[(G) state court rules][;] [or]

[(H) [list any other category of legal material to be included]].

(3) "Official publisher" means:

(A) for [insert name of constitution of this state], the [insert appropriate agency or official];

(B) for [insert name of session laws], the [insert appropriate agency or official];

(C) for [insert name of state code], the [insert appropriate agency or official]; [or]

(D) for a rule published in the [insert name of administrative code], the [insert appropriate agency or official][;] [or]

[(E) for a rule not published in the [insert name of administrative code], the state agency adopting the rule][;] [or]

[(F) for a state administrative agency decision included under paragraph (2)(E), the [insert appropriate agency or official]][;] [or]

[(G) for a state court decision included under paragraph (2)(F), the [insert appropriate agency or official]][;] [or]

[(H) for state court rules, the [insert appropriate agency or official]][;] [or]

[(I) for [any other category of legal material included], [insert appropriate agency or official]].

(4) "Publish" means to display, present, or release to the public, or cause to be displayed, presented, or released to the public, by the official publisher.

(5) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Legislative Note: *With regard to Section 2(2), drafters will need to insert, in the place indicated by bracketed language, the proper name or title for several types of state legal material including the state constitution, session laws, statutory code, and administrative code, as well as the proper name or title of other legal material, provided as alternatives, the enacting state chooses to include in the act's coverage.*

If additional legal material is added, each type should be identified by its proper name or title and given its own subparagraph. If additional legal material is added to Section 2(2), a corresponding addition must be made to Section 2(3).

With regard to Section 2(3), drafters will need to insert, in the place indicated by bracketed language, the proper name or title for several types of state legal material, including the state constitution, session laws, statutory code, and administrative code, as well as the proper name or title of any other publications the enacting state includes in the act's coverage. The name of the legal material inserted in place of the bracketed language must correspond

exactly with the name in the corresponding definition of legal material in Section 2(2).

Drafters will need to insert, in the place indicated by bracketed language, the proper name of the agency or state officer or employee designated as the official publisher.

With regard to Section 2(3)(H), drafters may need to make distinctions between courts, including courts of last resort, appellate level courts, and trial courts, including different types and levels of trial courts, depending on how court rules are promulgated or approved in the enacting state.

Comment

Several definitions used in this act are standard in Conference acts, including "electronic," "record," and "state." These words, so defined, have been used in other acts promulgated by the Conference, including notably the Uniform Electronic Transactions Act (UETA), which has been adopted by 47 states, the District of Columbia, and the U.S. Virgin Islands as of March 2011. (The definition of "state" in UETA includes a second sentence regarding Indian tribes and Alaskan villages that is not part of this act's definition.) The use of these terms in the same manner in several acts leads to a consistency within the laws of each state adopting the several acts, in addition to the sought-after uniformity among states.

Legal material. (Section 2(2)). The definition of "legal material" is intentionally narrow. As drafted, it includes only the most basic state-level legal documents: the state constitution, session laws, codified laws, and administrative rules with the effect of law. The act suggests as alternatives a range of additional legal material.

Among the additional legal material suggested for inclusion is state administrative agency decisions. An enacting state may choose to include those administrative agency decisions that are treated in that state as having the effect of law, for example, or the state may choose to include or exclude certain agency decisions in the act's coverage, in which situation the decisions should be listed with specificity. Each enacting state is given discretion to determine which, if any, of its administrative agency decisions should be covered by the act.

In some states, the publication of judicial decisions and court rules is handled by the judicial branch, over which the state legislature may have no authority to mandate specific procedures such as those created by this act. Because of this potential separation of powers issue, judicial decisions and court rules are included in this act as an alternative in the definition of legal material. If an enacting state includes judicial decisions or court rules, some differentiation between legal material issued by the state's various courts (i.e. trial courts of various types, appellate courts, and supreme court) may be necessary.

Enacting states may decide to expand the definition of legal material beyond that offered as alternatives. For example, in some states, an initiative or referendum process may result in the creation of statutory law outside of, or in addition to, the legislative process. An enacting state may choose to include in the definition of legal material the various documents created in an initiative or referendum process, including especially the final, uncodified form (similar to a session law) as passed by popular vote. States may decide to include enacted, but subsequently vetoed, legislation. Other states may decide to include certain categories of municipal or county

legal material in the act. The definition of legal material is left to the discretion of the enacting state, beyond the four categories of basic state-level legal material defined in this Section .

Many important sources of law, such as legislative journals and calendars, reports of legislative confirmations and other hearings, versions of bills, gubernatorial orders and proclamations, attorney general opinions, and many agency publications, might be included in the act's coverage under the discretionary section 2 (2) (H). Whether a state legislature can include in the act the records from certain executive branch officials (executive orders and proclamations, or attorney general opinions, for example) raises a separation of powers issue similar to that regarding judicial decisions.

If additional legal material is added to Section 2(2), a corresponding addition must be made to Section 2(3) that identifies an official publisher for the legal material.

Official publisher. (Section 2(3)). The state must designate an official publisher for each type of legal material defined in Section 2(2). This can, and most likely will, be an existing state agency, officer, or employee that already has responsibility for the publication of the legal material. The official publisher is the state actor charged with carrying out the provisions of this act.

To complete the definition of official publisher, an appropriate government agency or employee for each type of legal material must be identified, as indicated by bracketed language. Because the legal material may come from different departments, and even different branches, of government, the official publisher may be one employee or agency, or several.

This act only applies to legal material published by the official publisher designated in this Section. Many states contract with commercial printers or publishers for the production of their legal material, and under this act states can continue to contract out the production of their legal material as desired. The act does not interfere with the contractual relationship between the state and the commercial publisher. However, a commercial publisher cannot serve as official publisher of legal material for the purposes of this act.

SECTION 3. APPLICABILITY. This [act] applies to all legal material in an electronic record that is designated as official under Section 4 and first published electronically on or after [the effective date of this [act]].

Legislative Note: *To include a preexisting publication in the coverage of the act, the following changes should be made. First, the present language of Section 3 should become subsection (a). Second, subsection (b), as follows, should be added: "(b) This [act] applies to the following legal material in an official electronic record that was first published before [the effective date of this [act]]: [insert proper name or title here].".*

If preexisting legal material is included in the act's coverage, drafters should include the material in the definition of legal material in Section 2(2), and designate an official publisher for the material in Section 2(3), as necessary.

Comment

This act is intended to complement, and not affect, an enacting state's existing public records or records management laws and practices, under which non-electronic legal material is preserved. This act does not affect a state's responsibility to preserve non-electronic legal material.

The UELMA applies to legal material designated as official and first published in an electronic record on or after the act's effective date in the enacting state. If, after the effective date, an enacting state republishes legal material in an electronic record that was previously not published in an electronic record, and if the state designates as official the newly republished legal material, the UELMA applies. This may occur, for example, when the state is transitioning a category of legal material from print to electronic format. If legal material as defined by the act is first published only in an electronic record subsequent to the effectiveness of the act, the state must meet the requirements of the UELMA.

SECTION 4. LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.

(a) If an official publisher publishes legal material only in an electronic record, the publisher shall:

(1) designate the electronic record as official; and

(2) comply with Sections 5, 7, and 8.

(b) An official publisher that publishes legal material in an electronic record and also publishes the material in a record other than an electronic record may designate the electronic record as official if the publisher complies with Sections 5, 7, and 8.

Comment

This act does not direct a state to publish its legal material in any specific format or formats. The act leaves policy decisions regarding format of its legal material to the state.

There are no publication standards for legal information shared among the states at this time, and within a single state there may be multiple publishing practices for legal material. For example, today in a single state, the state's code may be published in a yearly paperback edition and electronically, court reports may be published in hardbound volumes, and the administrative regulations may be available in a looseleaf format or only in an electronic format. All states are transitioning from a print-only publishing environment to either an environment in which legal materials are published in a mix of formats or one in which legal materials are published in electronic format only. Many states publish the same legal material in both print and electronic formats. A state may designate as official as many formats of its legal material as it wishes. If

legal material in an electronic record is designated as official, the requirements of the act must be met regardless of whether the state publishes the same legal material in another format.

As a matter of courtesy to the user of electronic legal material, if the electronic version is not designated as official, the state should include information that displays with the legal material that explains the source of or the procedure by which the public can obtain a copy of the official version of the legal material.

Where the legal material is published only in an electronic format, the official publisher is required to designate as official the electronic format. This is a common sense requirement; if legal material is available from the state government in one version only, it follows that that version must be official.

SECTION 5. AUTHENTICATION OF OFFICIAL ELECTRONIC RECORD. An official publisher of legal material in an electronic record that is designated as official under Section 4 shall authenticate the record. To authenticate an electronic record, the publisher shall provide a method for a user to determine that the record received by the user from the publisher is unaltered from the official record published by the publisher.

Comment

As matters of public policy, a state should make its official legal material available in a trustworthy form and citizens should be able to ascertain the trustworthiness of electronic official legal material. Reliable and accurate government legal material is necessary to allow those who use the information to make informed decisions based on it. The UELMA supports governments in fulfilling their obligations to provide trustworthy legal information so that citizens may participate knowledgeably in their own governance. The act also provides assurances to the legal community that the legal material it needs are accurate and reliable.

This act guides a state in implementing both policies. The intent of this act is to be technology-neutral, leaving it to the enacting state to choose its preferred technology for authentication of legal material in an electronic record from among the options available. The technology-neutral approach also allows the state to change technologies when necessary or desirable.

Authentication of electronic legal documents is an issue of both national and worldwide concern. Numerous governments and organizations are beginning to authenticate legal material and develop best practices. As of March, 2011, there are several U.S. jurisdictions in which legal material in an electronic record is being authenticated. Their practice offers guidance on specific technologies. For example, the United States Government Printing office provides official, authenticated Public Laws and other legal material using digital signatures (*see* http://www.gpoaccess.gov/authentication/faq.html#1). Utah authenticates its administrative code using hash values (*see* www.rules.utah.gov/publicat/code.html). Delaware provides an

authenticated electronic version of administrative rules using a digital signature (*see*, http://regulations.delaware.gov/AdminCode/). Arkansas issues its opinions in an authenticated, electronic format, also using digital signatures (*see* http://courts.arkansas.gov/court_opinions/sc/2009a/20090528/published/09-540.pdf).

France's electronic JOURNAL OFFICIEL, the official record of its legislation and regulations, is authenticated (*see* http://journal-officiel.gouv.fr/). South Korea has announced, as part of its transition to a more electronic environment, that it will improve its practices so that "digital documents are considered as valid as their printed versions". (http://www.koreaherald.com/business/Detail.jsp?newsMLId=20101205000243).

The Hague Conference on Private International Law, a 72-member inter-governmental organization that develops multilateral legal instruments, has developed a best practices document requiring authentication of its official electronic legal materials. The "Guiding Principles to be Considered in Developing a Future Instrument," begun in 2008, includes principles for Integrity and Authoritativeness that state, in part:

> 4. State Parties are encouraged to make available authoritative versions of their legal materials provided in electronic form.
> 5. State Parties are encouraged to take all reasonable measures available to them to ensure that authoritative legal materials can be reproduced or re-used by other bodies with clear indications of their origins and integrity (authoritativeness).

These Principles, when completed and adopted, will apply to the development of all instruments coming from the Hague Conference, and the principles will become standards for organizations and jurisdictions worldwide. This act adds to these emerging standards by approaching the issue from an outcomes-based perspective.

As shown in the examples above, products that are cost-effective, convenient, and immediate in outcome are already available for electronic authentication of legal material. As authentication of electronic information becomes standard, more products for and methods of authentication will be developed. This Section describes a technological outcome only—authentication of an electronic record. In order to allow states maximum flexibility, neither this section nor any other section of the act specifies any particular technologies or methods of authentication.

Regardless of the method of authentication, it is important that official publishers designate a "baseline" copy of all published legal material that constitutes the definitive document against which all others are compared for the purpose of authenticating the legal material. The format of the baseline copy may vary, depending on the practices of the official publisher and the type of legal material. The baseline copy will ensure that the legal material required to be preserved under Section 7, and to which public access is made available in Section 8, is accurate and trustworthy.

SECTION 6. EFFECT OF AUTHENTICATION.

(a) Legal material in an electronic record that is authenticated under Section 5 is

presumed to be an accurate copy of the legal material.

(b) If another state has adopted a law substantially similar to this [act], legal material in an electronic record that is designated as official and authenticated by the official publisher in that state is presumed to be an accurate copy of the legal material.

(c) A party contesting the authentication of legal material in an electronic record authenticated under Section 5 has the burden of proving by a preponderance of the evidence that the record is not authentic.

Comment

The intent of this act is to provide the end-user of electronic legal material with a presumption that authenticated legal material is accurate. The act extends the same presumption to authenticated electronic legal material that is provided to legal material published in a book, and results in the same shift in the burden of proof as occurs when a party questions the accuracy of the print legal material. This is the legal outcome of authentication.

The act does not affect or supersede any rules of evidence, and leaves further evidentiary effect to existing state law and court rules. The presumption that authenticated electronic legal material is an accurate copy is not determinative of any criteria a court may wish to establish regarding admissibility and reliability of electronic legal material. Beyond any steps necessary to authenticate electronic information as required by Section 5, no burden is imposed on courts, lawyers, or other users.

Authentication provides only a presumption of accuracy, and a party disputing the accuracy of legal material in an authenticated electronic record can offer proof as to its inaccuracy. Authentication of an electronic record provides the same level of assurance of accuracy of the electronic record that publication in a printed book provides. Just as the reader of a book can look at the book to determine if the document has been altered, the user of electronic legal material can use the authentication method to determine if the electronic document has been altered.

This act does not affect the practice of certification, and courts retain discretion to require a certified copy to meet a particular evidentiary standard. Certification is a long-standing practice in which an official publisher reviews a printed document and adds a notarization or other verification that the document is an accurate copy of the original.

The act does not require electronic legal material from another state to be authenticated for use in the enacting state. However, if another state has adopted this act, the same presumption of accuracy applies to its authenticated electronic legal material. Widespread adoption of this act will further the recognition and use of electronic legal material.

SECTION 7. PRESERVATION AND SECURITY OF LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD.

(a) An official publisher of legal material in an electronic record that is or was designated as official under Section 4 shall provide for the preservation and security of the record in an electronic form or a form that is not electronic.

(b) If legal material is preserved under subsection (a) in an electronic record, the official publisher shall:

(1) ensure the integrity of the record;

(2) provide for backup and disaster recovery of the record; and

(3) ensure the continuing usability of the material.

Comment

Legal material retains its value regardless of whether it is currently in effect. This includes legal material that is subsequently amended or repealed, as happens with statutes, as well as legal material such as cases that may be reversed or overruled. Legal material does not cease to be legal material with the passage of time. For example, the outcome of today's lawsuit may depend on rights or obligations created by yesterday's statutes or regulations. Researchers need historical as well as current legal material to understand the development of legal doctrine and predict its future course. Legal material must be saved and protected—preserved—to allow for future use.

The best practices document of the Hague Conference on Private International Law, "Guiding Principles to be Considered in Developing a Future Instrument," acknowledges the importance of preservation of all legal material in its delegation to each state of the responsibility for preserving its legal material. The Guiding Principles document states that: "7. State Parties are encouraged to ensure long-term preservation and accessibility of their legal materials . . .". This act provides guidance to an enacting state to allow it to meet this principle.

Enacting states are given discretion to decide what electronic legal material must be preserved. This is done through the definition of legal material in Section 2. Section 7 requires that any legal material included in the Section 2 definitions and designated as official under section 4 must be preserved. The preservation requirement is intended to cover all materials typically published with the defined legal material. For example, state session laws usually include lists of legislators and state officials, memorials, proposed or final state constitutional amendments, and resolutions, all of which should be preserved along with the legislative enactments.

The UELMA does not address the measures taken by states to secure their internal information, prior to the point of official publication. This act applies only to legal material that has been officially published and thereby made available to the public. Section 7 (a) requires that an official publisher provide for the preservation and security of electronic legal material designated as official, in either electronic or non-electronic form. This gives states the flexibility to preserve electronic legal material in a print format or in an electronic format. Regardless of the method chosen for preserving legal material, the official publisher's practices should be carried out in accordance with existing public records and records management laws.

If legal material is preserved in print form, procedures to do so securely are well-established and are therefore not specified in the act. Traditionally, multiple copies of law books have been maintained by several libraries in diverse geographic locations. This method of preservation and security can be replicated for electronic legal material by printing multiple copies and distributing them in the same manner as books. Many states have an official state archivist, whose duties include preserving copies of important documents such as legal material and who may be able to provide assistance in preserving electronic legal material.

If legal material is preserved electronically, however, Section 7 (b) of the act requires certain outcomes. Electronic records must be securely stored to ensure their integrity. In addition to other possible security measures, best practices for secure storage of electronic records call for the maintenance of multiple copies that are geographically and administratively separated. As with preservation in print form, the existence of multiple electronic copies maximizes the possibility that at least one copy of important records will remain available, even after a natural disaster or other emergency.

To maintain security over time, backup copies of electronic records must be made periodically. A backup copy provides an identical version of an electronic record that is usable in case the original is lost or unusable. The backup process may be incremental, essentially tracking all changes to the original, or a continuous backing up of the entire system that saves the complete text of each version, among other methods. Whatever method the state chooses must back-up the original material plus subsequent changes; a changed record becomes a new record with content that must also be backed-up. Legal material is continually updated; states must develop systems that recognize the dynamic nature of legal material and provide for appropriate preservation.

Preservation requires that the electronic records be migrated to new storage media from time to time. Just as cassette tapes were replaced by CD-ROMs which were then replaced by digital music formats, storage media for electronic records has and will continue to change over time. While the nature of new technologies is not known at the present time, the fact that new technologies will be developed is a certainty. Costs of storage media are decreasing rapidly as the marketplace produces new products and methods. The anticipation of the Drafting Committee is that preservation of electronic records will be cost neutral when compared with the current system of storing tangible legal material.

In migrating to new storage media, the official publisher should preserve the legally significant formatting of electronic legal material. Legal material is often complex in organization and presentation. The formatting of the legal material, including italicization,

indentation, numbering, bold face fonts, and internal subdivisions and subsections, can be significant. Hierarchies are defined and priorities are established, for example, by formatting, and legislative intent is made clear.

The act does not impose a duty to convert non-electronic legal material retrospectively to an electronic format. Choice of format is entirely up to the state. If, however, the official publisher chooses to digitize non-electronic legal material and designate that material as official, the requirements of the act must be met once the legal material is published in an electronic format.

SECTION 8. PUBLIC ACCESS TO LEGAL MATERIAL IN OFFICIAL ELECTRONIC RECORD. An official publisher of legal material in an electronic record that is required to be preserved under Section 7 shall ensure that the material is reasonably available for use by the public on a permanent basis.

Comment

Our democratic system of government depends on an informed citizenry. Legal material includes information essential to all citizens in a democracy, whether the legal material is effective currently, has been repealed or overruled, or is of historical value only. To exercise their rights to participate in our democracy, citizens must have reasonable access to all legal material.

This section highlights the importance to the citizenry of legal material by requiring permanent public access to electronic legal material. Permanent public access to official electronic legal material allows citizens to stay informed of legal developments and carry out their democratic responsibilities. Any legal material in an electronic record designated as official under Section 4 of this act must be preserved under Section 7. All legal material required to be preserved under Section 7 of the act must be publicly accessible under this Section.

Legal material preserved under this act must be "reasonably available" to the general public. Reasonable availability does not necessarily mean that the information must be accessible around the clock, every day of the year. An enacting state has discretion to decide what is reasonable, which should be determined in a manner consistent with other state practice. Providing public access to state records is routinely done by state archives, whose practices may provide important guidance to official publishers. Reasonable availability may mean that the legal material can be used during business hours at publicly accessible locations, such as designated state offices, public libraries, a state repository or archive, or similar location.

Access to preserved electronic legal material may be limited by the state's determination of reasonableness, but access must be offered permanently. That is, the preserved electronic legal material must remain available in perpetuity. This requirement makes electronic legal material comparable to print legal material, which is stored on a permanent basis in libraries, archives, and offices.

The Hague Conference's "Guiding Principles to be Considered in Developing a Future Instrument" state that "2. State Parties are also encouraged to make available for free access relevant historical materials . . .". In order to provide for maximum flexibility, and recognizing economic realities, however, the act does not address the issue of cost for access to electronic legal material. The result is that providing free access or charging reasonable fees for access to electronic legal material is a decision left up to the states.

SECTION 9. STANDARDS. In implementing this [act], an official publisher of legal material in an electronic record shall consider:

(1) standards and practices of other jurisdictions;

(2) the most recent standards regarding authentication of, preservation and security of, and public access to, legal material in an electronic record and other electronic records, as promulgated by national standard-setting bodies;

(3) the needs of users of legal material in an electronic record;

(4) the views of governmental officials and entities and other interested persons; and

(5) to the extent practicable, methods and technologies for the authentication of, preservation and security of, and public access to, legal material which are compatible with the methods and technologies used by other official publishers in this state and in other states that have adopted a law substantially similar to this [act].

Comment

The language of this section, based on a similar provision in the Uniform Real Property Electronic Recording Act, requires consideration of standards and best practices for the authentication, preservation, and permanent access of electronic records. As private sector organizations, government agencies, and international organizations tackle these issues, their work may offer guidance to states as this act is implemented on an on-going basis. Like many other technology-related procedures, standards and best practices for management of electronic records are in a state of development and refinement. For example, appropriate information security is a key element of the authentication process, and security standards are currently being developed. The state's own standards should include a method to evaluate the effectiveness of the official publisher's implementation of this act.

Each enacting state is encouraged to consider a single system for authentication of, preservation and security of, and public access to its legal material. A single system will lead to

financial and personnel efficiencies in implementation and maintenance, and avoid confusion on the part of the users. While each enacting state will determine its own practices, states are encouraged to communicate, coordinate, and collaborate in the development of authentication, preservation, and permanent access standards.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 12. EFFECTIVE DATE. This [act] takes effect . . . .

Comment

This act applies to legal material in an electronic record designated as official and first published after the effective date of the act, as noted in Section 3. Additional time may be needed, beyond the usual date of effectiveness of its statutes, for a state to prepare policies and procedures to meet the requirements of authentication, preservation and public access of electronic legal material.

Free Law Project

http://freelawproject.org

Brian W. Carver

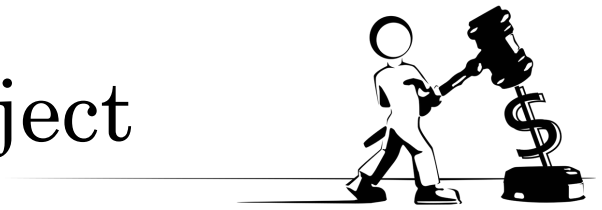
Assistant Professor
UC Berkeley School of Information

41st National Conference of Appellate Court Clerks
July 17, 2014

@brianwc

@freelawproject

Free Law Project



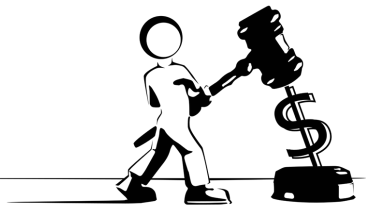
- This presentation has an *agenda*!:
  - Explain what Free Law Project is and does.
  - Show how choices the courts make with respect to file formats and website design have an impact on third party publishers, like us, and therefore, on public access.
  - To have some of you here in attendance so fully digest items one and two that you agree to work with us to make your jurisdiction even better.

Free Law Project

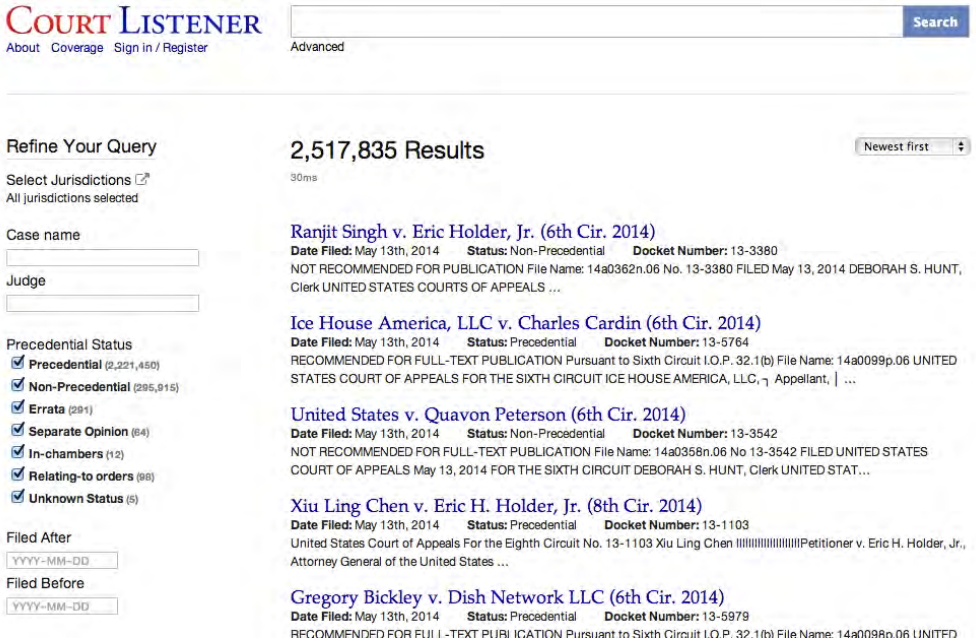
- Free Law Project is a California non-profit that seeks to:
  - provide free online access to primary legal materials,
  - develop online legal research tools, and
  - support academic research on legal corpora.

- Co-founders:
  - Michael Lissner & Brian W. Carver

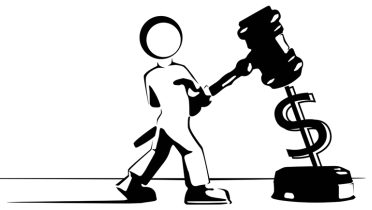
Free Law Project



- Free Law Project sponsors the development of:
  - CourtListener, https://www.courtlistener.com, a free online searchable database of over 2.5 million appellate court opinions.



Free Law Project

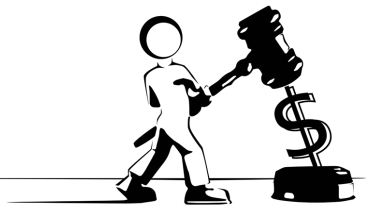


- Free Law Project sponsors the development of:
  - Juriscraper, https://bitbucket.org/mlissner, a software system for harvesting the court opinions provided on appellate court websites.
    - Covers all federal circuit courts and Supreme Court.
    - Covers most state courts of last resort and we hope to complete all appellate state courts soon.
    - Covers various special jurisdictions, such as Court of Federal Claims, Veterans Claims, Tax, Int'l Trade, etc.
  - This amounts to watching over 100 different webpages for new documents, every weekday.

Free Law Project

- Free Law Project partners with Princeton's Center for Information Technology Policy on the development of:
  - RECAP, http://recapthelaw.org, a browser plugin that improves the experience of browsing the federal electronic document system, PACER, while helping PACER users build a free and open repository of public court records.
  - Another panelist here today, Harlan Yu, will focus on RECAP.

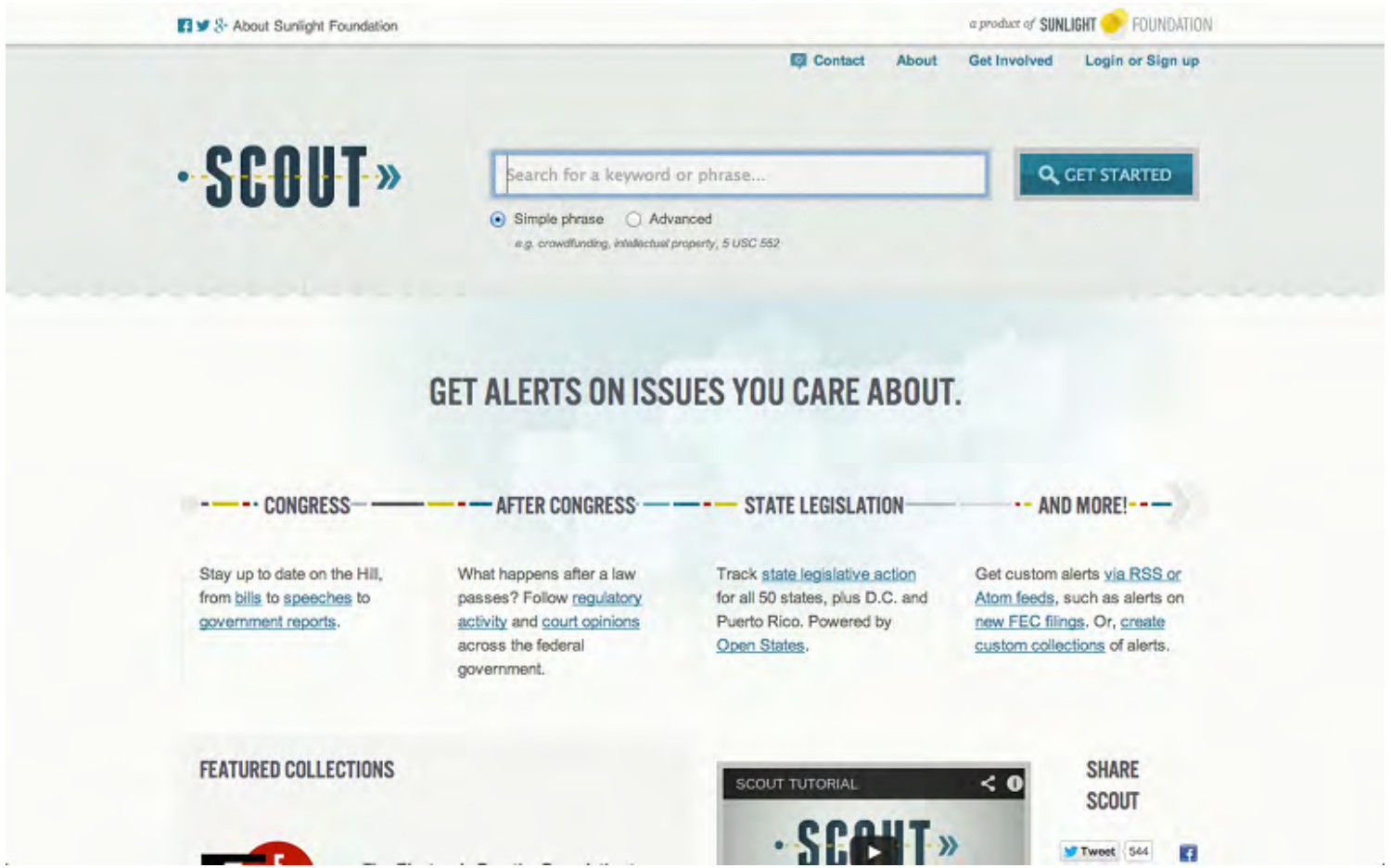
Free Law Project



- Free Law Project sponsors the development of:
  - Online legal research tools on the CourtListener platform, such as a citator, table of authorities for each document, sophisticated search filtering options, improvements to relevancy search results, etc.
  - An Application Programming Interface (API) to provide access to all court opinions and key related metadata in our database, to enable others to programmatically utilize our opinion collection.

Free Law Project

- How does one use a caselaw API?
  - Sunlight Foundation improved its Scout alerts



Free Law Project

- How does one use a caselaw API?
  - StateDecoded made its version of Virginia's statutes better by including interpreting decisions alongside the statutes.

§ 51.5-41

Discrimination against otherwise qualified persons with disabilities by employers prohibited.

A. No employer shall discriminate in employment or promotion practices against an otherwise qualified person with a disability solely because of such disability.

B. It is the policy of the Commonwealth that persons with disabilities shall be employed in the state service, the service of the political subdivisions of the Commonwealth, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as other persons unless it is shown that the particular disability prevents the performance of the work involved.

C. An employer shall make reasonable accommodation to the known physical and mental impairments of an otherwise qualified person with a disability, if necessary to assist such person in performing a particular job, unless the employer can demonstrate that the accommodation would impose an undue burden on the employer.

SHARE

Tweet 0

Recommend 0

TRUST, BUT VERIFY

If you're reading this for anything important, you should double-check its accuracy—read § 51.5-41 on the official Code of Virginia website.

COURT DECISIONS

Progress Printing Co., Inc. v. Nichols (SCV, 09/18/92)
. . . was based solely on the disabling condition. Code § 51.5-41 A. While the record supports a . . .
Parker v. Com. (COA, 02/03/04)
. . . rise to a civil *376 enforcement. See e.g., Code § 51.5-41 (barring as a civil prohibition an . . .
Mary M. Tyndall v. National Education Centers, Incorporated of California, T/a Kee Business College Campus National Education Centers, Incorporated (Court

Free Law Project

- Free Law Project supports academic research:
  - The entire collection of court opinions is available for bulk download.
  - Bulk downloads include the citation network.
  - No other free legal information site provides this.

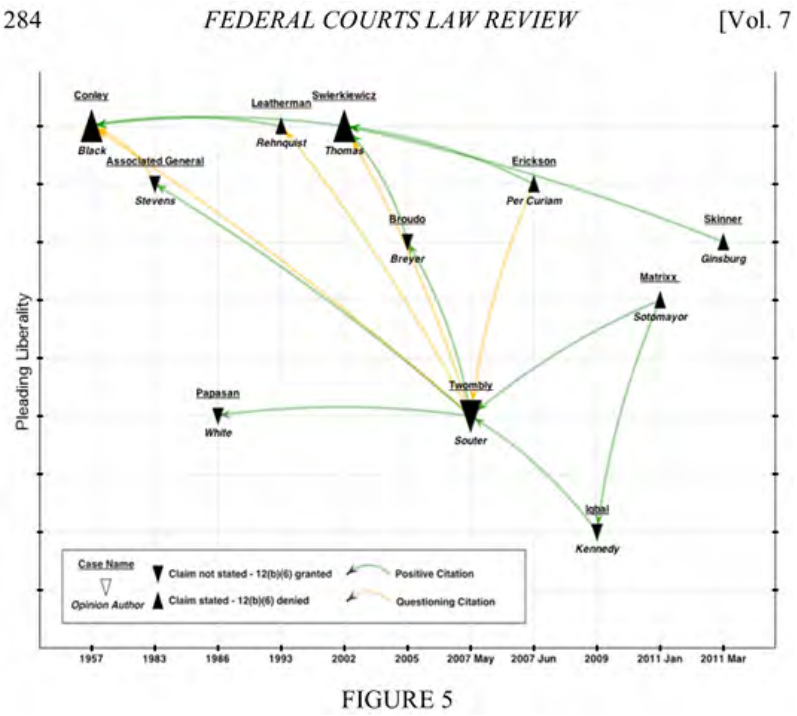
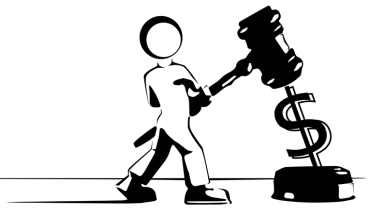


FIGURE 5

Free Law Project

- Most court websites publish opinions in .pdf format:

Free Law Project



.pdf is a friendly format for human readers and an *un*friendly format for machine readers

affirming the denial of confirmation did not appear to be a final order, as required by 28 U.S.C. § 158(d)(1). After receiving Bullard's response, we determined that the case should proceed to full briefing of both the jurisdictional and merits questions.

II. Analysis

We start and, as it turns out, end with the jurisdictional question.[1] Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a BAP or district court sitting in an appellate capacity in bankruptcy proceedings. 28 U.S.C. § 158(d)(1). With the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, it extended our jurisdiction to reach direct appeals of the bankruptcy court's orders (final or interlocutory), upon

[1] We note that we are considering statutory, rather than Article III, jurisdiction. We have on occasion sidestepped thorny questions of statutory jurisdiction to reach the merits of a case, but only where "precedent clearly dictates the result on the merits," Alvarado v. Holder, 743 F.3d 271, 276 (1st Cir. 2014), and the merits question is easily decided in favor of the party challenging jurisdiction, Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 59 (1st Cir. 2003). Because we are presented with a difficult, unsettled question that we have not previously addressed, that route is not open to us here.

affirming the denial of confirmation did not appear to be a final order, as required by 28 U.S.C. § 158(d)(1). After receiving Bullard's response, we determined that the case should proceed to full briefing of both the jurisdictional and merits questions.

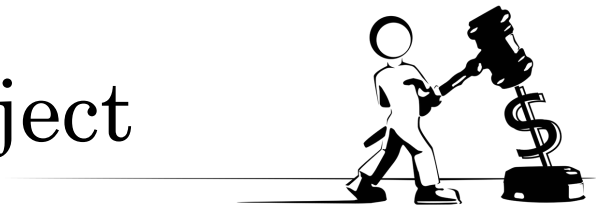
II. Analysis

We start and, as it turns out, end with the jurisdictional question.1 Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a BAP or district court sitting in an appellate capacity in bankruptcy proceedings. 28 U.S.C. § 158(d)(1). With the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, it extended our jurisdiction to reach direct appeals of the bankruptcy court's orders (final or interlocutory), upon

1 We note that we are considering statutory, rather than Article III, jurisdiction. We have on occasion sidestepped thorny questions of statutory jurisdiction to reach the merits of a case, but only where "precedent clearly dictates the result on the merits," Alvarado v. Holder, 743 F.3d 271, 276 (1st Cir. 2014), and the merits question is easily decided in favor of the party challenging jurisdiction, Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd., 325 F.3d 54, 59 (1st Cir. 2003). Because we are presented with a difficult, unsettled question that we have not previously addressed, that route is not open to us here.

-4-

Free Law Project



- Third party publishers, like us, need court websites to be predictable. A table is nice…

ARKANSAS JUDICIARY

Home Browse Search Arkansas Judiciary > Opinions > Supreme Court > Latest Opinions

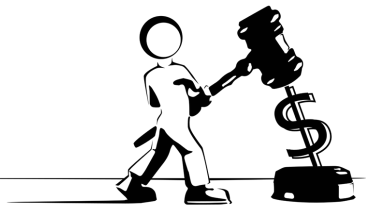
Name	Author	Case Name	Docket Number	Date	Citation	Opinion Type	Disposition
Ark. St. Bd. of Elec. Comm'rs v. PCEC	PAUL E. DANIELSON	Ark. St. Bd. of Elec. Comm'rs v. Pulaski Cnty. Elec. Comm'n	CV-14-371	5/14/2014	2014 Ark.	Majority, with Dissenting	Affirmed in pa
Bailey v. Martin	DONALD L. CORBIN	Bailey v. Martin	CV-14-358	5/14/2014	2014 Ark.	Majority, with Concurring	Dismissed
Chandler v. Martin	CLIFF HOOFMAN	Chandler v. Martin	CV-14-369	5/14/2014	2014 Ark.	Majority, with Dissenting	Affirmed
Kelly v. Martin	JOSEPHINE LINKER HART	Kelly v. Martin	CV-14-367	5/14/2014	2014 Ark.	Majority, with Dissenting	Affirmed
Smith v. Wright							
Williams v. Martin	JIM HANNAH	Williams v. Martin	CV-14-370	5/14/2014	2014 Ark.	Majority, with Concurring and Dissenting	Affirmed

6 Entries

Document management portal powered by LaserFiche WebLink 8.2.1 © 1998-2012 Laserfiche

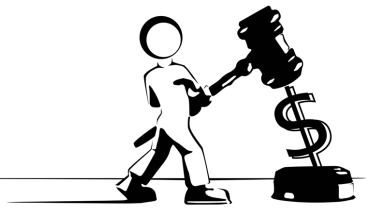
…but not if suddenly one document doesn't have a docket number, date, or other metadata had by all the other documents.

Free Law Project



- When courts provide public access to court documents, they are part of a larger government "open data" movement.
- What do open data experts look for in evaluating how well a government data provider is doing?
- *See* Open Knowledge Foundation.

Free Law Project



Easier…

1. Data exists.
2. It's digital.
3. It's publicly available.
4. It's free of charge.
5. It's online.

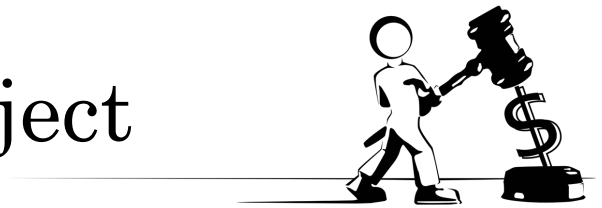
Harder…

6. Data is provided in a machine-friendly format.
7. It's available in bulk.
8. It's openly-licensed / free of © claims.
9. It's up-to-date.
10. It's verifiable.

Free Law Project

- How would courts fare if Free Law Project published "Court Open Data Report Cards"?
  - Don't worry! I came here to make friends, not enemies! I'd rather help than complain.
  - Actually, many courts could score 7/10 with respect to court opinions on our criteria from the prior slide.
  - But court documents in machine-friendly formats, available in bulk, that are verifiable, are really hard to come by. (I know of none.)

Free Law Project



- What is a machine-friendly format and how could I generate one?
- How do I provide my documents “in bulk” and also provide important information such as the case name, date of decision, etc.?
- How do I create “verifiable” documents, whether pdf or machine-friendly?
- Is this going to cost me a lot of money or be a giant hassle?
- Are you trying to automate away my job?

Free Law Project

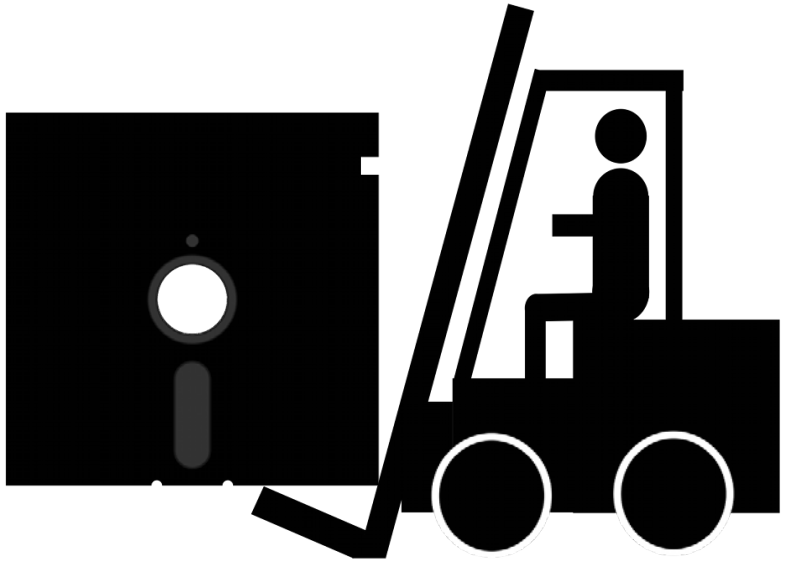
Free Law Project

- This is actually very easy and inexpensive.
- Nobody has to lose their job and no one gets asked to do a ton of new work.
- Machine-friendly formats are just text formats with some markup to show where to make things bold, italic, underlined, etc.

- Someone probably already converts your .doc or .wpd to .pdf. That same person could click one extra button to make the machine-friendly version.

Free Law Project

- Done right, the machine-friendly version also makes provision in bulk easy too.
- With our help, your IT person can automate the creation of the bulk downloads on a regular schedule and rarely lift a finger afterward.



http://freelawproject.org

Free Law Project

- Verifiability can also be worked into your existing process and can be automatically generated in a way that creates no additional work for anyone.
- One option – Digital Fingerprints:
  - 8f70ccd08d51137b030d38b8d6ca37dd1796759f
  - Uniquely identifies a file; third parties can confirm that the file has not been altered.

Free Law Project

- So, who will volunteer to work with us on this?
- Raise your hand high.

  - The eleven most terrifying words in the English language? (With apologies to Ronald Reagan.)

  - "I'm from the Free Law Project, and I'm here to help." –Brian Carver
    - Email: brian@mail.freelawproject.org
    - Twitter: @brianwc

Using Software To Liberate U.S. Case Law

Although public information is open, it is not always easily accessible.

By Harlan Yu and Stephen Schultze

DOI: 10.1145/2043236.2043244

"Ignorance of the law is no excuse." This legal principle puts the responsibility on us—the citizens—to know the law in order to abide by it. This principle assumes that citizens will have open access to the laws that our government prescribes so that we will have adequate opportunity to learn our civic obligations. A complementary legal principle obligates the justice system to provide equal access to the law for all citizens, without regard to social or economic status.

While these may seem like basic conditions in a democracy, equal and open access to the law in the United States has been a work in progress. In past generations, access meant not only equal rights to petition the court and defend yourself, but also the ability to sit and observe the government from the gallery of a legislative chamber or a courtroom. It also meant obtaining copies of written records that document these activities. Of course, for those who didn't have the time or money to physically visit the courthouse or buy expensive compendiums of decisions, the law often remained opaque and unknown. These limitations to access were consequences of the analog format, which made obtaining vast amounts of information neither easy nor cheap.

But as society embraces digital distribution of information over the Internet, the potential for equal and open access to the law is no longer limited by physical constraints. Digital distribution is instantaneous, cheap, and will eventually reach all corners of our society.

The Courts' highly distributed infrastructure perpetuates higher than necessary costs and barriers to citizen access.

The U.S. Courts were among the first in the government to recognize this enormous potential. They began building a systeim in the early 1990s called PACER (Public Access to Court Electronic Records) that started out as a dial-up system and eventually transitioned to a graphical Web interface. The system provides access to all of the raw documents in federal court proceedings since its inception. But while PACER has without a doubt expanded public access to federal court information, the government has yet to harness digital technologies in a way that realizes the full potential for equal and open access that they present.

HOW PACER LIMITS ACCESS

Although PACER makes hundreds of millions of court documents available online to the public, using the system to find relevant information can be quite a challenge.

The entire PACER system is made up of approximately 200 individual data silos—for each of the federal district, bankruptcy, and circuit courts—but the system provides very limited functionality to search across all of the silos. Within each silo, it's only

possible to do a search over a few fields, rather than over the full-text of all of the available documents—a stark contrast to what's possible on modern Web search engines. Indeed, because of PACER's walled-garden approach, search engines are unable to crawl its contents. The interface also relies heavily on legal jargon, making it difficult to figure out where and how to search (see **Figure 1**).

But the biggest problem with PACER by far is its pay-for-access model. The Courts charge PACER users a fee of eight cents per page to access records (see **Figure 2**). This means searches will cost eight cents for every 4320 bytes of results—one "page" of information according to PACER's policy. Obtaining a docket that lists all the documents in a case can cost the user a couple of dollars. To download a specific document, for example a 30-page PDF brief, the user would be charged another $2.40 for the privilege. Each individual charge may seem small, but the cost incurred by using PACER for any substantial purpose racks up very quickly. Repeated searching using the limited interface can become particularly costly.

Even at many of our nation's top law schools, access to the primary legal documents in PACER is limited for fear that the institutions' PACER bills will spiral out of control [1]. Academics who want to study large quantities of court documents are effectively shut out. Also affected are journalists, nonprofit groups, and other interested citizens, whose limited budgets make paying for PACER access an unfair burden. From the Court's own statistics, nearly half of all PACER users are attorneys who practice in the federal courts, which indicate that PACER is not adequately serving the general public [2]. The pay-for-access model bears much of the blame.

Furthermore, the Courts do not provide a consistent machine-readable way to index or track cases, even though all of this information is gathered electronically and stored in relational databases. Anyone seeking to comprehensively analyze case materials faces an uphill battle of reconstructing the original record.

Using PACER is the only way for citizens to obtain electronic records from the Courts. Ideally, the Courts would publish all of their records online, in bulk, in order to allow any private party to index and re-host all of the documents, or to build new innovative services on top of the data. But while this would be relatively cheap for the Courts to do, they haven't done so, instead choosing to limit "open" access.

Figure 1. The PACER search interface for the Southern District of New York.

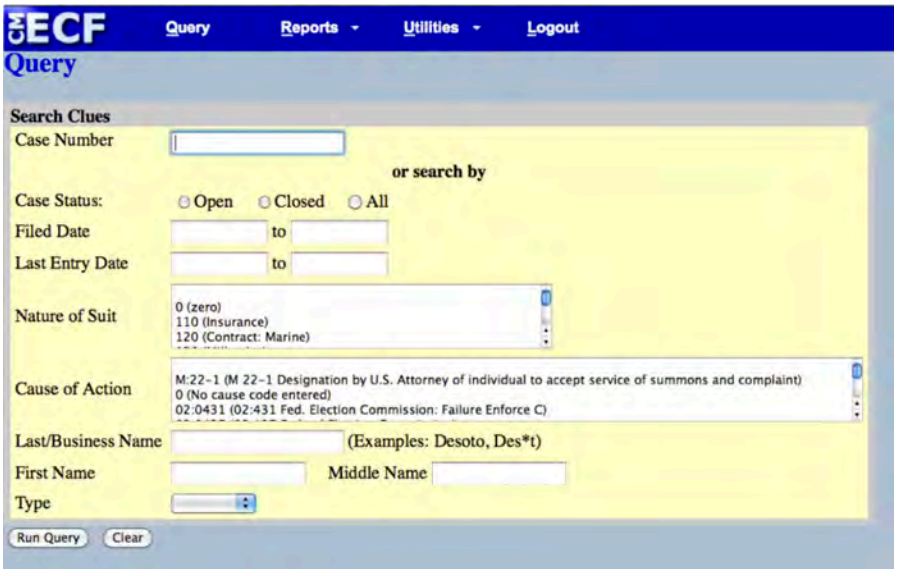


Figure 2. PACER receipt page for purchasing a court document.

LIBERATING COURT RECORDS WITH RECAP

Because everything in PACER is part of the public record, users can legally share their document purchases freely once they have been legitimately acquired. Recognizing this possibility, we created a Firefox extension called RECAP—to "turn PACER around" [3]. RECAP crowdsources the purchase of the PACER repository by helping users automatically share their purchases. The extension provides two primary functions (see **Figure 3**).

First, whenever a user purchases a document from PACER, the extension will automatically upload a copy of the document to our central repository hosted by the Internet Archive, where it will be indexed and saved. This effectively liberates that document from behind the PACER paywall.

Second, RECAP helps PACER users save money by notifying them whenever documents are available from the shared central repository. Whenever a user pulls up a docket listing, the extension will query the central RECAP database to check whether any of the listed documents are already in our repository. If so, the extension will inject a small RECAP link next to the PACER link to indicate that the user can download the document for free from our repository, rather than buying it again from PACER (see **Figure 4**).

Figure 3. Diagram of the RECAP document sharing model.

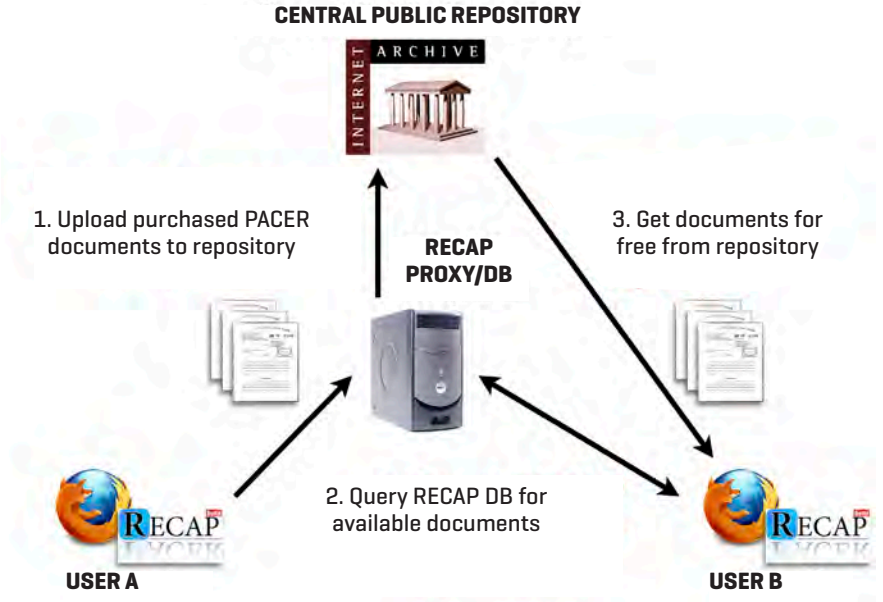
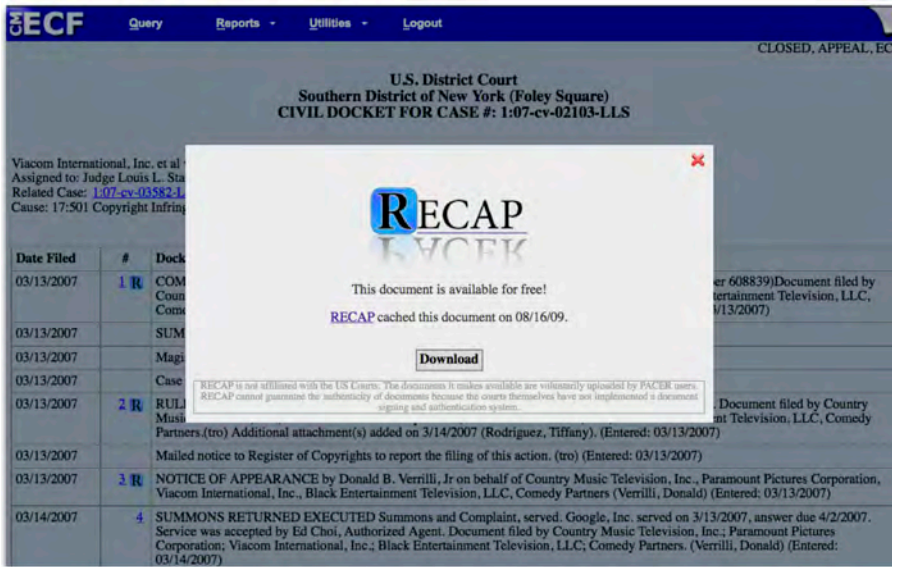


Figure 4. Accessing documents from RECAP while using PACER.



When RECAP was released in August 2009, the Courts reacted somewhat impulsively. They issued warnings to PACER users that RECAP might be dangerous to use because it was "open source" software, but ultimately they had no legal recourse against a tool that simply helped citizens to exercise their right to share public records.

Since the first release, RECAP has gained thousands of users, and the central repository contains more than 2.3 million documents across 400,000 federal cases. If you were to purchase these documents from scratch from PACER, it would cost you nearly $1.5 million. And while our collection still pales in comparison to the 500 million documents purportedly in the PACER system, it contains many of the most-frequently accessed documents the public is searching for.

WHY THE COURTS RESIST OPEN ACCESS

With PACER's many limitations, it's not difficult to imagine how one might build a better, more intuitive online interface for access to court records. Indeed, a group of Princeton undergraduates spent a semester building a beautiful front-end on top of our repository, called the RECAP Archive, available at archive.recapthelaw.org. Access to case law would be much improved if all of PACER's records were available within the RECAP Archive. But it's unlikely that the Courts will voluntarily drop the PACER paywall any time soon.

As with many issues, it all comes down to money. In the E-Government Act of 2002, Congress authorized the Courts to prescribe reasonable fees for PACER access, but "only to the extent necessary" to provide the service. They sought to approve a fee structure "in which this information is freely available to the greatest extent possible" [4].

However, the Courts' current fee structure collects significantly more funds from users than the actual cost of running the PACER system. We examined the Courts' budget documents from the past few years, and discovered that the Courts claim PACER expenses of roughly $25 million per year. But in 2010, PACER users paid about $90 million in fees to access the system [5]. The overflow is deposited into a fund for IT projects benefiting the Courts. This fund is used to purchase an assortment of unrelated items for the Courts, like flat screen monitors in courtrooms and state-of-the-art AV systems. While we support the Courts' adoption of these modern technologies, it shouldn't come at the direct expense of legally mandated open access to court records.

Indeed, the reported figure of $25 million per year either wildly over-estimates the actual cost, or is a reflection of a system that's horribly inefficient, or is perhaps a bit of both. The cost of making a few hundred terabytes of data available on the Web is not low, but in an era of abundant and ever-cheaper cloud storage and hosting services, it also shouldn't be anywhere near the claimed costs.

The Courts' highly distributed infrastructure—each courthouse manages its own servers and private network links—may have made sense two decades ago, but today it only perpetuates higher than necessary costs and barriers to citizen access.

THE DECLINE OF PRACTICAL OBSCURITY

One significant challenge in opening up federal court records is the concern over personal privacy. Many of life's dramas play themselves out in our public courtrooms. Consider cases concerning divorce, domestic abuse and bankruptcy. Many intimate private details are revealed in these proceedings and are part of public case records.

Before electronic records, the Courts relied on the notion of "practical obscurity" to protect sensitive information. That is, because these documents were only available by physically travelling to the courthouse to obtain the paper copy, the sensitive data contained therein—while public—were in practice obscure enough that very few people, if anyone, would ever see them.

Only in 2007 did the Courts define formal procedural rules that required attorneys to redact certain sensitive information from court filings. But not only were the Courts remiss at enforcing their own rule, older documents, which were subsequently scanned and made available electronically, contain substantial amounts of sensitive information, such as Social Security numbers and names of minors.

A preliminary audit conducted by Carl Malamud found more than 1,500 out of a sample of 2.7 million documents in PACER contain unredacted Social Security numbers and other sensitive information [6]. Research by Timothy Lee, our fellow RECAP co-creator and computer science student at Princeton, studied the rate of "failed redactions" in PACER— where authors simply drew a black box over the sensitive information in the PDF, leaving the sensitive information in the underlying file. He estimated that tens of thousands of files with failed redactions exist in PACER today [7].

By preventing search engine indexing of public documents, PACER's paywall attempts to extend practical obscurity, at least temporarily, to the digital realm. But over time, these documents will ultimately make their way into wider distribution, whether through RECAP or other means. Large data brokers already regularly mine PACER for personal data. The resulting decline in practical obscurity will ultimately force the Courts to deal more directly with the privacy problem. This may mean that documents will need to be more heavily redacted before they are filed publicly, or in some cases, entire documents will need to be sealed from public view.

The potential for equal and open access to the law is no longer limited by physical constraints. Digital distribution is instantaneous, cheap, and will eventually reach all corners of our society.

It is not always easy to align privacy and open access, but what's clear is that the Courts ought to make more explicit determinations about which data are sensitive and which are not, rather than relying simply on the hope that certain records won't often be accessed.

Somewhat counter-intuitively, more openness can help lead to more privacy if citizens become aware of what information is contained in public records, and more proactively choose what to include and when to petition for redaction or sealing. A more accessible corpus also provides opportunities for researchers to devise new methods to protect personal privacy while enhancing the accessibility of the law. The Courts can benefit from improved technology and smart computer scientists in this task.

In our initial research, we have already identified several ways for the Courts to enhance automatic identification and redaction of sensitive information. Using text analysis and machine learning techniques, and what we already know about the prevalence of sensitive information in the PACER corpus, we can try to prioritize documents for human review, starting with the documents that are most likely to contain sensitive information.

CONCLUSION

The PACER paywall is a significant barrier to public participation in the U.S. justice system. Online access to court records, through innovative third-party services, has the potential to serve as the spectators' gallery of the 21st century. But without free and open access to the underlying data, it is nearly impossible for developers to build new, useful services for citizens.

Digital technologies present our Courts with a key opportunity to advance our Founders' vision of forming a more perfect union, with equal justice under the law. Opening up free access to all electronic court records would mark a significant step in our collective journey.

Biographies

Harlan Yu is a Ph.D. candidate in computer science at Princeton University, affiliated with the Center for Information Technology Policy (CITP). His primary research interests include computer security, privacy and open government. He received his B.S. from UC Berkeley and his M.A .from Princeton.

Stephen Schultze is the associate director of the Center for Information Technology Policy at Princeton University. His work at CITP includes internet privacy, computer security, government transparency, and telecommunications policy. He holds degrees from Calvin College and MIT.

References

[1] Wayne, E.V. PACER spending survey. Legal Resarch Plus, August 2009; http://legalresearchplus.com/2009/08/28/pacer-spending-survey

[2] Yu, H. Assessing PACER's access barriers. Freedom to Tinker, August 2010; https://freedom-to-tinker.com/blog/harlanyu/assessing-pacers-access-barriers

[3] RECAP: Turning PACER Around; https://www.recapthelaw.org

[4] U.S. Congress. Senate. Committee on Governmental Affairs. *E-Government Act of 2001*, 107th Cong., 2d sess., 2002, S. Rept. 107-174, 23

[5] Schultze, S. What does it cost to provide electronic public access to court records? Managing Miracles, May 2010; http://managingmiracles.blogspot.com/2010/05/what-is-electronic-public-access-to.html

[6] Malamud, C. Letter to the Honorable Lee H. Rosenthal, October 24, 2008. https://public.resource.org/scribd/7512583.pdf

[7] Lee, T.B. Studying the frequency of redaction failures in PACER. Freedom to Tinker, May 2011; https://freedom-to-tinker.com/blog/tblee/studying-frequency-redaction-failures-pacer

Leadership: Inspiring Excellence

Thursday, July 17, 2014 **10:15 a.m. – 11:30 a.m.** **James River Salon C**

Speaker: William A. Moorman, Judge
The United States Court of Appeals for Veterans Claims

William A. Moorman, Judge

Judge William A. Moorman was confirmed by the Senate and appointed a Judge of the United States Court of Appeals for Veterans Claims by the President of the United States on November 20, 2004. His appointment continues a career of public service begun in September 1971.

Born in Chicago, Illinois, Judge Moorman attended the University of Illinois at Champaign-Urbana, earning a Bachelor of Arts degree in History and Economics in 1967. He earned his Juris Doctorate from the University of Illinois College of Law in 1970 and was designated a Distinguished Graduate in 2000. He was commissioned a Second Lieutenant in the United States Air Force through the Reserve Officers Training Corps in June 1970.

On active duty, Judge Moorman rose to the grade of Major General, last serving as the Judge Advocate General of the United States Air Force, the Air Force's highest ranking uniformed lawyer. In that position he directed an active and Reserve force of more than 2,500 uniformed and civilian attorneys. He was serving in that position at the Pentagon on September 11, 2001, when terrorists attacked the United States. During his career, he was the first Staff Judge Advocate of the new joint-service U.S. Strategic Command and was the Staff Judge Advocate of the air component for Operation Just Cause in Panama and the Bosnian operations in Europe. He was the only Judge Advocate ever to serve as the senior officer aboard Looking Glass, the nation's airborne nuclear forces command post. Judge Moorman's military decorations include the Superior Service Medal with oak leaf cluster, the Legion of Merit with oak leaf cluster, the Joint Meritorious Service Medal, and the Meritorious Service Medal with four oak leaf clusters. He retired from the Air Force in April 2002, after 31 years of service.

In July 2002, Judge Moorman joined the Department of Veterans Affairs and was named Assistant to the Secretary for Regulation Policy and Management. In this position he was a senior advisor to the Secretary with principal responsibility for regulatory reform, leading the Department's effort to overhaul its compensation and pension regulations.

In 2004, he was appointed by the President as Acting Assistant Secretary for Management for the Department of Veterans Affairs. In that position, he was responsible for managing VA's $70 billion budget and all financial, budgetary, acquisition, real property, and logistics operations. He served as the Chief Financial Officer, Chief Environmental Officer, and Chief Acquisition Officer for VA during this period. He resigned that position in order to accept his appointment as an Appellate Judge on this Court.

LEADERSHIP FOR APPELLATE COURT CLERKS

MANAGEMENT FOR APPELLATE COURT CLERKS

MANAGEMENT

LEADERSHIP

MANAGEMENT vs. LEADERSHIP

Stephen Covey's View

- **Left Brain**
  - Speed
  - Structure/Systems
  - Bottom Line
  - Resources
  - Logic
  - Specifics

- **Right Brain**
  - Direction
  - Vision
  - Top Line
  - Values/Principles
  - Emotions
  - Relationships

COVEY'S CONCLUSION

- **Manage from the Left –**
- **Lead from the Right**

MANAGESHIP

LEADERMENT

Manageship / Leaderment

- **Organizational Position is Only the Starting Point**
  - **Being at the top only counts on organizational charts**
  - **Position gives others a place to look for leaderment or manageship**
  - **Technical competence usually gets you to the top organizational block –but it doesn't guarantee success**
  - **If there's a vacuum, someone else will fill it**

Manageship / Leaderment

- **Organizational Position**
  - Being at the top of the org chart carries responsibilities
  - People naturally look to you for
    - **Knowledge**
    - **Foresight**
    - **Communication**
    - **Optimism**

KNOWLEDGE

- In depth knowledge of every area of the Court's work is not required
- Genuine interest in what people do can substitute for depth of knowledge
- You can navigate the unknown
- There's no substitute for knowledge of indicators of success or failure

FORESIGHT

- Goes by many names
  - Situational Assessment/Awareness
  - Anticipation
  - Vision
  - Goals and Objectives
  - Planning
- All move the organization forward systematically

COMMUNICATION

- **Good communication is essential to success**
- **Good communication addresses:**
  - **where** we're headed
  - **what** are our priorities
  - **how** are we performing
  - **WHY** all of those things are important
- **Active listening**

JEOPARDY

- The Answer: **E-Mail**
- The Question: **What is the biggest impediment to Active Listening?**

COMMUNICATION

- **Good communication within the Court is essential to success**
- **Good communication**
  - **where** we're headed
  - **what** are our priorities
  - **how** are we performing
  - **WHY** all of those things are important
- **Active listening**
- **Communication is NEVER perfect**

OPTIMISM

- There will ALWAYS be problems and changes are part of every court system, every judicial practice – and life
- Problems are your business. Clerks of the Court are problem solvers – there is no other objective of the job that is more important
- Believing that a thing can be done is frequently the biggest step toward doing it
- Those who work for you don't, generally, want to know or care that you are having a bad day/week

Colin Powell

"Optimism is a force multiplier"

Achieving Success in Leaderment/Manageship

- How do you define success?
- Gen Dwight D. Eisenhower:

  " Leadership is the knack of getting somebody to do something you want done because he (or she) wants to do it."

Successful Leaderment/Manageship = Trust

The real product of genuine leadership, when deftly practiced, is the creation of a mutual trust between the leader and the led. And, it is that mutual trust, mutual respect, that produces results.

INTEGRITY IS THE INDISPENSABLE CORNERSTONE

If mutual trust is what you seek to build in your organization, it is axiomatic that you must conduct yourself with integrity

INTEGRITY IS THE INDISPENSABLE CORNERSTONE

If mutual trust is what you seek to build in your organization, it is axiomatic that you must conduct yourself with integrity

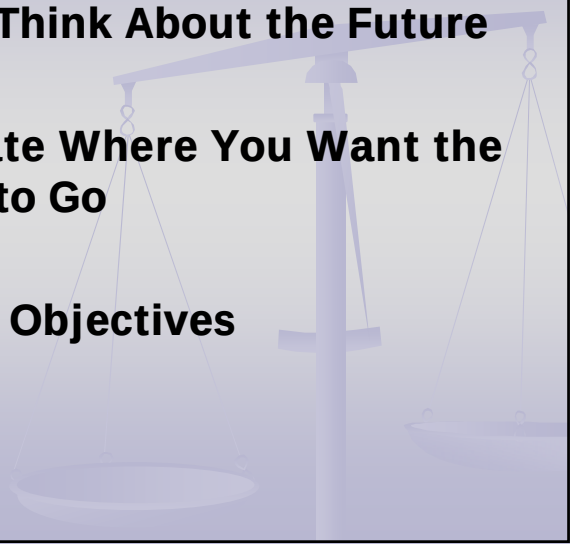
And, you will develop a reputation in this respect

The Five Building Blocks

- Task
- Tell
- Teach or Train
- Track
- Teamwork

TASKING YOUR ORGANIZATION

- Take Time to Think About the Future
- Then, Articulate Where You Want the Organization to Go
- Set Goals and Objectives



TELLING PEOPLE WHAT IS EXPECTED OF THEM

- HOW:
  - One-on-one communication with your direct reports
  - "All Hands" meetings
  - Predictable communications

TELLING PEOPLE WHAT IS EXPECTED OF THEM

- WHAT:
  - Where you stand
  - How success will be judged
  - How failure / lack of progress will be judged and communicated
- "Repetition is Emphasis"

TEACHING/TRAINING PEOPLE

- Essential in providing people the ability to succeed
- If your turnover is low, you are lucky
- BUT, don't allow any functional area to stagnate
- New people need to learn everything their predecessors had to learn
- A training program assures that you don't get pushed off course

TRACKING

- Metrics, Statistics, Numbers
  - "Lions and Tigers and Bears, Oh My."
- Why lawyers, in particular, hate metrics
- Making sense of all the numbers
  - Snapshots in time are interesting, but often pretty meaningless

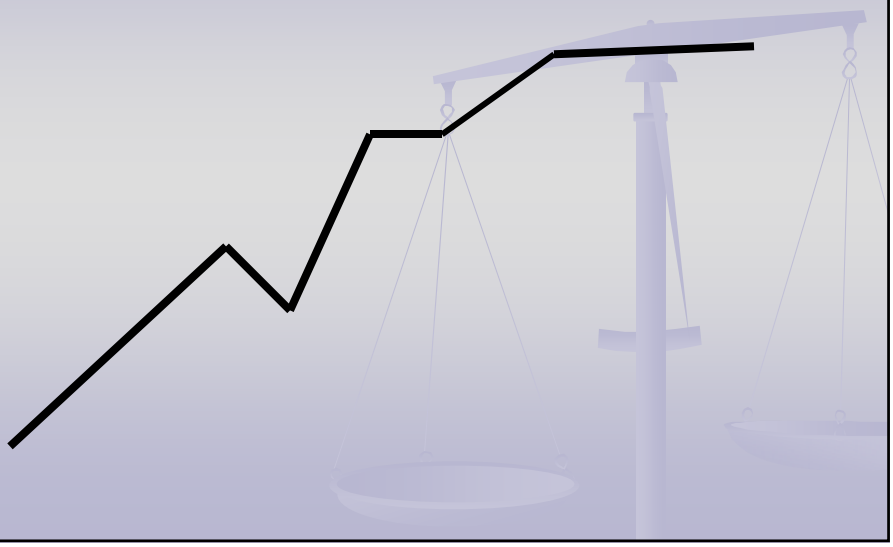
SNAPSHOT STATISTICS

- The DOW was at 1650 today
- Diesel Fuel was at $3.63 today
- Last month we wrote 300 opinions
- "I couldn't reach anyone in Washington today after 3 pm!"

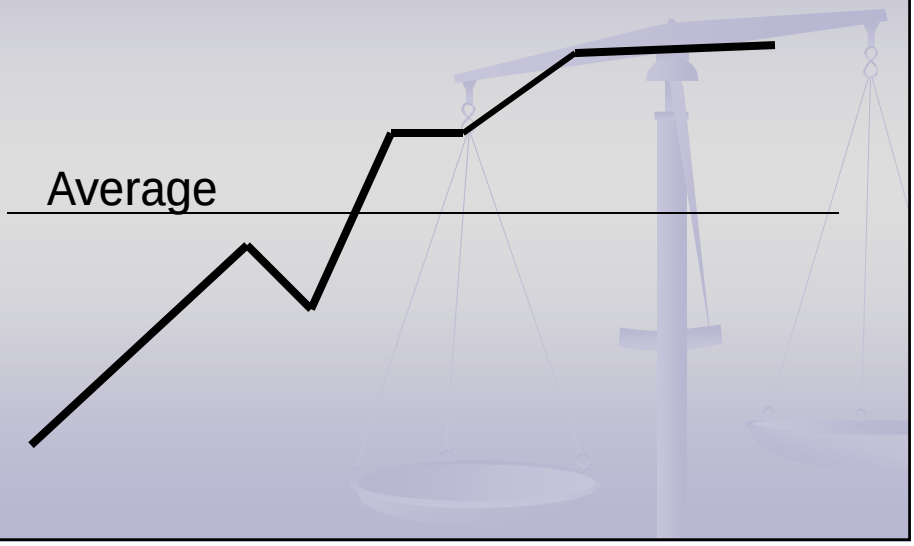
TRACKING

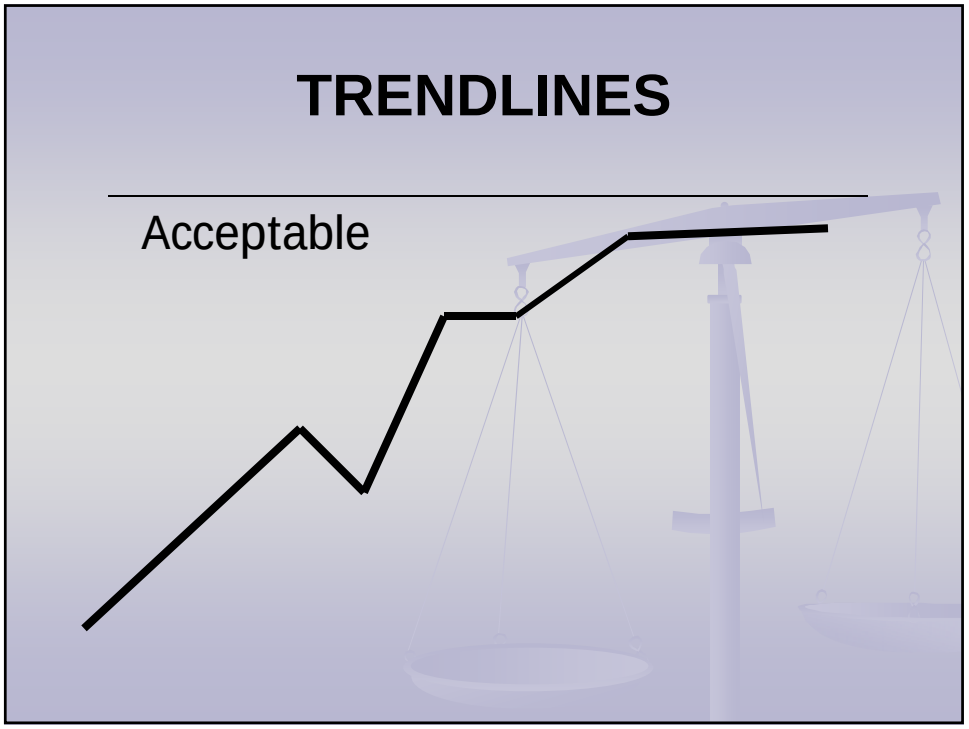
- Metrics, Statistics, Numbers
  - "Lions and Tigers and Bears, Oh My."
- Why lawyers hate metrics
- Making sense of all the numbers
  - Snapshots in time are interesting, but often pretty meaningless
  - Trendlines mean a lot
  - But, sometimes don't tell the whole story

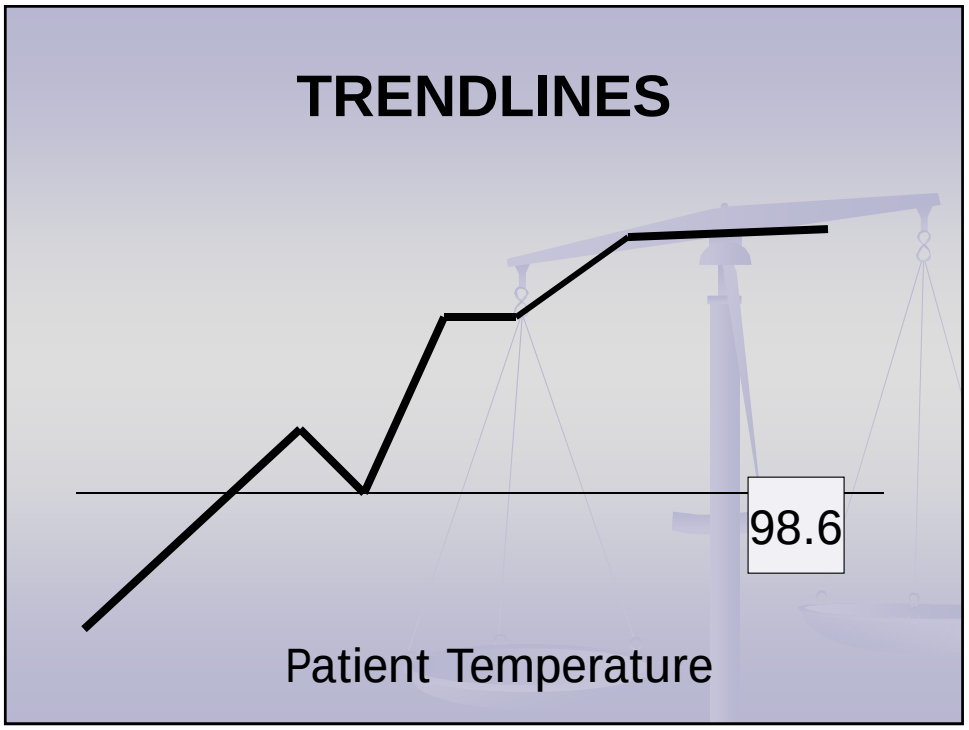
TRENDLINES



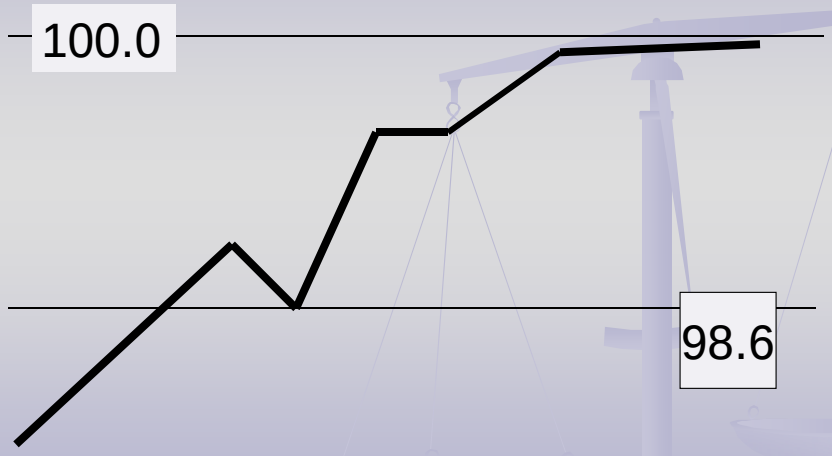
TRENDLINES




TRENDLINES
Acceptable


TRENDLINES
98.6
Patient Temperature

TRENDLINES



Patient Temperature

ALL I EVER NEEDED TO KNOW ABOUT METRICS, I LEARNED FROM A BIG-RIG TRUCKER

- Dave drives 18-wheeler out of Memphis
- Dave spent $40,000 last year on fuel
- Diesel fuel had gone up 25 % in the last year
- Dave bought a new International cab and now only gets 6 miles to the gallon
- **Why did Dave buy that truck?**

WHAT I LEARNED FROM DAVE

- The old truck got the mileage that most long-haul trucks got:
  4 miles to the gallon
- Dave stood to save himself about $14,000 that year if fuel prices stayed the same
- With what deisel prices have actually done, he's saved himself about $25,000 a year
- **METRICS can make you money!**

METRICS

- **Make you money**
- **Can motivate your people**
- **Let you know if you are making progress toward your goals**
- **Can support in tangible terms requests for more money or more manpower**

LEFT BRAIN-RIGHT BRAIN METRICS DISCONNECT

- "OK BOSS, DO YOU WANT IT FAST OR DO YOU WANT IT GOOD?"
- HENRY FORD PROBABLY GOT THE SAME QUESTION AND – ANSWERED IT THIS WAY: "I WANT BOTH!"
- "BUT, LEGAL WORK ISN'T WIDGET PRODUCTION!"

TEAMWORK

- Don't confuse synchronized activity with teamwork
- The Thunderbirds Demonstration Team

TEAMWORK

- Every organization has teams within teams
- When all the internal teams feel they are equal partners, synergy results
- Transparency in reporting leads to cross-functional respect for work being done
- Most people are less likely to quit on a team than on themselves

NOT EVERY COMPONENT OF TRUST BEGINS WITH "T"

- CARING
  - More than knowing people's names
  - People who believe their boss genuinely cares about them are willing to do almost anything
  - But, don't try to fake it
  - Spend some time visiting subordinates' workspaces without a business agenda

STYLE

- Does style matter?
- Has the world changed?
- Blanchard on style
  - 4 styles
  - matched to 4 stages of each employee's development

COMPARE

- Eisenhower, 1950 + / -:

Leadership is the knack of getting somebody to do something you want done because he (or she) wants to do it.

- Blanchard, 2013:

The key to successful leadership is influence, not authority.

- **Lao Tzu (circa 500 B.C.)**

When the best leader's work is done, the people say: "We did it ourselves."

YOUR FINAL QUESTION

IS THERE A SIMPLE FORMULA FOR SUCCESS IN MANAGESHIP AND LEADERMENT?

Formula For Success

$$\frac{5t + C}{I} = T \Rightarrow \frac{S}{M/L}$$

Self-Assessment Test

- 1. I am aware of what I am feeling.
- 2. I know my strengths and weaknesses.
- 3. I deal calmly with stress.
- 4. I believe the future will be better than the past.
- 5. I deal with changes easily.
- 6. I set measurable goals when I have a project.

Self-Assessment Test

- 7. Others say I understand and am sensitive to them.
- 8. Others say I resolve conflicts.
- 9. Others say I build and maintain relationships
- 10. Others say I inspire them.
- 11. Others say I am a team player.
- 12. Others say I helped to develop their abilities.

Self-Assessment Score

Score each of the 12 questions as follows:

Seldom	Occasionally	Often	Frequently
☐	☐	☐	☐

Each mark in first block (seldom) is worth 1, each in second block (occasionally) is 2, "often" is 3, and "frequently" is 4.

36+ total means excellent use of manageship/leaderment abilities, 30-35 some strengths but some underused talents, 29 or less suggests unused abilities and room for improvement

Highly Respected Source: Parade Magazine, June 16, 2002

Resources

- **The One Minute Manager, Blanchard**
- **The Power of Ethical Management, Blanchard and Peale**
- **Teaching the Elephant to Dance, Belasco**
- **Seven Habits of Highly Effective People, Covey**
- **Principle-Centered Leadership, Covey**
- **Primal Leadership, Goleman, Boyatzis, McKee**
- **Lincoln on Leadership, Phillips**
- **My American Journey, Powell**

- Who Moved My Cheese, Johnson
- The Power of Nice, Thaler & Koval
- The DNA of Leadership, Abel
- How Successful People Think, Maxwell
- Leadership and the One Minute Manager, Blanchard